File Number:_____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC., MATRIX ASSET MANAGEMENT INC., GESTION FÉRIQUE, AND MONTRUSCO BOLTON INVESTMENTS INC.

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Respondents
(Respondents)

Proceeding under the *Class Proceedings Act, 1992*

APPLICATION FOR LEAVE TO APPEAL OF THE APPLICANTS INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC., MATRIX ASSET MANAGEMENT INC., GESTION FÉRIQUE, AND MONTRUSCO BOLTON INVESTMENTS INC.

Section 40 of the *Supreme Court Act,* R.S.C. 1995, c. S-26
Rules 25(1) of the *Rules of the Supreme Court of Canada*, SOR/2002-156

VOLUME II of IV

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TAB 1

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Proceeding under the *Class Proceedings Act, 1992*

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PART I – OVERVIEW OF THE ISSUES OF PUBLIC IMPORTANCE AND CONCISE STATEMENT OF FACTS

1. The issue in this proposed appeal is whether a court may properly approve a class action settlement in which the class plaintiff and the settling defendant have agreed to prohibit opt outs and to prevent absent class members from suing the defendant individually. The Applicants are investment funds whose attempts to opt out were abrogated.

2. Whenever this Court has considered issues involving the binding effect of class litigation, the principle that plaintiff class members must be given the alternative right to proceed on their own (by either opting out, or not opting in) has been recognized as a sacrosanct hallmark of procedural fairness.

3. All provincial class proceedings statutes provide for opt-out or opt-in rights. Most provinces use an opt-out regime, so the term "opt-out rights" will be used herein to denote the right of class members to exit or avoid entering the class proceeding and to proceed, if they desire, to prosecute their claims on an individual basis.

4. This Court first emphasized that the class action procedure is legitimized by the ability of putative class members to elect whether to opt out in its 2001 decision in *Western Canadian Shopping Centres v. Dutton:*

> ¶49 A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding.[1]

5. The importance of opt-out rights was emphasized again in the Court's 2009 decision in *Canada Post Corp. v. Lepine:*

> ¶42 The [class action] notice procedure is indispensable in that it informs [class] members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights -- in particular the possibility of opting out of the class action -- they have under the judgment, and sometimes, as here, about a settlement in the case.[2]

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[1] *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, [2001] 2 SCR 534 at para 49 ["*Western*"], Application Record, Volume II, Tab 1M.

[2] *Canada Post Corp v Lepine*, 2009 SCC 16, [2009] 1 SCR 549 at para 42 ["*Canada Post*"], Application Record, Volume II, Tab 1N. Other decisions confirming opt-out rights are *Marcotte v Longueuil (City)*, 2009 SCC 43, [2009] SCJ No. 43, [2009] 3 SCR 65 (SCC), at para. 40 Application Record, Volume II, Tab 1O; *Bisaillon v Concordia*

6. This judicial insistence on opt-out rights derives from several sources. Irrevocably binding claimants to a proceeding that they want no part of would violate fundamental principles of procedural fairness and natural justice. Similarly, our courts will not recognize and enforce class judgments from other countries unless that type of due process has been afforded. Within an existing class proceeding, the prospective ability of class members to opt out acts as a counter-weight against the power of class counsel who are discouraged from concluding inadequate settlements at the risk of losing their constituency if enough class members are dissatisfied and opt out. Similarly, settling defendants are incentivized to raise their settlement offers in order to include as many members as possible in the settlement class and thus avoid having to deal separately with opt outs.

7. Given the legislated inviolability and universal judicial acceptance of opt-out rights, the Applicants submit it is an issue of public importance to ensure that those fundamental pillars of class action law cannot be bargained away by the parties and abrogated by the courts. Yet just that has occurred in this case.

8. The present litigation involves the largest securities fraud in recent Canadian history: the Sino-Forest case. Sino-Forest Corp. was organized in Ontario and listed on the TSX, but its forestry operations were largely in China. At the end of 2010, its market capitalization was over $6 billion, but, when a small analyst firm asserted in June 2011 that the company was a "near total fraud", the stock collapsed. A massive securities class proceeding was commenced soon thereafter in Ontario (there were also class actions started in Québec, Saskatchewan, and New York) against the company, its directors and officers, and experts, auditors and underwriters. Ernst & Young LLP ("E&Y"), the company's primary auditor, was a main target.

9. In March 2012, plaintiffs' counsel in the Ontario and Québec cases (the actions were not yet class-certified) reached a proposed settlement with defendant Pöyry (Beijing) Consulting Company Limited ("Pöyry"), the forestry expert that had opined on Sino-Forest's operations. Ten days later, Sino-Forest filed for insolvency protection in Ontario under the *Companies' Creditors Arrangement Act* ("*CCAA*")[3], which (among other things) stayed the class proceedings.

University, 2006 SCC 19, [2006] 1 SCR 666, at para. 97 Application Record, Volume II, Tab 1P; and *Nault v Canadian Consumer Co.*, [1981] 1 SCR 553 at page 557 Application Record, Volume II, Tab 1Q.

[3] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ["*CCAA*"], Application Record, Volume II, Tab 1A.

In due course, the stay was lifted to allow the class action courts to proceed with normal notice, opt-out, and approval procedures to implement the Pöyry settlement.

10. The parties to the *CCAA* proceeding worked through the summer and fall of 2012 to restructure the company. There were no Canadian operations or employees' jobs to save. The parties ultimately proposed a Plan of Compromise and Reorganization under which the company's assets, which had not attracted an outside buyer, were placed in "Newco" entities. Sino-Forest's creditors (largely foreigners who had bought Sino-Forest's debt securities) were then given title to the entities. By late November 2012, all parties were ready to sign off on the plan. Unsurprisingly, no Sino-Forest money remained to pay the two overlapping groups of "equity" claimants: (a) Sino-Forest shareholders on the effective date of the reorganization, and (b) Sino-Forest share purchaser class members who had acquired their shares while the fraud was occurring. The equity claimants, though technically creditors, thus were not to receive any consideration and were not entitled to vote on the plan.

11. The proposed plan also predictably and explicitly provided that it did *not* affect any of the claims that were being, or could be, asserted against "third party defendants" -- *i.e.*, against the experts, auditors, underwriters, and many of the company's officers -- who were *not* insolvent, *not* applying for *CCAA* protection, and *not* eligible to escape adjudication of the claims asserted against them in the class action.

12. On December 3, 2012 -- the day of the adjourned creditor vote on the reorganization plan -- E&Y and the plaintiffs' counsel in the still-uncertified class action made a bombshell announcement: they had reached a proposed settlement of the class claims against E&Y for $117 million. Moreover, the plaintiffs and counsel for other parties had agreed on a "framework" for handling as yet unsettled claims against other third party defendants in the class action -- some of whom were already designated, and others of whom could be added later and without court approval. Plan amendments released that day contained a new Article 11 covering the E&Y settlement and the framework for other settlements. The plan was approved by Sino-Forest's (non-equity) creditors, with many represented by proxies that had been submitted long before the amendments were announced. Moreover, the plaintiffs and counsel for other parties had agreed on a "framework" for handling as yet unsettled claims against other third party defendants in the class action -- some of whom were already designated, and others of whom could be added later

and without court approval. But these settlements were not proposed to be handled through the class action, as the Pöyry settlement had been. Instead, plan amendments released that day contained a new Article 11, which provided that the E&Y settlement and the framework for other settlements would be implemented under the *CCAA*. The plan was approved by Sino-Forest's (non-equity) creditors, with many represented by proxies that had been submitted long before the amendments were announced.

13. As details emerged over the next few days, it was disclosed that the E&Y settlement was conditioned on provisions that the settlement "shall be approved and implemented" in the *CCAA* proceedings and "shall be conditional upon full and final releases" of all claims against E&Y "and without opt-outs".

14. The class plaintiffs' counsel later issued a memorandum stating that E&Y was paying a "substantial premium" in return for the no-opt-out condition.

15. The Applicants here seeking leave to appeal to this Court are six investment funds from Ontario and Québec. They are "absent" members of the class defined in the Sino-Forest class proceeding (*i.e.,* purchasers of Sino-Forest shares prior to disclosure of the fraud).[4] The Applicants range from a very large Ontario based private mutual fund that offers units to the public (Invesco Canada Ltd.), to smaller private funds, to a consortium of Québec-based union retirement funds (Comité Syndical National de Retraite Bâtirente Inc.).

16. The Applicants were incensed upon learning that settlements with solvent defendants in the Sino-Forest class case were being implemented on a non-opt-out basis. They found this violation of principle to be offensive and would have reacted the same way regardless of the dollars involved. Furthermore, the parties were seeking to push through the reorganization plan by obtaining the appointment of the *CCAA* judge under the *Class Proceedings Act, 1992* ("*CPA*")[5] and scheduling all approval hearings to occur on or before January 4, 2013. The basis for the Applicants' objections was the deprivation of their rights to opt out and sue directly.

17. Ultimately, despite the Applicants' opposition, Sino-Forest's revised reorganization plan was judicially approved (sanctioned) after a hearing on December 7, 2012; the plan was implemented on January 30, 2013; and the E&Y settlement was approved after a hearing on

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[4] Two of them had sought carriage of the Sino-Forest class proceedings, but lost out to the funds that were appointed.
[5] *Class Proceedings Act*, SO 1992, c 6 ["*CPA*"], Application Record, Volume II, Tab 1D.

February 4, 2013. The Applicants were not allowed to opt out and pursue their claims individually. Their attempts to appeal were dismissed.

18. The results below are not just a one-off aberration lacking in further public importance. Unfortunately, the approach pioneered by third party non-debtor defendants in Sino-Forest is susceptible of duplication in any multi-defendant class litigation where one defendant may seek *CCAA* protection and the rest will ride their coat-tails into non-opt-out settlements. This would be particularly egregious in cases where fraud is alleged.

19. The advantages to such defendants of non-opt-out settlements are quite obvious: the settlement amount is set, the timing is predictable, and there is only one approval hearing. The pressure to pay an increased amount in order to minimize opt-out claims is removed. Moreover, there are advantages to the plaintiffs' counsel as well (whether or not the class is yet certified), because preventing attrition of absent class members' claims into opt-out proceedings will maximize the size of the pot from which plaintiffs' counsel fees are typically ascertained and paid. The temptations for all of these parties are clear.

20. There are already at least three situations known to the Applicants' counsel in which defendants in major pending class actions have sought *CCAA* protection.[6] Now that the template has been defined and approved in Sino-Forest, defence counsel are nearly certain to seek similar settlements for their solvent clients in other class cases, thereby negating the fundamental opt-out rights of class members. For the reasons described above, class counsel would have pecuniary reasons to consent to the no-opt-out settlement model.

21. Accordingly, the Applicants respectfully submit that guarding class action opt-out rights is a matter of public importance. This Court should accept review of the orders below so that the opt-out rights of class members will be preserved against negation in settlements specifically crafted to abrogate those rights.

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[6] Timminco Ltd. is the securities-issuer defendant named in *Pennyfeather v Timminco Ltd et al*, a securities class action alleging that the company's main asset, a supposedly innovative process for producing solar-quality silicon, in fact did not exist. Timminco obtained *CCAA* protection and the other defendants are now seeking releases. In April 2013, Poseidon Concepts Corp. was granted creditor protection under the *CCAA;* it is the company defendant in class proceedings in Ontario, Alberta and Québec alleging breaches of securities law, secondary market misrepresentation and negligent misrepresentation. In August 2013, Montreal, Main & Atlantic Canada Co. ("MMA") announced that it was petitioning for relief under the *CCAA*. MMA is one of several defendants in class proceedings regarding the devastating railway explosion in Lac-Mégantic, Québec.

PART II -- THE QUESTIONS IN ISSUE

22. The Superior Court issued the following two decisions as to which review is sought:

(a) *CCAA* order dated December 10, 2012, sanctioning Sino-Forest's Plan of Compromise and Reorganization, including Article 11 provisions on the E&Y settlement and the framework for other third party defendant settlements;

(b) Order dated March 20, 2013, issued under captions for both the Sino-Forest *CCAA* proceeding and the Sino-Forest class proceeding, approving the E&Y settlement and dismissing the Applicants' objections. An additional order issued the same day dismissed the Applicants' request to be appointed to represent the interests of some 84 objecting class members.

23. The Court of Appeal issued two decisions as to which review is sought:

(a) an endorsement and order dated June 26, 2013 (the "Leave Order"), dismissing the Applicants' motions for leave to appeal under the *CCAA* from the December 10, 2012, and March 20, 2013 orders; and

(b) an endorsement and order dated June 28, 2013 (the "Quash Order"), granting motions by the class action plaintiffs and E&Y to quash the Applicants' appeal of the March 20, 2013, orders approving the E&Y settlement under the *CPA*.

24. The issue on the present applications is whether the Applicants should be granted leave to appeal to this Court on the following issues, which the Applicants submit are of public importance:

a. In a class action, is it permissible for a settling defendant and the counsel for the (uncertified) class plaintiffs to agree on an explicit no-opt-out provision as part of the proposed settlement, and for the court to approve such a provision?

b. Does a *CCAA* insolvency proceeding pending against a company that is a defendant in a class action give the *CCAA* court jurisdiction or discretion to provide non-opt-out releases to other (non-applicant, solvent) defendants?

c. Do absent class members lack standing under the *CPA* to appeal an order approving a settlement of a class proceeding that explicitly prohibits them from opting out?

25. The Applicants' position is that a class member's right to opt out of a class proceeding is fundamental and it is of public importance to ensure that the right is not abrogated. If a settlement is approved with a no-opt-out provision such that class members are not allowed to

prosecute their own claims, it is of public importance to ensure that those class members may appeal that decision.

PART III – STATEMENT OF ARGUMENT

26. The Applicants respectfully request that the Court grant leave to appeal the Quash Order and Leave Order, and that the appeals be consolidated and heard together if leave is granted. The Applicants respectfully submit that the questions in issue stated above are of public importance such that they ought to be reviewed and decided by this Court.[7]

A. This Court Should Grant Leave Because Preserving Class Members' Rights to Opt Out of Class Settlements Is a Matter of Public Importance

1. Opt-out rights are a fundamental feature of class actions and are required by principles of fairness and natural justice

27. This case represents the first time, as far as the Applicants are aware, that any Canadian court has allowed class plaintiffs to bargain away the right of absent class members to opt out, as part of a settlement in which the settling defendant sought the prohibition against opt outs as a provision of the settlement. The Minutes of Settlement leave no doubt of the parties' intention to contract away the right to opt out:

> ¶10 It is the intention of the Parties that this settlement shall be approved and implemented in the Sino-Forest Corporation CCAA Proceedings. The settlement shall be conditional upon full and final releases and claims bar orders in favour of EY and which satisfy and extinguish all claims against EY, and without opt-outs, and as contemplated by the additional terms attached hereto as Schedule B hereto and incorporated as part of these Minutes of Settlement.[8]

28. Section 9 of the Ontario *CPA* provides:

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[7] Section 40 of the *Supreme Court Act* provides that leave should be granted when, "with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it ...." *Supreme Court Act,* RSC 1985, c S-26, as amended, s 40.

[8] Exhibit "A" to the Affidavit of Charles M. Wright sworn January 10, 2013 - Minutes of Settlement between the Ontario Plaintiffs and Ernst & Young LLP, para. 10, Appellant's Motion Record, Volume III, Tab 2A, p 51. The attached Schedule "B" at page 2 contains a cryptic reference to a Final Order to be issued in the Ontario Class Action, to include an "opt-out threshold agreeable to E&Y". The Objectors have sought an explanation of that reference, but none has been furnished.

> Any 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.[9]

This section was enacted specifically so that the right to opt out is not subject to judicial discretion, contrary to the Law Reform Commission's recommendation that discretion be allowed.[10]

29. Each province that allows class proceedings requires a procedure making class members' participation in the action non-mandatory. Ontario, Alberta, Manitoba, Saskatchewan, Québec, and Nova Scotia are opt-out regimes.[11] British Columbia, Newfoundland and Labrador, and New Brunswick have a hybrid system, in which residents of the province operate under an opt-out regime and non-residents operate under an opt-in regime.[12] No class proceedings legislation grants discretion to the court or the parties to waive or override a class member's right to decide not to participate.

30. As described in the first paragraphs of this factum, this Court has recognized the opt-out right as fundamental. The Ontario Court of Appeal has said the same[13], and in one case concluded that a class notice, which was supposed to inform class members about their opt-out rights, was so inadequate as to constitute a denial of natural justice.[14] The right to opt out is part of the balance that provincial legislators have struck in allowing multiple claims to be litigated on a group or common basis.

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[9] *CPA*, s. 9, Application Record, Volume II, Tab 1D.
[10] Ministry of the Attorney General, Ontario Law Reform Commission, *Report on Class Actions*, Vol II, at 490, Application Record, Volume II ab BB
[11] *Class Proceedings Act, 1992*, SO 1992, c 6, s 9, Application Record, Volume II, Tab 1D; *Class Proceedings Act*, SA 2003, c C-16.5, s 17, Application Record, Volume II, Tab 1E; *Class Proceedings Act*, CCSM, c C130, s 16, Application Record, Volume II, Tab 1F; *The Class Actions Act,* SS 2001, c C-12.01, s 18, Application Record, Volume II, Tab 1G; *Civil Code of* Québec, LRQ, c C-1991, s 2897, Application Record, Volume II, Tab 1H; *Class Proceedings Act*, SNS 2007, c 28, s 19, Application Record, Volume II, Tab 1I.
[12] *Class Proceedings Act*, RSBC 1996, c 50, s 16, Application Record, Volume II, Tab 1J; *Class Actions Act,* SNL 2001, c C-18.1, s 17, Application Record, Volume II, Tab 1K; *Class Proceedings Act,* RSNB 2011, c 125, s 18, Application Record, Volume II, Tab 1L.
[13] *Fischer v IG Investment Management Ltd*, 2012 ONCA 47 at para 69 ["*Fischer*"], Application Record, Volume II, Tab 1R; see also *Currie v McDonald's Restaurants of Canada Ltd*, [2005] 74 OR (3d) 321 at para 28 (CA) ["*Currie*"], Application Record, Volume II, Tab 1S.
[14] *Ibid.*, at para 43.

2. Sino-Forest has attracted substantial public attention

31. The high public profile of the demise of Sino-Forest, of the efforts to determine what went wrong, and of the litigation seeking recoveries for injured investors enhances the public importance of the issues presented by this application.

32. Sino-Forest was the largest failure of a Canadian public company due to apparent fraud, at least since Bre-X, with investor losses in the multi-billions. An RCMP investigation into the alleged fraud by company officers is ongoing; two former officers, former CEO Mr. Allen T.Y. Chan and Mr. David J. Horsley, have been accused by the Ontario Securities Commission ("OSC") of engaging in unlawful conduct, and Mr. Chan specifically of fraud (he was called the "mastermind").[15] The OSC has also asserted that E&Y failed to perform its audits of Sino-Forest in accordance with generally accepted auditing standards, in violation of the Ontario *Securities Act*.[16] The fact that the OSC released its Statement of Allegations against E&Y on the same day that E&Y announced its proposed $117 million class settlement also raises the public profile of this matter.

33. Other than the E&Y settlement at issue here and the Pöyry opt-out settlement mentioned earlier, the disposition of claims against other defendants has stalled. Certification of the case has been scheduled for hearing in late February 2014. Several defendants have been added to the list of those qualified to use the framework for further no-opt-out settlements, including BDO Limited (another former Sino-Forest auditor); the underwriters; and three former officers and directors, including Mr. Chan. No further settlements have been announced; the parties may be waiting to see whether this Court will accept review. All of these factors confirm the public importance of the present application.

34. In addition, the fact that there were several dozen valid and timely objections to the E&Y settlement -- which was announced during the holiday season -- indicates public interest in this matter. Normally there are few if any objectors to securities settlements in class actions. Some objectors stated they did not believe their interests had been represented by the class plaintiffs.

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[15] Exhibit "EE" to the Affidavit of Charles M Wright sworn January 10, 2013 – Statement of Allegations against Sino-Forest by the Ontario Securities Commission at paras 11 and 119, Application Record, Volume III, Tab 4, pp 13 and 23.

[16] Exhibit "FF" to the Affidavit of Charles M Wright sworn January 10, 2013 – Statement of Allegations against Ernst & Young by the Ontario Securities Commission at paras 14 and 65-67, Application Record, Volume III, Tab 6, pp 62, 68, and 73; *Securities Act*, R.S.O. 1990, c. S. 5, s 78, Application Record, Volume II, Tab 1C,

Some said that a $117 million settlement from an auditor defendant with primary responsibility for causing investors' losses was insufficient, in light of the total multi-billion-dollar losses and the fact that the E&Y settlement amount apparently did not even exhaust the available insurance coverage.

35. Finally, as also noted above, the E&Y settlement may become a template for other situations, in cases in which one defendant files for *CCAA* protection (often the company that issued securities in cases alleging securities violations may end up insolvent), and other defendants seek to negotiate settlements for themselves using the no-opt-out framework. Several securities cases presenting this configuration are cited above. The no-opt-out innovation in the E&Y settlement, if it is not disapproved, has the potential of becoming routine in complex securities and other cases.

3. The Applicants are serious and responsible investors, had a large stake in Sino-Forest, and fear that introduction of no-opt-out settlements in Canada will harm the integrity of our securities markets

36. The six Applicants are institutional investment funds in Ontario and Québec. They are attuned to corporate governance issues, and as noted above, they were incensed that the class plaintiffs and E&Y negotiated a settlement that excluded opt outs; that the Superior Court specifically approved that aspect of the settlement; and that E&Y apparently paid and the class plaintiffs accepted a "premium" to obtain that provision.

37. Even in this situation involving an as-yet-uncertified class, the counsel for the class plaintiffs are supposed to represent the interests of all class members. Negotiating away opt-out rights was contrary to that duty.

38. The class plaintiffs argued to the Superior Court and the Court of Appeal that the Applicants represented only a small minority of Sino-Forest shareholder class members, and that two of the Applicants were motivated by sour grapes because they had sought carriage of the class action but failed. The latter point was purely ad hominem and simply wrong. As for financial interests, the Applicants together held over 3.9 million Sino-Forest shares at the time the fraud was revealed[17] -- about four times the aggregate holdings of the (named) class plaintiffs.[18]

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[17] Affidavit of Tanya T Jemec sworn January 18, 2013, at para6, Application Record, Volume III, Tab 9, pp 116.
[18] Excerpts from Class Action Carriage decision in *Smith v Sino-Forest Corporation*, 2012 ONSC 24 at paras 112-126, Application Record, Volume III, Tab 1, pp 3-4.

In any event, the importance of opt-out rights does not depend on numbers of shares or amounts of money involved.

39. The Applicants also articulated concerns to the Superior Court that allowing no-opt-out settlements in securities class actions would damage Canada's capital markets:

> ¶17 If the Plan operates as described above, so that investors in Invesco's position would effectively lose the ability to opt out and seek adjudication of claims against Third Party Defendants in litigation outside the Class Action, then this would have the perverse consequence of irretrievably damaging investors' trust in the integrity of our capital markets, and thus would in the long run impair the proper functioning of those markets themselves.[19]

40. Those concerns go beyond the fundamental issues of procedural fairness identified in the jurisprudence on class actions, and raise larger concerns about the integrity of our financial markets, which the Applicants submit are of high public importance.

B. Sino-Forest's *CCAA* Plan of Reorganization Does Not Provide Any Good Reason for Allowing E&Y and the Class Plaintiffs to Settle on a No-Opt-Out Basis

41. The Superior Court abrogated class members' opt-out rights based on its view that a no-opt-out release of defendants like E&Y is permitted under Part I of the *CCAA* ("Compromises and Arrangements"), which the court held takes precedence, at least in this situation.[20] The Court of Appeal referred generally to this point but did not articulate any further analysis.[21]

42. The *CCAA* does not explicitly mention releases of third party defendants (*i.e.*, parties other than the debtor applicant in the *CCAA* proceeding), except in s. 5.1, which specifically provides for releases of company directors in certain circumstances. *CCAA* releases of other categories of persons would have to be inferred from more general *CCAA* provisions. Two provincial courts of appeal have reached opposite conclusions on whether the *CCAA* authorizes releases of "third party" defendants (other than under s. 5.1). In *Michaud v. Steinberg*[22], the

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[19] Affidavit of Eric J Adelson sworn December 6, 2012 ("Adelson Aff"), at para 17, Application Record, Volume III, Tab 8B, pp 97.

[20] *Reasons of the Hon. Mr. Justice Morawetz re: Settlement Approval and Representation Dismissal* (2013 ONSC 1078) at paras 71-73, Application Record, Volume 1, Tab 3C, pp 58-59.

[21] Endorsement of the Court of Appeal re: Motions for Leave to Appeal (2013 ONCA 456) at para 14, Application Record, Volume I, Tab 3D, pp 66.

[22] *Steinberg Inc c Michaud,* 1993 CarswellQue 2055 (CA), Application Record, Volume II, Tab 1W.

Court of Appeal for Québec stated that the *CCAA* "does not go so far as to offer an umbrella to all the persons within [the *CCAA*'s] orbit" and that "[t]he Act and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors ...." [23] Fifteen years later, in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*[24], the courts in Ontario came to a somewhat opposing view, finding that cross-releases of all creditors and participants in the asset-backed commercial paper market should be approved as "related to" and "necessary for" the *CCAA* restructuring put in place to prevent the collapse of that market. Other than its denial of leave to appeal in the *ATB Financial* matter, this Court has not considered the issue of whether and when *CCAA* non-debtor third party releases may be approved.[25]

43. This Court could conceivably use the present case as an opportunity to confront that issue, which would raise matters of public importance. However, in reality, and despite the decisions by the courts below, this case does not present a situation, under any fair view of the law, that could justify using the *CCAA* to abrogate class members' opt-out rights. In trying to bring most of the multi-defendant Sino-Forest investors' litigation into the *CCAA* court, the parties and the courts reached far beyond the standard for allowing non-debtor third party *CCAA* releases recognized in the *ATB Financial* decision (even assuming that decision represents the proper standard for permitting such releases). Indeed, the courts below ventured into an area where "the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice".[26]

44. The Applicants anticipate that the parties opposed to the present application will argue that a *CCAA* court clearly has jurisdiction and discretion to approve releases in favour of third party defendants such as E&Y, even though they are not the *CCAA* applicant and are certainly not

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[23] *Ibid* at paras 54, 58.

[24] *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp,*[2008] OJ No 3164 (CA), aff'g [2008] OJ No 2265 (SCJ), Application Record, Volume II, Tab 1X.

[25] Courts in the U.S. have considered similar issues in connection with reorganizations under Chapter 11 of the Bankruptcy Code. Three federal circuits categorically prohibit non-debtor releases. In the Second Circuit, where the analysis is more flexible, the courts require "unique circumstances", and the most recent authority indicates that reorganization plan releases of a non-debtor by non-voting equity stakeholders will be enforced only on an opt-out basis. *In re DBSD North America Inc.,* 419 B.R. 179 (Bankr. S.D.N.Y. 2009), *aff'd,* 2010 WL 1223109 (S.D.N.Y. 2010), *rev'd on other grounds,* 627 F.2d 496 (2d Cir. 2010), 634 F.3d 79 (2011) (opinion), Application Record, Volume II, Tab 1Y; see also *In re Conseco, Inc.,* 301 B.R. 525 (Bankr. N.D. Ill. 2003), Application Record, Volume II, Tab 1Z.

[26] *Sun Indalex Finance, LLC v United Steelworkers,*2013 SCC 6, at para 275 (LaBel and Abella JJ, dissenting in part). Application Record, Volume II, Tab 1V.

insolvent, and that this Court need not and should not review whether the *CCAA* court's exercise of discretion was justified in the present situation.

45. The lower courts found that, so long as a third party release "related to" the debtor's restructuring, it could be approved (on a no-opt-out basis). That articulation of the requirement, without focusing on whether the release is "necessary", is so relaxed as to be meaningless. It would allow no-opt-out releases to be given to all third party defendants in any case involving a company that seeks *CCAA* reorganization. That is demonstrated in the present case because all categories of defendants, even including those accused of fraud by the OSC, are being permitted to use the "framework" sanctioned by the *CCAA* court for their settlements. The present circumstances are far less exceptional than those that persuaded the *ATB Financial* court, after almost anguished analysis, to allow third party defendant releases in order to save the entire asset-backed commercial paper market.

46. In addition, the *CCAA* court here justified bringing the E&Y settlement into the *CCAA* proceedings on the basis that the $117 million to be paid by E&Y constituted the "only monetary contribution that can be directly identified, at this time"[27] as a distribution to Sino-Forest's "claimants ... and voting creditors"[28] and the "only real monetary consideration available to all stakeholders"[29]. The term "monetary" in these statements is significant because the (non-equity) creditors of Sino-Forest certainly received valuable interests in the Newco entities and were not left empty-handed. The $117 million will be derived from the settlement of the class action claims against E&Y. That sum properly belongs to the class members in that litigation, the purchasers of Sino-Forest securities prior to the disclosure of the fraud -- and not to Sino-Forest's current creditors. In fact, section 6(8) of the *CCAA* prohibits the use of a *CCAA* plan to pay equity claimants unless non-equity creditor claims are first "paid in full" (which certainly is not happening under any circumstances in Sino-Forest).[30] This reveals a deep disconnect between Justice Morawetz's reasoning that the $117 million can be deemed a distribution under the *CCAA* plan, and the reality that the money must be paid to the plaintiff class members who are entitled to it and who comprise a different group than the *CCAA* creditors. (The parties have deferred

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[27] Reasons of the Hon. Mr. Justice Morawetz re: Settlement Approval and Representation Dismissal (2013 ONSC 1078) at para 60, Application Record, Volume I, Tab 3C, pp 57.
[28] *Ibid* at paras 63, 64 Application Record, Volume I, Tab 3C, pp 57-58.
[29] *Ibid* at para 71 Application Record, Volume I, Tab 3C, pp 58-59.
[30] *CCAA*, section 6(8) Application Record, Volume II, Tab 1A.

defining the allocation of the $117 million.) All of these considerations show that the E&Y settlement proceeds cannot properly be treated or considered as part of Sino-Forest's reorganization plan, and so the money cannot justify the courts' approval of the no-opt-out releases.

47. Finally, the idea that the E&Y settlement was related to or necessary for the success of Sino-Forest's reorganization plan is belied by the calendar. As described in the statement of facts above, the original reorganization plan included a provision confirming that third party defendant claims were *unaffected,* and that the plan was poised for approval by creditors when E&Y and the class plaintiffs announced their proposed settlement. Thus it cannot be said that the settlement was necessary to the plan when the plan was promulgated. Moreover, the plan itself was implemented -- *i.e.,* the reorganization was put into effect, and the Newco interests were distributed to the creditors -- on January 30, 2013, five days *before* the *CCAA* court held the hearing to approve the E&Y settlement (which of course has not yet been implemented). Therefore, the settlement could not have been necessary for the reorganization plan to succeed. The two are separate, and have been connected by the class plaintiffs and E&Y only because they are trying to use the *CCAA* in order to avoid dealing with possible opt outs.

C. The Applicants Must Have *Some* Right to Appeal the Abrogation of Their Opt-Out Rights Under the Class Proceedings Act

48. The Applicants sought appellate review of the denial of their rights by seeking leave under the *CCAA* to appeal to the Court of Appeal, and by taking a direct appeal to the Court of Appeal under the *CPA*. Since the Superior Court acted in a dual capacity as a *CCAA* and a *CPA* court, it may be difficult to parse out the scope of each type of appeal. In any event, because opt-out rights arise under the *CPA*, the Applicants concluded it was prudent and appropriate to take a direct appeal under that statute.

49. Because the Applicants are absent class members (*i.e.,* not named parties in the class proceeding), the Ontario statutes allowing appeals are not necessarily clear in this situation. The Applicants appealed under both section 6(1)(b) of the *Courts of Justice Act*[31], which is the general appellate provision with respect to final orders issued from the Superior Court; and sections 30(3) and (5) of the *CPA*, which together allow an absent class member to move for leave to act as a representative party in taking an appeal if the class plaintiff herself does not appeal from a

[31] *Courts of Justice Act* RSO 1990, c C43 ["*CJA*"], Application Record, Volume II, Tab 1B.

judgment on common issues. Statutes with provisions that are similar to sections 30(3) and (5) appear in other provinces' class proceedings laws.[32] E&Y and the class plaintiffs moved to quash the Applicants' direct appeal under s. 30(3) and (5).

50. Appellate rights and standing under sections 30(3) and (5), in an analogous situation except for one important factor, were previously explained by the Court of Appeal for Ontario in *Dabbs v. Sun Life Assurance Co. of Canada*[33]. In that case, an absent class member who had unsuccessfully objected to a class settlement in the lower court was held *not* to have standing to appeal the court's approval of the settlement *because that class member could have opted out* and pursued his remedy individually -- but he did not.

51. The Applicants argued to the Court of Appeal that the converse of *Dabbs* means that if an absent class member was *prevented* from opting out, standing to appeal plainly *should* be recognized. However, the Court of Appeal denied standing and granted the motion to quash based on summary reasons.

52. The Applicants submit that it was illogical for the Court of Appeal to construe the statutes granting appeal rights, as cited by the Applicants in their notice of appeal, as depriving absent class members of the right to appeal the deprivation of their opt-out rights. Otherwise, the clear intention of the provincial legislation clearly providing for opt-out rights could be frustrated without recourse.

53. Resolution of this issue is a necessary adjunct to a decision on the main issue of opt-out rights described above. Moreover, holding that absent class members whose opt-out rights are abrogated completely lack standing to appeal would jeopardize opt-out rights in any setting (not just when *CCAA* proceedings are involved) and render the rights essentially illusory. Leave to appeal on this issue should thus be granted as part of the present application.

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[32] *Class Proceedings Act*, SNS 2007, c 28, section 39(4), Application Record, Volume II, Tab 1I; *Class Actions Act,* SNL 2001, c C-18.1, section 36(4), Application Record, Volume II, Tab 1K; *Class Proceedings Act,* RSNB 2011, c 125, section 38(4), Application Record, Volume II, Tab 1L; *Class Proceedings Act,* CCSM c C-130, section 36(5), Application Record, Volume II, Tab 1F; *The Class Actions Act,* SS 2001, c C-12.01, section 39(4), Application Record, Volume II, Tab 1G; *Class Proceedings Act,* SA 2003, c C-16.5, section 36, Application Record, Volume II, Tab 1E; *Class Proceedings Act,* RSBC 1996, c 50, section 36(2), Application Record, Volume II, Tab 1J.

