Court of Appeal File No. C61331

COURT OF APPEAL FOR ONTARIO

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

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

FACTUM OF THE APPELLANT, THE UNION

December 23, 2015

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PART I. JUDGMENT APPEALED FROM

1. This is an appeal by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") and its Local 1005 (collectively, the "Union") from the decision of Justice Wilton-Siegel of the Ontario Superior Court of Justice, dated August 13, 2015 (the "Order").[1]

PART II. OVERVIEW

2. The motion judge held that the court does not have the authority to apply the doctrine of equitable subordination in proceedings under the *Companies' Creditors Arrangement Act* ("CCAA" or the "Act"). He reached this conclusion even though:

(a) s. 11 of the CCAA gives a CCAA court a broad discretion to make "any order that it considers appropriate in the circumstances", subject only to "the restrictions set out in" the CCAA;[2] and

(b) the Act contains no such restriction on the court's authority.

3. The motion judge erred in his interpretation of s. 11 of the CCAA. The Act gives judges a broad discretion to make such orders as are necessary for a debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.[3] The motion judge, however, reasoned that unrelated provisions

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[1] Order of Justice Wilton Siegel, August 13, 2015, Appellant's Appeal Book and Compendium ("ABC") Tab 2, p. 6.

[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 1.

[3] *Century Services v. Canada (Attorney General)*, 2010 SCC 60 at para. 15, Appellant's Book of Authorities ("BOA") Tab 1.

in the CCAA could imply "restrictions" on the court's authority under s. 11. This interpretation runs contrary to the scheme and purpose of the Act.

4. The Union asks this Court to allow the appeal and affirm that the court's s. 11 discretion—which is limited only by the Act's express restrictions, the baseline considerations of "appropriateness, good faith, and due diligence"[4], and the policy objectives underlying the CCAA—does not preclude the application of the doctrine of equitable subordination in the appropriate circumstances.

PART III. FACTS

A. These CCAA proceedings

5. On September 16, 2014, U.S. Steel Canada Inc. ("USSC") applied for and was granted protection from the Ontario Superior Court of Justice (Commercial List) under the CCAA (the "Initial Order"). At that time, the court appointed Ernst & Young Inc. as Monitor of USSC in the CCAA proceeding (the "Monitor").[5] USSC was, at the time of the Initial Order, an indirect, wholly-owned subsidiary of United States Steel Corporation ("USS").

6. USSC was known as Stelco prior to USS's acquisition of the company. USSC operates from two principal facilities in Ontario: Lake Erie Works and Hamilton Works.[6] The Lake Erie Works facility is an integrated steel mill located on the shores of Lake Erie near Nanticoke, Ontario.[7] Hamilton Works' steelmaking operations were

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[4] *Century Services*, *supra* at para. 70, BOA Tab 1.

[5] See Second Amended and Restated Initial Order of Morawetz R.S.J., dated November 26, 2014, ABC Tab 4, p. 32; Seventh Report of the Monitor, March 9, 2015 ("Monitor's 7th Report"), ABC Tab 11, p. 168 at para. 1.

[6] Monitor's 7th Report, ABC Tab 11, p. 171 at para. 18.

[7] Monitor's