[33] *Dabbs v Sun Life Assurance Co. of Canada,* [1998] OJ No 3622 (CA) at paras 18-21, Application Record, Volume II, Tab 1AA

PART IV – SUBMISSION AS TO COSTS

54. The Applicants respectfully request costs of the motion in accordance with this Court's normal practices, should leave be granted.

PART V – THE ORDER REQUESTED

55. The Applicants respectfully request leave to appeal to this Honourable Court from the decisions of the Court of Appeal for Ontario, dated June 26, 2013 and June 28, 2013, together with costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 23, 2013

Won J. Kim

Michael C. Spencer

per Michael C. Spencer
Megan B. McPhee

Yonatan Rozenszajn

Tanya T. Jemec

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PART VII – STATUTORY AUTHORITIES

CANADA

A. COMPANIES' CREDITORS ARRANGEMENT ACT

RSC 1985, c C-36, ss 6 and 40

Payment – equity claims

6. **(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.

B. SUPREME COURT ACT

RSC 1985, c S-26

Appeals with leave of Supreme Court

40. **(1)** Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

Application for leave

(2) An application for leave to appeal under this section shall be brought in accordance with paragraph 58(1)(a).

Appeals in respect of offences

(3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

Extending time for allowing appeal

(4) Whenever the Court has granted leave to appeal, the Court or a judge may, notwithstanding anything in this Act, extend the time within which the appeal may be allowed.

ALBERTA

A. ***CLASS PROCEEDINGS ACT***

SA 2003, c C-16.5, ss 17 and 36

Opting out

17 (1) A person who meets the criteria to be a class member in respect of a class proceeding is a class member in the class proceeding unless the person opts out of the class proceeding.

(2) The Court may, in a certification order or at any time,

(a) specify the manner in which and the time within which the members of a class, or any individual member of a class, may opt out of the proceeding, and

(b) impose terms or conditions subject to which the class members or an individual member may opt out of the proceeding.

(3) A person who opts out of a class proceeding ceases, effective from the time the person opts out, to be a class member of the class proceeding.

(4) Notwithstanding anything in this section, where the Court certifies a proceeding pursuant to an application by a defendant, a class member is prohibited from opting out of the class proceeding other than with leave of the Court.

(5) If the Court grants leave under subsection (4) for a person to opt out of a class proceeding, that person has, as a matter of right, the right to apply to the Court to be added, on any terms or conditions that the Court considers appropriate, as a named plaintiff for the purposes of allowing that plaintiff to conduct the plaintiff's own case.

(6) Notwithstanding anything in this section, the Court may at any time determine whether or not a person is a class member and may impose any terms or conditions the Court considers appropriate on the person's membership in the class.

Appeals

36 (1) Any party may, without leave, appeal to the Court of Appeal from any of the following:

(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;

(d) an order made under Division 2 of this Part, other than an order that determines individual claims made by class members or subclass members.

(2) A class member or subclass member, a representative plaintiff or a defendant may appeal to the Court of Appeal any order

(a) determining an individual claim made by a class member or subclass member, or

(b) dismissing an individual claim for monetary relief made by a class member or subclass member.

(3) If a representative plaintiff

(a) does not appeal as permitted under this section within the time limit set under the Rules of Court for bringing an appeal, or

(b) abandons an appeal commenced pursuant to this section,

any class member or subclass member for whom the representative plaintiff was appointed may apply to the Court of Appeal for leave to act as the representative plaintiff for the purposes of bringing or continuing an appeal or seeking leave to appeal.

(4) An application by a class member or subclass member for leave to act as the representative plaintiff under subsection (3) must be made within 30 days from the day of the expiry of the appeal period available to the representative plaintiff or by a later date as may be set by the Court of Appeal.

BRITISH COLUMBIA

A. CLASS PROCEEDINGS ACT

RSBC 1996, c 50, ss 16 and 36

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).

Appeals

36 **(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).

MANITOBA

A. ***CLASS PROCEEDINGS ACT***

CCSM, c C130, ss 16 and 36

Opting out of class proceeding

16 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.

Appeal of certification decision

36 **(4)** With leave of a justice of The Court of Appeal, a representative plaintiff or defendant may appeal to The Court of Appeal from

(a) an order certifying or refusing to certify a proceeding as a class proceeding; or

(b) an order decertifying a proceeding.

NEW BRUNSWICK

A. ***CLASS PROCEEDINGS ACT***

RSNB 2011, c 125, ss 18 and 38

Opting out and opting in

18. **(1)** A person who is a member of a class involved in a class proceeding may opt out of the class proceeding

(a) in the manner and within the time specified in the certification order, or

(b) with leave of the court and on the terms or conditions the court considers appropriate.

(2) A person referred to in subsection (1) who opts out of the class proceeding ceases, from the time the person opts out and subject to any terms or conditions referred to in subsection (1), to be a member of the class involved in the class proceeding.

(3) Subject to subsection (5), a person who is not a resident of New Brunswick and who would otherwise be a member of a class involved in the class proceeding may opt into the class proceeding

(a) in the manner and within the time specified in the certification order, or

(b) with leave of the court and on the terms or conditions the court considers appropriate.

(4) A person referred to in subsection (3) who opts into a class proceeding is, from the time the person opts in and subject to any terms or conditions referred to in subsection (3), a member of the class involved in the class proceeding.

(5) A person shall not opt into a class proceeding under subsection (3) 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 set out in paragraphs 8(1)(a), (b) and (c).

(6) If a subclass is created as a result of persons opting into a class proceeding under subsection (3), the representative plaintiff for that subclass shall ensure that the certification order for the class proceeding is amended, if necessary, to comply with subsection 10(2).

(7) Notwithstanding anything in this section, if the court certifies a proceeding as a class proceeding on a motion by a defendant, a class member shall not opt out of the class proceeding other than with leave of the court.

(8) Notwithstanding anything in this section, the court may at any time determine whether or not a person is a class or subclass member subject to any terms or conditions the court considers appropriate.

38. **(4)** If a representative plaintiff for a class or subclass does not appeal or seek leave to appeal as permitted by subsection (1) or (3) within the time limit for bringing an appeal set under the Rules of Court or if a representative plaintiff abandons an appeal under subsection (1) or (3), any member of the class or subclass may make a motion to a judge of The Court of Appeal of New Brunswick for leave to act as the representative plaintiff for the purposes of subsection (1) or (3).

NEWFOUNDLAND

A. ***CLASS ACTIONS ACT***

SNL 2001, c C-18.1, s 17 and 36

17. **(1)** A member of a class involved in a class action may opt out of the action in the manner and within the time specified in the certification order.

(2) A person who is not a resident of the province may opt in to a class action in the manner and within the time specified in the certification order where that person, if they were resident in the province, would be a member of the class involved in the action.

(3) A person who opts in to a class action under subsection (2) is from that time a member of the class for the purpose of this Act.

(4) A person shall not opt in to a class action under subsection (2) unless the subclass of which the person is to become a member has or shall have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of paragraphs 7 (1)(a), (b) and (c).

(5) Where a subclass is created as a result of persons opting in to a class action under subsection (2), the representative plaintiff for that subclass shall ensure that the certification order for the class action is amended, if necessary, to comply with subsection 9 (2).

36. **(4)** Where a representative plaintiff does not appeal or seek leave to appeal as permitted by subsection (1) or (3) within the time limit for bringing an appeal under rule 57.03 of the Rules of the Supreme Court, 1986 or if a representative plaintiff abandons an appeal under subsection (1) or (3), a member of the class or subclass for which the representative plaintiff had been appointed may apply to a judge of the Court of Appeal for leave to act as the representative plaintiff for the purpose of subsection (1) or (3) and when granting leave the court may extend the time limit for bringing an appeal or seeking leave to appeal under subsections (1) or (3).

NOVA SCOTIA

A. CLASS PROCEEDINGS ACT

SNS 2007, c 28, ss 19 and 38

19 **(1)** A person who is a member of a class involved in a class proceeding may opt out of the class proceeding

(a) in the manner and within the time specified in the certification order; or

(b) with leave of the court and on the terms or conditions the court considers appropriate.

(2) A person referred to in subsection (1) who opts out of the class proceeding ceases, from the time the person opts out and subject to any terms or conditions referred to in subsection (1), to be a member of the class involved in the class proceeding.

(3) Notwithstanding anything contained in this Section, the court may at any time determine whether or not a person is a class or subclass member, subject to any terms or conditions the court considers appropriate.

38. **(4)** Where a representative party for a class or subclass does not appeal or seek leave to appeal as permitted by subsection (1) or (3) within the time limit for bringing an appeal set under the Civil Procedure Rules or where a representative party abandons an appeal under subsection (1) or (3), any member of the class or subclass may make an application to a judge of the Nova Scotia Court of Appeal for leave to act as the representative party for the purposes of subsection (1) or (3).

ONTARIO

A. CLASS PROCEEDINGS ACT

SO 1992, c 6, s 9

Opting out

9. Any 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.

B. COURTS OF JUSTICE ACT

RSO 1990, c C43, s 6

Court of Appeal jurisdiction

6. **(1)** An appeal lies to the Court of Appeal from,

> **(b)** a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

C. SECURITIES ACT

RSO 1990, c. S. 5, s 78

Comparative financial statements

78. **(1)** Every reporting issuer that is not a mutual fund and every mutual fund in Ontario shall file annually within 140 days from the end of its last financial year comparative financial statements relating separately to,

> **(a)** the period that commenced on the date of incorporation or organization and ended as of the close of the first financial year or, if the reporting issuer or mutual fund has completed a financial year, the last financial year, as the case may be; and
>
> **(b)** the period covered by the financial year next preceding the last financial year, if any,

made up and certified as required by the regulations and in accordance with generally accepted accounting principles.

Auditor's report

> **(2)** Every financial statement referred to in subsection (1) shall be accompanied by a report of the auditor of the reporting issuer or mutual fund prepared in accordance with the regulations.

Auditor's examination

> **(3)** The auditor of a reporting issuer or mutual fund shall make such examinations as will enable the auditor to make the report required by subsection (2).

"auditor" defined

> **(4)** For the purposes of this Part,
>
> "auditor", where used in relation to the reporting issuer or mutual fund, includes the auditor of the reporting issuer or mutual fund and any other independent public accountant.

QUEBEC

A. ***CIVIL CODE OF QUÉBEC***

LRQ, c C-1991, s 2897, a 2897

2897. An interruption which results from the bringing of a class action benefits all the members of the group who have not requested their exclusion from the group.

SASKATCHEWAN

A. ***THE CLASS ACTIONS ACT***

SS 2001, c C-12.01, s 18 and 39

Opting out of a class action

18. A class member involved in a class action may opt out of the action in the manner and within the time stated in the certification order.

Appeals

39. **(4)** If a representative plaintiff does not appeal or seek leave to appeal pursuant to subsection (1) or (3) within the time limit for bringing an appeal set pursuant to section 9 of *The Court of Appeal Act, 2000* or if a representative plaintiff abandons an appeal pursuant to subsection (1) or (3), 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) or (3)

TAB A

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 September 4, 2013

Last amended on April 1, 2013

À jour au 4 septembre 2013

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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 September 4, 2013. The last amendments came into force on April 1, 2013. Any amendments that were not in force as of September 4, 2013 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 4 septembre 2013. Les dernières modifications sont entrées en vigueur le 1 avril 2013. Toutes modifications qui n'étaient pas en vigueur au 4 septembre 2013 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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L.R.C., 1985, ch. C-36

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" « *agent négociateur* »

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a company;

"bond" « *obligation* »

"bond" includes a debenture, debenture stock or other evidences of indebtedness;

"cash-flow statement" « *état de l'évolution de l'encaisse* »

"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;

"claim" « *réclamation* »

"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*;

"collective agreement" « *convention collective* »

"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;

"company" « *compagnie* »

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of 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

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 » "*title transfer credit support agreement*"

« 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.

« actionnaire » "*shareholder*"

« 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.

« administrateur » "*director*"

« 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.

« agent négociateur » "*bargaining agent*"

« agent négociateur » Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie.

« biens aéronautiques » [Abrogée, 2012, ch. 31, art. 419]

« compagnie » "*company*"

« 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,

or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

"court" « *tribunal* »

"court" means

(*a*) in Nova Scotia, British Columbia and Newfoundland, 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 Prince Edward Island, 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;

"debtor company" « *compagnie débitrice* »

"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;

"director" « *administrateur* »

"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;

"eligible financial contract" « *contrat financier admissible* »

"eligible financial contract" means an agreement of a prescribed kind;

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*.

« compagnie débitrice » "*debtor 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.

« contrat financier admissible » "*eligible financial contract*"

« contrat financier admissible » Contrat d'une catégorie réglementaire.

« contrôleur » "*monitor*"

« 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.

« convention collective » "*collective agreement*"

« 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.

« créancier chirographaire » "*unsecured creditor*"

« 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.

"equity claim" « *réclamation relative à des capitaux propres* »

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(*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*);

"equity interest" « *intérêt relatif 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;

"financial collateral" « *garantie financière* »

"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;

"income trust" « *fiducie de revenu* »

"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;

« créancier garanti » *"secured creditor"*

« créancier garanti » Détenteur d'hypothèque, de gage, charge, nantissement ou privilège sur ou contre l'ensemble 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.

« demande initiale » *"initial application"*

« demande initiale » La demande faite pour la première fois en application de la présente loi relativement à une compagnie.

« état de l'évolution de l'encaisse » *"cash-flow statement"*

« 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.

« fiducie de revenu » *"income trust"*

« 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.

« garantie financière » *"financial collateral"*

« 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.

"initial application" « *demande initiale* »
"initial application" means the first application made under this Act in respect of a company;

"monitor" « *contrôleur* »
"monitor", in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company;

"net termination value" « *valeurs nettes dues à la date de résiliation* »
"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;

"prescribed" *Version anglaise seulement*
"prescribed" means prescribed by regulation;

"secured creditor" « *créancier garanti* »
"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;

"shareholder" « *actionnaire* »
"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;

"Superintendent of Bankruptcy" « *surintendant des faillites* »
"Superintendent of Bankruptcy" means the Superintendent of Bankruptcy appointed under subsection 5(1) of the *Bankruptcy and Insolvency Act*;

"Superintendent of Financial Institutions" « *surintendant des institutions financières* »
"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*;

« intérêt relatif à des capitaux propres » "*equity interest*"
« 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 action 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.

« obligation » "*bond*"
« obligation » Sont assimilés aux obligations les débentures, stock-obligations et autres titres de créance.

« réclamation » "*claim*"
« 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*.

« réclamation relative à des capitaux propres » "*equity 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*).

« surintendant des faillites » "*Superintendent of Bankruptcy*"
« surintendant des faillites » Le surintendant des faillites nommé au titre du paragraphe 5(1) de la *Loi sur la faillite et l'insolvabilité*.

« surintendant des institutions financières » "*Superintendent of Financial Institutions*"
« 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*.

« tribunal » "*court*"
« tribunal »

a) Dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de Terre-Neuve, la Cour suprême;

"title transfer credit support agreement" « *accord de transfert de titres pour obtention de crédit* »

"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;

"unsecured creditor" « *créancier chirographaire* »

"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 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.

a.1) dans la province d'Ontario, la Cour supérieure de justice;

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 l'Île-du-Prince-Édouard, 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.

« valeurs nettes dues à la date de résiliation » *"net termination value"*

« 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.

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.

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.

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 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.

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 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 com-

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 liquida-

pany, 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. 5.

teur 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. 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.

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.

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.

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.

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.

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.

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.

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.

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

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

(*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.

peut être homologué par le tribunal et, le cas échéant, lie :

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.

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.

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.

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 pro-

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

vides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

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 auquel 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.

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.

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 — 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

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*) 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

(*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

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 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,

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*).

(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.

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.

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.

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.

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.

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.

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.

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 ho-

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.

mologué 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.

PART II

JURISDICTION OF COURTS

PARTIE II

JURIDICTION DES TRIBUNAUX

Jurisdiction of court to receive applications

9. (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

Le tribunal a juridiction pour recevoir des demandes

9. (1) Toute demande prévue par la présente loi peut être faite au tribunal ayant juridiction dans la province où est situé le siège social ou le principal bureau d'affaires de la compagnie au Canada, ou, si la compagnie n'a pas de bureau d'affaires au Canada, dans la province où est situé quelque actif de la compagnie.

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Form of applications

10. (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Forme des demandes

10. (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(*a*) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(*b*) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(*c*) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

General power of court

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

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Pouvoir général du tribunal

11. Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(*a*) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(*b*) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

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

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

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

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F).

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Persons deemed to be directors

(3) If 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 company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

2005, c. 47, s. 128.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* or the by-laws or rules of that Association.

2005, c. 47, s. 128, 2007, c. 36, s. 64.

11.07 [Repealed, 2012, c. 31, s. 420]

Restriction — certain powers, duties and functions

11.08 No order may be made under section 11.02 that affects

(*a*) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(*b*) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(*c*) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

2005, c. 47, s. 128.

Stay — Her Majesty

11.09 (1) An order made under section 11.02 may provide that

(3) 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 est réputé un administrateur pour l'application du présent article.

Présomption : administrateurs

2005, ch. 47, art. 128.

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la personne — autre que la compagnie visée par l'ordonnance — qui a des obligations au titre de lettres de crédit ou de garanties se rapportant à la compagnie.

Suspension — lettres de crédit ou garanties

2005, ch. 47, art. 128.

11.05 [Abrogé, 2007, ch. 29, art. 105]

11.06 Aucune ordonnance prévue par la présente loi ne peut avoir pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'Association.

Membre de l'Association canadienne des paiements

2005, ch. 47, art. 128; 2007, ch. 36, art. 64.

11.07 [Abrogé, 2012, ch. 31, art. 420]

11.08 L'ordonnance prévue à l'article 11.02 ne peut avoir d'effet sur :

Restrictions : exercice de certaines attributions

a) l'exercice par le ministre des Finances ou par le surintendant des institutions financières des attributions qui leur sont conférées par la *Loi sur les banques*, la *Loi sur les associations coopératives de crédit*, la *Loi sur les sociétés d'assurances* ou la *Loi sur les sociétés de fiducie et de prêt*;

b) l'exercice par le gouverneur en conseil, le ministre des Finances ou la Société d'assurance-dépôts du Canada des attributions qui leur sont conférées par la *Loi sur la Société d'assurance-dépôts du Canada*;

c) l'exercice par le procureur général du Canada des pouvoirs qui lui sont conférés par la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 128.

11.09 (1) L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

Suspension des procédures : Sa Majesté

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, 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, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation estab-

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe 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 et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition 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 et autres charges afférents, laquelle :

(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 auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

lishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

When order ceases to be in effect

(2) The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, 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

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(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 institue un régime provincial de pensions au sens de ce paragraphe.

Cessation d'effet

(2) Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) 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 et autres charges afférents,

(iii) 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 et autres charges afférents, laquelle :

(A) 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 auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) 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

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, 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

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) 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 et autres charges afférents,

(iii) 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 et autres charges afférents, laquelle :

(A) 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 auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) 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 institue un régime provincial de pensions au sens de ce paragraphe.

Operation of similar legislation

(3) An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

Effet

(3) L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, 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

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

2005, c. 47, s. 128; 2009, c. 33, s. 28.

de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) 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 et 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 et autres charges afférents, laquelle :

(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 auquel 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 institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges affé-

rents, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 128; 2009, ch. 33, art. 28.

Meaning of "regulatory body"

11.1 (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Définition de « organisme administratif »

11.1 (1) Au présent article, « organisme administratif » s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par règlement.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Organisme administratif — ordonnance rendue en vertu de l'article 11.02

(2) Sous réserve du paragraphe (3), l'ordonnance prévue à l'article 11.02 ne porte aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la compagnie débitrice par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(*a*) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(*b*) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Exception

(3) Le tribunal peut par ordonnance, sur demande de la compagnie et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

a) il ne pourrait être fait de transaction ou d'arrangement viable à l'égard de la compagnie si ce paragraphe s'appliquait;

b) l'ordonnance demandée au titre de l'article 11.02 n'est pas contraire à l'intérêt public.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106, c. 36, s. 65.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2005, ch. 47, art. 128; 2007, ch. 29, art. 106, ch. 36, art. 65.

11.11 [Repealed, 2005, c. 47, s. 128]

11.11 [Abrogé, 2005, ch. 47, art. 128]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou

that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Priority — secured creditors

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

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité — créanciers garantis

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Priorité — autres ordonnances

Factors to be considered

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

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

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

(*c*) whether the company's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65.

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)*b*).

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 36, art. 65.

Facteurs à prendre en considération

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is

11.3 (1) Sur demande de la compagnie débitrice et sur préavis à toutes les parties au contrat et au contrôleur, le tribunal peut, par ordonnance, céder à toute personne qu'il précise

Cessions

specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(*a*) an agreement entered into on or after the day on which proceedings commence under this Act;

(*b*) an eligible financial contract; or

(*c*) a collective agreement.

Factors to be considered

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

(*a*) whether the monitor approved the proposed assignment;

(*b*) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(*c*) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107, c. 36, ss. 65, 112.

11.31 [Repealed, 2005, c. 47, s. 128]

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or ser-

et qui y a consenti les droits et obligations de la compagnie découlant du contrat.

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

Facteurs à prendre en considération

(3) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de cession, le cas échéant;

b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

c) l'opportunité de lui céder les droits et obligations.

Restriction

(4) Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la compagnie est insolvable, est visée par une procédure intentée sous le régime de la présente loi ou ne s'est pas conformée à une obligation non pécuniaire.

Copie de l'ordonnance

(5) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 29, art. 107, ch. 36, art. 65 et 112.

11.31 [Abrogé, 2005, ch. 47, art. 128]

Fournisseurs essentiels

11.4 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer toute personne fournisseur essentiel de la compagnie s'il est convaincu que cette personne est un fournisseur de la compagnie et que les marchandises ou les services qu'elle lui fournit sont essentiels à la continuation de son exploitation.

Obligation de fourniture

(2) S'il fait une telle déclaration, le tribunal peut ordonner à la personne déclarée fournisseur essentiel de la compagnie de fournir à

vices specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

celle-ci les marchandises ou services qu'il précise, à des conditions compatibles avec les modalités qui régissaient antérieurement leur fourniture ou aux conditions qu'il estime indiquées.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

(3) Le cas échéant, le tribunal déclare dans l'ordonnance que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté, en faveur de la personne déclarée fournisseur essentiel, d'un montant correspondant à la valeur des marchandises ou services fournis en application de l'ordonnance.

Charge ou sûreté en faveur du fournisseur essentiel

Priority

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

(4) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

1997, ch. 12, art. 124; 2000, ch. 30, art. 156; 2001, ch. 34, art. 33(A); 2005, ch. 47, art. 128; 2007, ch. 36, art. 65.

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

11.5 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur de la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi s'il est convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Révocation des administrateurs

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

Vacance

1997, c. 12, s. 124; 2005, c. 47, s. 128.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Security or charge relating to director's indemnification

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

11.51 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

Priority

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

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assu-

Restriction — assurance

rance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Négligence, inconduite ou faute

Court may order security or charge to cover certain costs

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

(*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

Priority

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Priorité

Bankruptcy and Insolvency Act matters

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(*a*) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(*b*) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

11.6 Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;

b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

Lien avec la *Loi sur la faillite et l'insolvabilité*

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

(i) de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,

(ii) du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

Nomination du contrôleur

11.7 (1) Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(*a*) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(*b*) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Personnes qui ne peuvent agir à titre de contrôleur

(2) Sauf avec l'autorisation du tribunal et aux conditions qu'il peut fixer, ne peut être nommé pour agir à titre de contrôleur le syndic :

a) qui est ou, au cours des deux années précédentes, a été :

(i) administrateur, dirigeant ou employé de la compagnie,

(ii) lié à la compagnie ou à l'un de ses administrateurs ou dirigeants,

(iii) vérificateur, comptable ou conseiller juridique de la compagnie, ou employé ou associé de l'un ou l'autre;

b) qui est :

(i) le fondé de pouvoir aux termes d'un acte constitutif d'hypothèque — au sens du *Code civil du Québec* — émanant de la compagnie ou d'une personne liée à celle-ci ou le fiduciaire aux termes d'un acte de fiducie émanant de la compagnie ou d'une personne liée à celle-ci,

(ii) lié au fondé de pouvoir ou au fiduciaire visé au sous-alinéa (i).

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insol-*

Remplacement du contrôleur

(3) Sur demande d'un créancier de la compagnie, le tribunal peut, s'il l'estime indiqué dans les circonstances, remplacer le contrôleur en nommant un autre syndic, au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolva-*

vency Act, to monitor the business and financial affairs of the company.

1997, c. 12, s. 124; 2005, c. 47, s. 129.

bilité, pour agir à ce titre à l'égard des affaires financières et autres de la compagnie.

1997, ch. 12, art. 124; 2005, ch. 47, art. 129.

No personal liability in respect of matters before appointment

11.8 (1) Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(*a*) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and

(*b*) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

Immunité

11.8 (1) Par dérogation au droit fédéral et provincial, le contrôleur qui, en cette qualité, continue l'exploitation de l'entreprise de la compagnie débitrice ou lui succède comme employeur est dégagé de toute responsabilité personnelle découlant de quelque obligation de la compagnie, notamment à titre d'employeur successeur, si celle-ci, à la fois :

a) l'oblige envers des employés ou anciens employés de la compagnie, ou de l'un de ses prédécesseurs, ou découle d'un régime de pension pour le bénéfice de ces employés;

b) existait avant sa nomination ou est calculée par référence à une période la précédant.

Status of liability

(2) A liability referred to in subsection (1) shall not rank as costs of administration.

Obligation exclue des frais

(2) L'obligation visée au paragraphe (1) ne fait pas partie des frais d'administration.

Liability of other successor employers

(2.1) Subsection (1) does not affect the liability of a successor employer other than the monitor.

Responsabilité de l'employeur successeur

(2.1) Le paragraphe (1) ne dégage aucun employeur successeur, autre que le contrôleur, de sa responsabilité.

Liability in respect of environmental matters

(3) Notwithstanding anything in any federal or provincial law, a monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(*a*) before the monitor's appointment; or

(*b*) after the monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the monitor's gross negligence or wilful misconduct.

Responsabilité en matière d'environnement

(3) Par dérogation au droit fédéral et provincial, le contrôleur est, ès qualités, dégagé de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu, avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée.

Reports, etc., still required

(4) Nothing in subsection (3) exempts a monitor from any duty to report or make disclosure imposed by a law referred to in that subsection.

Rapports

(4) Le paragraphe (3) n'a pas pour effet de soustraire le contrôleur à l'obligation de faire rapport ou de communiquer des renseignements prévus par le droit applicable en l'espèce.

Non-liability re certain orders

(5) Notwithstanding anything in any federal or provincial law but subject to subsection (3), where an order is made which has the effect of requiring a monitor to remedy any environmental condition or environmental damage affecting property involved in a proceeding under this Act, the monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

Immunité — ordonnances

(5) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (3), le contrôleur est, ès qualité, dégagé de toute responsabilité personnelle découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par des procédures intentées au titre de la présente loi, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

(*a*) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed or during the period of the stay referred to in paragraph (*b*), the monitor

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(*b*) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (*a*) or within ten days after the order is made or within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the monitor to contest the order, or

(ii) the court having jurisdiction under this Act for the purposes of assessing the economic viability of complying with the order; or

(*c*) if the monitor had, before the order was made, abandoned or renounced any interest in any real property affected by the condition or damage.

a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa *b*) :

(i) il s'y conforme,

(ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout intérêt dans l'immeuble en cause, en dispose ou s'en dessaisit;

b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa *a*) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

(i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au contrôleur de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d'évaluer les conséquences économiques du respect de l'ordonnance;

c) si, avant que l'ordonnance ne soit rendue, il avait abandonné tout intérêt dans le bien immeuble en cause ou y avait renoncé, ou s'en était dessaisi.

Stay may be granted

(6) The court may grant a stay of the order referred to in subsection (5) on such notice and for such period as the court deems necessary for the purpose of enabling the monitor to assess the economic viability of complying with the order.

Suspension

(6) En vue de permettre au contrôleur d'évaluer les conséquences économiques du respect de l'ordonnance, le tribunal peut en ordonner la suspension après avis et pour la période qu'il estime indiqués.

Costs for remedying not costs of administration

(7) Where the monitor has abandoned or renounced any interest in real property affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Frais

(7) Si le contrôleur a abandonné tout intérêt dans le bien immeuble en cause ou y a renoncé, les réclamations pour les frais de réparation du fait ou dommage lié à l'environnement et touchant le bien ne font pas partie des frais d'administration.

Priority of claims

(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the

Priorité des réclamations

(8) Dans le cas où des procédures ont été intentées au titre de la présente loi contre une compagnie débitrice, toute réclamation de Sa Majesté du chef du Canada ou d'une province contre elle pour les frais de réparation du fait ou dommage lié à l'environnement et touchant

company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(*a*) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(*b*) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

un de ses biens immeubles est garantie par une sûreté sur le bien immeuble en cause et sur ceux qui sont contigus à celui où le dommage est survenu et qui sont liés à l'activité ayant causé le fait ou le dommage; la sûreté peut être exécutée selon le droit du lieu où est situé le bien comme s'il s'agissait d'une hypothèque ou autre garantie sur celui-ci et, par dérogation aux autres dispositions de la présente loi et à toute règle de droit fédéral et provincial, a priorité sur tout autre droit, charge ou réclamation visant le bien.

Claim for clean-up costs

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

1997, c. 12, s. 124; 2007, c. 36, s. 67.

Précision

(9) La réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un bien immeuble de la compagnie débitrice constitue une réclamation, que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi.

1997, ch. 12, art. 124; 2007, ch. 36, art. 67.

Fixing deadlines

12. The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

R.S., 1985, c. C-36, s. 12; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 2004, c. 25, s. 195; 2005, c. 47, s. 130; 2007, c. 36, s. 68.

Échéances

12. Le tribunal peut fixer des échéances aux fins de votation et aux fins de distribution aux termes d'une transaction ou d'un arrangement.

L.R. (1985), ch. C-36, art. 12; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 2004, ch. 25, art. 195; 2005, ch. 47, art. 130; 2007, ch. 36, art. 68.

Leave to appeal

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

R.S., 1985, c. C-36, s. 13; 2002, c. 7, s. 134.

Permission d'en appeler

13. Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards.

L.R. (1985), ch. C-36, art. 13; 2002, ch. 7, art. 134.

Court of appeal

14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Cour d'appel

14. (1) Cet appel doit être porté au tribunal de dernier ressort de la province où la procédure a pris naissance.

Practice

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within

Pratique

(2) Tous ces appels sont régis autant que possible par la pratique suivie dans d'autres causes devant le tribunal saisi de l'appel; toutefois, aucun appel n'est recevable à moins que, dans le délai de vingt et un jours après qu'a été rendue l'ordonnance ou la décision faisant l'ob-

such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

R.S., 1985, c. C-36, s. 14; 2002, c. 7, s. 135.

jet de l'appel, ou dans le délai additionnel que peut accorder le tribunal dont il est interjeté appel ou, au Yukon, un juge de la Cour suprême du Canada, l'appelant n'y ait pris des procédures pour parfaire son appel, et à moins que, dans ce délai, il n'ait fait un dépôt ou fourni un cautionnement suffisant selon la pratique du tribunal saisi de l'appel pour garantir qu'il poursuivra dûment l'appel et payera les frais qui peuvent être adjugés à l'intimé et se conformera aux conditions relatives au cautionnement ou autres qu'impose le juge donnant la permission d'en appeler.

L.R. (1985), ch. C-36, art. 14; 2002, ch. 7, art. 135.

Appeals

15. (1) An appeal lies to the Supreme Court of Canada on leave therefor being granted by that Court from the highest court of final resort in or for the province or territory in which the proceeding originated.

Appels

15. (1) Un appel peut être interjeté à la Cour suprême du Canada sur autorisation à cet effet accordée par ce tribunal, du plus haut tribunal de dernier ressort de la province ou du territoire où la procédure a pris naissance.

Jurisdiction of Supreme Court of Canada

(2) The Supreme Court of Canada shall have jurisdiction to hear and to decide according to its ordinary procedure any appeal under subsection (1) and to award costs.

Juridiction de la Cour suprême du Canada

(2) La Cour suprême du Canada a juridiction pour entendre et décider, selon sa procédure ordinaire, tout appel ainsi permis et pour adjuger des frais.

Stay of proceedings

(3) No appeal to the Supreme Court of Canada shall operate as a stay of proceedings unless and to the extent ordered by that Court.

Suspension de procédures

(3) Un tel appel à la Cour suprême du Canada n'a pas pour effet de suspendre les procédures, à moins que ce tribunal ne l'ordonne et dans la mesure où il l'ordonne.

Security for costs

(4) The appellant in an appeal under subsection (1) shall not be required to provide any security for costs, but, unless he provides security for costs in an amount to be fixed by the Supreme Court of Canada, he shall not be awarded costs in the event of his success on the appeal.

Cautionnement pour les frais

(4) L'appelant n'est pas tenu de fournir un cautionnement pour les frais; toutefois, à moins qu'il ne fournisse un cautionnement pour les frais au montant que fixe la Cour suprême du Canada, il ne lui est pas adjugé de frais en cas de réussite dans son appel.

Decision final

(5) The decision of the Supreme Court of Canada on any appeal under subsection (1) is final and conclusive.

R.S., c. C-25, s. 15; R.S., c. 44(1st Supp.), s. 10.

Décision finale

(5) La décision de la Cour suprême du Canada sur un tel appel est définitive et sans appel.

S.R., ch. C-25, art. 15; S.R., ch. 44(1er suppl.), art. 10.

Order of court of one province

16. Every order made by the court in any province in the exercise of jurisdiction conferred by this Act in respect of any compromise or arrangement shall have full force and effect in all the other provinces and shall be enforced in the court of each of the other provinces in the same manner in all respects as if the order had been made by the court enforcing it.

R.S., c. C-25, s. 16.

Ordonnance d'un tribunal d'une province

16. Toute ordonnance rendue par le tribunal d'une province dans l'exercice de la juridiction conférée par la présente loi à l'égard de quelque transaction ou arrangement a pleine vigueur et effet dans les autres provinces, et elle est appliquée devant le tribunal de chacune des autres provinces de la même manière, à tous égards, que si elle avait été rendue par le tribunal la faisant ainsi exécuter.

S.R., ch. C-25, art. 16.

Courts shall aid each other on request

17. All courts that have jurisdiction under this Act and the officers of those courts shall act in aid of and be auxiliary to each other in all matters provided for in this Act, and an order of a court seeking aid with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

R.S., c. C-25, s. 17.

Les tribunaux doivent s'entraider sur demande

17. Tous les tribunaux ayant juridiction sous le régime de la présente loi et les fonctionnaires de ces tribunaux sont tenus de s'entraider et de se faire les auxiliaires les uns des autres en toutes matières prévues par la présente loi, et une ordonnance du tribunal sollicitant de l'aide au moyen d'une demande à un autre tribunal est réputée suffisante pour permettre à ce dernier tribunal d'exercer, en ce qui concerne les questions prescrites par l'ordonnance, la juridiction que le tribunal ayant formulé la demande ou le tribunal auquel est adressée la demande pourrait exercer à l'égard de questions similaires dans les limites de leurs juridictions respectives.

S.R., ch. C-25, art. 17.

18. [Repealed, 2005, c. 47, s. 131]

18.1 [Repealed, 2005, c. 47, s. 131]

18.2 [Repealed, 2005, c. 47, s. 131]

18.3 [Repealed, 2005, c. 47, s. 131]

18.4 [Repealed, 2005, c. 47, s. 131]

18.5 [Repealed, 2005, c. 47, s. 131]

18.6 [Repealed, 2005, c. 47, s. 131]

18. [Abrogé, 2005, ch. 47, art. 131]

18.1 [Abrogé, 2005, ch. 47, art. 131]

18.2 [Abrogé, 2005, ch. 47, art. 131]

18.3 [Abrogé, 2005, ch. 47, art. 131]

18.4 [Abrogé, 2005, ch. 47, art. 131]

18.5 [Abrogé, 2005, ch. 47, art. 131]

18.6 [Abrogé, 2005, ch. 47, art. 131]

PART III

GENERAL

CLAIMS

PARTIE III

DISPOSITIONS GÉNÉRALES

RÉCLAMATIONS

Claims that may be dealt with by a compromise or arrangement

19. (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(*a*) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(*b*) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or ar-

Réclamations considérées dans le cadre des transactions ou arrangements

19. (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont:

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre:

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le consentement des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*;

rangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (*a*)(i) and (ii).

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l'acceptation de la transaction ou de l'arrangement, en raison d'une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas *a*)(i) et (ii) qui est antérieure à l'autre.

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(*a*) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(*b*) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(*c*) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(*d*) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(*e*) any debt for interest owed in relation to an amount referred to in any of paragraphs (*a*) to (*d*).

R.S., 1985, c. C-36, s. 19; 1996, c. 6, s. 167; 2005, c. 47, s. 131; 2007, c. 36, s. 69.

Exception

(2) La réclamation se rapportant à l'une ou l'autre des dettes ou obligations ci-après ne peut toutefois être ainsi considérée, à moins que la transaction ou l'arrangement ne prévoie expressément la possibilité de transiger sur cette réclamation et que le créancier intéressé n'ait voté en faveur de la transaction ou de l'arrangement proposé :

a) toute ordonnance d'un tribunal imposant une amende, une pénalité, la restitution ou une autre peine semblable;

b) toute indemnité accordée en justice dans une affaire civile :

(i) pour des lésions corporelles causées intentionnellement ou pour agression sexuelle,

(ii) pour décès découlant d'un acte visé au sous-alinéa (i);

c) toute dette ou obligation résultant de la fraude, du détournement, de la concussion ou de l'abus de confiance alors que la compagnie agissait, au Québec, à titre de fiduciaire ou d'administrateur du bien d'autrui ou, dans les autres provinces, à titre de fiduciaire;

d) toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation de la compagnie qui découle d'une réclamation relative à des capitaux propres;

e) toute dette relative aux intérêts dus à l'égard d'une somme visée à l'un des alinéas *a*) à *d*).

L.R. (1985), ch. C-36, art. 19; 1996, ch. 6, art. 167; 2005, ch. 47, art. 131; 2007, ch. 36, art. 69.

Determination of amount of claims

20. (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(*a*) the amount of an unsecured claim is the amount

Détermination du montant de la réclamation

20. (1) Pour l'application de la présente loi, le montant de la réclamation d'un créancier garanti ou chirographaire est déterminé de la façon suivante :

a) le montant d'une réclamation non garantie est celui :

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) 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*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(*b*) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

(i) dans le cas d'une compagnie en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, dont la preuve a été établie en conformité avec cette loi,

(ii) 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 sous le régime de la *Loi sur la faillite et l'insolvabilité*, dont la preuve a été établie en conformité avec cette loi,

(iii) dans le cas de toute autre compagnie, dont la preuve peut être établie sous le régime de la *Loi sur la faillite et l'insolvabilité*, mais si le montant ainsi prouvable n'est pas admis par la compagnie, il est déterminé par le tribunal sur demande sommaire de celle-ci ou du créancier;

b) le montant d'une réclamation garantie est celui dont la preuve pourrait être établie sous le régime de la *Loi sur la faillite et l'insolvabilité* si la réclamation n'était pas garantie, mais ce montant, s'il n'est pas admis par la compagnie, est, dans le cas où celle-ci est assujettie à une procédure pendante sous le régime de la *Loi sur les liquidations et les restructurations* ou de la *Loi sur la faillite et l'insolvabilité*, établi par preuve de la même manière qu'une réclamation non garantie sous le régime de l'une ou l'autre de ces lois, selon le cas, et, s'il s'agit de toute autre compagnie, il est déterminé par le tribunal sur demande sommaire de celle-ci ou du créancier.

Admission of claims

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

R.S., 1985, c. C-36, s. 20; 2005, c. 47, s. 131; 2007, c. 36, s. 70.

Admission des réclamations

(2) Malgré le paragraphe (1), la compagnie peut admettre le montant d'une réclamation aux fins de votation sous réserve du droit de contester la responsabilité quant à la réclamation pour d'autres objets, et la présente loi, la *Loi sur les liquidations et les restructurations* et la *Loi sur la faillite et l'insolvabilité* n'ont pas pour effet d'empêcher un créancier garanti de voter à une assemblée de créanciers garantis ou d'une catégorie de ces derniers à l'égard du montant total d'une réclamation ainsi admis.

L.R. (1985), ch. C-36, art. 20; 2005, ch. 47, art. 131; 2007, ch. 36, art. 70.

Law of set-off or compensation to apply

21. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the

Compensation

21. Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses

company were plaintiff or defendant, as the case may be.

1997, c. 12, s. 126; 2005, c. 47, s. 131.

créances, comme si elle était demanderesse ou défenderesse, selon le cas.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131.

Classes of Creditors

Catégories de créanciers

Company may establish classes

22. (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Établissement des catégories de créanciers

22. (1) La compagnie débitrice peut établir des catégories de créanciers en vue des assemblées qui seront tenues au titre des articles 4 ou 5 relativement à une transaction ou un arrangement la visant; le cas échéant, elle demande au tribunal d'approuver ces catégories avant la tenue des assemblées.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(*a*) the nature of the debts, liabilities or obligations giving rise to their claims;

(*b*) the nature and rank of any security in respect of their claims;

(*c*) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(*d*) any further criteria, consistent with those set out in paragraphs (*a*) to (*c*), that are prescribed.

Critères

(2) Pour l'application du paragraphe (1), peuvent faire partie de la même catégorie les créanciers ayant des droits ou intérêts à ce point semblables, compte tenu des critères énumérés ci-après, qu'on peut en conclure qu'ils ont un intérêt commun :

a) la nature des créances et obligations donnant lieu à leurs réclamations;

b) la nature et le rang de toute garantie qui s'y rattache;

c) les voies de droit ouvertes aux créanciers, abstraction faite de la transaction ou de l'arrangement, et la mesure dans laquelle il pourrait être satisfait à leurs réclamations s'ils s'en prévalaient;

d) tous autres critères réglementaires compatibles avec ceux énumérés aux alinéas *a*) à *c*).

Related creditors

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

1997, c. 12, s. 126; 2005, c. 47, s. 131; 2007, c. 36, s. 71.

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2005, c. 47, s. 131; 2007, c. 36, s. 71.

Catégorie de créanciers ayant des réclamations relatives à des capitaux propres

22.1 Malgré le paragraphe 22(1), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d'une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal.

2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

Monitors

Contrôleurs

Duties and functions

23. (1) The monitor shall

(*a*) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

Attributions

23. (1) Le contrôleur est tenu :

a) à moins que le tribunal n'en ordonne autrement, lorsqu'il rend une ordonnance à

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(*b*) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(*c*) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(*d*) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(*d.1*) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to

l'égard de la demande initiale visant une compagnie débitrice :

(i) de publier, sans délai après le prononcé de l'ordonnance, une fois par semaine pendant deux semaines consécutives, ou selon les modalités qui y sont prévues, dans le journal ou les journaux au Canada qui y sont précisés, un avis contenant les renseignements réglementaires,

(ii) dans les cinq jours suivant la date du prononcé de l'ordonnance :

(A) de rendre l'ordonnance publique selon les modalités réglementaires,

(B) d'envoyer un avis, selon les modalités réglementaires, à chaque créancier connu ayant une réclamation supérieure à mille dollars les informant que l'ordonnance a été rendue publique,

(C) d'établir la liste des nom et adresse de chacun de ces créanciers et des montants estimés des réclamations et de la rendre publique selon les modalités réglementaires;

b) de réviser l'état de l'évolution de l'encaisse de la compagnie, en ce qui a trait à sa justification, et de déposer auprès du tribunal un rapport où il présente ses conclusions;

c) de faire ou de faire faire toute évaluation ou investigation qu'il estime nécessaire pour établir l'état des affaires financières et autres de la compagnie et les causes des difficultés financières ou de l'insolvabilité de celle-ci, et de déposer auprès du tribunal un rapport où il présente ses conclusions;

d) de déposer auprès du tribunal un rapport portant sur l'état des affaires financières et autres de la compagnie et contenant les renseignements réglementaires :

(i) dès qu'il note un changement défavorable important au chapitre des projections relatives à l'encaisse ou de la situation financière de la compagnie,

(ii) au plus tard quarante-cinq jours — ou le nombre de jours supérieur que le tribunal fixe — après la fin de chaque trimestre d'exercice,

(iii) à tout autre moment fixé par ordonnance du tribunal;

include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(*e*) advise the company's creditors of the filing of the report referred to in any of paragraphs (*b*) to (*d.1*);

(*f*) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(*f.1*) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(*g*) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(*h*) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(*i*) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(*j*) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(*k*) carry out any other functions in relation to the company that the court may direct.

d.1) de déposer auprès du tribunal, au moins sept jours avant la date de la tenue de l'assemblée des créanciers au titre des articles 4 ou 5, un rapport portant sur l'état des affaires financières et autres de la compagnie, contenant notamment son opinion sur le caractère raisonnable de la décision d'inclure dans la transaction ou l'arrangement une disposition prévoyant la non-application à celle-ci des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, et contenant les renseignements réglementaires;

e) d'informer les créanciers de la compagnie du dépôt du rapport visé à l'un ou l'autre des alinéas *b*) à *d.1*);

f) de déposer auprès du surintendant des faillites, selon les modalités réglementaires, de temps et autre, une copie des documents précisés par règlement;

f.1) afin de défrayer le surintendant des faillites des dépenses engagées par lui dans l'exercice de ses attributions prévues par la présente loi, de lui verser, pour dépôt auprès du receveur général, le prélèvement réglementaire, et ce au moment prévu par les règlements;

g) d'assister aux audiences du tribunal tenues dans le cadre de toute procédure intentée sous le régime de la présente loi relativement à la compagnie et aux assemblées de créanciers de celle-ci, s'il estime que sa présence est nécessaire à l'exercice de ses attributions;

h) dès qu'il conclut qu'il serait plus avantageux pour les créanciers qu'une procédure visant la compagnie soit intentée sous le régime de la *Loi sur la faillite et l'insolvabilité*, d'en aviser le tribunal;

i) de conseiller le tribunal sur le caractère juste et équitable de toute transaction ou de tout arrangement proposés entre la compagnie et ses créanciers;

j) de rendre publics selon les modalités réglementaires, de temps et autres, les documents réglementaires et de fournir aux créanciers de la compagnie des renseignements sur les modalités d'accès à ces documents;

k) d'accomplir à l'égard de la compagnie tout ce que le tribunal lui ordonne de faire.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(*b*) to (*d.1*), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

2005, c. 47, s. 131; 2007, c. 36, s. 72.

Non-responsabilité du contrôleur

(2) S'il agit de bonne foi et prend toutes les précautions voulues pour bien établir le rapport visé à l'un ou l'autre des alinéas (1)*b*) à *d.1*), le contrôleur ne peut être tenu pour responsable des dommages ou pertes subis par la personne qui s'y fie.

2005, ch. 47, art. 131; 2007, ch. 36, art. 72.

Right of access

24. For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

2005, c. 47, s. 131.

Droit d'accès aux biens

24. Dans le cadre de la surveillance des affaires financières et autres de la compagnie et dans la mesure où cela s'impose pour lui permettre de les évaluer adéquatement, le contrôleur a accès aux biens de celle-ci, notamment les locaux, livres, données sur support électronique ou autre, registres et autres documents financiers.

2005, ch. 47, art. 131.

Obligation to act honestly and in good faith

25. In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

2005, c. 47, s. 131.

Diligence

25. Le contrôleur doit, dans l'exercice de ses attributions, agir avec intégrité et de bonne foi et se conformer au code de déontologie mentionné à l'article 13.5 de la *Loi sur la faillite et l'insolvabilité*.

2005, ch. 47, art. 131.

Powers, Duties and Functions of Superintendent of Bankruptcy

Attributions du surintendant des faillites

Public records

26. (1) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, a public record of prescribed information relating to proceedings under this Act. On request, and on payment of the prescribed fee, the Superintendent of Bankruptcy must provide, or cause to be provided, any information contained in that public record.

Registres publics

26. (1) Le surintendant des faillites conserve ou fait conserver, en la forme qu'il estime indiquée et pendant la période réglementaire, un registre public contenant des renseignements réglementaires sur les procédures intentées sous le régime de la présente loi. Il fournit ou voit à ce qu'il soit fourni à quiconque le demande tous renseignements figurant au registre, sur paiement des droits réglementaires.

Other records

(2) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, any other records relating to the administration of this Act that he or she considers appropriate.

Autres dossiers

(2) Il conserve également, ou fait conserver, en la forme qu'il estime indiquée et pendant la période réglementaire, les autres dossiers qu'il estime indiqués concernant l'application de la présente loi.

Agreement to provide compilation

(3) The Superintendent of Bankruptcy may enter into an agreement to provide a compilation of all or part of the information that is contained in the public record.

2005, c. 47, s. 131; 2007, c. 36, s. 73.

Accord visant la fourniture d'une compilation

(3) Enfin, il peut conclure un accord visant la fourniture d'une compilation de tout ou partie des renseignements figurant au registre public.

2005, ch. 47, art. 131; 2007, ch. 36, art. 73.

Applications to court and right to intervene

27. The Superintendent of Bankruptcy may apply to the court to review the appointment or conduct of a monitor and may intervene, as

Demande au tribunal et intervention

27. Le surintendant des faillites peut demander au tribunal d'examiner la nomination ou la conduite de tout contrôleur et intervenir dans

though he or she were a party, in any matter or proceeding in court relating to the appointment or conduct of a monitor.

2005, c. 47, s. 131.

toute affaire ou procédure devant le tribunal se rapportant à ces nomination ou conduite comme s'il y était partie.

2005, ch. 47, art. 131.

Complaints

28. The Superintendent of Bankruptcy must receive and keep a record of all complaints regarding the conduct of monitors.

2005, c. 47, s. 131.

Plaintes

28. Le surintendant des faillites reçoit et note toutes les plaintes sur la conduite de tout contrôleur.

2005, ch. 47, art. 131.

Investigations

29. (1) The Superintendent of Bankruptcy may make, or cause to be made, any inquiry or investigation regarding the conduct of monitors that he or she considers appropriate.

Investigations et enquêtes

29. (1) Le surintendant des faillites effectue ou fait effectuer au sujet de la conduite de tout contrôleur les investigations ou les enquêtes qu'il estime indiquées.

Rights

(2) For the purpose of the inquiry or investigation, the Superintendent of Bankruptcy or any person whom he or she appoints for the purpose

(*a*) shall have access to and the right to examine and make copies of the books, records, data, documents or papers — including those in electronic form — in the possession or under the control of a monitor under this Act; and

(*b*) may, with the leave of the court granted on an *ex parte* application, examine the books, records, data, documents or papers — including those in electronic form — relating to any compromise or arrangement in respect of which this Act applies that are in the possession or under the control of any other person designated in the order granting the leave, and for that purpose may under a warrant from the court enter and search any premises.

Droit d'accès

(2) Pour les besoins de ces investigations ou enquêtes, le surintendant des faillites ou la personne qu'il nomme à cette fin :

a) a accès aux livres, registres, données, documents ou papiers, sur support électronique ou autre, se trouvant, en vertu de la présente loi, en la possession ou sous la responsabilité du contrôleur et a droit de les examiner et d'en tirer des copies;

b) peut, avec la permission du tribunal donnée *ex parte*, examiner les livres, registres, données, documents ou papiers, sur support électronique ou autre, qui sont en la possession ou sous la responsabilité de toute autre personne désignée dans l'ordonnance et se rapportent aux transactions ou arrangements auxquels la présente loi s'applique et peut, en vertu d'un mandat du tribunal et aux fins d'examen, pénétrer dans tout lieu et y faire des perquisitions.

Staff

(3) The Superintendent of Bankruptcy may engage the services of persons having technical or specialized knowledge, and persons to provide administrative services, to assist the Superintendent of Bankruptcy in conducting an inquiry or investigation, and may establish the terms and conditions of their engagement. The remuneration and expenses of those persons, when certified by the Superintendent of Bankruptcy, are payable out of the appropriation for the office of the Superintendent.

2005, c. 47, s. 131; 2007, c. 36, s. 74.

Personnel

(3) Le surintendant des faillites peut retenir les services des experts ou autres personnes et du personnel administratif dont il estime le concours utile à l'investigation ou l'enquête et fixer leurs fonctions et leurs conditions d'emploi. La rémunération et les indemnités dues à ces personnes sont, une fois certifiées par le surintendant, imputables sur les crédits affectés à son bureau.

2005, ch. 47, art. 131; 2007, ch. 36, art. 74.

Powers in relation to licence

30. (1) If, after making or causing to be made an inquiry or investigation into the conduct of a monitor, it appears to the Superintendent of Bankruptcy that the monitor has not ful-

Décision relative à la licence

30. (1) Si, au terme d'une investigation ou d'une enquête sur la conduite du contrôleur, il estime que ce dernier n'a pas observé la présente loi ou les règlements ou que l'intérêt pu-

ly complied with this Act and its regulations or that it is in the public interest to do so, the Superintendent of Bankruptcy may

(*a*) cancel or suspend the monitor's licence as a trustee under the *Bankruptcy and Insolvency Act*; or

(*b*) place any condition or limitation on the licence that he or she considers appropriate.

blic le justifie, le surintendant des faillites peut annuler ou suspendre la licence que le contrôleur détient, en vertu de la *Loi sur la faillite et l'insolvabilité*, à titre de syndic ou soumettre sa licence aux conditions ou restrictions qu'il estime indiquées.

Notice to trustee

(2) Before deciding whether to exercise any of the powers referred to in subsection (1), the Superintendent of Bankruptcy shall send the monitor written notice of the powers that the Superintendent may exercise and the reasons why they may be exercised and afford the monitor a reasonable opportunity for a hearing.

(2) Avant de prendre l'une des mesures visées au paragraphe (1), le surintendant des faillites envoie au syndic un avis écrit et motivé de la ou des mesures qu'il peut prendre et lui donne la possibilité de se faire entendre.

Avis au syndic

Summons

(3) The Superintendent of Bankruptcy may, for the purpose of the hearing, issue a summons requiring the person named in it

(*a*) to appear at the time and place mentioned in it;

(*b*) to testify to all matters within their knowledge relative to the subject matter of the inquiry or investigation into the conduct of the monitor; and

(*c*) to bring and produce any books, records, data, documents or papers — including those in electronic form — in their possession or under their control relative to the subject matter of the inquiry or investigation.

(3) Le surintendant des faillites peut, aux fins d'audition, convoquer des témoins par assignation leur enjoignant:

a) de comparaître aux date, heure et lieu indiqués;

b) de témoigner sur tous faits connus d'eux se rapportant à l'investigation ou à l'enquête sur la conduite du contrôleur;

c) de produire tous livres, registres, données, documents ou papiers, sur support électronique ou autre, qui sont pertinents et dont ils ont la possession ou la responsabilité.

Convocation de témoins

Effect throughout Canada

(4) A person may be summoned from any part of Canada by virtue of a summons issued under subsection (3).

(4) Les assignations visées au paragraphe (3) ont effet sur tout le territoire canadien.

Effet

Fees and allowances

(5) Any person summoned under subsection (3) is entitled to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court.

(5) Toute personne assignée reçoit les frais et indemnités accordés aux témoins assignés devant la Cour fédérale.

Frais et indemnités

Procedure at hearing

(6) At the hearing, the Superintendent of Bankruptcy

(*a*) has the power to administer oaths;

(*b*) is not bound by any legal or technical rules of evidence in conducting the hearing;

(*c*) shall deal with the matters set out in the notice of the hearing as informally and expeditiously as the circumstances and a consideration of fairness permit; and

(*d*) shall cause a summary of any oral evidence to be made in writing.

(6) Lors de l'audition, le surintendant:

a) peut faire prêter serment;

b) n'est lié par aucune règle de droit ou de procédure en matière de preuve;

c) règle les questions exposées dans l'avis d'audition avec célérité et sans formalisme, eu égard aux circonstances et à l'équité;

d) fait établir un résumé écrit de toute preuve orale.

Procédure de l'audition

Record

(7) The notice referred to in subsection (2) and, if applicable, the summary of oral evidence referred to in paragraph (6)(*d*), together with any documentary evidence that the Superintendent of Bankruptcy receives in evidence, form the record of the hearing, and that record and the hearing are public unless the Superintendent of Bankruptcy is satisfied that personal or other matters that may be disclosed are of such a nature that the desirability of avoiding public disclosure of those matters, in the interest of a third party or in the public interest, outweighs the desirability of the access by the public to information about those matters.

Dossier et audition

(7) L'audition et le dossier de celle-ci sont publics à moins que le surintendant ne juge que la nature des révélations possibles sur des questions personnelles ou autres est telle que, en l'occurrence, l'intérêt d'un tiers ou l'intérêt public l'emporte sur le droit du public à l'information. Le dossier comprend l'avis prévu au paragraphe (2), le résumé de la preuve orale prévu à l'alinéa (6)*d*) et la preuve documentaire reçue par le surintendant des faillites.

Decision

(8) The decision of the Superintendent of Bankruptcy after the hearing, together with the reasons for the decision, must be given in writing to the monitor not later than three months after the conclusion of the hearing, and is public.

Décision

(8) La décision du surintendant des faillites est rendue par écrit, motivée et remise au contrôleur dans les trois mois suivant la clôture de l'audition, et elle est publique.

Review by Federal Court

(9) A decision of the Superintendent of Bankruptcy given under subsection (8) is deemed to be a decision of a federal board, commission or other tribunal that may be reviewed and set aside under the *Federal Courts Act*.

2005, c. 47, s. 131; 2007, c. 36, s. 75.

Examen de la Cour fédérale

(9) La décision du surintendant, rendue et remise conformément au paragraphe (8), est assimilée à celle d'un office fédéral et est soumise au pouvoir d'examen et d'annulation prévu par la *Loi sur les Cours fédérales*.

2005, ch. 47, art. 131; 2007, ch. 36, art. 75.

Delegation

31. (1) The Superintendent of Bankruptcy may, in writing, authorize any person to exercise or perform, subject to any terms and conditions that he or she may specify in the authorization, any of the powers, duties or functions of the Superintendent of Bankruptcy under sections 29 and 30.

Pouvoir de délégation

31. (1) Le surintendant des faillites peut, par écrit, selon les modalités qu'il précise, déléguer les attributions que lui confèrent les articles 29 et 30.

Notification to monitor

(2) If the Superintendent of Bankruptcy delegates in accordance with subsection (1), the Superintendent or the delegate must give notice of the delegation in the prescribed manner to any monitor who may be affected by the delegation.

2005, c. 47, s. 131.

Notification

(2) En cas de délégation, le surintendant des faillites ou le délégué en avise, de la manière réglementaire, tout contrôleur qui pourrait être touché par cette mesure.

2005, ch. 47, art. 131.

AGREEMENTS

CONTRATS ET CONVENTIONS COLLECTIVES

Disclaimer or resiliation of agreements

32. (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may

Résiliation de contrats

32. (1) Sous réserve des paragraphes (2) et (3), la compagnie débitrice peut — sur préavis donné en la forme et de la manière réglementaires aux autres parties au contrat et au contrôleur et après avoir obtenu l'acquiescement de celui-ci relativement au projet de résiliation — résilier tout contrat auquel elle est partie à la

not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

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

(*a*) whether the monitor approved the proposed disclaimer or resiliation;

(*b*) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(*c*) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(*a*) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(*b*) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(*c*) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party ex-

date à laquelle une procédure a été intentée sous le régime de la présente loi.

Contestation

(2) Dans les quinze jours suivant la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), toute partie au contrat peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner que le contrat ne soit pas résilié.

Absence d'acquiescement du contrôleur

(3) Si le contrôleur n'acquiesce pas au projet de résiliation, la compagnie peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner la résiliation du contrat.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de résiliation, le cas échéant;

b) la question de savoir si la résiliation favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

c) le risque que la résiliation puisse vraisemblablement causer de sérieuses difficultés financières à une partie au contrat.

Résiliation

(5) Le contrat est résilié :

a) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), si aucune demande n'est présentée en vertu du paragraphe (2);

b) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1) ou à la date postérieure fixée par le tribunal, si ce dernier rejette la demande présentée en vertu du paragraphe (2);

c) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (3) ou à la date postérieure fixée par le tribunal, si ce dernier ordonne la résiliation du contrat en vertu de ce paragraphe.

Propriété intellectuelle

(6) Si la compagnie a autorisé par contrat une personne à utiliser un droit de propriété intellectuelle, la résiliation n'empêche pas la personne de l'utiliser ni d'en faire respecter l'utilisation exclusive, à condition qu'elle respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce pour la période prévue

tends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

au contrat et pour toute période additionnelle dont elle peut et décide de se prévaloir de son propre gré.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Pertes découlant de la résiliation

(7) En cas de résiliation du contrat, toute partie à celui-ci qui subit des pertes découlant de la résiliation est réputée avoir une réclamation prouvable.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Motifs de la résiliation

(8) Dans les cinq jours qui suivent la date à laquelle une partie au contrat le lui demande, la compagnie lui expose par écrit les motifs de son projet de résiliation.

Exceptions

(9) This section does not apply in respect of

(*a*) an eligible financial contract;

(*b*) a collective agreement;

(*c*) a financing agreement if the company is the borrower; or

(*d*) a lease of real property or of an immovable if the company is the lessor.

2005, c. 47, s. 131; 2007, c. 29, s. 108, c. 36, ss. 76, 112.

Exceptions

(9) Le présent article ne s'applique pas aux contrats suivants :

a) les contrats financiers admissibles;

b) les conventions collectives;

c) les accords de financement au titre desquels la compagnie est l'emprunteur;

d) les baux d'immeubles ou de biens réels au titre desquels la compagnie est le locateur.

2005, ch. 47, art. 131; 2007, ch. 29, art. 108, ch. 36, art. 76 et 112.

Collective agreements

33. (1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

Conventions collectives

33. (1) Si une procédure a été intentée sous le régime de la présente loi à l'égard d'une compagnie débitrice, toute convention collective que celle-ci a conclue à titre d'employeur demeure en vigueur et ne peut être modifiée qu'en conformité avec le présent article ou les règles de droit applicables aux négociations entre les parties.

Application for authorization to serve notice to bargain

(2) A debtor company that is a party to a collective agreement and that is unable to reach a voluntary agreement with the bargaining agent to revise any of the provisions of the collective agreement may, on giving five days notice to the bargaining agent, apply to the court for an order authorizing the company to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

Demande pour que le tribunal autorise le début de négociations en vue de la révision

(2) Si elle est partie à une convention collective à titre d'employeur et qu'elle ne peut s'entendre librement avec l'agent négociateur sur la révision de celle-ci, la compagnie débitrice peut, après avoir donné un préavis de cinq jours à l'agent négociateur, demander au tribunal de l'autoriser, par ordonnance, à donner à l'agent négociateur un avis de négociations collectives pour que celui-ci entame les négociations collectives en vue de la révision de la convention collective conformément aux règles de droit applicables aux négociations entre les parties.

Conditions for issuance of order

(3) The court may issue the order only if it is satisfied that

(*a*) a viable compromise or arrangement could not be made in respect of the company,

Cas où l'autorisation est accordée

(3) Le tribunal ne rend l'ordonnance que s'il est convaincu, à la fois :

a) qu'une transaction ou un arrangement viable à l'égard de la compagnie ne pourrait

taking into account the terms of the collective agreement;

(*b*) the company has made good faith efforts to renegotiate the provisions of the collective agreement; and

(*c*) a failure to issue the order is likely to result in irreparable damage to the company.

être fait compte tenu des dispositions de la convention collective;

b) que la compagnie a tenté de bonne foi d'en négocier de nouveau les dispositions;

c) qu'elle subirait vraisemblablement des dommages irréparables si l'ordonnance n'était pas rendue.

No delay on vote

(4) The vote of the creditors in respect of a compromise or an arrangement may not be delayed solely because the period provided in the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent has not expired.

(4) Le vote des créanciers sur la transaction ou l'arrangement ne peut être retardé pour la seule raison que le délai imparti par les règles de droit applicables aux négociations collectives entre les parties à la convention collective n'est pas expiré.

Vote sur la proposition

Claims arising from termination or amendment

(5) If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under this Act in respect of the company, the bargaining agent that is a party to the agreement is deemed to have a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.

(5) Si les parties parviennent à une entente sur la révision de la convention collective après qu'une procédure a été intentée sous le régime de la présente loi à l'égard d'une compagnie, l'agent négociateur en cause est réputé avoir une réclamation à titre de créancier chirographaire pour une somme équivalant à la valeur des concessions accordées à l'égard de la période non écoulée de la convention.

Réclamation consécutive à la révision

Order to disclose information

(6) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the company's business or financial affairs and that is relevant to the collective bargaining between the company and the bargaining agent. The court may make the order only after the company has been authorized to serve a notice to bargain under subsection (2).

(6) Sur demande de l'agent négociateur partie à la convention collective et sur avis aux personnes qui ont un intérêt, le tribunal peut ordonner à celles-ci de communiquer au demandeur, aux conditions qu'il précise, tout renseignement qu'elles ont en leur possession ou à leur disposition sur les affaires et la situation financière de la compagnie pertinent pour les négociations collectives. Le tribunal ne peut rendre l'ordonnance qu'après l'envoi à l'agent négociateur de l'avis de négociations collectives visé au paragraphe (2).

Ordonnance de communication

Parties

(7) For the purpose of this section, the parties to a collective agreement are the debtor company and the bargaining agent that are bound by the collective agreement.

(7) Pour l'application du présent article, les parties à la convention collective sont la compagnie débitrice et l'agent négociateur liés par elle.

Parties

Unrevised collective agreements remain in force

(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

2005, c. 47, s. 131.

(8) Il est entendu que toute convention collective que la compagnie et l'agent négociateur n'ont pas convenu de réviser demeure en vigueur et que les tribunaux ne peuvent en modifier les termes.

2005, ch. 47, art. 131.

Maintien en vigueur des conventions collectives

Certain rights limited

34. (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a se-

34. (1) Il est interdit de résilier ou de modifier un contrat — notamment un contrat de garantie — conclu avec une compagnie débitrice

Limitation de certains droits

curity agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

ou de se prévaloir d'une clause de déchéance du terme figurant dans un tel contrat au seul motif qu'une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie ou que celle-ci est insolvable.

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.

Baux

(2) Lorsque le contrat visé au paragraphe (1) est un bail, l'interdiction prévue à ce paragraphe vaut également dans le cas où la compagnie est insolvable ou n'a pas payé son loyer à l'égard d'une période antérieure à l'introduction de la procédure.

Public utilities

(3) No public utility may discontinue service to a company by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid for services rendered or goods provided before the commencement of those proceedings.

Entreprise de service public

(3) Il est interdit à toute entreprise de service public d'interrompre la prestation de ses services auprès d'une compagnie débitrice au seul motif qu'une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie, que celle-ci est insolvable ou qu'elle n'a pas payé des services ou marchandises fournis avant l'introduction de la procédure.

Certain acts not prevented

(4) Nothing in this section is to be construed as

(*a*) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;

(*b*) requiring the further advance of money or credit; or

(*c*) [Repealed, 2012, c. 31, s. 421]

Exceptions

(4) Le présent article n'a pas pour effet :

a) d'empêcher une personne d'exiger que soient effectués des paiements en espèces pour toute contrepartie de valeur — marchandises, services, biens loués ou autres — fournie après l'introduction d'une procédure sous le régime de la présente loi;

b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits.

c) [Abrogé, 2012, ch. 31, art. 421]

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Incompatibilité

(5) Le présent article l'emporte sur les dispositions incompatibles de tout contrat, celles-ci étant sans effet.

Powers of court

(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Pouvoirs du tribunal

(6) À la demande de l'une des parties à un contrat ou d'une entreprise de service public, le tribunal peut déclarer le présent article inapplicable, ou applicable uniquement dans la mesure qu'il précise, s'il est établi par le demandeur que son application lui causerait vraisemblablement de sérieuses difficultés financières.

Eligible financial contracts

(7) Subsection (1) does not apply

(*a*) in respect of an eligible financial contract; or

(*b*) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Pay-*

Contrats financiers admissibles

(7) Le paragraphe (1) ne s'applique pas aux contrats financiers admissibles et n'a pas pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paie-*

ments Act and the by-laws and rules of that Association.

Permitted actions

(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(*a*) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(*b*) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

2005, c. 47, s. 131; 2007, c. 29, s. 109, c. 36, ss. 77, 112; 2012, c. 31, s. 421.

ments et aux règles et règlements administratifs de l'association.

Opérations permises

(8) Si le contrat financier admissible conclu avant qu'une procédure soit intentée sous le régime de la présente loi à l'égard de la compagnie est résilié à la date d'introduction de la procédure ou par la suite, il est permis d'effectuer les opérations ci-après en conformité avec le contrat :

a) la compensation des obligations entre la compagnie et les autres parties au contrat;

b) toute opération à l'égard de la garantie financière afférente, notamment :

(i) la vente, la demande en forclusion ou, dans la province de Québec, la demande en délaissement,

(ii) la compensation, ou l'affectation de son produit ou de sa valeur.

Restriction

(9) Aucune ordonnance rendue au titre de la présente loi ne peut avoir pour effet de suspendre ou de restreindre le droit d'effectuer les opérations visées au paragraphe (8).

Valeurs nettes dues à la date de résiliation

(10) Si, aux termes du contrat financier admissible visé au paragraphe (8), des sommes sont dues par la compagnie à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée être un créancier de la compagnie relativement à ces sommes.

Rang

(11) Il ne peut être rendu, au titre de la présente loi, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

2005, ch. 47, art. 131; 2007, ch. 29, art. 109, ch. 36, art. 77 et 112; 2012, ch. 31, art. 421.

Obligations and Prohibitions

Obligation to provide assistance

35. (1) A debtor company shall provide to the monitor the assistance that is necessary to enable the monitor to adequately carry out the monitor's functions.

Obligation to duties set out in section 158 of the *Bankruptcy and Insolvency Act*

(2) A debtor company shall perform the duties set out in section 158 of the *Bankruptcy and Insolvency Act* that are appropriate and applicable in the circumstances.

2005, c. 47, s. 131.

Obligations et interdiction

Assistance

35. (1) La compagnie débitrice est tenue d'aider le contrôleur à remplir adéquatement ses fonctions.

Obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité*

(2) Elle est également tenue de satisfaire aux obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité* selon ce qui est indiqué et applicable dans les circonstances.

2005, ch. 47, art. 131.

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(*a*) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(*b*) whether the monitor approved the process leading to the proposed sale or disposition;

(*c*) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(*d*) the extent to which the creditors were consulted;

(*e*) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(*f*) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(*a*) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(*b*) the consideration to be received is superior to the consideration that would be received under any other offer made in accor-

Restriction à la disposition d'actifs

36. (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

dance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(*a*) a director or officer of the company;

(*b*) a person who has or has had, directly or indirectly, control in fact of the company; and

(*c*) a person who is related to a person described in paragraph (*a*) or (*b*).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

PREFERENCES AND TRANSFERS AT UNDERVALUE

Application of sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(*a*) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(*b*) to "trustee" is to be read as a reference to "monitor"; and

(*c*) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

2005, c. 47, s. 131; 2007, c. 36, s. 78.

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

Personnes liées

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas *a*) ou *b*).

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Autorisation de disposer des actifs en les libérant de restrictions

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(4)*a*) et (5)*a*) s'il avait homologué la transaction ou l'arrangement.

Restriction à l'égard des employeurs

2005, ch. 47, art. 131; 2007, ch. 36, art. 78.

TRAITEMENTS PRÉFÉRENTIELS ET OPÉRATIONS SOUS-ÉVALUÉES

36.1 (1) Les articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité* s'appliquent, avec les adaptations nécessaires, à la transaction ou à l'arrangement sauf disposition contraire de ceux-ci.

Application des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*

(2) Pour l'application du paragraphe (1), la mention, aux articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, de la date de la faillite vaut mention de la date à laquelle une procédure a été intentée sous le régime de la présente loi, celle du syndic vaut mention du contrôleur et celle du failli, de la personne insolvable ou du débiteur vaut mention de la compagnie débitrice.

Interprétation

2005, ch. 47, art. 131; 2007, ch. 36, art. 78.

HER MAJESTY

Deemed trusts

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

Exceptions

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

2005, c. 47, s. 131.

SA MAJESTÉ

Fiducies présumées

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

Exceptions

(2) Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspon-

dante, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 131.

Status of Crown claims

38. (1) In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 39 called a "workers' compensation body", rank as unsecured claims.

Réclamations de la Couronne

38. (1) Dans le cadre de toute procédure intentée sous le régime de la présente loi, les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

Exceptions

(2) Subsection (1) does not apply

(*a*) in respect of claims that are secured by a security or charge of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body

(i) pursuant to any law, or

(ii) pursuant to provisions of federal or provincial legislation if those provisions do not have as their sole or principal purpose the establishment of a means of securing claims of Her Majesty or a workers' compensation body; and

(*b*) to the extent provided in subsection 39(2), to claims that are secured by a security referred to in subsection 39(1), if the security is registered in accordance with subsection 39(1).

Exceptions

(2) Sont soustraites à l'application du paragraphe (1):

a) les réclamations garanties par un type de charge ou de sûreté dont toute personne, et non seulement Sa Majesté ou l'organisme, peut se prévaloir au titre de dispositions législatives fédérales ou provinciales n'ayant pas pour seul ou principal objet l'établissement de mécanismes garantissant les réclamations de Sa Majesté ou de l'organisme, ou au titre de toute autre règle de droit;

b) les réclamations garanties et enregistrées aux termes du paragraphe 39(1), dans la mesure prévue au paragraphe 39(2).

Operation of similar legislation

(3) Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, 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 if the sum

Effet

(3) Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes:

a) les paragraphes 224(1.2) et (1.3) 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 et 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

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and, for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

2005, c. 47, s. 131; 2009, c. 33, s. 29.

que des intérêts, pénalités et autres charges afférents, laquelle :

(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 auquel 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 institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 131; 2009, ch. 33, art. 29.

Statutory Crown securities

39. (1) In relation to proceedings under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if, before the day on which proceedings commence, the security is registered under a system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.

Garanties créées par législation

39. (1) Dans le cadre de toute procédure intentée à l'égard d'une compagnie débitrice sous le régime de la présente loi, les garanties créées aux termes d'une loi fédérale ou provinciale dans le seul but — ou principalement dans le but — de protéger des réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail ne sont valides que si elles ont été enregistrées avant la date d'introduction de la procédure et selon un système d'enregistrement des garanties qui est accessible non seulement à Sa Majesté du chef du Canada ou de la province ou à l'organisme, mais aussi aux autres créanciers détenant des garanties, et qui est accessible au public à des fins de consultation ou de recherche.

Effect of security

(2) A security referred to in subsection (1) that is registered in accordance with that subsection

(*a*) is subordinate to securities in respect of which all steps necessary to setting them up against other creditors were taken before that registration; and

(*b*) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.

2005, c. 47, s. 131; 2007, c. 36, s. 79.

Act binding on Her Majesty

40. This Act is binding on Her Majesty in right of Canada or a province.

2005, c. 47, s. 131.

MISCELLANEOUS

Certain sections of *Winding-up and Restructuring Act* do not apply

41. Sections 65 and 66 of the *Winding-up and Restructuring Act* do not apply to any compromise or arrangement to which this Act applies.

2005, c. 47, s. 131.

Act to be applied conjointly with other Acts

42. The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

2005, c. 47, s. 131.

Claims in foreign currency

43. If a compromise or an arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency is to be converted to Canadian currency as of the date of the initial application in respect of the company unless otherwise provided in the proposed compromise or arrangement.

2005, c. 47, s. 131.

PART IV

CROSS-BORDER INSOLVENCIES

PURPOSE

Purpose

44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

Rang

(2) Les garanties enregistrées conformément au paragraphe (1):

a) prennent rang après toute autre garantie à l'égard de laquelle les mesures requises pour la rendre opposable aux autres créanciers ont toutes été prises avant l'enregistrement;

b) ne sont valides que pour les sommes dues à Sa Majesté ou à l'organisme lors de l'enregistrement et les intérêts échus depuis sur celles-ci.

2005, ch. 47, art. 131; 2007, ch. 36, art. 79.

Obligation de Sa Majesté

40. La présente loi lie Sa Majesté du chef du Canada ou d'une province.

2005, ch. 47, art. 131.

DISPOSITIONS DIVERSES

Inapplicabilité de certains articles de la *Loi sur les liquidations et les restructurations*

41. Les articles 65 et 66 de la *Loi sur les liquidations et les restructurations* ne s'appliquent à aucune transaction ni à aucun arrangement auxquels la présente loi est applicable.

2005, ch. 47, art. 131.

Application concurrente d'autres lois

42. Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

2005, ch. 47, art. 131.

Créances en monnaies étrangères

43. Dans le cas où une transaction ou un arrangement est proposé à l'égard d'une compagnie débitrice, la réclamation visant une créance en devises étrangères doit être convertie en monnaie canadienne au taux en vigueur à la date de la demande initiale, sauf disposition contraire de la transaction ou de l'arrangement.

2005, ch. 47, art. 131.

PARTIE IV

INSOLVABILITÉ EN CONTEXTE INTERNATIONAL

OBJET

Objet

44. La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants:

(*a*) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(*b*) greater legal certainty for trade and investment;

(*c*) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(*d*) the protection and the maximization of the value of debtor company's property; and

(*e*) the rescue of financially troubled businesses to protect investment and preserve employment.

2005, c. 47, s. 131.

a) assurer la coopération entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;

b) garantir une plus grande certitude juridique dans le commerce et les investissements;

c) administrer équitablement et efficacement les affaires d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des autres parties intéressées, y compris les compagnies débitrices;

d) protéger les biens des compagnies débitrices et en optimiser la valeur;

e) faciliter le redressement des entreprises en difficulté, de manière à protéger les investissements et préserver les emplois.

2005, ch. 47, art. 131.

INTERPRETATION

Definitions

45. (1) The following definitions apply in this Part.

"foreign court" « *tribunal étranger* »

"foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

"foreign main proceeding" « *principale* »

"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.

"foreign non-main proceeding" « *secondaire* »

"foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding.

"foreign proceeding" « *instance étrangère* »

"foreign proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

"foreign representative" « *représentant étranger* »

"foreign representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

(*a*) monitor the debtor company's business and financial affairs for the purpose of reorganization; or

DÉFINITIONS

Définitions

45. (1) Les définitions qui suivent s'appliquent à la présente partie.

« instance étrangère » *"foreign proceeding"*

« instance étrangère » Procédure judiciaire ou administrative, y compris la procédure provisoire, régie par une loi étrangère relative à la faillite ou à l'insolvabilité qui touche les droits de l'ensemble des créanciers et dans le cadre de laquelle les affaires financières et autres de la compagnie débitrice sont placées sous la responsabilité ou la surveillance d'un tribunal étranger aux fins de réorganisation.

« principale » *"foreign main proceeding"*

« principale » Qualifie l'instance étrangère qui a lieu dans le ressort où la compagnie débitrice a ses principales affaires.

« représentant étranger » *"foreign representative"*

« représentant étranger » Personne ou organe qui, même à titre provisoire, est autorisé dans le cadre d'une instance étrangère à surveiller les affaires financières ou autres de la compagnie débitrice aux fins de réorganisation, ou à agir en tant que représentant.

« secondaire » *"foreign non-main proceeding"*

« secondaire » Qualifie l'instance étrangère autre que l'instance étrangère principale.

« tribunal étranger » *"foreign court"*

« tribunal étranger » Autorité, judiciaire ou autre, compétente pour contrôler ou surveiller des instances étrangères.

(*b*) act as a representative in respect of the foreign proceeding.

Centre of debtor company's main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

2005, c. 47, s. 131.

(2) Pour l'application de la présente partie, sauf preuve contraire, le siège social de la compagnie débitrice est présumé être le lieu où elle a ses principales affaires.

Lieu des principales affaires

2005, ch. 47, art. 131.

RECOGNITION OF FOREIGN PROCEEDING

RECONNAISSANCE DES INSTANCES ÉTRANGÈRES

Application for recognition of a foreign proceeding

46. (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

46. (1) Le représentant étranger peut demander au tribunal de reconnaître l'instance étrangère dans le cadre de laquelle il a qualité.

Demande de reconnaissance de l'instance étrangère

Documents that must accompany application

(2) Subject to subsection (3), the application must be accompanied by

(*a*) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(*b*) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(*c*) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

(2) La demande de reconnaissance est accompagnée des documents suivants :

a) une copie certifiée conforme de l'acte — quelle qu'en soit la désignation — introductif de l'instance étrangère ou le certificat délivré par le tribunal étranger attestant l'introduction de celle-ci;

b) une copie certifiée conforme de l'acte — quelle qu'en soit la désignation — autorisant le représentant étranger à agir à ce titre ou le certificat délivré par le tribunal étranger attestant la qualité de celui-ci;

c) une déclaration faisant état de toutes les instances étrangères visant la compagnie débitrice qui sont connues du représentant étranger.

Documents accompagnant la demande de reconnaissance

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(*a*) and (*b*) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

(3) Le tribunal peut, sans preuve supplémentaire, accepter les documents visés aux alinéas (2)*a*) et *b*) comme preuve du fait qu'il s'agit d'une instance étrangère et que le demandeur est le représentant étranger dans le cadre de celle-ci.

Documents acceptés comme preuve

Other evidence

(4) In the absence of the documents referred to in paragraphs (2)(*a*) and (*b*), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

(4) En l'absence des documents visés aux alinéas (2)*a*) et *b*), il peut accepter toute autre preuve — qu'il estime indiquée — de l'introduction de l'instance étrangère et de la qualité du représentant étranger.

Autre preuve

Translation

(5) The court may require a translation of any document accompanying the application.

2005, c. 47, s. 131.

(5) Il peut exiger la traduction des documents accompagnant la demande de reconnaissance.

Traduction

2005, ch. 47, art. 131.

Order recognizing foreign proceeding

47. (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the

47. (1) S'il est convaincu que la demande de reconnaissance vise une instance étrangère et que le demandeur est un représentant étran-

Ordonnance de reconnaissance

applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

ger dans le cadre de celle-ci, le tribunal reconnaît, par ordonnance, l'instance étrangère en cause.

Nature of foreign proceeding to be specified

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

(2) Il précise dans l'ordonnance s'il s'agit d'une instance étrangère principale ou secondaire.

Nature de l'instance

2005, c. 47, s. 131.

2005, ch. 47, art. 131.

Order relating to recognition of a foreign main proceeding

48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

48. (1) Sous réserve des paragraphes (2) à (4), si l'ordonnance de reconnaissance précise qu'il s'agit d'une instance étrangère principale, le tribunal, par ordonnance, selon les modalités qu'il estime indiquées :

Effets de la reconnaissance d'une instance étrangère principale

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

a) suspend, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

b) surseoit, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

c) interdit, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie;

(*d*) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

d) interdit à la compagnie de disposer, notamment par vente, des biens de son entreprise situés au Canada hors du cours ordinaire des affaires ou de ses autres biens situés au Canada.

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

(2) L'ordonnance visée au paragraphe (1) doit être compatible avec les autres ordonnances rendues sous le régime de la présente loi.

Compatibilité

When subsection (1) does not apply

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

(3) Le paragraphe (1) ne s'applique pas si au moment où l'ordonnance de reconnaissance est rendue une procédure a déjà été intentée sous le régime de la présente loi contre la compagnie débitrice.

Non-application du paragraphe (1)

Application of this and other Acts

(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Re-*

(4) Le paragraphe (1) n'a pas pour effet d'empêcher la compagnie débitrice d'intenter ou de continuer une procédure sous le régime de la présente loi, de la *Loi sur la faillite et l'in-*

Application de la présente loi et d'autres lois

structuring Act in respect of the debtor company.

2005, c. 47, s. 131.

solvabilité ou de la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 131.

Other orders

49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(*a*) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(*b*) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(*c*) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Autre ordonnance

49. (1) Une fois l'ordonnance de reconnaissance rendue, le tribunal, sur demande présentée par le représentant étranger demandeur, peut, s'il est convaincu que la mesure est nécessaire pour protéger les biens de la compagnie débitrice ou les intérêts d'un ou plusieurs créanciers, rendre toute ordonnance qu'il estime indiquée, notamment pour :

a) s'il s'agit d'une instance étrangère secondaire, imposer les interdictions visées au paragraphe 48(1);

b) régir l'interrogatoire des témoins et la manière de recueillir des preuves ou fournir des renseignements concernant les biens, affaires financières et autres, dettes, obligations et engagements de la compagnie débitrice;

c) autoriser le représentant étranger à surveiller les affaires financières et autres de la compagnie débitrice qui se rapportent à ses opérations au Canada.

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Restriction

(2) Si, au moment où l'ordonnance de reconnaissance est rendue, une procédure a déjà été intentée sous le régime de la présente loi contre la compagnie débitrice, l'ordonnance prévue au paragraphe (1) doit être compatible avec toute ordonnance qui peut être rendue dans le cadre de cette procédure.

Application of this and other Acts

(3) The making of an order under paragraph (1)(*a*) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

2005, c. 47, s. 131.

Application de la présente loi et d'autres lois

(3) L'ordonnance rendue au titre de l'alinéa (1)*a*) n'a pas pour effet d'empêcher que soit intentée ou continuée, contre la compagnie débitrice, une procédure sous le régime de la présente loi, de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 131.

Terms and conditions of orders

50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

2005, c. 47, s. 131.

Conditions

50. Le tribunal peut assortir les ordonnances qu'il rend au titre de la présente partie des conditions qu'il estime indiquées dans les circonstances.

2005, ch. 47, art. 131.

Commencement or continuation of proceedings

51. If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the

Début et continuation de la procédure

51. Une fois l'ordonnance de reconnaissance rendue, le représentant étranger en cause peut intenter ou continuer la procédure visée par la présente loi comme s'il était créancier de la

debtor company, or the debtor company, as the case may be.

2005, c. 47, s. 131.

compagnie débitrice ou la compagnie débitrice elle-même, selon le cas.

2005, ch. 47, art. 131.

OBLIGATIONS

OBLIGATIONS

Cooperation — court

52. (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Collaboration — tribunal

52. (1) Une fois l'ordonnance de reconnaissance rendue, le tribunal collabore dans toute la mesure possible avec le représentant étranger et le tribunal étranger en cause dans le cadre de l'instance étrangère reconnue.

Cooperation — other authorities in Canada

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Collaboration — autres autorités compétentes

(2) Si une procédure a été intentée sous le régime de la présente loi contre une compagnie débitrice et qu'une ordonnance a été rendue reconnaissant une instance étrangère visant cette compagnie, toute personne exerçant des attributions dans le cadre de cette procédure collabore dans toute la mesure possible avec le représentant étranger et le tribunal étranger en cause.

Forms of cooperation

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

(*a*) the appointment of a person to act at the direction of the court;

(*b*) the communication of information by any means considered appropriate by the court;

(*c*) the coordination of the administration and supervision of the debtor company's assets and affairs;

(*d*) the approval or implementation by courts of agreements concerning the coordination of proceedings; and

(*e*) the coordination of concurrent proceedings regarding the same debtor company.

Moyens d'assurer la collaboration

(3) Pour l'application du présent article, la collaboration peut être assurée par tout moyen approprié, notamment :

a) la nomination d'une personne chargée d'agir suivant les instructions du tribunal;

b) la communication de renseignements par tout moyen jugé approprié par celui-ci;

c) la coordination de l'administration et de la surveillance des biens et des affaires de la compagnie débitrice;

d) l'approbation ou l'application par les tribunaux des accords concernant la coordination des procédures;

e) la coordination de procédures concurrentes concernant la même compagnie débitrice.

2005, c. 47, s. 131; 2007, c. 36, s. 80.

2005, ch. 47, art. 131; 2007, ch. 36, art. 80.

Obligations of foreign representative

53. If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

(*a*) without delay, inform the court of

(i) any substantial change in the status of the recognized foreign proceeding,

(ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and

Obligations du représentant étranger

53. Si l'ordonnance de reconnaissance est rendue, il incombe au représentant étranger demandeur :

a) d'informer sans délai le tribunal :

(i) de toute modification sensible du statut de l'instance étrangère reconnue,

(ii) de toute modification sensible de sa qualité,

(iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and

(*b*) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

2005, c. 47, s. 131.

(iii) de toute autre procédure étrangère visant la compagnie débitrice qui a été portée à sa connaissance;

b) de publier, sans délai après le prononcé de l'ordonnance, une fois par semaine pendant deux semaines consécutives, ou selon les modalités qui y sont prévues, dans le journal ou les journaux au Canada qui y sont précisés, un avis contenant les renseignements réglementaires.

2005, ch. 47, art. 131.

Multiple Proceedings

Concurrent proceedings

54. If any proceedings under this Act in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order made under section 49 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order.

2005, c. 47, s. 131.

Multiple foreign proceedings

55. (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor company, an order recognizing a foreign main proceeding is made in respect of the debtor company, the court shall review any order made under section 49 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

Multiple foreign proceedings

(2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor company, an order recognizing another foreign non-main proceeding is made in respect of the debtor company, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 49 in respect of the first recognized proceeding and amend or revoke the order if it considers it appropriate.

2005, c. 47, s. 131.

Instances multiples

Instances concomitantes

54. Si, après qu'a été rendue une ordonnance de reconnaissance à l'égard d'une instance étrangère visant une compagnie débitrice, une procédure est intentée sous le régime de la présente loi contre cette compagnie, le tribunal examine toute ordonnance rendue au titre de l'article 49 et, s'il conclut qu'elle n'est pas compatible avec toute ordonnance rendue dans le cadre des procédures intentées sous le régime de la présente loi, il la modifie ou la révoque.

2005, ch. 47, art. 131.

Plusieurs instances étrangères

55. (1) Si, après qu'a été rendue une ordonnance de reconnaissance à l'égard d'une instance étrangère secondaire visant une compagnie débitrice, une ordonnance de reconnaissance est rendue à l'égard d'une instance étrangère principale visant la même compagnie, toute ordonnance rendue au titre de l'article 49 dans le cadre de l'instance étrangère secondaire doit être compatible avec toute ordonnance qui peut être rendue au titre de cet article dans le cadre de l'instance étrangère principale.

Plusieurs instances étrangères

(2) Si, après qu'a été rendue une ordonnance de reconnaissance à l'égard d'une instance étrangère secondaire visant une compagnie débitrice, une autre ordonnance de reconnaissance est rendue à l'égard d'une instance étrangère secondaire visant la même compagnie, le tribunal examine, en vue de coordonner les instances étrangères secondaires, toute ordonnance rendue au titre de l'article 49 dans le cadre de la première procédure reconnue et la modifie ou la révoque s'il l'estime indiqué.

2005, ch. 47, art. 131.

MISCELLANEOUS PROVISIONS

Authorization to act as representative of proceeding under this Act

56. The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

2005, c. 47, s. 131.

Foreign representative status

57. An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.

2005, c. 47, s. 131.

Foreign proceeding appeal

58. A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

2005, c. 47, s. 131.

Presumption of insolvency

59. For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.

2005, c. 47, s. 131.

Credit for recovery in other jurisdictions

60. (1) In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:

(*a*) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and

(*b*) the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if it were subject to

DISPOSITIONS DIVERSES

Autorisation d'agir à titre de représentant dans toute procédure intentée sous le régime de la présente loi

56. Le tribunal peut autoriser toute personne ou tout organe à agir à titre de représentant dans le cadre de toute procédure intentée sous le régime de la présente loi en vue d'obtenir la reconnaissance de celle-ci dans un ressort étranger.

2005, ch. 47, art. 131.

Statut du représentant étranger

57. Le représentant étranger n'est pas soumis à la juridiction du tribunal pour le motif qu'il a présenté une demande au titre de la présente partie, sauf en ce qui touche les frais de justice; le tribunal peut toutefois subordonner toute ordonnance visée à la présente partie à l'observation par le représentant étranger de toute autre ordonnance rendue par lui.

2005, ch. 47, art. 131.

Instance étrangère : appel

58. Le fait qu'une instance étrangère fait l'objet d'un appel ou d'une révision n'a pas pour effet d'empêcher le représentant étranger de présenter toute demande au tribunal au titre de la présente partie; malgré ce fait, le tribunal peut, sur demande, accorder des redressements.

2005, ch. 47, art. 131.

Présomption d'insolvabilité

59. Pour l'application de la présente partie, une copie certifiée conforme de l'ordonnance d'insolvabilité ou de réorganisation ou de toute ordonnance semblable, rendue contre une compagnie débitrice dans le cadre d'une instance étrangère, fait foi, sauf preuve contraire, de l'insolvabilité de celle-ci et de la nomination du représentant étranger au titre de l'ordonnance.

2005, ch. 47, art. 131.

Sommes reçues à l'étranger

60. (1) Lorsqu'une transaction ou un arrangement visant la compagnie débitrice est proposé, les éléments énumérés ci-après doivent être pris en considération dans la distribution des dividendes aux créanciers d'un débiteur au Canada comme s'ils faisaient partie de la distribution :

a) les sommes qu'un créancier a reçues — ou auxquelles il a droit — à l'étranger, à titre de dividende, dans le cadre d'une instance étrangère le visant;

b) la valeur de tout bien de la compagnie que le créancier a acquis à l'étranger au titre d'une créance prouvable ou par suite d'un

this Act, would be a preference over other creditors or a transfer at undervalue.

transfert qui, si la présente loi lui était applicable, procurerait à un créancier une préférence sur d'autres créanciers ou constituerait une opération sous-évaluée.

Restriction

(2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(*a*) and the value referred to in paragraph (1)(*b*) is of that creditor's claim.

2005, c. 47, s. 131.

Restriction

(2) Le créancier n'a toutefois pas le droit de recevoir un dividende dans le cadre de la distribution faite au Canada tant que les titulaires des créances venant au même rang que la sienne dans l'ordre de collocation prévu par la présente loi n'ont pas reçu un dividende dont le pourcentage d'acquittement est égal au pourcentage d'acquittement des éléments visés aux alinéas (1)*a*) et *b*).

2005, ch. 47, art. 131.

Court not prevented from applying certain rules

61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

Application de règles étrangères

61. (1) La présente partie n'a pas pour effet d'empêcher le tribunal d'appliquer, sur demande faite par le représentant étranger ou tout autre intéressé, toute règle de droit ou d'equity relative à la reconnaissance des ordonnances étrangères en matière d'insolvabilité et à l'assistance à prêter au représentant étranger, dans la mesure où elle n'est pas incompatible avec les dispositions de la présente loi.

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

2005, c. 47, s. 131; 2007, c. 36, s. 81.

Exception relative à l'ordre public

(2) La présente partie n'a pas pour effet d'empêcher le tribunal de refuser de prendre une mesure contraire à l'ordre public.

2005, ch. 47, art. 131; 2007, ch. 36, art. 81.

PART V

ADMINISTRATION

PARTIE V

ADMINISTRATION

Regulations

62. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including regulations

(*a*) specifying documents for the purpose of paragraph 23(1)(*f*); and

(*b*) prescribing anything that by this Act is to be prescribed.

2005, c. 47, s. 131; 2007, c. 36, s. 82.

Règlements

62. Le gouverneur en conseil peut, par règlement, prendre toute mesure d'application de la présente loi, notamment:

a) préciser les documents pour l'application de l'alinéa 23(1)*f*);

b) prendre toute mesure d'ordre réglementaire prévue par la présente loi.

2005, ch. 47, art. 131; 2007, ch. 36, art. 82.

Review of Act

63. (1) Within five years after the coming into force of this section, the Minister shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to those provisions.

Rapport

63. (1) Dans les cinq ans suivant l'entrée en vigueur du présent article, le ministre présente au Sénat et à la Chambre des communes un rapport sur les dispositions de la présente loi et son application dans lequel il fait état des modifications qu'il juge souhaitables.

Reference to parliamentary committee

(2) The report stands referred to the committee of the Senate, the House of Commons or both Houses of Parliament that is designated or established for that purpose, which shall

Examen parlementaire

(2) Le comité du Sénat, de la Chambre des communes, ou mixte, constitué ou désigné à cette fin, est saisi d'office du rapport et procède dans les meilleurs délais à l'étude de celui-ci et,

(*a*) as soon as possible after the laying of the report, review the report; and

(*b*) report to the Senate, the House of Commons or both Houses of Parliament, as the case may be, within one year after the laying of the report of the Minister, or any further time authorized by the Senate, the House of Commons or both Houses of Parliament.

2005, c. 47, s. 131.

dans l'année qui suit le dépôt du rapport ou le délai supérieur accordé par le Sénat, la Chambre des communes ou les deux chambres, selon le cas, leur présente son rapport.

2005, ch. 47, art. 131.

RELATED PROVISIONS	DISPOSITIONS CONNEXES
— R.S., 1985, c. 27 (2nd Supp.), s. 11	— L.R. (1985), ch. 27 (2e suppl.), art. 11
Transitional: proceedings **11.** Proceedings to which any of the provisions amended by the schedule apply that were commenced before the coming into force of section 10 shall be continued in accordance with those amended provisions without any further formality.	**11.** Les procédures intentées en vertu des dispositions modifiées en annexe avant l'entrée en vigueur de l'article 10 se poursuivent en conformité avec les nouvelles dispositions sans autres formalités. Disposition transitoire : procédure
— 1990, c. 17, s. 45(1)	— 1990, ch. 17, par. 45(1)
Transitional: proceedings **45.** (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.	**45.** (1) Les procédures intentées avant l'entrée en vigueur du présent paragraphe et auxquelles s'appliquent des dispositions visées par la présente loi se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée. Disposition transitoire : procédures
— 1997, c. 12, s. 127	— 1997, ch. 12, art. 127
Application **127.** Section 120, 121, 122, 123, 124, 125 or 126 applies to proceedings commenced under the *Companies' Creditors Arrangement Act* after that section comes into force.	**127.** Les articles 120, 121, 122, 123, 124, 125 ou 126 s'appliquent aux procédures intentées sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* après l'entrée en vigueur de l'article en cause. Application
— 1998, c. 30, s. 10	— 1998, ch. 30, art. 10
Transitional — proceedings **10.** Every proceeding commenced before the coming into force of this section and in respect of which any provision amended by sections 12 to 16 applies shall be taken up and continued under and in conformity with that amended provision without any further formality.	**10.** Les procédures intentées avant l'entrée en vigueur du présent article et auxquelles s'appliquent des dispositions visées par les articles 12 à 16 se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée. Procédures
— 2000, c. 30, s. 156(2)	— 2000, ch. 30, par. 156(2)
(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.	(2) Le paragraphe (1) s'applique aux procédures intentées en vertu de la même loi après le 29 septembre 1997.
— 2000, c. 30, s. 157(2)	— 2000, ch. 30, par. 157(2)
(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.	(2) Le paragraphe (1) s'applique aux procédures intentées en vertu de la même loi après le 29 septembre 1997.
— 2000, c. 30, s. 158(2)	— 2000, ch. 30, par. 158(2)
(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.	(2) Le paragraphe (1) s'applique aux procédures intentées en vertu de la même loi après le 29 septembre 1997.
— 2001, c. 34, s. 33(2)	— 2001, ch. 34, par. 33(2)
(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.	(2) Le paragraphe (1) s'applique aux procédures intentées en vertu de la même loi après le 29 septembre 1997.
— 2005, c. 47, s. 134, as amended by 2007, c. 36, s. 107	— 2005, ch. 47, art. 134, modifié par 2007, ch. 36, art. 107
Companies' Creditors Arrangement Act **134.** An amendment to the *Companies' Creditors Arrangement Act* that is enacted by any of sections 124 to 131 of this Act applies only to a debtor company in respect of whom proceedings commence un-	**134.** Toute modification à la *Loi sur les arrangements avec les créanciers des compagnies* édictée par l'un des articles 124 à 131 de la présente loi ne s'applique qu'aux compagnies débitrices à l'égard desquelles une procédure est intentée sous le régime *Loi sur les arrangements avec les créanciers des compagnies*

der that Act on or after the day on which the amendment comes into force.

— 2007, c. 29, s. 119

Companies' Creditors Arrangement Act

119. An amendment to the *Companies' Creditors Arrangement Act* made by section 104 or 106 of this Act applies only to a debtor company in respect of which proceedings under that Act are commenced on or after the day on which the amendment comes into force.

— 2007, c. 36, s. 111

Companies' Creditors Arrangement Act

111. The amendment to the *Companies' Creditors Arrangement Act* that is enacted by section 67 of this Act applies only to a debtor company in respect of whom proceedings commence under that Act on or after the day on which the amendment comes into force.

de la *Loi sur les arrangements avec les créanciers des compagnies* à la date d'entrée en vigueur de la modification ou par la suite.

— 2007, ch. 29, art. 119

Loi sur les arrangements avec les créanciers des compagnies

119. La modification apportée à la *Loi sur les arrangements avec les créanciers des compagnies* par les articles 104 ou 106 de la présente loi ne s'applique qu'aux compagnies débitrices à l'égard desquelles une procédure est intentée sous le régime de cette loi à la date d'entrée en vigueur de la modification ou par la suite.

— 2007, ch. 36, art. 111

Loi sur les arrangements avec les créanciers des compagnies

111. La modification à la *Loi sur les arrangements avec les créanciers des compagnies* édictée par l'article 67 de la présente loi ne s'applique qu'aux compagnies débitrices à l'égard desquelles une procédure est intentée sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* à la date d'entrée en vigueur de la modification ou par la suite.

TAB B

Français

Courts of Justice Act

R.S.O. 1990, CHAPTER C.43

Consolidation Period: From December 31, 2011 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 6, s. 50.

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Court of Appeal jurisdiction

6. (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17).

Combining of appeals from other courts

(2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal. R.S.O. 1990, c. C.43, s. 6 (2); 1996, c. 25, s. 9 (17).

Idem

(3) The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2). R.S.O. 1990, c. C.43, s. 6 (3); 1996, c. 25, s. 9 (17).

TAB C

Français

Securities Act

R.S.O. 1990, CHAPTER S.5

Consolidation Period: From September 1, 2013 to the e-Laws currency date.

Last amendment: 2013, c. 2, Sched. 13.

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INTERPRETATION

Interpretation, other general matters

Definitions

1. (1) In this Act,

...

"security" includes,

(a) any document, instrument or writing commonly known as a security,

(b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company,

(c) any document constituting evidence of an interest in an association of legatees or heirs,

(d) any document constituting evidence of an option, subscription or other interest in or to a security,

(e) a bond, debenture, note or other evidence of indebtedness or a share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription other than,

(i) a contract of insurance issued by an insurance company licensed under the *Insurance Act*, and

(ii) evidence of a deposit issued by a bank listed in Schedule I, II or III to the *Bank Act* (Canada), by a credit union or league to which the *Credit Unions and Caisses Populaires Act, 1994* applies, by a loan corporation or trust corporation registered under the *Loan and Trust Corporations Act* or by an association to which the *Cooperative Credit Associations Act* (Canada) applies,

(f) any agreement under which the interest of the purchaser is valued for purposes of conversion or surrender by reference to the value of a proportionate interest in a specified portfolio of assets, except a contract issued by an insurance company licensed under the *Insurance Act* which provides for payment at maturity of an amount not less than three quarters of the premiums paid by the purchaser for a benefit payable at maturity,

(g) any agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person or company,

(h) any certificate of share or interest in a trust, estate or association,

(i) any profit-sharing agreement or certificate,

(j) any certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate,

(k) any oil or natural gas royalties or leases or fractional or other interest therein,

(l) any collateral trust certificate,

(m) any income or annuity contract not issued by an insurance company,

(n) any investment contract,

(o) any document constituting evidence of an interest in a scholarship or educational plan or trust, and

(p) any commodity futures contract or any commodity futures option that is not traded on a commodity futures exchange registered with or recognized by the Commission under the *Commodity Futures Act* or the form of which is not accepted by the Director under that Act,

whether any of the foregoing relate to an issuer or proposed issuer; ("valeur mobilière")

TAB D

Français

Class Proceedings Act, 1992

S.O. 1992, CHAPTER 6

Consolidation Period: From June 22, 2006 to the e-Laws currency date.

Last amendment: 2006, c.19, Sched.C, s.1(1).

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Definitions

1. In this Act,

"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; ("questions communes")

"court" means the Superior Court of Justice but does not include the Small Claims Court; ("tribunal")

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant. ("demandeur") 1992, c. 6, s. 1; 2006, c. 19, Sched. C, s. 1 (1).

Plaintiff's class proceeding

2. (1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class. 1992, c. 6, s. 2 (1).

Motion for certification

(2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff. 1992, c. 6, s. 2 (2).

Idem

(3) A motion under subsection (2) shall be made,

(a) within ninety days after the later of,

(i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and

(ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or

(b) subsequently, with leave of the court. 1992, c. 6, s. 2 (3).

Defendant's class proceeding

3. A defendant to two or more proceedings may, at any stage of one of the proceedings, make a motion to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff. 1992, c. 6, s. 3.

Classing defendants

4. Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant. 1992, c. 6, s. 4.

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant 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 for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences 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 shall not certify the class proceeding unless there is a representative plaintiff or defendant 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 in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

Certain matters not bar to certification

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members. 1992, c. 6, s. 6.

Refusal to certify: proceeding may continue in altered form

7. Where 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 the purpose, the court may,

(a) order the addition, deletion or substitution of parties;

(b) order the amendment of the pleadings or notice of application; and

(c) make any further order that it considers appropriate. 1992, c. 6, s. 7.

Contents of certification order

8. (1) An order certifying a proceeding as a class proceeding shall,

(a) describe the class;

(b) state the names of the representative parties;

(c) state the nature of the claims or defences asserted on behalf of the class;

(d) state the relief sought by or from the class;

(e) set out the common issues for the class; and

(f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out. 1992, c. 6, s. 8 (1).

Subclass protection

(2) Where a class includes a subclass whose members have claims or defences 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, subsection (1) applies with necessary modifications in respect of the subclass. 1992, c. 6, s. 8 (2).

Amendment of certification order

(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding. 1992, c. 6, s. 8 (3).

Opting out

9. Any 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. 1992, c. 6, s. 9.

Where it appears conditions for certification not satisfied

10. (1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate. 1992, c. 6, s. 10 (1).

Proceeding may continue in altered form

(2) Where 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. 1992, c. 6, s. 10 (2).

Powers of court

(3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7 (a) to (c). 1992, c. 6, s. 10 (3).

Stages of class proceedings

11. (1) Subject to section 12, in a class proceeding,

(a) common issues for a class shall be determined together;

(b) common issues for a subclass shall be determined together; and

(c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25. 1992, c. 6, s. 11 (1).

Separate judgments

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue. 1992, c. 6, s. 11 (2).

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 1992, c. 6, s. 12.

Court may stay any other proceeding

13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate. 1992, c. 6, s. 13.

Participation of class members

14. (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. 1992, c. 6, s. 14 (1).

Idem

(2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate. 1992, c. 6, s. 14 (2).

Discovery

Discovery of parties

15. (1) Parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding. 1992, c. 6, s. 15 (1).

Discovery of class members with leave

(2) After discovery of the representative party, a party may move for discovery under the rules of court against other class members. 1992, c. 6, s. 15 (2).

Idem

(3) In deciding whether to grant leave to discover other class members, the court shall consider,

(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 claims or 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; and

(f) any other matter the court considers relevant. 1992, c. 6, s. 15 (3).

Idem

(4) A class member is subject to the same sanctions under the rules of court as a party for failure to submit to discovery. 1992, c. 6, s. 15 (4).

Examination of class members before a motion or application

16. (1) A party shall not require a class member other than a representative party to be examined as a witness before the hearing of a motion or application, except with leave of the court. 1992, c. 6, s. 16 (1).

Idem

(2) Subsection 15 (3) applies with necessary modifications to a decision whether to grant leave under subsection (1). 1992, c. 6, s. 16 (2).

Notice of certification

17. (1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section. 1992, c. 6, s. 17 (1).

Court may dispense with notice

(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. 1992, c. 6, s. 17 (2).

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

(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 places of residence of class members; and

(f) any other relevant matter. 1992, c. 6, s. 17 (3).

Idem

(4) The court may order that notice be given,

(a) personally or by mail;

(b) by posting, advertising, publishing or leafleting;

(c) by individual notice to a sample group within the class; or

(d) by any means or combination of means that the court considers appropriate. 1992, c. 6, s. 17 (4).

Idem

(5) The court may order that notice be given to different class members by different means. 1992, c. 6, s. 17 (5).

Contents of notice

(6) Notice under this section shall, unless the court orders otherwise,

(a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;

(b) state the manner by which and time within which class members may opt out of the proceeding;

(c) describe the possible financial consequences of the proceeding to class members;

(d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;

(e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;

(f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;

(g) describe the right of any class member to participate in the proceeding;

(h) give an address to which class members may direct inquiries about the proceeding; and

(i) give any other information the court considers appropriate. 1992, c. 6, s. 17 (6).

Solicitations of contributions

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements. 1992, c. 6, s. 17 (7).

Notice where individual participation is required

18. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section. 1992, c. 6, s. 18 (1).

Idem

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section. 1992, c. 6, s. 18 (2).

Contents of notice

(3) Notice under this section shall,

(a) state that common issues have been determined in favour of the class;

(b) state that class members may be entitled to individual relief;

(c) describe the steps to be taken to establish an individual claim;

(d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;

(e) give an address to which class members may direct inquiries about the proceeding; and

(f) give any other information that the court considers appropriate. 1992, c. 6, s. 18 (3).

Notice to protect interests of affected persons

19. (1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding. 1992, c. 6, s. 19 (1).

Idem

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section. 1992, c. 6, s. 19 (2).

Approval of notice by the court

20. A notice under section 17, 18 or 19 shall be approved by the court before it is given. 1992, c. 6, s. 20.

Delivery of notice

21. The court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party under section 17, 18 or 19, where that is more practical. 1992, c. 6, s. 21.

Costs of notice

22. (1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties. 1992, c. 6, s. 22 (1).

Idem

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass. 1992, c. 6, s. 22 (2).

Statistical evidence

23. (1) For the purposes of determining issues relating to the amount or distribution of a 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. 1992, c. 6, s. 23 (1).

Idem

(2) A record of statistical information purporting to be prepared 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. 1992, c. 6, s. 23 (2).

Notice

(3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,

(a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;

(b) complied with subsections (4) and (5); and

(c) complied with any requirement to produce documents under subsection (7). 1992, c. 6, s. 23 (3).

Contents of notice

(4) Notice under this section shall 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. 1992, c. 6, s. 23 (4).

Idem

(5) Except with respect to information referred to in subsection (4), notice under this section shall,

(a) specify the name and qualifications of each person who supervised the preparation of 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. 1992, c. 6, s. 23 (5).

Cross-examination

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information. 1992, c. 6, s. 23 (6).

Production of documents

(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. 1992, c. 6, s. 23 (7).

Aggregate assessment of monetary relief

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(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. 1992, c. 6, s. 24 (1).

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order. 1992, c. 6, s. 24 (4).

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims. 1992, c. 6, s. 24 (5).

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis. 1992, c. 6, s. 24 (6).

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 24 (7).

Idem

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 24 (8).

Extension of time

(9) The court may give leave under subsection (8) 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 given. 1992, c. 6, s. 24 (9).

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so. 1992, c. 6, s. 24 (10).

Individual issues

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the 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 to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner. 1992, c. 6, s. 25 (1).

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity. 1992, c. 6, s. 25 (2).

Idem

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, 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. 1992, c. 6, s. 25 (3).

Time limits for making claims

(4) The court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 25 (4).

Idem

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 25 (5).

Extension of time

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5). 1992, c. 6, s. 25 (6).

Determination under cl. (1) (c) deemed court order

(7) A determination under clause (1) (c) is deemed to be an order of the court. 1992, c. 6, s. 25 (7).

Judgment distribution

26. (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate. 1992, c. 6, s. 26 (1).

Idem

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class 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 until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court. 1992, c. 6, s. 26 (2).

Idem

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant. 1992, c. 6, s. 26 (3).

Idem

(4) The court may order that all or a part of an award under section 24 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 members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order. 1992, c. 6, s. 26 (4).

Idem

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined. 1992, c. 6, s. 26 (5).

Idem

(6) The court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding. 1992, c. 6, s. 26 (6).

Supervisory role of the court

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate. 1992, c. 6, s. 26 (7).

Payment of awards

(8) The court may order that an award made under section 24 or 25 be paid,

(a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate. 1992, c. 6, s. 26 (8).

Costs of distribution

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate. 1992, c. 6, s. 26 (9).

Return of unclaimed amounts

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court. 1992, c. 6, s. 26 (10).

Judgment on common issues

27. (1) A judgment on common issues of a class or subclass shall,

(a) set out the common issues;

(b) name or describe the class or subclass members;

(c) state the nature of the claims or defences asserted on behalf of the class or subclass; and

(d) specify the relief granted. 1992, c. 6, s. 27 (1).

Effect of judgment on common issues

(2) A judgment on common issues of a class or subclass does not bind,

(a) a person who has opted out of the class proceeding; or

(b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a). 1992, c. 6, s. 27 (2).

Idem

(3) A judgment on common issues of a class or subclass binds every class member 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 or defences described in the certification order; and

(c) relate to relief sought by or from the class or subclass as stated in the certification order. 1992, c. 6, s. 27 (3).

Limitations

28. (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

(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 abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise. 1992, c. 6, s. 28 (1).

Idem

(2) Where there is a right of appeal in respect of an event described in clauses (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. 1992, c. 6, s. 28 (2).

Discontinuance, abandonment and settlement

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any 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 settlement funds. 1992, c. 6, s. 29 (4).

Appeals

Appeals: refusals to certify and decertification orders

30. (1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding. 1992, c. 6, s. 30 (1).

Appeals: certification orders

(2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court. 1992, c. 6, s. 30 (2); 2006, c. 19, Sched. C, s. 1 (1).

Appeals: judgments on common issues and aggregate awards

(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members. 1992, c. 6, s. 30 (3).

Appeals by class members on behalf of the class

(4) If a representative party does not appeal or seek leave to appeal as permitted by subsection (1) or (2), or if a representative party abandons an appeal under subsection (1) or (2), any class member may make a motion to the court for leave to act as the representative party for the purposes of the relevant subsection. 1992, c. 6, s. 30 (4).

Idem

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3). 1992, c. 6, s. 30 (5).

Appeals: individual awards

(6) A class member may appeal to the Divisional Court from an order under section 24 or 25 determining an individual claim made by the member and awarding more than $3,000 to the member. 1992, c. 6, s. 30 (6).

Idem

(7) A representative plaintiff may appeal to the Divisional Court from an order under section 24 determining an individual claim made by a class member and awarding more than $3,000 to the member. 1992, c. 6, s. 30 (7).

Idem

(8) A defendant may appeal to the Divisional Court from an order under section 25 determining an individual claim made by a class member and awarding more than $3,000 to the member. 1992, c. 6, s. 30 (8).

Idem

(9) With leave of the Superior Court of Justice as provided in the rules of court, a class member may appeal to the Divisional Court from an order under section 24 or 25,

(a) determining an individual claim made by the member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by the member for monetary relief. 1992, c. 6, s. 30 (9); 2006, c. 19, Sched. C, s. 1 (1).

Idem

(10) With leave of the Superior Court of Justice as provided in the rules of court, a representative plaintiff may appeal to the Divisional Court from an order under section 24,

(a) determining an individual claim made by a class member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by a class member for monetary relief. 1992, c. 6, s. 30 (10); 2006, c. 19, Sched. C, s. 1 (1).

Idem

(11) With leave of the Superior Court of Justice as provided in the rules of court, a defendant may appeal to the Divisional Court from an order under section 25,

(a) determining an individual claim made by a class member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by a class member for monetary relief. 1992, c. 6, s. 30 (11); 2006, c. 19, Sched. C, s. 1 (1).

Costs

31. (1) In exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. 1992, c. 6, s. 31 (1).

Liability of class members for costs

(2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims. 1992, c. 6, s. 31 (2).

Small claims

(3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court. 1992, c. 6, s. 31 (3).

Fees and disbursements

32. (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32 (3).

Determination of fees where agreement not approved

(4) If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

Agreements for payment only in the event of success

33. (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

Interpretation: success in a proceeding

(2) For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some or all class members; and

(b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).

Definitions

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraires de base")

"multiplier" means a multiple to be applied to a base fee. ("multiplicateur") 1992, c. 6, s. 33 (3).

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

Idem

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).

Idem

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

Motions

34. (1) The same judge shall hear all motions before the trial of the common issues. 1992, c. 6, s. 34 (1).

Idem

(2) Where a judge who has heard motions under subsection (1) becomes unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 34 (2).

Idem

(3) Unless the parties agree otherwise, a judge who hears motions under subsection (1) or (2) shall not preside at the trial of the common issues. 1992, c. 6, s. 34 (3).

Rules of court

35. The rules of court apply to class proceedings. 1992, c. 6, s. 35.

Crown bound

36. This Act binds the Crown. 1992, c. 6, s. 36.

Application of Act

37. 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 proceeding commenced before this Act comes into force. 1992, c. 6, s. 37.

38. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 1992, c. 6, s. 38.

39. OMITTED (ENACTS SHORT TITLE OF THIS ACT). 1992, c. 6, s. 39.

Français

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TAB E

Province of Alberta

CLASS PROCEEDINGS ACT

Statutes of Alberta, 2003
Chapter C-16.5

Current as of March 1, 2011

Office Consolidation

Alberta Queen's Printer
5th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
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Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Division 2
Participation of Class Members

Participation of class members

16(1) For the purposes of ensuring the fair and adequate representation of the interests of the class or any subclass or for any other reason that the Court considers appropriate, the Court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding if, in the opinion of the Court, this would be useful to the class.

(2) Participation under subsection (1) must be in the manner and on the terms or conditions, including terms or conditions as to costs, that the Court considers appropriate.

Opting out

17(1) A person who meets the criteria to be a class member in respect of a class proceeding is a class member in the class proceeding unless the person opts out of the class proceeding.

(2) The Court may, in a certification order or at any time,

(a) specify the manner in which and the time within which the members of a class, or any individual member of a class, may opt out of the proceeding, and

(b) impose terms or conditions subject to which the class members or an individual member may opt out of the proceeding.

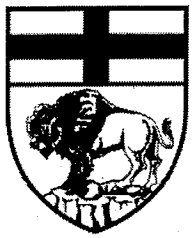
(3) A person who opts out of a class proceeding ceases, effective from the time the person opts out, to be a class member of the class proceeding.

(4) Notwithstanding anything in this section, where the Court certifies a proceeding pursuant to an application by a defendant, a class member is prohibited from opting out of the class proceeding other than with leave of the Court.

(5) If the Court grants leave under subsection (4) for a person to opt out of a class proceeding, that person has, as a matter of right, the right to apply to the Court to be added, on any terms or conditions that the Court considers appropriate, as a named plaintiff for the purposes of allowing that plaintiff to conduct the plaintiff's own case.

(6) Notwithstanding anything in this section, the Court may at any time determine whether or not a person is a class member and may

TAB F



MANITOBA

THE CLASS PROCEEDINGS ACT

C.C.S.M. c. C130

LOI SUR LES RECOURS COLLECTIFS

c. C130 de la *C.P.L.M.*

This is an unofficial consolidation showing the provisions of the Act in force as of the date shown below.

The official sources for this Act are the original Act and any amending Acts, as published by the Queen's Printer.

La présente loi est une codification non officielle indiquant les dispositions qui sont en vigueur à la date indiquée ci-dessous.

La loi originale et, le cas échéant, les lois modificatives publiées par l'Imprimeur de la Reine sont les sources officielles de la présente loi.

Last consolidated: 2010-06-17
Current as of: 2013-09-12

Date de codification : 2010-06-17
À jour en date du : 2013-09-12

Unavailability of certification judge
14(2) If the judge who has heard motions under subsection (1) becomes unavailable for any reason to hear a motion in the class proceeding, the chief justice of the court may assign another judge to hear the motion.

Certification judge not to preside at trial
14(3) Except with the consent of the parties, a judge who hears a motion under subsection (1) or (2) may not preside at the trial of the common issues.

Instruction de motions par un autre juge
14(2) Si le juge qui a instruit des motions en vertu du paragraphe (1) n'est plus en mesure, pour quelque raison que ce soit, d'instruire une motion dans le cadre du recours collectif, le juge en chef du tribunal peut affecter un autre juge du tribunal à l'instruction de la motion.

Interdiction
14(3) Le juge qui instruit une motion en vertu du paragraphe (1) ou (2) ne peut, sans le consentement des parties, présider l'instruction des questions communes.

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 a 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.

Court order re participation by class members
15(2) Participation by a class member under subsection (1) must be in the manner and on the terms, including terms as to costs, that the court considers appropriate.

Opting out of class proceeding
16 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.

Discovery
17(1) Parties to a class proceeding have the same rights of examination for discovery under the *Queen's Bench Rules* against one another as they would have in any other proceeding.

SECTION 2

PARTICIPATION DES MEMBRES DU GROUPE

Participation des membres du groupe
15(1) Afin de s'assurer que les intérêts du groupe ou d'un sous-groupe sont représentés de façon juste et appropriée ou pour tout autre motif valable, le tribunal peut, en tout temps dans le cadre d'un recours collectif, permettre à un ou plusieurs membres du groupe de participer au recours.

Conditions rattachées à la participation
15(2) La participation prévue au paragraphe (1) a lieu de la façon et aux conditions — y compris les conditions rattachées aux dépens — que le tribunal estime indiquées.

Retrait
16 Tout membre d'un groupe engagé dans un recours collectif peut s'en retirer de la façon et dans le délai indiqués dans l'ordonnance d'attestation.

Interrogatoire préalable
17(1) Les parties à un recours collectif ont, l'une à l'égard de l'autre, les mêmes droits à l'interrogatoire préalable en vertu des *Règles de la Cour du Banc de la Reine* que si elles étaient parties à toute autre instance.

TAB G

The Class Actions Act

being

Chapter C-12.01 of the *Statutes of Saskatchewan, 2001* (effective January 1, 2002) as amended by the *Statutes of Saskatchewan*, 2007, c.21.

Opting out of a class action

18 A class member involved in a class action may opt out of the action in the manner and within the time stated in the certification order.

2007, c.21, s.10.

Discovery

19(1) Parties to a class action have the same rights of discovery as they would have in any other action.

(2) After the examination for discovery of the representative plaintiff or, in an action mentioned in section 8, one or more of the representative plaintiffs, a defendant may, with leave of the court, conduct an examination for discovery of other class members.

(3) In determining whether to grant a defendant leave to conduct an examination for discovery of other class members, the court shall consider:

(a) the stage of the class action and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the examination for 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 an examination for discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be examined; and

(f) any other matter the court considers appropriate.

2001, c.C-12.01, s.19.

Sanctions for failure to submit to examination for discovery

20 A class member who fails to submit to an examination for discovery is subject to the sanctions set out in *The Queen's Bench Rules*.

2001, c.C-12.01, s.20.

PART IV
Notices

Notice of certification

21(1) Notice that an action has been certified as a class action 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.

TAB H

Updated to 1 September 2013
This document has official status.

Civil Code of Québec
PRELIMINARY PROVISION

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the jus commune, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

BOOK ONE
PERSONS

TITLE ONE
ENJOYMENT AND EXERCISE OF CIVIL RIGHTS

1. Every human being possesses juridical personality and has the full enjoyment of civil rights.

1991, c. 64, a. 1.

2. Every person has a patrimony.

The patrimony may be divided or appropriated to a purpose, but only to the extent provided by law.

1991, c. 64, a. 2.

3. Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.

These rights are inalienable.

1991, c. 64, a. 3.

4. Every person is fully able to exercise his civil rights.

2894. Interruption does not occur if the application is dismissed, the suit discontinued or peremptied.

1991, c. 64, a. 2894.

2895. Where the application of a party is dismissed without a decision having been made on the merits of the action and where, on the date of the judgment, the prescriptive period has expired or will expire in less than three months, the plaintiff has an additional period of three months from service of the judgment in which to claim his right.

The same applies to arbitration; the three-month period then runs from the time the award is made, from the end of the arbitrators' mandate, or from the service of the judgment annulling the award.

1991, c. 64, a. 2895.

2896. An interruption resulting from a judicial demand continues until the judgment acquires the authority of a final judgment (res judicata) or, as the case may be, until a transaction is agreed between the parties.

The interruption has effect with regard to all the parties in respect of any right arising from the same source.

1991, c. 64, a. 2896.

2897. An interruption which results from the bringing of a class action benefits all the members of the group who have not requested their exclusion from the group.

1991, c. 64, a. 2897.

2898. Acknowledgement of a right, as well as renunciation of the benefit of a period of time which has elapsed, interrupts prescription.

1991, c. 64, a. 2898.

2899. A judicial demand or any other act of interruption against the principal debtor or against a surety interrupts prescription with regard to both.

1991, c. 64, a. 2899.

2900. Interruption with regard to one of the creditors or debtors of a solidary or indivisible obligation has effect with regard to the others.

1991, c. 64, a. 2900.

TAB I

BILL NO. 19

(as introduced)

2nd Session, 60th General Assembly
Nova Scotia
56 Elizabeth II, 2007

Government Bill

Class Proceedings Act

The Honourable Cecil P. Clarke
Minister of Justice

First Reading: November 26, 2007

Second Reading: November 30, 2007

Third Reading: December 13, 2007 (LINK TO BILL AS PASSED)

An Act Respecting Class Proceedings

Be it enacted by the Governor and Assembly as follows:

19 (1) A person who is a member of a class involved in a class proceeding may opt out of the class proceeding

(a) in the manner and within the time specified in the certification order; or

(b) with leave of the court and on the terms or conditions the court considers appropriate.

(2) A person referred to in subsection (1) who opts out of the class proceeding ceases, from the time the person opts out and subject to any terms or conditions referred to in subsection (1), to be a member of the class involved in the class proceeding.

(3) Notwithstanding anything contained in this Section, the court may at any time determine whether or not a person is a class or subclass member, subject to any terms or conditions the court considers appropriate.

TAB J

IMPORTANT INFORMATION

This Act is Current to September 4, 2013

Class Proceedings Act

[RSBC 1996] CHAPTER 50

Contents

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).

TAB K

SNL2001 CHAPTER C-18.1

CLASS ACTIONS ACT

Amended:

2004 c47 s10

CHAPTER C-18.1

AN ACT TO PERMIT AN ACTION BY ONE PERSON ON BEHALF OF A CLASS OF PERSONS

(Assented to December 13, 2001)

Analysis

Discovery

18. (1) A party to a class action has the same rights of discovery as they would have in another action in the court.

(2) After the examination for discovery of a representative plaintiff, 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 may consider

(a) the stage of the class action and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the examination for discovery is necessary in view of the defence of the party seeking leave;

(d) the approximate monetary value of the 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 examined; and

(f) another matter the court considers relevant.

(4) A class member is subject to the same sanctions under the Rules of the Supreme Court, 1986 as a party for failure to submit to an examination for discovery.

2001 cC-18.1 s18

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TAB L

3rd Session, 55th Legislature
New Brunswick
54-55 Elizabeth II, 2005-2006

3e session, 55e législature
Nouveau-Brunswick
54-55 Elizabeth II, 2005-2006

BILL
50

CLASS PROCEEDINGS ACT

Read first time: April 25, 2006

Read second time:

Committee:

Read third time:

HON. BRADLEY GREEN, Q.C.

PROJET DE LOI
50

LOI SUR LES RECOURS COLLECTIFS

Première lecture : le 25 avril 2006

Deuxième lecture :

Comité :

Troisième lecture :

L'HON. BRADLEY GREEN, c.r.

Justice of the court may assign another judge of the court to hear the motion.

16(2) A judge who hears a motion under subsection (1) may but need not preside at the trial of the common issues.

Division B

Participation of Class Members

Participation of class members

17(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 class proceeding.

17(2) Participation under subsection (1) shall be in the manner and on the terms or conditions, including terms or conditions as to costs, that the court considers appropriate.

Opting out and opting in

18(1) A person who is a member of a class involved in a class proceeding may opt out of the class proceeding

(*a*) in the manner and within the time specified in the certification order, or

(*b*) with leave of the court and on the terms or conditions the court considers appropriate.

18(2) A person referred to in subsection (1) who opts out of the class proceeding ceases, from the time the person opts out and subject to any terms or conditions referred to in subsection (1), to be a member of the class involved in the class proceeding.

18(3) Subject to subsection (5), a person who is not a resident of New Brunswick and who would otherwise be a member of a class involved in the class proceeding may opt into the class proceeding

(*a*) in the manner and within the time specified in the certification order, or

(*b*) with leave of the court and on the terms or conditions the court considers appropriate.

18(4) A person referred to in subsection (3) who opts into a class proceeding is, from the time the person opts in

pour entendre une motion dans le cadre du recours collectif, le juge en chef de la cour peut affecter un autre juge de la cour à entendre la motion.

16(2) Le juge qui entend une motion en vertu du paragraphe (1) peut, mais ne doit pas nécessairement, présider l'instruction des questions communes.

Section B

Contribution et participation des membres du groupe

Contribution des membres du groupe

17(1) Afin de s'assurer que les intérêts du groupe ou d'un sous-groupe sont représentés de façon juste et appropriée ou pour tout autre motif valable, la cour peut en tout temps dans le cadre d'un recours collectif permettre à un ou plusieurs membres du groupe de contribuer au recours collectif.

17(2) La contribution prévue au paragraphe (1) a lieu de la façon et aux modalités ou conditions, notamment en matière de dépens, que la cour estime appropriées.

Choix de se retirer ou de participer

18(1) Toute personne qui est membre d'un groupe engagé dans un recours collectif peut s'en retirer :

a) soit de la façon et dans le délai indiqués dans l'ordonnance de certification;

b) soit avec l'autorisation de la cour et aux modalités ou conditions qu'elle estime appropriées.

18(2) Toute personne visée au paragraphe (1) qui se retire d'un recours collectif cesse d'être un membre du groupe engagé dans le recours collectif à compter de la date de son retrait et sous réserve de toutes modalités ou conditions mentionnées au paragraphe (1).

18(3) Sous réserve du paragraphe (5), une personne qui n'est pas un résident du Nouveau-Brunswick mais qui serait par ailleurs un membre du groupe engagé dans le recours collectif peut participer au recours collectif :

a) soit de la façon et dans le délai indiqués dans l'ordonnance de certification;

b) soit avec l'autorisation de la cour et aux modalités ou conditions qu'elle estime appropriées.

18(4) Toute personne visée au paragraphe (3) qui participe à un recours collectif est un membre du groupe en-

and subject to any terms or conditions referred to in subsection (3), a member of the class involved in the class proceeding.

18(5) A person shall not opt into a class proceeding under subsection (3) 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 set out in paragraphs 8(1)(*a*), (*b*) and (*c*).

18(6) If a subclass is created as a result of persons opting into a class proceeding under subsection (3), the representative plaintiff for that subclass shall ensure that the certification order for the class proceeding is amended, if necessary, to comply with subsection 10(2).

18(7) Notwithstanding anything in this section, if the court certifies a proceeding as a class proceeding on a motion by a defendant, a class member shall not opt out of the class proceeding other than with leave of the court.

18(8) Notwithstanding anything in this section, the court may at any time determine whether or not a person is a class or subclass member subject to any terms or conditions the court considers appropriate.

Discovery

19(1) Parties to a class proceeding have the same rights of discovery under the Rules of Court against one another as they would have in any other proceeding.

19(2) After discovery of the representative plaintiff or, if there are subclasses, one or more of the representative plaintiffs, a defendant may, with leave of the court, discover other class members.

19(3) In deciding whether to grant a defendant leave to discover other class members, the court shall consider

(*a*) the stage of the class proceeding and the issues to be determined at that stage,

(*b*) the presence of subclasses,

gagé dans le recours collectif à compter de la date de sa participation et sous réserve de toutes modalités ou conditions mentionnées au paragraphe (3).

18(5) Une personne ne peut participer à un recours collectif en vertu du paragraphe (3) à moins que le sous-groupe dont elle deviendra membre ait ou aura, au moment où elle devient membre, un représentant demandeur qui remplit les conditions énoncées aux alinéas 8(1)*a*), *b*) et *c*).

18(6) Si la participation des personnes à un recours collectif en vertu du paragraphe (3) entraîne la création d'un sous-groupe, le représentant demandeur pour ce sous-groupe doit, en cas de besoin, s'assurer que l'ordonnance de certification concernant ce recours collectif soit modifiée pour se conformer au paragraphe 10(2).

18(7) Malgré les autres dispositions du présent article, si la cour certifie sur motion du défendeur une instance comme recours collectif, un membre du groupe ne peut pas se retirer du recours collectif sans l'autorisation de la cour.

18(8) Malgré les autres dispositions du présent article, la cour peut en tout temps déterminer si une personne est un membre d'un groupe ou d'un sous-groupe, sous réserve des modalités ou conditions que la cour estime appropriées.

Enquête préalable

19(1) Les parties à un recours collectif ont, l'une à l'égard de l'autre, les mêmes droits à l'enquête préalable en vertu des Règles de procédure que si elles étaient parties à toute autre instance.

19(2) Après avoir effectué l'enquête préalable du représentant demandeur ou, s'il existe des sous-groupes, de l'un ou plusieurs des représentants demandeurs, un défendeur peut, avec l'autorisation de la cour, effectuer une enquête préalable de tout autre membre du groupe.

19(3) Afin de décider si elle doit accorder à un défendeur l'autorisation d'effectuer une enquête préalable de tout autre membre du groupe, la cour tient compte de ce qui suit :

a) l'étape du recours collectif et les questions à trancher à cette étape;

b) l'existence de sous-groupes;

(*a*) an account of the conduct of the class proceeding,

(*b*) a statement of the result of the class proceeding, and

(*c*) a description of any plan for distributing any settlement funds.

37(6) Subsections 21(3) to (5) apply with the necessary modifications to a notice referred to in subsection (5) of this section.

Appeals

38(1) Any party may appeal, without leave, to The Court of Appeal of New Brunswick from

(*a*) a judgment on common issues, or

(*b*) an order under Division B of this Part, other than an order that determines individual claims made by class or subclass members.

38(2) With leave of a judge of The Court of Appeal of New Brunswick, 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.

38(3) With leave of a judge of The Court of Appeal of New Brunswick, any party may appeal to that court from

(*a*) a certification order or an order refusing to certify a proceeding as a class proceeding, or

(*b*) a decertification order.

38(4) If a representative plaintiff for a class or subclass does not appeal or seek leave to appeal as permitted by subsection (1) or (3) within the time limit for bringing an appeal set under the Rules of Court or if a representative plaintiff abandons an appeal under subsection (1) or (3), any member of the class or subclass may make a motion

a) un compte rendu du déroulement du recours collectif;

b) un exposé du résultat du recours collectif;

c) une description de tout plan de distribution des sommes faisant objet du règlement amiable.

37(6) Les paragraphes 21(3) à (5) s'appliquent, avec les adaptations nécessaires, à l'avis mentionné au paragraphe (5) du présent article.

Appels

38(1) Toute partie peut, sans autorisation, interjeter appel devant la Cour d'appel du Nouveau-Brunswick :

a) soit d'un jugement sur les questions communes;

b) soit d'une ordonnance rendue en vertu de la section B de la présente partie, à l'exception d'une ordonnance statuant sur les demandes individuelles des membres du groupe ou du sous-groupe.

38(2) Avec l'autorisation d'un juge de la Cour d'appel du Nouveau-Brunswick, un membre du groupe ou du sous-groupe, un représentant demandeur ou un défendeur peut interjeter appel devant cette cour de toute ordonnance qui, selon le cas :

a) statue sur une demande individuelle d'un membre du groupe ou du sous-groupe;

b) rejette une demande de mesure de redressement pécuniaire individuelle présentée par un membre du groupe ou du sous-groupe.

38(3) Avec l'autorisation d'un juge de la Cour d'appel du Nouveau-Brunswick, toute partie peut interjeter appel devant cette cour :

a) soit d'une ordonnance de certification ou d'une ordonnance refusant de certifier une instance comme recours collectif;

b) soit d'une ordonnance annulant la certification.

38(4) Si le représentant demandeur d'un groupe ou d'un sous-groupe n'interjette pas appel ou ne demande pas l'autorisation d'interjeter appel en vertu du paragraphe (1) ou (3) dans le délai imparti pour le dépôt d'un appel aux termes des Règles de procédure ou si le représentant demandeur se désiste de l'appel prévu au paragraphe (1) ou

to a judge of The Court of Appeal of New Brunswick for leave to act as the representative plaintiff for the purposes of subsection (1) or (3).

38(5) A motion by a class or subclass member for leave to act as the representative plaintiff under subsection (4) shall be made within 30 days after the expiry of the appeal period available to the representative plaintiff or by such other date as the judge of The Court of Appeal of New Brunswick may order.

PART 5

COSTS, FEES AND DISBURSEMENTS

Costs

39(1) With respect to any proceeding or other matter under this Act, costs may be awarded in accordance with the Rules of Court.

39(2) Class members, other than a representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.

Agreements respecting fees and disbursements

40(1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff shall be in writing and shall

(*a*) state the terms or conditions 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,

(*c*) if interest is payable on fees or disbursements referred to in paragraph (*a*), state the manner in which the interest will be calculated, and

(*d*) state the method by which payment is to be made, whether by lump sum or otherwise.

40(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the motion of the solicitor.

(3), tout membre du groupe ou du sous-groupe peut demander, par voie de motion, à un juge de la Cour d'appel du Nouveau-Brunswick l'autorisation d'agir comme représentant demandeur aux fins du paragraphe (1) ou (3).

38(5) La motion visant à autoriser un membre du groupe ou du sous-groupe à agir comme représentant demandeur en vertu du paragraphe (4) est introduite dans les trente jours suivant l'expiration du délai d'appel dont dispose le représentant demandeur ou dans tout autre délai imparti par le juge de la Cour d'appel du Nouveau-Brunswick.

PARTIE 5

DÉPENS, HONORAIRES ET DÉBOURS

Dépens

39(1) Des dépens peuvent être accordés conformément aux Règles de procédure relativement à toute instance ou toute autre affaire aux termes de la présente loi.

39(2) Les membres du groupe, à l'exception d'un représentant demandeur, ne sont pas redevables des dépens sauf à l'égard de la décision sur leur propre demande individuelle.

Ententes relatives aux honoraires et aux débours

40(1) L'entente relative aux honoraires et aux débours conclue entre un avocat et un représentant demandeur est consignée par écrit et indique :

a) les modalités ou les conditions de paiement des honoraires et des débours;

b) une estimation des honoraires prévus, qu'ils soient subordonnés à l'issu favorable du recours collectif ou non;

c) si des intérêts sont payables sur les honoraires ou débours mentionnés à l'alinéa *a*), le mode de calcul des intérêts;

d) le mode de paiement choisi, que ce soit par une somme forfaitaire ou autrement.

40(2) L'entente relative aux honoraires et aux débours conclue entre un avocat et un représentant demandeur n'est exécutoire qu'avec l'autorisation de la cour, sur motion de l'avocat.

Class Proceedings Act

Legislature : 55
Bill No. : 50
First Reading : 2006-4-25
Committee of the Whole :
Third Reading : 2006-6-8
Download PDF : Bill 50

Session : 3
Member : Hon. Green
Second Reading : 2006-4-26
Amended :
Royal Assent : 2006-6-22

Text of Bill :
Chapter Outline

Opting out and opting in

18(1) A person who is a member of a class involved in a class proceeding may opt out of the class proceeding

(a) in the manner and within the time specified in the certification order, or

(b) with leave of the court and on the terms or conditions the court considers appropriate.

18(2) A person referred to in subsection (1) who opts out of the class proceeding ceases, from the time the person opts out and subject to any terms or conditions referred to in subsection (1), to be a member of the class involved in the class proceeding.

18(3) Subject to subsection (5), a person who is not a resident of New Brunswick and who would otherwise be a member of a class involved in the class proceeding may opt into the class proceeding

(a) in the manner and within the time specified in the certification order, or

(b) with leave of the court and on the terms or conditions the court considers appropriate.

18(4) A person referred to in subsection (3) who opts into a class proceeding is, from the time the person opts in and subject to any terms or conditions referred to in subsection (3), a member of the class involved in the class proceeding.

18(5) A person shall not opt into a class proceeding under subsection (3) 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 set out in paragraphs 8(1)(a), (b) and (c).

18(6) If a subclass is created as a result of persons opting into a class proceeding under subsection (3), the representative plaintiff for that subclass shall ensure that the certification order for the class proceeding is amended, if necessary, to comply with subsection 10(2).

18(7) Notwithstanding anything in this section, if the court certifies a proceeding as a class proceeding on a motion by a defendant, a class member shall not opt out of the class proceeding other

than with leave of the court.

18(8) Notwithstanding anything in this section, the court may at any time determine whether or not a person is a class or subclass member subject to any terms or conditions the court considers appropriate.

TAB M

Case Name:

Western Canadian Shopping Centres Inc. v. Dutton

Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co., Ernst & Young, Alan Lundell, The Royal Trust Company, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill,
appellants/respondents on cross-appeal;
v.
Western Canadian Shopping Centres Inc. and Muh-Min Lin and Hoi-Wah Wu, representatives of all holders of Class "A", Class "E" and Class "F" Debentures issued by Western Canadian Shopping Centres Inc.,
respondents/appellants on cross-appeal.

[2000] S.C.J. No. 63

[2000] A.C.S. no 63

2001 SCC 46

2001 CSC 46

[2001] 2 S.C.R. 534

[2001] 2 R.C.S. 534

201 D.L.R. (4th) 385

272 N.R. 135

[2002] 1 W.W.R. 1

J.E. 2001-1430

94 Alta. L.R. (3d) 1

286 A.R. 201

8 C.P.C. (5th) 1

106 A.C.W.S. (3d) 397

REJB 2001-25017

File No.: 27138.

Supreme Court of Canada

Hearing and judgment: December 13, 2000.
Reasons delivered: July 13, 2001.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA (62 paras.)

Practice -- Class actions -- Plaintiffs suing defendants for breach of fiduciary duties and mismanagement of funds -- Defendants applying for order to strike plaintiffs' claim to sue in representative capacity -- Whether requirements for class action met -- If so, whether class action should be allowed -- Whether defendants entitled to examination and discovery of each class member -- Alberta Rules of Court, Alta. Reg. 390/68, Rule 42.

L and W, together with 229 other investors, became participants in the federal government's Business Immigration Program by purchasing debentures in WCSC, which was incorporated by D, its sole shareholder, for the purpose of helping investor-class immigrants qualify as permanent residents in Canada. WCSC solicited funds through two offerings to invest in income-producing properties. After the investors' funds were deposited, WCSC purchased from CRI, for $5,550,000, the rights to a Crown surface lease and also agreed to commit a further $16.5 million for surface improvements. To finance WCSC's obligations to CRI, D directed that the Series A debentures be issued in an aggregate principal amount of $22,050,000 to some of the investors. D advanced more funds to CRI and corresponding debentures were issued, in particular the Series E and F debentures. Eventually, the debentures were pooled. When CRI announced that it could not pay the interest due on the debentures, L and W, the representative plaintiffs, commenced a class action complaining that D and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging their funds. The defendants applied to the Court of Queen's Bench for a declaration and order striking that portion of the claim in which the individual plaintiffs purport, pursuant to Rule 42 of the Alberta Rules of Court, to represent a class of 231 investors. The chambers judge denied the application. The majority of the Court of Appeal upheld that decision but granted the defendants the right to discovery from each of the 231 plaintiffs. The defendants appealed to this Court, and the plaintiffs cross-appealed taking issue with the Court of Appeal's allowance of individualized discovery from each class member.

Held: The appeal should be dismissed and the cross-appeal allowed.

In Alberta, class-action practice is governed by Rule 42 of the Alberta Rules of Court but, in the absence of comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them. Class actions should be allowed to proceed under Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of law or fact common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness. The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious". On procedural matters, all potential class members should be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out. This should be done before any decision is made that purports to prejudice or otherwise affect the interests of class members. The court also retains discretion to determine how the individual issues should be addressed, once common issues have been resolved. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis in a flexible and liberal manner, seeking a balance between efficiency and fairness.

number of class members or the identity of every class member is unknown; or (5) the class includes subgroups that have claims or defences that raise common issues not shared by all members of the class: see Ontario Class Proceedings Act, 1992, s. 6; British Columbia Class Proceedings Act, s. 7; see also Alberta Law Reform Institute, supra, at pp. 75-76. Common sense suggests that these factors should no more bar a class action suit in Alberta than in Ontario or British Columbia.

44 Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.

45 The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious", as the Chambers judge held. Unlike Rule 129, which is directed at the question of whether the claim should be prosecuted at all, Rule 42 is directed at the question of how the claim should be prosecuted. The "plain and obvious" standard is appropriate where the result of striking is to forever end the action. It recognizes that a plaintiff "should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success": Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094 (C.A.), at p. 1102 (quoted in Hunt, supra, at pp. 974-75). Denial of class status under Rule 42, by contrast, does not defeat the claim. It merely places the plaintiffs in the position of any litigant who comes before the court in his or her individual capacity. Moreover, nothing in Alberta's rules suggests that class actions should be disallowed only where it is plain and obvious that the action should not proceed as a representative one. Rule 42 and the analogous rules in other provinces merely state that a representative may maintain a class action if certain conditions are met.

46 The need to strike a balance between efficiency and fairness also belies the suggestion that class actions should be approached restrictively. The defendants argue that General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72, precludes a generous approach to class actions. I respectfully disagree. First, when Naken was decided, the modern class action was very much an untested procedure in Canada. In the intervening years, the importance of the class action as a procedural tool in modern litigation has become manifest. Indeed, the reform that has been effected since Naken has been motivated in large part by the recognition of the benefits that class actions can offer the parties, the court system, and society: see, e.g., Ontario Law Reform Commission, supra, at pp. 3-4.

47 Second, Naken on its facts invited caution. The action was brought on behalf of all persons who purchased new 1971 or 1972 Firenza motor vehicles in Ontario. The complaint was that General Motors had misrepresented the quality of the vehicles and that the vehicles "were not reasonably fit for use" (p. 76). The statement of claim alleged breach of warranty and breach of representation, and sought $1,000 in damages for each of approximately 4,600 plaintiffs. Estey J., writing for a unanimous Court, disallowed the class action. While each plaintiff raised the same claims against the defendant, the resolution of those claims would have required particularized evidence and fact-finding at both the liability and damages stages of the litigation. Far from avoiding needless duplication, a class action would have unnecessarily complicated the resolution of what amounted to 4,600 individual claims.

48 To summarize, class actions should be allowed to proceed under Alberta's Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of fact or law common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed.

49 Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

50 Another procedural issue that may arise is how to deal with non-common issues. The court retains discretion to determine how the individual issues should be addressed, once common issues have been resolved: see Branch, supra, at para. 18.10. Generally, individual issues will be resolved in individual proceedings. However, as under the legislation of British Columbia, Ontario, and Quebec, a court may specify special procedures that it considers necessary or useful: see

TAB N

** Preliminary Version **

Case Name:

Canada Post Corp. v. Lépine

Canada Post Corporation, Appellant;
v.
Michel Lépine, Respondent, and
Attorney General of Canada and Cybersurf Corp., Interveners.

[2009] S.C.J. No. 16

2009 SCC 16

[2009] 1 S.C.R. 549

[2009] 1 R.C.S. 549

387 N.R. 91

304 D.L.R. (4th) 539

67 C.P.C. (6th) 201

EYB 2009-156806

J.E. 2009-620

2009 CarswellQue 2490

File No.: 32299.

Supreme Court of Canada

Heard: November 17, 2008;
Judgment: April 2, 2009.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ.

(58 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

D. *Jurisdiction of the Ontario Superior Court of Justice*

38 There is no doubt that the Ontario Superior Court of Justice had jurisdiction pursuant to art. 3168 *C.C.Q.*, since the Corporation, the defendant to the action, had its head office in Ontario. This connecting factor in itself justified finding that the Ontario court had jurisdiction. The question whether there were obstacles to the recognition of the judgment is more problematic, especially given the allegations that it had been rendered in contravention of the fundamental principles of procedure and that the motion for authorization made in Quebec and the parallel application for certification made in Ontario had given rise to a situation of *lis pendens*.

E. *Issue of Notices to the Quebec Members of the National Class*

39 One of the main arguments made by the respondent in contesting the application for recognition relates to the issue of contravention of the fundamental principles of civil procedure. Under art. 3155(3) *C.C.Q.*, such a contravention precludes enforcement. The Court of Appeal accepted this argument, among others, to justify dismissing the application for recognition.

40 The issue of the application of art. 3155(3) arises in relation to the notices given pursuant to the Ontario Superior Court of Justice's judgment certifying the class proceeding. The respondent submits that the very content of the notices contravened the fundamental principles of procedure. In his opinion, the notices published in Quebec newspapers were insufficient and confusing. Their wording did not enable class members residing in Quebec to understand the impact of the Ontario judgment on their rights and on the authorization of the class action by the Quebec Superior Court on December 23, 2003.

41 This argument does not amount to a request to review the Ontario Superior Court of Justice's decision. The judge hearing the application for recognition does not examine the merits of the judgment (art. 3158 *C.C.Q.*). However, at the stage of recognition and, therefore, of enforcement of the judgment, he or she must consider whether the procedure leading up to the decision and the procedure for giving effect to it are consistent with the fundamental principles of procedure. The judge hearing the application is concerned not only with the procedure prior to the judgment but also with the procedural consequences of the judgment. This approach is particularly important in the case of class actions.

42 A class action takes place outside the framework of the traditional duel between a single plaintiff and a single defendant. In many class proceedings, the representative acts on behalf of a very large class. The decision that is made not only affects the representative and the defendants, but may also affect all claimants in the classes covered by the action. For this reason, adequate information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights - in particular the possibility of opting out of the class action - they have under the judgment, and sometimes, as here, about a settlement in the case. In the instant case, the question raised by the respondent relates not to the Ontario statute but to the way it was applied by the Ontario Superior Court of Justice in a case in which that court knew that a parallel proceeding was under way in Quebec. Were the notices provided for in the Ontario court's judgment therefore consistent, in the context in which they were published, with the fundamental principles of procedure applicable to class actions?

43 The Ontario Court of Appeal stressed the importance of notice to members in a case involving an application for recognition of a judgment rendered in Illinois, in the United States. It emphasized the vital importance of clear notices and an adequate mode of publication (*Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, at paras. 38-40). In a class action, it is important to be able to convey the necessary information to members. Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. In some situations, it may be necessary to word the notice more precisely or provide more complete information to enable the members of the class to fully understand how the action affects their rights. These requirements constitute a fundamental principle of procedure in the class action context. In light of the requirement of comity between courts of the various provinces of Canada, they are no less compelling in a case concerning recognition of a judgment from within Canada. Compliance with these requirements constitutes an expression of such comity and a condition for preserving it within the Canadian legal space.

44 In the context of the instant case, I agree with the opinion expressed by the Quebec Court of Appeal and with the findings of the trial judge on the notice issue. The procedure adopted in the Ontario judgment certifying the class proceeding for the purpose of notifying Quebec members of the national class established in the judgment contravened the

TAB O

2009 CarswellQue 9842, 2009 SCC 43, J.E. 2009-1852, 62 M.P.L.R. (4th) 1, 311 D.L.R. (4th) 1, 394 N.R. 1, [2009] 3 S.C.R. 65, 181 A.C.W.S. (3d) 218

2009 CarswellQue 9842, 2009 SCC 43, J.E. 2009-1852, 62 M.P.L.R. (4th) 1, 311 D.L.R. (4th) 1, 394 N.R. 1, [2009] 3 S.C.R. 65, 181 A.C.W.S. (3d) 218

Marcotte c. Longueuil (Ville)

Michel Marcotte, Appellant and City of Longueuil, Respondent and Attorney General of Ontario, Intervener

Usinage Pouliot Inc., Appellant and City of Longueuil, Respondent

Supreme Court of Canada

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

Heard: January 19, 2009
Judgment: October 8, 2009
Docket: 32213, 32214

Proceedings: affirmed *Marcotte c. Longueuil (Ville)* (2007), 2007 QCCA 866, 2007 QCCA 867, 2007 CarswellQue 5318, [2007] R.J.Q. 1467, Brossard J.C.A., Dufresne J.C.A., Rochon J.C.A. (Que. C.A.); affirmed *Usinage Pouliot inc. c. Longueuil (Ville)* (2006), 2006 CarswellQue 12030, 2006 QCCS 6517, Hébert J.C.S. (Que. S.C.); affirmed *Marcotte c. Longueuil (Ville)* (2006), 2006 CarswellQue 12027, 2006 QCCS 6516, Hébert J.C.S. (Que. S.C.)

Counsel: Marie Audren, Emmanuelle Rolland, for Appellants

Nicole Gibeau, Louis Bouchart D'Orval, for Respondent

Sara Blake, Lise Favreau, for Intervener

Subject: Civil Practice and Procedure; Public; Property; Restitution; Tax — Miscellaneous

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Refusal to certify

In early 2000s, cities on Montreal's South Shore were merged into large agglomeration — Legislature aimed to achieve equality in tax burdens among residents of amalgamated cities, and Quebec National Assembly accordingly

such a recalculation would give rise to a liquid and exigible claim, which would cause prescription to start running in respect of an action for restitution, with the underlying problems I mentioned above. In my view, this makes it all the more clear that the Court of Appeal was right to uphold the Superior Court's judgment and deny the appellants authorization to institute class actions. The actions would he of no assistance in interrupting prescription, since prescription has not yet started to run. The demands do not lead to the conclusion being sought. But this is not the only problem raised by the appellants' motions.

G. Composition of the Group

40 Owing to the specific characteristics of an action to quash a municipal by-law, difficulties arise with respect to the operation of certain procedural rules governing the establishment of and changes to the group covered by a class action. Thus, because of the fact that such a declaration would apply in respect of all ratepayers, members of the group would not be able to withdraw effectively from the action in nullity. This is contrary to the rules respecting the institution and conduct of class actions, which give them the option of withdrawing from or refusing to participate in such actions and set time limits for doing so (arts. 1006(*e*) and 1007 C.C.P.).

H. Jurisdictional Issues

41 The actions the appellants wish to institute fall undeniably within the ambit of art. 33 C.C.P. But other causes of nullity, such as formal defects and irregularities, would instead fall within the framework of annulment proceedings over which the Superior Court is granted jurisdiction in statutes relating to municipalities, such as the *Cities and Towns Act*, s. 397, and the *Municipal Code of Québec*, R.S.Q., c. C-27.1, arts. 689 and 690. In many cases, there is a fine line between the subject matter of a motion for annulment and that of an action in nullity under art. 33 (see Rousseau, at pp. 766-68; Hétu and Duplessis, at p. 8 553; *Immeubles Port Louis Ltée c. Lafontaine (Village)*, at pp. 343-46, *per* Gonthier J.). Recourse to the class action in such situations could hamper the conduct of proceedings that are in principle simple and quick, and would hardly be consistent with the principle of proportionality set out in art. 4.2 C.C.P.

I. Principle of Proportionality

42 Even though there is no need to invoke the principle of proportionality to justify the dismissal of the motions to authorize the class actions in issue here, I think it would be helpful to add a few comments about this principle, as I would not wish to limit it to a principle of interpretation that confers no real power on the courts in respect of the conduct of civil proceedings in Quebec.

43 The principle of proportionality set out in art. 4.2 C.C.P. is not entirely new. To be considered proper, a proceeding must be consistent with it (see Y.M. Morisette, "Gestion d'instance, proportionnalité et preuve civile: état provisoire des questions" (2009), 50 *C. de D.* 381). Moreover, the requirement of proportionality in the conduct of proceedings reflects the nature of the civil justice system, which, while frequently called on to settle private disputes, discharges state functions and constitutes a public service. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an abuse of the public service provided by the institutions of the civil justice system. There are of course special rules for the most diverse

TAB P

2006 CarswellQue 3689, 2006 SCC 19, J.E. 2006-1081, 51 C.C.P.B. 163, 2006 C.L.L.C. 220-033, 2006 C.E.B. & P.G.R. 8200, 266 D.L.R. (4th) 542, 149 L.A.C. (4th) 225, 348 N.R. 201, [2006] 1 S.C.R. 666

2006 CarswellQue 3689, 2006 SCC 19, J.E. 2006-1081, 51 C.C.P.B. 163, 2006 C.L.L.C. 220-033, 2006 C.E.B. & P.G.R. 8200, 266 D.L.R. (4th) 542, 149 L.A.C. (4th) 225, 348 N.R. 201, [2006] 1 S.C.R. 666

Bisaillon c. Concordia University

Concordia University (Appellant) and Richard Bisaillon, Régie des rentes du Québec, Concordia University Faculty Association (CUFA), John Hall and Howard Fink (Respondents)

Concordia University Faculty Association (CUFA) (Appellant) and Richard Bisaillon, Régie des rentes du Québec, Concordia University, John Hall and Howard Fink (Respondents)

Supreme Court of Canada

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Abella, Charron JJ.

Heard: December 14, 2005
Judgment: May 18, 2006
Docket: 30363

Counsel: Nancy Boyle, Guy Du Pont, Nick Rodrigo, Jean-Philippe Groleau for Appellant/Respondent, Concordia University

John T. Keenan, Harold C. Lehrer for Respondent/Appellant, Concordia University Faculty Association

Mario Évangéliste, Marie Pépin for Respondent, Richard Bisaillon

No one for Respondents, Régie des rentes du Québec, John Hall, Howard Fink

Subject: Corporate and Commercial; Civil Practice and Procedure; Labour and Employment; Public

Pensions --- Practice in pension actions — Jurisdiction

Employer university offered unique pension plan to all employees, more than 80 per cent of whom were unionized and represented by nine unions — Each collective agreement mentioned pension plan — Unionized employee B brought motion for authorization to bring class action against employer — B alleged employer granted itself contri

96 In my view, the absurd multiplicity of proceedings associated with the respondent's claim is symptomatic of a misapplication of the *Weber* test. Bringing the claim in front of the Quebec Superior Court's inherent jurisdiction is the only way to avoid this result because it is the only solution that recognizes that the essential character of this dispute transcends any one collective agreement, and thus the exclusive jurisdiction of any labour arbitrator. It is the only principled and practical way for the respondent's claim to finally be resolved. At the same time, and for the same reason this claim escapes the labour arbitrator's exclusive jurisdiction in the first place, a decision by the Quebec Superior Court will not imperil any of the terms negotiated individually by any of the unions involved. Such matters remain the exclusive domain of the labour arbitrator.

97 In reaching this conclusion, I do not comment on whether the respondent's proposed class action should be certified as such. That is a matter for the Quebec Superior Court to decide. Accordingly, the possibility that some litigants may opt out of the class action and begin their own court proceedings is irrelevant at this stage. The respondent's claim may be argued individually, authorized as a class action, or joined with independent actions by other beneficiaries; it may even need to be resolved by an appellate court. But whichever of these options ultimately materializes, an application to the Quebec Superior Court is still the only procedure that offers the hope of conclusively settling how the appellant university should finance the Fund.

98 I also do not purport to decide whether the respondent has a "sufficient interest" to proceed with this claim independently of his union: see art. 55 of the *Code of Civil Procedure*, R.S.Q., c. C-25. This Court has only been asked to determine whether the Quebec Superior Court has jurisdiction. Now that this has been established, though, that court may still refuse to render judgment if it is not convinced of the sufficiency of the respondent's interest in the claim: see art. 462 of the *Code of Civil Procedure*. Again, any uncertainty concerning the answer to this question cannot serve to remove jurisdiction from the Quebec Superior Court. To the contrary, the Quebec Superior Court is the only forum vested with the jurisdiction to hear this claim whomever may be most suited to advance it.

5. Conclusion

99 While a labour arbitrator enjoys exclusive jurisdiction over matters whose essential character arises out of the interpretation, application, administration or violation of a collective agreement, his/her exclusive jurisdiction does not extend beyond that point. Rather, in such a situation, the inherent jurisdiction of the superior court will be engaged. In the present appeal, the respondent's claim transcends the collective agreement binding him to the appellant university and directly implicates the Fund of which he is but one of many beneficiaries. The essential character of this dispute cannot be said to arise out of a collective agreement.

100 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

TAB Q

1981 CarswellQue 105, [1981] 1 S.C.R. 553, 38 N.R. 205, J.E. 81-553

1981 CarswellQue 105, [1981] 1 S.C.R. 553, 38 N.R. 205, J.E. 81-553

Nault c. Canadian Consumer Co.

Robert Nault, Appellant and Canadian Consumer Company Limited, Respondent

Supreme Court of Canada

Martland, Dickson, Beetz, McIntyre and Chouinard JJ.

Judgment: February 18, 1981
Judgment: May 11, 1981

Proceedings: On appeal from the Court of Appeal for Quebec

Counsel: *Pierre Sylvestre* and *Mario Bouchard*, for the appellant.

George R. Hendy and *William Brock*, for the respondent.

Subject: Civil Practice and Procedure

Practice --- Parties — Representative or class actions

Appellant applying for leave to bring class action for specific performance of contract — Respondent failing to deliver cutlery ordered and paid for by appellant in response to newspaper advertisement — Specific performance alone being inadequate remedy for all members of class who had ordered and not received cutlery — Difficult to establish entirely homogeneous class because of choice of contract remedies offered by art. 1065 of Civil Code — Appellant not in position to provide adequate representation for class as required by s. 1033(d) of Code of Civil Procedure — Leave to bring action denied — Civil Code, art. 1065 — Code of Civil Procedure, s. 1003.

English version of the judgment of the Court delivered by *Chouinard J.*:

1 Appellant was given leave to bring a class action by a judgment of the Superior Court on May 9, 1979, and this judgment was reversed by the Court of Appeal on January 14, 1980, hence his appeal.

2 In his reasons concurred in by Turgeon J.A., Lamer J.A., as he then was, summarized the issue as follows:

[TRANSLATION] On November 19, 1978 Robert Nault, the respondent in this appeal and applicant in the Superior Court, read advertising in the newspaper *Dimanche-Matin* by which Canadian Consumer Company Limited, the appellant, was offering cutlery for $16.88. Mr. Nault completed the order form for two sets of cutlery, indicating on the detachable coupon his Chargex account number, for the sum of $39.97, representing the cost of two sets of cutlery plus sales tax and shipping costs. The amount of $39.97 was in fact received by Canadian Consumer a few days later, on November 24, 1978. When the company delayed in sending him his merchandise, Nault contacted them several times and filed complaints with the federal Consumer Affairs Bureau of the Department of Consumer and Corporate Affairs. On March 8, 1979 he received a cheque, dated March 2, 1979, refunding the amount paid by him. He chose not to cash it and filed in the Superior Court a motion to bring a class action. The substantive conclusions which he intends eventually to seek for himself and all others in the "group" which he wishes to represent are as follows:

> To order delivery of the cutlery bought by members;
>
> To order respondent to pay members of the group damages on account of the delay in delivery, consisting of interest at the legal rate on the purchase price, from the expiry of one month after the date of payment;

The group he wishes to represent, and of which he says he is a member, is described as follows:

> Any person who has accepted one of the public offers made in the form of advertising in a newspaper of the Province of Quebec, by which the respondent offered to sell "six place settings" of Old Colony cutlery, who has made payment, and who has not received the cutlery bought within one month of payment;

3 Article 1003 *C.C.P.* lists the conditions on which the prior authorization necessary to bring a class action may be given:

> *1003.* The Court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> (a) the recourses of the members raise identical, similar or related questions of law or fact;
>
> (b) the facts alleged seem to justify the conclusions sought;
>
> (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
>
> (d) the member to whom the Court intends to ascribe the status of representative is in a position to represent the members adequately.

4 In accordance with para. (*d*) of this article, Lamer J.A. concluded that the motion for authorization should be dismissed because appellant is not in a position to provide adequate representation for the members of the group

described in the motion. This is because the conclusion sought is too limited to give effect to the rights of members of the group. Apart from interest at the legal rate on the amount paid of $39.97, from one month after payment until delivery, which I shall deal with in greater detail below, the only conclusion sought is "delivery of the cutlery bought by members". This single conclusion could not enable appellant to adequately represent the members of the group, in which as Lamer J.A. pointed out, [TRANSLATION] "the personal interests varied as follows:

> 1. those who, like himself, did not wish to be repaid, whether an offer had been made to them or not, and who continued to want only the cutlery and/or damages;
>
> 2. those who accepted the refund and who wanted to have damages;
>
> 3. those who in fact obtained the cutlery, but later than one month after making payment, and who wanted interest on the amount paid for the period elapsed beyond the month;
>
> 4. those who had no cutlery, received no refund and wanted their money and interest;
>
> 5. finally, those who only wanted the cutlery or a refund."

5 Lamer J.A. then raised the question of whether, in view of the provision of art. 1005 *C.C.P.* that "the judgment granting the motion describes the group whose members will be bound by any judgment", the judge could have limited the group so as to make appellant an adequate representative. In the circumstances of the case at bar, he felt that in the absence of an amended motion the judge could not impose on appellant a duty to represent a group other than the one he was seeking to represent, even if it constituted a sub-group. The motion accordingly had to be dismissed, as we have seen, for the reason that appellant is not in a position to provide adequate representation for members of the group described in the motion.

6 It would appear to me that in an action on a contract it is often going to be difficult to establish an entirely homogeneous group because of the choice of remedies offered by art. 1065 *C.C.*, in the event of a default by the debtor:

> *1065.* Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense, or that the contract from which the obligation arises be set aside; subject to the special provisions contained in this code, and without prejudice, in either case, to his claim for damages.

7 For my part, I would hesitate to adopt an interpretation as a result of which a class action could not be brought on a contract, and in my opinion it suffices for the conclusion sought to be capable of providing an appropriate remedy for all the members of the group, leaving those who prefer some other remedy to disassociate themselves from the group.

8 I do not propose to discuss this point any further, because in my view there is in any case another compelling

reason why the motion for authorization should have been dismissed.

9 This reason was not considered either in the Superior Court or in the Court of Appeal, but was argued in this Court at the latter's request.

10 It is that the conclusion sought, by itself, apart from the interest asked for (which I shall discuss below) could not have been allowed because it is, contrary to art. 469 *C.C.P.*, unenforceable.

11 The fact is that cutlery is not a certain and determinate thing, and if respondent does not voluntarily carry out the judgment ordering him to make delivery, that judgment cannot be made the subject of compulsory execution by seizure.

12 As Dorion J. observed in *North American Iron & Metal Co., Re* [FN1] at p. 8: [TRANSLATION] "Everyone is agreed on the meaning of the words 'certain and determinate thing': it is a thing the identity of which is known."

13 The case at bar involves cutlery of the king described in the advertisement but not identified, not individualized.

14 This is not a case in which performance of the obligation in kind can be obtained under art. 1065 *C.C.*

15 Applying the rules of art. 1065 *C.C.* to obligations to give, Mignault observed in *Le droit civil canadien*, vol. 5, at p. 405:

> [TRANSLATION] 3. *Obligation to give a thing which is not individually specified*, as for example, A *horse*. — There is no direct means of forcing the debtor to carry out his obligation; for if he does not wish to buy a horse and give it to his creditor, the law obviously cannot compel him to do so. The creditor then has only one recourse, a judgment for damages.

16 In the *Traité de Droit civil du Québec*, vol. 7-bis, at p. 233, No. 339, Faribault wrote:

> [TRANSLATION] When the object of the obligation to give is not a specific thing, it cannot be performed in kind. The creditor's only recourse then is a claim for damages.

17 In "L'exécution spécifique des contrats en droit québécois", (1958-59), 5 McGill L.J. 108, Jean Louis Baudoin writes, at p. 111:

> [TRANSLATION] In the contract of sale, specific performance depends solely on the nature of the item sold. When this is an indefinite or unascertained thing, as in a sale by number, weight or measure, the right of ownership does not pass to the buyer before the counting, weighing or measuring have taken place; specific performance is impossible because the subject-matter of the contract is insufficiently identified. On the other hand, if the subject-matter is a definite item, whether movable or immovable, performance in kind is always granted by

the courts. As the buyer of movable property becomes the owner even before delivery, he can claim it from the seller or from any third party. In the event of a refusal by the latter to give up the property in question, the creditor may be seizure in revendication obtain physical and legal possession of it.

18 For the time when ownership passes to the buyer, as mentioned in the preceding passage, reference may be made to arts. 1025 and 1026 *C.C.*

19 The same author further states, at p. 127:

[TRANSLATION] The choice given to the creditor by our law may become a dangerous weapon against him. This risk is twofold. First, the creditor's claim must be so presented that the judgment allowing it can be enforced. Accordingly, if he words his conclusions badly, he risks losing any remedy he may have against his debtor. Second, the courts cannot decide *ultra petita* (art. 113 *C.C.P.*): the judge cannot supply an alternative conclusion which has been omitted, as under our law he is required to consider only the actual claim of the creditor. If, therefore, the latter opts for specific performance, when in the court's opinion this is essentially impossible, he cannot be awarded any monetary compensation. This rule is followed to the point that any judgment ordering a type of performance not recognized by the law is invariably reversed by the appellate courts. To avoid this problem of form, the creditor nowadays generally submits a principal conclusion asking for specific performance and an alternative conclusion asking for damages.

20 In *Melançon v. Commissaires d'écoles de Grand' Mère*[FN2], which concerned an action for repayment of part of the price paid for bricks, due to a failure to deliver the entire quantity, Rivard J. observed, at pp. 502-3:

[TRANSLATION] Finally, it should be noted that the general rule of art. 1065 is that failure to perform the obligation makes the debtor liable for damages. The creditor may *also* ask for specific performance of the contract or that it be set aside "in cases which admit of it".

Can the commissioners ask for specific performance in the case at bar? One should not lose sight of the fact that delivery cannot be made without the vendor's co-operation, that no one can make it but him, and he does not wish to do so. In any event, the commissioners asked Melançon to perform his obligation, they gave him notice to deliver: and he refused. Even after this first refusal, he could certainly, in response to the action, have offered to perform, as performance of an obligation is always admissible up to the time of judgment. He did not wish to do so, he maintained the position he had taken, he persisted and continues to persist in refusing delivery. How can he then complain that the commissioners have not called on him to do what they asked, which he refused and still refuses to do?

21 As Tancelin observed, *Théorie du droit des obligations*, 1975, at p. 367, dealing with obligations to give a generic thing, as in the case at bar, [TRANSLATION] "... His [the debtor's] refusal to perform may then prevent performance in kind and the creditor must accept damages". See also on the obligation to perform, *Quebec County Railway Company v. Montcalm Land Company Limited*[FN3].

22 Accordingly, I am of the opinion that the motion for authorization should be dismissed on the ground that the

conclusion sought by the class action in question, namely delivery of the cutlery, unaccompanied by an alternative conclusion, could not be allowed because it is unenforceable.

23 However, appellant argued that on a motion for authorization of a class action the judge should take an active part and revise the proposed conclusion to make it admissible. Appellant relied on various articles in the title regarding the conduct of the class action once authorization has been given and the action brought. He also relied on art. 1005 *C.C.P.*:

> *1005.* The judgment granting the motion:
>
> (a) describes the group whose members will be bound by any judgment;
>
> (b) identifies the principal questions to be dealt with collectively and the related conclusions sought;
>
> (c) orders the publication of a notice to the members.
>
> The judgment also determines the date after which a member can no longer request his exclusion from the group, the delay for exclusion cannot be less than thirty days nor more than six months after the date of the notice to the members. Such delay is peremptory; the court may nevertheless permit the exclusion of a member who shows that in fact it was impossible for him to act sooner.

24 It appears from this article that the judge should not simply allow or refuse the authorization, but in allowing it should make certain rulings. He must describe the group whose members will be bound by any judgment, identify the principal questions that are to be dealt with collectively and the related conclusions sought, and order publication of a notice to the members. He must also determine the date after which a member can no longer request his exclusion from the group.

25 The judge undoubtedly enjoys some discretion in this regard, and is not bound strictly by the claims presented by the applicant. However, there is little in the record of the case at bar to indicate what the judge could have done under this article. It is rather a case in which the judge could not correct the written pleadings. In my view, the judge could not have amended the conclusions sought by attaching an alternative conclusion conflicting with the express wish of appellant, who was not willing to accept any reimbursement. After alleging that on or about March 8, 1979 he received from respondent a cheque for $39.36 in repayment of the purchase price (this cheque is filed as Exhibit R-4), appellant alleged:

> [TRANSLATION] Applicant never solicited this repayment, refuses it and therefore does not intend to cash the said cheque;

26 I do not see how the judge could add a conclusion which had been so categorically rejected by appellant himself.

27 There only remains to consider the possibility that appellant could amend his pleadings.

28 In his factum, appellant submitted the following claim:

> [TRANSLATION]
>
> ALLOW this appeal;
>
> REVERSE the judgment of the Court of Appeal;
>
> GRANT appellant authorization to bring a class action in accordance with the conclusions of the initial motion;
>
> IDENTIFY any other alternative conclusion which the Court sees fit to award in the interests of members of the group.

29 At the hearing, appellant further submitted an oral motion for leave to amend, to add an alternative claim for damages corresponding to the amount paid plus interest on that amount.

30 I do not think this motion can be granted at this stage. Apart from adding a conclusion which is in conflict with appellant's initial intent, its only effect would be to allow him to obtain considerable costs.

31 Appellant admitted receiving a cheque, which he filed as an exhibit, given to him to repay the amount which his conclusion now seeks to claim. The result would be that, if delivery is not made within the time limit, appellant would obtain the payment he was offered on March 8, 1979, while at the same time subjecting respondent to costs which would have been avoided if appellant had accepted at that time what he is now demanding.

32 That leaves the claim for interest. Appellant asked that respondent be ordered to pay the members of the group damages on account of the delay in delivery, consisting of interest at the legal rate on the purchase price, commencing one month after payment.

33 Do the facts alleged appear to justify a finding that appellant is entitled to interest commencing one month after payment? Under art. 1070 *C.C.*, damages are not due until the debtor is in default. Appellant did not allege that he had put respondent in default. The notice published by respondent indicated no deadline for delivery. According to art. 1067 *C.C.*, commencing an action at law constitutes putting the debtor in default. In a class action what procedure constitutes commencing an action — a motion for authorization or the instituting of an action when authorization has been given? Do the facts alleged appear to justify a finding that appellant is entitled to interest after March 8, 1979, the date on which respondent offered to reimburse the sum paid by appellant? These are points which were not argued in this Court, but which I felt should be mentioned to illustrate more clearly why this motion for a class action cannot be allowed by this Court on the conclusion relating to interest alone.

34 For these reasons, I would not allow the motion for leave to amend submitted by appellant at the hearing and

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors of record:

Solicitors for the appellant: *Sylvestre, Brisson, Dupin, Charbonneau & Bourdeau*, Montreal.

Solicitors for the respondent: *Phillips & Vineberg*, Montreal.

FN1 (1923), 36 K.B. 1 (Que. C.A.).

FN2 (1934), 58 K.B. 498.

FN3 (1928), 46 K.B. 262.

END OF DOCUMENT

TAB R

Case Name:

Fischer v. IG Investment Management Ltd.

Between
Dennis Fischer, Sheila Snyder, Lawrence Dykun, Ray Shugar and Wayne Dzeoba, Plaintiffs (Respondents), and
IG Investment Management Ltd., CI Mutual Funds Inc., Franklin Templeton Investments Corp., AGF Funds Inc. and AIC Limited, Defendants (Appellants)

[2012] O.J. No. 343

2012 ONCA 47

287 O.A.C. 148

15 C.P.C. (7th) 81

109 O.R. (3d) 498

346 D.L.R. (4th) 598

211 A.C.W.S. (3d) 785

2012 CarswellOnt 635

Dockets: C53852, C53853

Ontario Court of Appeal
Toronto, Ontario

W.K. Winkler C.J.O., G.J. Epstein J.A. and G.I. Pardu J. (ad hoc)

Heard: December 6, 2011.
Judgment: January 27, 2012.

(84 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Appeal by mutual fund managers from order of Divisional Court allowing respondents' appeal and granting certification of proposed class action dismissed -- Respondent investors sued appellants for damages for permitting market timing that caused significant losses to respondents -- Securities Commission had investigated appellants and required them to pay $205,600,000

69 While this speculation about future opting out may ultimately prove to be correct, it ignores the well-settled principle that a right to opt out is an important element of procedural fairness in class proceedings. It is not an illusory right that should be negated by speculation, judicial or otherwise. Further, on a practical level, the fact that the economics of judicial recourse is a potential barrier to proceeding individually is an argument in favour of - not against - certification of a class proceeding.

70 The motion judge's third reason for dismissing the plaintiffs' argument regarding procedural fairness misconstrues the very rationale for and approach to class proceedings in this province. According to the motion judge, at paras. 67-69, even if a class action were to be certified, investors would not truly have their day in court unless individual assessment trials were required. In support of this conclusion, the motion judge noted that class action litigation is prosecuted by representative plaintiffs and class counsel and, accordingly, investors "would be non-participants in the resolution of the common issues" (at para. 69). The motion judge then equated the non-participation by investors in the OSC proceedings with the so-called non-participation by investors in a class action, at para. 69:

> In my opinion, the issue in this case is not whether the investors *who were non-participants in the OSC proceedings and who would be non-participants in the resolution of the common issues* had or would have procedural fairness. The issue is whether they have had access to justice and whether the other important values of the *Class Proceedings Act, 1992* have been satisfied. The considerable power of the subjective and emotive plea that the investors have not had their day in court misdirects the analysis from the access to justice and other policy issues that inform the preferable procedure debate ... [Emphasis added.]

71 The notion that class members would not have their day in court unless individual assessment trials were to take place is contrary to the very essence of a class proceeding. Were it to be accepted as a general principle, it would serve to defeat every certification motion. The fundamental purpose of the class proceeding is to provide access to justice, not to deny it. Equating the *total* lack of participation by investors in the OSC proceedings with their alleged non-participation in resolving the common issues in the class proceeding ignores the underlying representative structure of a class proceeding. The purpose of ensuring that there is an adequate representative plaintiff is to ensure that the rights of each class member are protected and the claims of each are advanced vigorously.

72 As stated in *Hollick*, at para. 15: "by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own". This economy is achieved, in part, by appointing a representative plaintiff who shares a sufficient common interest with other members of the class and by allowing the representative plaintiff, under court supervision, to conduct the litigation on behalf of class members. The notion of representation that is inherent in the procedural mechanism of a class proceeding is a very far cry from the complete absence of participation by investors in the OSC proceedings. The motion judge erred in dismissing this critical distinction as simply a "subjective and emotive plea" that has nothing to do with access to justice.

73 Moreover, the above passage clearly reveals the motion judge's failure to properly consider the accessibility of the OSC proceedings insofar as the class members are concerned. To repeat, in his view, "the issue in this case is not whether the investors ... had or would have procedural fairness. The issue is whether they have had access to justice". Yet access to justice by the investors surely could not be achieved through the completion of a process that was not made accessible to them.

74 By ignoring the essential differences between the scope of the OSC's jurisdiction and remedial powers and by treating as irrelevant the lack of participation in those proceedings by class members or their representatives, the motion judge viewed the OSC proceedings as if they were a reasonable alternative to a class proceeding. He then analyzed the motion before him as though the key issue were the propriety of the settlements attained through the s. 127 proceedings. Thereafter, he applied the settlement approval criteria under the *CPA* to the settlements flowing from the OSC proceedings as a basis for finding that those proceedings were a reasonable alternative to the proposed class proceeding. This circular analysis compounded the initial error in principle.

75 The Divisional Court properly identified the motion judge's error in applying the test for approval of a settlement to the preferable procedure question under s. 5(1)(d) of the CPA. Molloy J. explained in detail, at paras. 48-57, why these criteria are not applicable at the certification stage. I would add that settlement criteria relative to a class action settlement cannot be applied to an OSC settlement for the simple reason that those criteria are based on a certification

TAB S

Case Name:

Currie v. McDonald's Restaurants of Canada Ltd.

Between
Greg Currie, plaintiff/respondent, and
McDonald's Restaurants of Canada Limited, McDonald's Corporation and Simon Marketing Inc., defendants/appellants

[2005] O.J. No. 506

74 O.R. (3d) 321

250 D.L.R. (4th) 224

195 O.A.C. 244

7 C.P.C. (6th) 60

137 A.C.W.S. (3d) 250

Dockets: C41264, C41289 and C41361

Ontario Court of Appeal
Toronto, Ontario

R.J. Sharpe, R.P. Armstrong and R.A. Blair JJ.A.

Heard: November 15, 2004.
Judgment: February 16, 2005.

(53 paras.)

Civil procedure -- Parties -- Class or representative actions -- Representative plaintiff -- Appeals -- International law and conflict of laws -- Conflict of laws -- Foreign judgments -- Recognition of judgments of foreign state.

Appeal by the defendant, McDonald's Restaurants of Canada Ltd, from an order that allowed this matter to proceed, despite the fact that similar claims had been settled by class action. McDonald's

27 On the other hand, provided the interests of non-resident class members were adequately represented, recognition and enforcement of foreign class proceedings would seem desirable. Recognition of the judgment would encourage the defendant to extend the benefits of the settlement to non-residents. Non-resident class members would receive a benefit without resorting to litigation and the defendant would buy peace from further litigation.

28 The right to opt out is an important procedural protection afforded to unnamed class action plaintiffs. Taking appropriate steps to opt out and remove themselves from the action allows unnamed class action plaintiffs to preserve legal rights that would otherwise be determined or compromised in the class proceeding. Although she was not referring to inter-jurisdictional issues, in Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 at para. 49, McLachlin C.J.C. identified the importance of notice as it relates to the right to opt out: "A judgment is binding on a class member only if the class member is notified of the suit and given an opportunity to exclude himself or herself from the proceeding." The right afforded to plaintiff class members to opt out has been found to provide some protection to out-of-province claimants who would prefer to litigate their claims elsewhere: Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389 at 404 (S.C.J.). It is obvious, however, that if the right to opt out is to be meaningful, the unnamed plaintiff must know about it and that, in turn, implicates the adequacy of the notice afforded to the unnamed plaintiff.

29 The respondent submits that recognition should be withheld absent an order requiring non-resident plaintiffs to opt in: see D.L. Bassett, "U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction" (2003) 72 Fordham Law Review 41. In some provinces (Alberta: Class Proceedings Act, S.A. 2003, c. C-16.5, s. 17(1)(b); British Columbia: Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 16(2); Saskatchewan: The Class Actions Act, S.S. 2001, c. C-12.01, s. 18(2); Newfoundland and Labrador Class Actions Act, SNL 2001, c. C-18.1, s. 17(2)) legislation requires out of province plaintiffs opt in to class proceedings. There may well be cases where the nature of the rights and interests at stake would make such a requirement appropriate as a prerequisite to recognition and enforcement, but I do not accept the suggestion that unnamed plaintiffs should always be required to opt in as a prerequisite to recognition. In my view, the case at bar does not fall into the category where an "opt in" order should be required. Here, the interest of each individual plaintiff is nominal at best. An order requiring members of the plaintiff class to opt in would, as a practical matter, effectively negate meaningful class action relief.

30 In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. I would add two qualifications: First, as stated by LaForest J. in Hunt v. T & N plc., above at p. 325, "the exact limits of what constitutes a reasonable assumption of jurisdiction" cannot be rigidly defined and "no test can perhaps ever be rigidly

41 The appellants argue that the motion judge erred in law by applying a higher standard to the notice than would be applied in an Ontario class action. They point out that under Ontario law, there is no absolute requirement for effective notice in class actions and, where the stake of an individual class member is extremely low, notice requirements may be tailored accordingly. In the present case, the individual class member could assert no more than a mathematical chance to win a prize and given the low value of such a claim, Ontario law sets a very low standard. The Class Proceedings Act, S.O. 1992, c. 6, ss. 17 and 20 direct the Ontario courts making directions regarding notice to consider, inter alia, the cost of notice, the size of the class and the nature of the relief sought. The Act specifically permits the court, having regard to these matters, to dispense with notice where appropriate (s. 17(2)). In consumer class actions involving large plaintiff classes asserting claims that are essentially insignificant on an individual basis, Canadian courts have approved notice arguably less effective than that approved in the case at bar: Chadha v. Bayer, above; Wilson v. Servier Canada Inc. (2002), above.

42 I agree that the motion judge appears not to have assessed the adequacy of the Canadian notice against the standard mandated by Ontario law for Ontario class actions. I disagree, however, that he erred is so doing. In assessing the fairness of the foreign proceedings, "the courts of this country must have regard to fundamental principles of justice and not to the letter of the rules which, either in our system, or in the relevant foreign system, are designed to give effect to those principles" (Adams v. Cape Industries plc. [1990] Ch. 433 at 559 (C.A.). The adequacy of the notice had to be assessed in terms of what is required in an international class action involving the assertion of jurisdiction against non-residents. While Ontario's domestic standard my have some bearing upon that issue, I do not agree that it is conclusive, particularly in light of the importance of notice to the jurisdictional issues discussed above.

43 In my view, the motion judge was entitled to look, as he did, to the standard the American court applied to its own residents. American and Canadian class members had similar if not identical interests at stake and there was no relevant basis upon which the Illinois court could have concluded that one standard of procedural fairness was appropriate for the American class and another for the Canadian. In the result, the Illinois court applied a different and lower standard in determining what notice should be given to the Canadian plaintiffs. I would not interfere with the motion judge's conclusion that there was a denial of natural justice. Natural justice surely requires that similarly situated litigants be accorded equal (although not necessarily identical) treatment.

3. Is Currie precluded by the doctrines of res judicata or abuse of process from prosecuting his claim in Ontario?

44 The appellants argue that Currie should be bound by Boland judgment on the basis that he is in the same interest as or a privy to Parsons. Parsons did not appeal the motion judge's finding that he attorned to the jurisdiction of the Illinois court; therefore, he is bound by it. The allegations in the Currie action are the same as those advanced by Parsons. The Currie action was brought as a protective measure to preserve the right to bring an action in Canada on behalf of the same class of

TAB T

Case Name:

Labatt Brewing Co. v. NHL Enterprises Canada

Between
Labatt Brewing Company Limited and Labatt Breweries of Canada LP, Applicants (Respondents), and NHL Enterprises Canada, L.P., NHL Interactive Cyberenterprises, LLC, NHL Enterprises, L.P., NHL Enterprises B.V., Molson Coors Canada Inc. and Millercoors LLC, Respondents (Appellants)

[2011] O.J. No. 3207

2011 ONCA 511

282 O.A.C. 151

106 O.R. (3d) 677

86 B.L.R. (4th) 226

2011 CarswellOnt 6140

Dockets: C53817 and C53818

Ontario Court of Appeal
Toronto, Ontario

D.R. O'Connor A.C.J.O., J.C. MacPherson and P.S. Rouleau JJ.A.

Heard: July 7, 2011.
Judgment: July 12, 2011.

(23 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Material facts -- Appeal by NHL and Molson Coors Canada (Molson) from order that Labatt Brewing Company (Labatt) and NHL had reached binding sponsorship agreement on November 12, 2010, and as result, NHL was not free to enter into similar agreement with Molson on February 8, 2011, allowed and judgment set aside -- Application judge's conclusion not anchored in pleadings, evidence, positions or submissions of parties -- NHL and Molson not given opportunity to address ultimate conclusion reached by application judge -- As issues between parties were not defined by and confined to those pleaded, NHL and Molson were denied procedural fairness.

1 THE COURT:-- In this expedited appeal, the appellants NHL Enterprises, L.P. ("NHL") and Molson Coors Canada Inc. ("Molson") and several related companies appeal from the judgment of Newbould J. dated June 3, 2011. On an application brought by Labatt Brewing Company Limited ("Labatt") and a related company, he held that the NHL and Labatt reached a binding sponsorship agreement on November 12, 2010. As a result, the NHL was not free to enter into a similar agreement (for substantially more money) with Molson on February 8, 2011.

2 In its application, Labatt sought an interpretation of the s. 7 renewal provision contained in the previous sponsorship agreement between the NHL and Labatt. The provision provided for a 60-day exclusive negotiation period.

3 The appellants advance four grounds of appeal as expressed in the NHL's factum:

> (a) Did the application judge err by considering whether the NHL and Labatt had reached a binding sponsorship agreement on November 12, given that such a position was not advanced by Labatt in the proceeding below and the NHL did not have an opportunity to respond to it?
> (b) Did the application judge err in finding that the NHL and Labatt reached a binding sponsorship agreement on November 12, given that neither party believed that such an agreement existed and both parties had agreed that any such agreement had to take the form of a signed document?
> (c) Did the application judge err by finding that (i) the doctrines of waiver and promissory estoppel could be used by Labatt to prevent the Exclusive Negotiating Period from expiring, and (ii) the NHL intentionally and unequivocally waived such expiry for an indefinite period of time?
> (d) In the event that Labatt was entitled to a remedy, did the application judge err by enjoining the NHL and Molson from implementing the Molson Agreement, rather than directing a reference for damages?

4 In our view, this appeal can, and should, be resolved on the basis of the first issue. The central conclusion of the application judge was that on November 12, 2010 the NHL and Labatt had reached a binding sponsorship agreement for the July 1, 2011-June 30, 2014 period.

5 The problem is that this central conclusion was not anchored in the pleadings, evidence, positions or submissions of any of the parties. Indeed the application judge recognized this when he said in his reasons: "I realize that this result is not exactly what either side contended." As such, it was procedurally unfair, or contrary to natural justice, for the application judge to reach this conclusion on this record.

6 In *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), Doherty J.A. held that it was both fundamentally unfair and inherently unreliable for a trial judge to make findings against a defendant on the basis of a theory of legal liability not advanced by the claimant. He said, at paras. 61-63:

> The injection of a novel theory of liability into the case via the reasons for judgment was fundamentally unfair to [the defendants].
>
> In addition to fairness concerns which standing alone would warrant appellate intervention, the introduction of a new theory of liability in the reasons for judgment also raises concerns about the reliability of that theory. We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties. A theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process. We simply do not know how [the trial judge's] lost opportunity theory would have held up had it been subject to the rigours of the adversarial process. We do know, however, that all arguments that were in fact advanced by [the plaintiff] and were therefore subject to the adversarial process were found wanting by [the trial judge].
>
> [The trial judge] erred in finding liability on a theory never pleaded and with respect to which battle was never joined at trial. This error alone requires reversal.

TAB U

SUPREME COURT OF CANADA
Att. Gen. of Can. v. Inuit Tapirisat et al., [1980] 2 S.C.R. 735
Date: 1980-10-07

The Attorney General of Canada *(Defendant) Appellant;*

and

Inuit Tapirisat of Canada and the National Anti-poverty Organization *(Plaintiffs) Respondents.*

1980: February 12; 1980: October 7.

Present: Laskin C.J. and Martland, Dickson, Beetz, Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Decision of CRTC — Review by Governor in Council — Rules of natural justice and duty of fairness — Whether Governor in Council subject to judicial review — National Transportation Act, R.S.C. 1970, c. N-17 as amended, s. 64 — Railway Act, R.S.C. 1970, c. R-2 as amended, ss. 320, 321(l) — Interpretation Act, R.S.C. 1970, c. 1-23, s. 28.

After the approval by the CRTC of a new rate structure for Bell Canada, the plaintiffs-respondents appealed the CRTC decision to the Governor General in Council pursuant to s. 64(1) of the *National Transportation Act.* Their petitions having been denied, the respondents attacked the decisions of the Governor General in Council alleging that they had not been given a hearing in accordance with the principles of natural justice. This appeal arises from an application made in the Trial Division of the Federal Court for an order striking out the plaintiffs' statement of claim on the ground that the statement disclosed "no reasonable cause of action". The application was granted but the Federal Court of Appeal set aside the order of the Trial Division judge. Hence the appeal to this Court.

Held: The appeal should be allowed.

The substance of the question before this Court in this appeal is whether there is a duty to observe natural justice in, or at least a duty of fairness incumbent on, the Governor in Council in dealing with parties such as the respondents upon their submission of a petition under s. 64(1) of the *National Transportation Act.*

Such petitions are to be contrasted with the mechanism for appeal to the Federal Court of Appeal on questions of law or jurisdiction provided in subs. (2) and following of s. 64. The courts have held that the rules of natural justice and the duty to act fairly depend on the

[Page 736]

circumstances of the case, the nature of the inquiry or investigation, the subject matter that is being dealt with, the consequences on the persons affected and so forth. The mere fact that a decision is made pursuant to a statutory power

> In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond. The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith. Such a course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged. Status in office deserves this minimal protection, however brief the period for which the office is held.

The House of Lords in the earlier decision of *Pearlberg v. Varty*[1], had in effect found a presumption that the rules of natural justice apply to a tribunal entrusted with judicial or quasi-judicial functions but that no such presumption arises where the body is charged with administrative or executive functions. In the latter case courts will

[Page 747]

act on the presumption that Parliament had not intended to act unfairly and will "in suitable cases" imply an obligation in the body or person to act with fairness. See Lord Pearson at p. 547. Lord Hailsham L.C., combining the idea of fairness and natural justice, put it this way at p. 540:

> The doctrine of natural justice has come in for increasing consideration in recent years and the courts generally, and your Lordships' House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases.

Tucker L.J., thirty years earlier, came closer to our situation in this appeal when he said in *Russell v. Duke of Norfolk*[2], at p. 118:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

The arena in which the broad rules of natural justice arose and the even broader rule *of* fairness now performs is described by Lord Denning M.R. in *Selvarajan v.*

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[5] [1972] 1 W.L.R. 534.
[6] [1949] I All E.R. 109.

Race Relations Board[3] where His Lordship, after enumerating a number of authorities dealing with tribunals generally concerned with a *lis inter partes* in *a* variety of administrative fields, said at p. 19:

> In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case

[Page 748]

> made against him and be afforded a fair opportunity of answering it.

(Even in those instances the Court went on to add that such a body may adopt its own procedure, can employ staff for all preliminary work, but in the end must come to its own decision.)

Let it be said at the outset that the mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity. In *Wilson v. Esquimalt and Nanaimo Railway Company*[4], for example, the Privy Council considered the position of the Lieutenant-Governor of British Columbia under the *Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917,* S.B.C. 1917, c. 71. The effectiveness of a Crown land grant issued by order of the Lieutenant-Governor in Council was contested on the grounds that the Lieutenant-Governor in Council had no "reasonable proof" before them that the grantees had improved the lands in question or occupied them with an intention to reside thereon. The Court of Appeal found that there was no such evidence and hence declared the Order in Council to be void. The Privy Council proceeded on the basis that before the Lieutenant-Governor in Council could make the grant in question, it must determine that the statutorily prescribed conditions had been met by the applicant for the grant. As here, the allegation was made that the owners did not have "an adequate opportunity" to show that there was no factual foundation for the grant made by the Lieutenant-Governor in Council. The Privy Council found against this submission stating at p. 213 through Duff J., sitting as a member of the Board:

> The respondents were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might to urge against the view that the depositions produced in themselves constituted "reasonable proof," and they had the fullest opportunity also of supporting their contention that the depositions alone, in

[Page 749]

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[7] [1976] 1 All E.R. 12.

[8] [1922] 1 A.C. 202.

TAB V

** Preliminary Version **

Case Name:

Sun Indalex Finance, LLC v. United Steelworkers

Sun Indalex Finance, LLC, Appellant;

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.

And between

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors, Appellant;

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.

And between

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited, Appellant;

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.

And between

United Steelworkers, Appellant;

v.

Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services, Respondents, and

Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association, Interveners.

[2013] S.C.J. No. 6

[2013] A.C.S. no 6

2013 SCC 6

301 O.A.C. 1

96 C.B.R. (5th) 171

8 B.L.R. (5th) 1

354 D.L.R. (4th) 581

2013EXP-356

2013EXPT-246

J.E. 2013-185

D.T.E. 2013T-97

EYB 2013-217414

439 N.R. 235

2013 CarswellOnt 733

223 A.C.W.S. (3d) 1049

20 P.P.S.A.C. (3d) 1

2 C.C.P.B. (2nd) 1

[2013] W.D.F.L. 1591

[2013] W.D.F.L. 1592

File No.: 34308.

Supreme Court of Canada

Heard: June 5, 2012;
Judgment: February 1, 2013.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

(280 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Appeals from judgment setting aside decision concluding that deemed trust did not apply to wind-up deficiencies allowed -- Statutory deemed trust extended to contributions employer had to make to ensure that pension fund was sufficient to cover liabilities upon wind-up -- However, deemed trust was superseded by security granted to creditor that loaned money to employer during insolvency proceedings -- Although employer, as plan administrator, might have put itself in position of conflict of interest by failing to give plan's members proper notice of motion requesting financing of its operations during restructuring process, there was no realistic possibility that, had members received notice and had CCAA court found they were secured creditors, it would have ordered priorities differently -- Consequently, it was not appropriate to order equitable remedy such as constructive trust ordered by Court of Appeal.

Pensions and benefits law -- Private pension plans -- Bankruptcy, effect of -- Appeals from judgment setting aside decision concluding that deemed trust did not apply to wind-up deficiencies allowed -- Statutory deemed trust extended to contributions employer had to make to ensure that pension fund was sufficient to cover liabilities upon wind-up -- However, deemed trust was superseded by security granted to creditor that loaned money to employer during insolvency proceedings -- Although employer, as plan administrator, might have put itself in position of conflict of interest by failing to give plan's members proper notice of motion requesting financing of its operations during restructuring process, there was no realistic possibility that, had members received notice and had CCAA court found they were secured creditors, it would have ordered priorities differently -- Consequently, it was not appropriate to order equitable remedy such as constructive trust ordered by Court of Appeal.

Appeals from a judgment of the Ontario Court of Appeal setting aside a decision concluding that a deemed trust did not apply to wind-up deficiencies. Indalex became insolvent in 2009. At that time, Indalex was the administrator of two registered pension plans. Indalex obtained protection under the Companies' Creditors Arrangement Act ("CCAA"). Both plans faced funding deficiencies when Indalex filed for the CCAA stay. Indalex's financial distress threatened the interests of all the plan members. Indalex was authorized to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors. Indalex subsequently received a bid for approximately US$30 million, and the buyer did not assume responsibility for the pension plans' wind-up deficiencies. The plan members contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings. The plan members brought motions for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors. The court concluded that the deemed trust did not apply to the wind-up deficiencies because the associated payments were not "due" or "accruing due" as of the date of the wind up. The Ontario Court of Appeal allowed the plan members' appeals. It found that the deemed trust created by section 57(4) of the Pension Benefits Act applied to all amounts due with respect to plan wind-up deficiencies. The Court of Appeal also concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations.

HELD: Appeals allowed. A contribution had "accrued" when the liabilities were completely constituted, even if the payment itself would not fall due until a later date. The fact that the precise amount of the contribution was not determined as of the time of the wind-up did not make it a contingent contribution that could not have accrued for accounting purposes. The relevant provisions, the legislative history and the purpose were all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. Therefore, Court of Appeal correctly held that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency with respect to salaried plan. It was difficult to accept the Court of Appeal's sweeping intimation that the debtor in possession ("DIP") lenders would have accepted that their claim ranked below claims resulting from the deemed trust. As a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust. Although the employer, as plan administrator, might have put itself in a position of conflict of interest by failing to give the plan members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the CCAA court

This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

64 Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

65 Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

66 When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

67 In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

68 In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4), *PBA*).

69 Since the Plan Members seek an equitable remedy, it is important to identify the point at which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

70 As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

71 First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

72 Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

73 In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

74 The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

75 The Monitor and George Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order. It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. *Would an Equitable Remedy Be Appropriate in the Circumstances?*

76 The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

77 Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

78 This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

79 Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

80 It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

81 There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency - at its essence - is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.
>
> *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

274 I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

III. Procedural Fairness in *CCAA* Proceedings

275 The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

276 I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

IV. Imposing a Constructive Trust

277 In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203 and 204: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

278 In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is necessary in order to grant justice to the parties (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law, 2007* (2008), 41, at pp. 78-79).

279 The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

280 For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

TAB W

1993 CarswellQue 2055, 55 Q.A.C. 298, J.E. 93-1227, [1993] R.J.Q. 1684, 42 C.B.R. (5th) 1

1993 CarswellQue 2055, 55 Q.A.C. 298, J.E. 93-1227, [1993] R.J.Q. 1684, 42 C.B.R. (5th) 1

Steinberg Inc. c. Michaud

Pierre Michaud et Philippe Michaud, Appelants-intimés, c. Steinberg Inc., Intimée-requérante, et Paul Bertrand, Intimé-mis en cause

Cour d'appel du Québec

Delisle J.C.A., Deschamps J.C.A., Vallerand J.C.A.

Heard: 12 mai 1993
Judgment: 16 juin 1993
Docket: C.A. Qué. Montréal 500-09-000668-939

Counsel: *Me James A. Wood, Me Christian Immer*, pour les appelants

Me Raynold Langlois, Me Guy Turner, pour l'intimée

Me Max R. Bernard, pour le Syndicat bancaire de Steinberg Inc.

Subject: Insolvency; Corporate and Commercial

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

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Cases considered by *Le juge Vallerand*:

Sovereign Life Assurance Co. v. Dodd (1892), [1891-94] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — considered

Cases considered by *Le juge Deschamps*:

[54] The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

[55] The case of *Browne v. Southern Canada Power Co.*.[FN23] provides an example of a dispute arising between a creditor and two guarantors, in that instance the president and the secretary-treasurer of the debtor. They argued that their position had become more onerous due to the modification of the debt due by the debtor further to an arrangement made under the Act. The decision of our Court was unanimous.

[55] Judge Barclay wrote:

> The very special remedies authorized by law for the exclusive benefit of a debtor company are not available to third parties.

[55] Judge Walsh expressed himself more explicitly:

> The Companies' Creditors Arrangement Act, however, intervened in the case of the City Gas Company to grant the company favoured treatment; this Act does not extend its favours to others, who had guaranteed the debt. The appellants cannot claim the benefit of delay that the Act affords to their company, because they became immediately liable by the default of the debtor, with whom they had bound themselves jointly and severally; and they did not demand the benefit of discussion. The appellants cannot set up exceptions personal to their debtor, and The Companies' Creditors Arrangement Act is an exception that favours the company only; nothing was shown to extend its scope to the appellants.

[55] And finally Judge McDougall (ad hoc):

> Such arrangement enured to the benefit of the company not to that of its guarantors.

[56] The possibility of extending the effect of a stay requested under the Act to directors, officers, employees, agents and consultants was studied recently in the case of *Philip's Manufacturing Ltd., Re.*[FN24] In that case, the debtor did not claim that the Act allowed the directors and others to benefit from the stay, but relied on the Court's inherent powers. The stay was refused to all parties except the debtor.

[57] If an arrangement is imposed on a creditor that prevents him from recovering part of his claim by the effect of the Act, he does not necessarily lose the benefit of other statutes that he may wish to invoke. In this sense, if the Civil Code provides a recourse in civil liability against the directors or officers, this right of the creditor cannot be wiped out, against his will, by the inclusion of a release in an arrangement.

[58] The Act and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is.

[59] Moreover, it is doubtful that the sanctioning of the arrangement can be considered definitive regarding the release given to the directors, as another party, the Syndicat des travailleurs unis de l'alimentation et du commerce, also contested the

TAB X

Case Name:

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

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Plan of Compromise and Arrangement involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 4446372 Canada Inc. and 6932819 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto

Between

The Investors represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper listed in Schedule "B" hereto, Applicants (Respondents in Appeal), and Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits listed in Schedule "A" hereto, Respondents (Respondents in Appeal), and Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal Inc., Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Domtar Inc., Domtar Pulp and Paper Products Inc., GIRO Inc., Vêtements de sports R.G.R. Inc., 131519 Canada Inc., Air Jazz LP, Petrifond Foundation Company Limited, Petrifond Foundation Midwest Limited, Services hypothécaires la patrimoniale Inc., TECSYS Inc., Société générale de financement du Québec, VibroSystM Inc., Interquisa Canada L.P., Redcorp Ventures Ltd., Jura Energy Corporation, Ivanhoe Mines Ltd., WebTech Wireless Inc., Wynn Capital Corporation Inc., Hy Bloom Inc., Cardacian Mortgage Services, Inc., West Energy

Ltd., Sabre Enerty Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd. and Standard Energy Inc., Respondents (Appellants)

[2008] O.J. No. 3164

2008 ONCA 587

45 C.B.R. (5th) 163

296 D.L.R. (4th) 135

2008 CarswellOnt 4811

168 A.C.W.S. (3d) 698

240 O.A.C. 245

47 B.L.R. (4th) 123

92 O.R. (3d) 513

Docket: C48969 (M36489)

Ontario Court of Appeal
Toronto, Ontario

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

Heard: June 25-26, 2008.
Judgment: August 18, 2008.

(121 paras.)

Bankruptcy and insolvency law -- Proceedings in bankruptcy and insolvency -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Courts -- Jurisdiction -- Federal -- Companies' Creditors Arrangement Act -- Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal sanctioning of that Plan -- Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings -- Plan dealt with liquidity crisis threatening Canadian market in Asset Backed Commercial Paper -- Plan was sanctioned by court -- Leave to appeal allowed and appeal dismissed -- CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court -- Companies' Creditors Arrangement Act, ss. 4, 6.

Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal the sanctioning of that Plan. In August 2007, a liquidity crisis threatened the Canadian market in Asset Backed Commercial Paper (ABCP). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on US sub-prime mortgages. By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-

initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings. The Plan was sanctioned on June 5, 2008. The applicants raised an important point regarding the permissible scope of restructuring under the Companies' Creditors Arrangement Act: could the court sanction a Plan that called for creditors to provide releases to third parties who were themselves insolvent and not creditors of the debtor company? They also argued that if the answer to that question was yes, the application judge erred in holding that the Plan, with its particular releases (which barred some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

HELD: Application for leave to appeal allowed and appeal dismissed. The appeal raised issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There were serious and arguable grounds of appeal and the appeal would not unduly delay the progress of the proceedings. In the circumstances, the criteria for granting leave to appeal were met. Respecting the appeal, the CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where the releases were reasonably connected to the proposed restructuring. The wording of the CCAA, construed in light of the purpose, objects and scheme of the Act, supported the court's jurisdiction and authority to sanction the Plan proposed in this case, including the contested third-party releases contained in it. The Plan was fair and reasonable in all the circumstances.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 4, s. 6

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 91(21), s. 92(13)

Appeal From:

On appeal from the sanction order of Justice Colin L. Campbell of the Superior Court of Justice, dated June 5, 2008, with reasons reported at [2008] O.J. No. 2265.

Counsel:

See Schedule "A" for the list of counsel.

The judgment of the Court was delivered by

R.A. BLAIR J.A.:--

A. INTRODUCTION

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

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

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

Leave to Appeal

while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s. 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s. 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[6] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

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

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

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

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then -- as was the case in *T&N* -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Re Canadian Airlines Corp.* (2000), 265 A.R. 201, leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.* (2000), 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, (2001) 293 A.R. 351 (S.C.C.). In *Re Muscle Tech Research and Development Inc.* (2006), 25 C.B.R (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Re Canadian Airlines*, however, the releases in those restructurings -- including *Muscle Tech* -- were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Re Canadian Airlines* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Michaud v. Steinberg,*[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Michaud v. Steinberg, supra*; *NBD Bank, Canada v. Dofasco Inc.*, (1999), 46 O.R. (3d) 514 (C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C.S.C.); and *Re Stelco Inc.* (2005), 78 O.R. (3d) 241 (C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines*, Tysoe J. made the following comment at para. 24:

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

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Re Ravelston Corp. Ltd.* (2007), 31 C.B.R. (5th) 233 (Ont. C.A.).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd.* (1998), 38 B.L.R. (2d) 251 at paras. 9 and 18 (B.C.S.C.). There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
c) The Plan cannot succeed without the releases;
d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. DISPOSITION

TAB Y

In re: DBSD NORTH AMERICA, INC., et al., Debtors.

Chapter 11, Case No. 09-13061 (REG), Jointly Administered

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

419 B.R. 179; 2009 Bankr. LEXIS 3341

October 26, 2009, Decided

SUBSEQUENT HISTORY: Motion granted by In re DBSD N. Am., Inc., 421 B.R. 133, 2009 Bankr. LEXIS 4147 (Bankr. S.D.N.Y., 2009)
Affirmed by Sprint Nextel Corp. v. DBSD North Am., Inc. (In re DBSD North Am., Inc.), 2010 U.S. Dist. LEXIS 33253 (S.D.N.Y., Mar. 24, 2010)

PRIOR HISTORY: In re DBSD North Am., Inc., 2009 Bankr. LEXIS 3036 (Bankr. S.D.N.Y., Sept. 30, 2009)

CASE SUMMARY:

PROCEDURAL POSTURE: Debtors, operators of a next generation mobile satellite service, sought confirmation of their Chapter 11 plan. Confirmation was opposed by a first lien creditor and an unsecured creditor.

OVERVIEW: Debtors were authorized to offer satellite terrestrial services throughout the U.S. While their satellite was launched and operational, the debtors were still in a developmental stage and had no current source of revenue. Among other arguments, the first lien creditor contended that the debtors' plan was not feasible as required by 11 U.S.C.S. § 1129(a)(11). The court disagreed because, upon plan confirmation, the debtors would have de-leveraged by more than $ 600 million. According to the court, this major change in the debtors' debt load resulting from the debtors' reorganization considerably reduced the risk on the first lien debt. While there could be no assurance that the reorganized debtors would succeed, the court found that the evidence suggested that they would and the court was not persuaded that it was likely that they would fail. The court also concluded that the plan complied with the "cramdown" requirements imposed by 11 U.S.C.S. § 1129(b), the good faith requirement of 11 U.S.C.S. § 1129(a)(3), and the best interests of creditors requirement of 11 U.S.C.S. § 1129(a)(7). The court further found that releases and exculpation provisions in the plan were permissible.

OUTCOME: The court confirmed the debtors' plan.

Debtors, pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, [167] represent a valid exercise of the Debtors' business judgment, and are fair, reasonable and in the best interests of the estate.

167 That section provides, that subject to provisions not applicable here:

> [HN13] **(b)** ... a plan may--
>
> ...
>
> **(3)** provide for--
>
> **(A)** the settlement or adjustment of any claim or interest belonging to the debtor or to the estate...

I can't agree with DISH's suggestion that the Debtors released claims of which **[**100]** they were aware. Mr. Corkery testified credibly that he was unaware of any significant potential claims against any released parties, including the Existing Shareholder. And these are not, of course, claims that DISH owns. Instead, to the extent any claims exist, they are claims that the *Debtors* own; DISH could not assert them except on behalf of the estate, and then only after getting an *STN* order upon a showing that prosecution of them was in the best interests of the estate.

[HN14] Section 1123(b)(3) permits a debtor to include a settlement of any claims it might own as a discretionary provision in its plan, and I find the Debtors' releases to be both appropriate and reasonable.

B. The Exculpation Provisions

The exculpation provisions, by contrast, involve claims owned by third parties (*e.g.*, stakeholders in the case, including DISH), against other third parties (*e.g.*, other stakeholders), against whom the former may have grievances. Exculpation provisions are frequently included in chapter 11 plans, because stakeholders all too often blame others for failures to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decisionmakers in the **[**101]** chapter 11 case.

Though exculpation provisions have a salutary purpose, that salutary purpose is insufficient by itself to make them proper as a general rule. As the Second Circuit's decision in *Metromedia*, [168] and my earlier decision in *Adelphia* [169] provide, exculpation provisions (and their first cousins, so-called "third party releases") are permissible under some circumstances, but **[*218]** not as a routine matter. [170] They may be used in *some* cases, including those where the provisions are important to a debtor's plan; the claims are "channeled" to a settlement fund rather than extinguished; the enjoined claims would indirectly impact the debtor's reorganization by way of indemnity or contribution; the released party provides substantial consideration; and where the plan otherwise provides for the full payment of the enjoined claims. [171]

168 *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136 (2d Cir. 2005).

TAB Z

In re: Conseco, Inc., et al., Debtors.

Chapter 11, Case No. 02 B 49672 (Jointly Administered)

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

301 B.R. 525; 2003 Bankr. LEXIS 1494; 42 Bankr. Ct. Dec. 55

November 17, 2003, Decided
November 17, 2003, Filed

DISPOSITION: Objection to confirmation of amended plan overruled.

CASE SUMMARY:

PROCEDURAL POSTURE: Many parties filed objections to the confirmation of the 6th amended Chapter 11 plan of the debtors. One group of creditors, the objecting creditors, contended that the plan could not be confirmed because it violated 11 U.S.C.S. § 524(e) by providing for the voluntary release of non-debtors by another group of creditors (releasing creditors).

OVERVIEW: The release at issue was part of a settlement reached between the releasing creditors and the debtors. The objecting creditors contended that the release violated 11 U.S.C.S. § 524(e) because it released non-debtors. The court found that the release could be included in the plan because it was voluntary and given in exchange for a distribution to which the releasing creditors were not otherwise entitled under the best interests of creditors test in 11 U.S.C.S. § 1129(a)(7)(A)(ii). The release was part of a voluntary settlement that could be included in the plan pursuant to 11 U.S.C.S. § 1123(b)(6).

OUTCOME: The objection was overruled.

CORE TERMS: non-debtors, settlement, billion, consensual, confirmation hearing, unusual circumstances, best interests, participating, liquidation, valuation, senior, stock, opt, preferred shares, settlement agreement, discharge of a debt, applicable provisions, vote to accept, non-consensual, confirmation, subsidiaries, inclusion, consented, objectors, valued, entity

LexisNexis(R) Headnotes

Bankruptcy Law > Discharge & Dischargeability > Effects of Discharge > Third Parties

Bankruptcy Law > Reorganizations > Plans > Confirmation > Prerequisites > Best Interest of Creditors
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
[HN1] 11 U.S.C.S. § 524(e) does not bar the inclusion of consensual releases of non-debtors in a Chapter 11 plan.

Bankruptcy Law > Discharge & Dischargeability > Effects of Discharge > Third Parties
Civil Procedure > Settlements > Releases From Liability > General Overview
[HN2] See 11 U.S.C.S. § 524(e).

Bankruptcy Law > Discharge & Dischargeability > Effects of Discharge > Third Parties
Bankruptcy Law > Discharge & Dischargeability > Reorganizations
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
[HN3] 11 U.S.C.S. § 524(e) provides only that the discharge of a debt of the debtor does not alter any other party's liability on the debt; it does not prohibit the inclusion of consensual releases in a Chapter 11 plan.

Bankruptcy Law > Reorganizations > Plans > Contents > Discretionary Provisions
[HN4] 11 U.S.C.S. § 1123(b)(6) provides that a plan may include any other appropriate provision not inconsistent with applicable provisions of that title.

Bankruptcy Law > Discharge & Dischargeability > General Overview
Bankruptcy Law > Reorganizations > Plans > Contents > Discretionary Provisions
[HN5] The voluntary release of non-debtors in a Chapter 11 plan in exchange for a distribution of stock and other assets that would otherwise go to more senior creditors does not conflict with any provision of the Bankruptcy Code.

COUNSEL: [1]** Trustee or Other Attorneys: James Sprayregen/Kirkland & Ellis for Debtor Richard Friedman, Office of US Trustee.

JUDGES: CAROL A. DOYLE, United States Bankruptcy Judge.

OPINION BY: CAROL A. DOYLE

OPINION

[*526] ***MEMORANDUM OPINION***

Many parties filed objections to the confirmation of the 6th Amended Plan ("Plan") of Conseco, Inc. and its related reorganizing debtors ("debtors"). Most objections were resolved, but two remained unresolved at the confirmation hearing on September 9, 2003. This opinion addresses one issue raised in one of those objections: whether the Plan may properly include the release of non-debtors by one group of creditors, the holders of Trust Originated Preferred Shares of Conseco, Inc. (collectively referred to as "TOPrS"). The TOPrS release is part of a settlement reached between the TOPrS Committee and the debtors. The objectors contend that the TOPrS release violates § 524(e) of the Bankruptcy Code because it releases non-debtors. In the alternative, they argue that a release of non-debtors should be permitted only in unusual circumstances, which do not exist in this case.

The court rejects these arguments. Section 524(e) [HN1] does not bar the inclusion of consensual releases of **[**2]** non-debtors in a Chapter 11 plan. The TOPrS release may be included in the Plan because it is voluntary and given in exchange for a distribution to which the TOPrS are not otherwise entitled under the best interests of creditors test in 11 U.S.C. § 1129(a)(7)(A)(ii). The objection is therefore overruled. [1]

1 The court ruled orally on this issue and the other issues raised in the two objections at the confirmation hearing on September 9, 2003. This memorandum opinion more fully addresses the release issue.

1. Background

Conseco, Inc. and its many subsidiaries have a complex financial structure, with various layers of bank and bond financing. The TOPrS own preferred shares that are subordinated to most other creditors. The United States Trustee appointed a committee to represent the TOPrS. The debtors originally proposed a plan based on a $ 3.8 billion valuation of the debtors. Under this valuation, the TOPrS are not entitled to any distribution under the "best interests of **[**3]** creditors test" in 11 U.S.C. § 1129(a)(7)(A)(ii), which requires that each creditor who has not accepted the plan receive at least what it would get in a Chapter 7 liquidation. The TOPrS Committee objected to the debtors' plan, contending that the debtors are worth significantly more than $ 4.8 billion. If the debtors are valued at $ 4.8 billion or higher, the TOPrS would be entitled to a distribution under § 1129(a)(7)(A)(ii).

As part of the confirmation hearing on an earlier version of the Plan, the court conducted a lengthy trial to determine the value of the debtors for purposes of § 1129(a)(7)(A)(ii). At the trial, the TOPrS Committee and the debtors each tried to prove that its valuation was correct. While the court was preparing its decision, the TOPrS Committee and the debtors reached a settlement.

Under the settlement, the TOPrS Committee and the debtors agreed that the value of the debtors for purposes of § 1129(a)(7)(A)(ii) is $ 3.8 billion, the amount the debtors attempted to establish at trial. The TOPrS' distribution under the Plan is $ 0, because the TOPrS are not entitled to a distribution if the debtors are valued at $ 3.8 billion. Instead, **[**4]** the settlement agreement provides that TOPrS who do not opt out of the settlement will receive a distribution of 1.5% of New Conseco common stock, warrants for New Conseco **[*527]** stock, and a share of potential post-confirmation litigation recoveries. This distribution comes from senior creditors who will give participating TOPrS a portion of the distribution to which the senior creditors are entitled under § 1129(a)(7)(A)(ii). TOPrS who participate in the settlement give a broad release to all third parties for almost any claims relating to Conseco or its subsidiaries. The debtors filed a motion to approve this settlement under Bankruptcy Rule 9019. They also included the basic terms of the settlement and release in Article V, Par. I of the Plan.

The objectors are present and former TOPrS (the "Lead Plaintiffs") who filed a lawsuit alleging violations of various securities laws in connection with their purchase of Conseco's Trust Originated Preferred Shares. The Lead Plaintiffs object to the TOPrS release because it releases non-debtors, including defendants in their class action.

2. Is the TOPrS Release Permissible?

The Lead Plaintiffs first argue that the TOPrS release violates **[**5]** 11 U.S.C. § 524(e) of the Bankruptcy Code because it releases entities other than the debtors. Section 524(e) provides that the [HN2] "discharge of a debt of the debtor does not affect the liability of any other entity on ... such debt." Citing cases from other circuits, the Lead Plaintiffs contend that this provision forbids the release of claims against non-debtors. However, the 7th Circuit has authoritatively rejected this argument. In *In re Specialty Equip. Cos.* , 3 F.3d 1043, 1047 (7th Cir. 1993), the 7th Circuit held that § 524(e) [HN3] provides only that the discharge of a debt of the debtor does not alter any other party's liability on the debt; it does not prohibit the inclusion of consensual releases in a Chapter 11 plan.

The Lead Plaintiffs also argue that, to the extent third party releases are ever permissible under the Bankruptcy Code, the TOPrS release is too broad and should not be included in the Plan. They cite various cases in which courts have held that a Chapter 11 plan cannot include a non-consensual release of third parties unless there are unusual circumstances. *E.g.*, *In re Dow Corning Corp.*, 280 F.3d 648, 657 (6th Cir. 2002). **[**6]** They assert that the requisite "unusual circumstances" do not exist here.

The Lead Plaintiffs misapprehend the nature of the releases given by participating TOPrS in Article V of the Plan. It is not a compulsory release that would require justification by special circumstances. Rather, the TOPrS' release is part of a voluntary settlement that may be included in the Plan pursuant to 11 U.S.C. § 1123(b)(6). [2] Therefore, the cases relied upon by the Lead Plaintiffs are irrelevant.

2 Section 1123(b)(6) [HN4] provides that a plan may "include any other appropriate provision not inconsistent with applicable provisions of this title."

The Lead Plaintiffs may have confused the present consensual TOPrS release with previous, non-consensual releases that have been removed from the Plan. Under Article X of earlier versions of the Plan, all creditors who accepted a distribution under the Plan would release certain non-debtors, regardless of whether the creditors voted to accept the plan. In *Specialty* **[**7]** *Equipment*, the 7th Circuit held that consensual releases of non-debtors are permissible, and that creditors who vote to accept a plan containing releases of non-debtors have consented to the releases. 3 F.3d at 1047. The court did not address whether creditors who did not vote for the plan could be required to release non-debtors. The debtors in this case argued that creditors who did not vote in favor of the plan but accepted a distribution under **[*528]** it should be deemed to have consented to the releases. However, under § 1129(a)(7)(A)(ii), a plan cannot be confirmed unless each non-accepting creditor gets at least as much as it would get in a Chapter 7 liquidation. Under previous plan provisions, creditors who did not vote to accept the plan but were clearly entitled to a distribution in a Chapter 7 liquidation had to release non-debtors to receive a distribution. These provisions violated the best interests of creditors test because they forced creditors to accept the release or to give up the distribution to which they were entitled under § 1129(a)(7)(A)(ii). In addition, under these circumstances, a creditor's mere acceptance of a distribution under the plan cannot **[**8]** be construed as a voluntary consent to the release.

After the court informed the parties that it would not confirm a plan containing third party releases by creditors who did not accept the plan, the debtors redrafted the Plan. In the 6th Amended Plan,

each creditor receiving a distribution under the Plan was given the opportunity to opt out of the release of non-debtors contained in Article X of the Plan. The Article X release now binds only those creditors who agreed to be bound, either by voting for the Plan or by choosing not to opt out of the release. Therefore, the Article X release is purely consensual and within the scope of releases that *Specialty Equipment* permits.

The TOPrS release in Article V, Par. I(2) of the Plan is completely separate from the release in Article X. The TOPrS release is not imposed as a condition to TOPrS receiving a distribution to which they are entitled under § 1129(a)(7)(A)(ii). Under the agreed $ 3.8 billion value of the debtors, the TOPrS are not entitled to any distribution under § 1129(a)(7)(A)(ii). Rather, participating TOPrS will receive the distribution described in Article V of the Plan only as part of a separate and completely voluntary **[**9]** compromise with the debtors and other creditors to provide TOPrS with a distribution in return (in part) for the release in Article V. This settlement agreement is the subject of a Rule 9019 settlement motion being heard with confirmation, and may properly be included in the plan under 11 U.S.C. § 1123(b)(6). Section 1123(b)(6) provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." [HN5] The voluntary release of non-debtors in exchange for a distribution of stock and other assets that would otherwise go to more senior creditors does not conflict with any provision of the Bankruptcy Code.

For these reasons, the court overrules the Lead Plaintiffs' objection that the TOPrS release violates § 524(e) and or is otherwise impermissible under the Bankruptcy Code.

Dated: November 17, 2003

ENTERED:

CAROL A. DOYLE

United States Bankruptcy Judge

TAB AA

1998 CarswellOnt 3539, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, [1998] O.J. No. 3622

1998 CarswellOnt 3539, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, [1998] O.J. No. 3622

Dabbs v. Sun Life Assurance Co. of Canada

Paul Dabbs, Plaintiff (Respondent) Moving Party and Sun Life Assurance Company of Canada, Defendant (Respondent) and Jack Maclean, Class Member (Appellant)

Ontario Court of Appeal

Laskin, Charron, O'Connor JJ.A.

Heard: August 26, 1998
Judgment: September 14, 1998[FN*]
Docket: CA C30326, M22971, M23028

Proceedings: refused leave to appeal *Dabbs v. Sun Life Assurance Co. of Canada* ((1998)), [1998] S.C.C.A. No. 372, 235 N.R. 390 (note), 118 O.A.C. 399 (note), 41 O.R. (3d) 97n ((S.C.C.)); affirmed *Dabbs v. Sun Life Assurance Co. of Canada* ((1998)), 1998 CarswellOnt 2758, [1998] O.J. No. 2811, [1998] I.L.R. I-3575, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18 ((Ont. Gen. Div.))

Counsel: *Michael S. Deverett*, for the appellant.

H. Lorne Morphy, Q.C., and *Patricia D.S. Jackson*, for the respondent Sun Life.

Michael A. Eizenga and *Michael J. Peerless*, for the plaintiff.

Subject: Insurance; Civil Practice and Procedure

Practice --- Parties — Representative or class actions — General

Parties settled plaintiff's proposed class action — Class action was certified and settlement was approved — Class member appealed approval of settlement — Plaintiff applied to quash class member's appeal — Class member was permitted under Class Proceedings Act, 1992, to participate in settlement approval proceedings but not granted party status — Act confers on court power to appoint class members to be representatives and permit class members to

participate in proceedings — Role of party distinguished from role of class member — Class members can participate but not become parties — Under Act, class member may opt out of class action and pursue claim in personal capacity if dissatisfied with conduct of proceedings — Only party has right of appeal — Right of appeal under Act takes precedence over and excludes provision of general right of appeal provided in Courts of Justice Act — Class member must obtain leave to act as representative for purpose of appeal — Class member had not applied to act as representative — Class member had no right to appeal under Act — Class member's alternative motion for leave to permit him to act as representative party for purpose of appeal dismissed — Courts in three jurisdictions had already approved settlement and class member was only one who wanted to set it aside — Wishes of one class member could not govern interests of entire class — Plaintiff's application granted — Class Proceedings Act, 1992, S.O. 1992, c. 6 — Courts of Justice Act, R.S.O. 1990, c. C.43.

Cases considered by *O'Connor J.A.*:

Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453, 31 C.P.C. (3d) 197, 78 O.A.C. 377, 121 D.L.R. (4th) 496 (Ont. Div. Ct.) — considered

Silva v. O'Donohue (1995), 30 M.P.L.R. (2d) 162, 130 D.L.R. (4th) 334, (sub nom. *O'Donohue v. Silva)* 87 O.A.C. 161, (sub nom. *O'Donohue v. Silva)* 27 O.R. (3d) 162 (Ont. C.A.) — referred to

792266 Ontario Ltd. v. Monarch Trust Co. (Liquidator of) (1996), 94 O.A.C. 384, 30 B.L.R. (2d) 219 (Ont. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 5 — referred to

s. 8(3) — referred to

s. 9 — referred to

s. 10(1) — referred to

s. 12 — referred to

s. 14 — considered

s. 16(1) — referred to

1998 CarswellOnt 3539, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, [1998] O.J. No. 3622

s. 18 — referred to

s. 19 — referred to

s. 25 — referred to

s. 29 — referred to

s. 30(3) — considered

s. 30(5) — considered

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

Generally — considered

s. 6(1)(b) [rep. & sub. 1994, c. 12, s. 1] — considered

s. 134 — referred to

Municipal Elections Act, R.S.O. 1990, c. M.53

Generally — referred to

Rules considered:

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

R. 13 — referred to

APPEAL by class member of approval of settlement in class action for damages for misrepresentation; MOTION by class member for leave to appeal approval of settlement; MOTION by plaintiff to quash class member's motion for leave to appeal, reported at 5 C.C.L.I. (3d) 18, [1998] I.L.R. 1-3575, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381 (Ont. Gen. Div.).

The judgment of the court was delivered by *O'Connor J.A.*:

1 These reasons deal with two motions. The first is a motion by the representative plaintiff in this class proceeding, Paul Dabbs, to quash an appeal brought by a class member, Jack Maclean. The second is a motion by Maclean

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for leave to appeal.

The Motion to Quash

2 Maclean seeks to appeal the judgment of Sharpe J. dated July 3, 1998 in which he ordered that this action be certified as a class proceeding and that a settlement agreement entered into between Dabbs and others as proposed representatives of the plaintiff class and the defendant Sun Life Assurance Company of Canada ("Sun Life") be approved under s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*Act*").

3 Maclean is a member of the class and had been permitted under s. 14 of the *Act* to participate in the settlement approval proceedings. He did not ask for and was not granted party status. Maclean objected to the approval of the settlement, raising essentially the same arguments as he makes in the material filed with this court.

4 Sharpe J. rejected those arguments, approved the settlement and found it to be fair, reasonable and in the best interest of those affected by it. The courts in British Columbia and Quebec have also approved the settlement agreement. In all, it affects the interests of an estimated 400,000 class members across Canada.

5 Maclean's notice of appeal raises issues relating to procedural rulings made by Sharpe J. and to the fairness and adequacy of the settlement agreement. Dabbs moves under s. 134 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, to quash the appeal primarily on the basis that Maclean is not a party to the proceeding and therefore has no standing to bring the appeal. Sun Life supports the motion. For the reasons set out below, I agree with their position.

6 One of the objects of the *Act* is to achieve the efficient handling of potentially complex cases of mass wrongs. See *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.), per O'Brien J. at p.455. This efficiency is accomplished, in part, by the court appointment of one or more class members under s. 5 to be representative plaintiffs or defendants as the case may be. The criteria for appointment include the ability to fairly and adequately represent the interests of the class. A representative plaintiff or defendant is a party to the proceeding and has the specific rights and responsibilities for the carriage of the litigation on behalf of the class that are set out in the *Act*.

7 The *Act* makes a clear distinction between the role of a party and that of a class member.[FN1] Section 14 gives the court a broad discretion to permit class members to participate in a proceeding and to provide for the manner and terms upon which the participation is permitted. Not surprisingly, s. 14 does not provide that class members who are permitted to participate thereby become parties to the proceeding. The section does not restrict participation to those class members who are able to fairly and adequately represent the class. Indeed, the court may permit participation by those who oppose the manner in which the party representing the class is conducting the proceeding and who assert positions that differ from those of the majority of the class. While the court may consider it useful to hear from these class members and to permit them to participate in a limited manner, it could frustrate the orderly and efficient management of the proceeding if they became parties simply because of their participation.

8 If class members are dissatisfied with the conduct of a proceeding or do not wish to be bound by the result,

1998 CarswellOnt 3539, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, [1998] O.J. No. 3622

they may opt out under s. 9 and pursue their claims or defences in a personal capacity.

9 The rights of appeal to the Court of Appeal in class proceedings are set out in s. 30(3) of the *Act*. It provides:

> **30.** (3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

10 These rights are conferred on parties. Section 30(5) permits class members in certain circumstances to move for leave to act as representative parties for purposes of bringing an appeal under s. 30(3). It provides:

> (5) If a representative party does not appeal as permitted by subsection(3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as a representative party for the purposes of subsection 3.

Absent leave, class members have no standing to bring an appeal to this court under the *Act*.

11 Maclean is not a party to this proceeding. He did not apply to be a representative plaintiff nor did he apply to intervene as an added party under Rule 13.[FN2] He participated in the settlement approval proceedings as a class member not as a party. He therefore has no right of appeal under s. 30(3).

12 Maclean argues that because Sharpe J.'s judgment is a final order of the Ontario Court (General Division), he has a right of appeal under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Section 6(1)(b) provides:

> **6(1)** An appeal lies to the Court of Appeal from,
>
> . . . . .
>
> (b) a final order of a judge of the Ontario Court (General Division), except an order referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act.

He argues that if the *Act* does not provide him with a right of appeal, either because he is not a party to the class proceeding or because s. 30(3) does not provide for a right of appeal from a judgment approving a settlement[FN3], then s. 6(1)(b) operates to confer a right where the *Act* has failed to do so. I do not accept that argument.

13 In my view, s. 30(3), which grants specific rights of appeal to this court in class proceedings, takes precedence over and excludes provisions of general application such as s. 6(1)(b) of the *Courts of Justice Act*. Two rules of statutory interpretation assist in determining the intention of the Legislature. First, a "general statute is made to 'yield' by regarding the special statute as an exception to the general."[FN4] Second, a more recent statute takes precedence over prior legislation because "the more recent expression of the will of the legislature should be retained."[FN5] In this case, the *Act* is the more recent enactment and specifically addresses the rights of appeal in class proceedings. The *Courts of Justice Act* was enacted earlier and is of more general ambit. These rules support

1998 CarswellOnt 3539, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, [1998] O.J. No. 3622

the conclusion that the appeal provisions in s. 30(3) of the *Act* take precedence over s. 6(1)(b).

14 This conclusion is consistent with the dicta of Doherty J.A. in *792266 Ontario Ltd. v. Monarch Trust Co. (Liquidator of)* (1996), 94 O.A.C. 384 (Ont. C.A.). At p. 389, he said:

> ...I would, however, observe that this court has held that statutory provisions granting a specific right of appeal take precedence over and exclude provisions of more general application: *Overseas Missionary Fellowship v. 578369 Ontario Ltd.* (1990), 73 O.R. (2d) 73 at 75 (C.A.). that conclusion is consistent with the well-recognized principle of statutory interpretation which provides that where a statutory provision in specific legislation appears to conflict with a provision in a general statutory scheme, the former is seen as an exception to the latter: *R. v. Greenwood* (1992), 7 O.R. (3d) 1 at 6-7 (C.A.), leave to appeal to S.C.C. refused, [1992] 1 S.C.R. viii.

I agree with that statement.

15 The logic of this interpretation is apparent in this case. The intent of the *Act* is clear that the rights of appeal to this court are conferred on parties, not class members. A class member requires leave under s. 30(5) to act as a representative party for the purpose of bringing an appeal under s. 30(3). If, as Maclean argues, a class member has a right of appeal under s. 6(1)(b) of the *Courts of Justice Act*, that intent would be defeated. Further, assuming, as Dabbs and Sun Life argue, that s. 30(3) does not confer a right to appeal a judgment approving a settlement, it would make no sense for the Legislature to have provided for specific limited rights of appeal in s. 30(3) if the general right of appeal in s. 6(1)(b) was also to apply. Section 30(3) would be redundant and whatever limits result from its specific wording would be frustrated.

16 Relying upon the case of *Silva v. O'Donohue* (1995), 27 O.R. (3d) 162 (Ont. C.A.), Maclean argues that the right of appeal in s. 6(1)(b) can only be excluded by express statutory provision. In that case, the court considered appeal rights under the *Municipal Elections Act*, R.S.O. 1990, c. M.53, as amended, which provides for an appeal from a judicial recount to a judge of the Ontario Court (General Division). The *Municipal Elections Act* does not provide for a further appeal. The court found that in the absence of an express statutory exclusion of an appeal from a final order of a General Division judge, the Legislature could not be deemed to have limited the jurisdiction granted to the Court of Appeal by s. 6(1)(b). Significantly, there was no right of appeal to the Court of Appeal set out in the *Municipal Elections Act*. It is the inclusion of the specific appeal provisions in the *Act* which, in my view, operate to exclude the jurisdiction under s. 6(1)(b) for proceedings under the *Act*.

17 In summary I am of the view that s. 30(3) of the *Act* provides the rights of appeal to this court for class proceedings and that s. 6(1)(b) of the *Courts of Justice Act* does not supplement those rights.

Maclean's Motion

18 Maclean brought a motion for leave, if necessary, to appeal the judgment of Sharpe J. During the course of argument he requested that the court consider this motion as a motion for leave under s. 30(5) of the *Act* to permit him to act as a representative party for purposes of bringing his appeal under s. 30(3). The court indicated that it was prepared to deal with the motion on this basis. In my view, this is not an appropriate case for leave.

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19 The court's discretion to grant leave under s. 30(5) is guided by the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class. There is nothing in the record which indicates that Maclean would adequately represent the interests of this class by bringing an appeal which seeks to set aside the settlement agreement. Courts in three jurisdictions have approved the agreement. Maclean is the only class member of an estimated 400,000 who now seeks to set it aside. The wishes of one class member ought not to govern the interests of the entire class.

20 Importantly, if Maclean is dissatisfied with this settlement, he has the opportunity under the terms of Sharpe J.'s judgment and s.9 of the *Act* to opt out of the class and pursue his claim against Sun Life in his personal capacity.

21 I would therefore dismiss the motion brought by Maclean under s. 30(5) of the *Act*. For the reasons above, I would allow the motion under s. 134 of the *Courts of Justice Act* and quash the appeal. Because the motions involved a novel point raised by an individual class member, I would make no order as to costs.

Order accordingly.

FN* Leave to appeal refused (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note) (S.C.C.).

FN1 See ss. 8(3), 10(1), 12, 16(1), 18, 19 and 25.

FN2 Section 35 of the *Act* provides that the rules of court apply to class proceedings.

FN3 Dabbs and Sun Life argued that even if Maclean is a party, s. 30(3) does not confer a right of appeal from a judgment approving a settlement under s. 29 of the *Act*.

FN4 Elmer Driedger, *Construction of Statutes*, 2nd ed. (1983), at p. 227.

FN5 Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (1991), at p. 301.

END OF DOCUMENT

TAB BB

REPORT
ON
CLASS ACTIONS

ONTARIO LAW REFORM COMMISSION

VOLUME II

Ministry of the Attorney General

1982

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions. The Commissioners are:

M. Patricia Richardson, M.A., LL.B., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada M5C 1C5.

During the course of the Class Actions Project, the Honourable G. A. Gale, C.C., Q.C., LL.D., retired as Vice Chairman of the Commission because of ill health. While the Commission benefited greatly from Mr. Gale's knowledge and experience and acknowledges its indebtedness to him, we wish to state that he did not agree with all the recommendations contained in this Report, particularly those relating to costs.

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Despite the fact that the approach that we have adopted has not been proposed or implemented elsewhere, a discretionary approach to opting out has been urged by several commentators in the United States as a replacement for the absolute right of exclusion conferred by Rule 23(b)(3).[89] For the reasons indicated above, we believe that this is the correct approach.

Before leaving the opt out issue, we would like to direct our attention to three ancillary matters. First, once the court decides that the case before it is a proper one for exclusion, class members will have to exercise the right to opt out. With respect to the manner of exercising this right, the Commission is divided. A majority of the Commission recommends allowing class members to withdraw from the class simply by informing the court of their wishes in writing, as this would allow class members to leave the class in an inexpensive, expeditious manner.[90] A minority of the Commission is of the view that class members who wish to opt out should be required to come forward and make submissions to the court, indicating the reasons for their desire to exclude themselves.

Secondly, we are of the opinion that, if a right to opt out is extended, and is exercised by some or all of the class members, this fact should be recorded. Consequently, if a class member who has withdrawn from the class action were to initiate his own suit, he could invoke the record if the defendant alleged that he did not opt out and was bound by the class judgment. On the other hand, a class member who has remained in the class might commence an individual action in the hope, for example, of securing a second recovery. A defendant seeking to rely on the *res judicata* effect of the prior class suit could present the list of exclusions as an indication of the class member's failure to opt out of the earlier action. Accordingly, the Commission recommends that the judgment on the common questions or any settlement of the action should set out the names of persons who have excluded themselves from the action.[91]

Thirdly, we note that certain class action mechanisms have addressed the problem that can arise where a class member has previously instituted a separate suit against the defendant asserting the same cause of action as is the foundation of a subsequent class action. Article 1008 of the Quebec *Code of Civil Procedure*[92] provides that, in these circumstances, the class member shall be deemed to have requested exclusion from the class if he has not discontinued his earlier suit. Bill C-42[93] and Bill C-13[94] take a slightly different

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[89] See Fisch, *supra*, note 70, at 216-17; Harvard Developments, *supra*, note 16, at 1627-28; Homburger, *supra*, note 70, at 652; and Newberg, *supra*, note 16, Vol. 5, Appendix Item 2, at 1491-92. The Kansas class action rule, Ks. Code Civ. Pro. 60-223 (1969), authorizes the court to prohibit class members from opting out of a (b)(3) class action where it "finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor".

[90] See Draft Bill, s. 20(3).

[91] *Ibid.*, s. 20(4).

[92] C.C.P., *supra*, note 87.

[93] Bill C-42, *supra*, note 85, s. 39.17(2).

[94] Bill C-13, *supra*, note 86, s. 39.15(2).

File Number: _____

INVESCO CANADA LTD., et al. Applicants (Applicants)	- and -	**SINO-FOREST CORPORATION, et al.** Respondents (Respondents)

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM COURT OF APPEAL FOR ONTARIO)

Proceeding commenced at Toronto
Proceeding under the Class Proceedings Act, 1992

APPLICATION FOR LEAVE TO APPEAL OF THE APPLICANTS INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC., MATRIX ASSET MANAGEMENT INC., GESTION FÉRIQUE, AND MONTRUSCO BOLTON INVESTMENTS INC.

VOLUME II OF IV

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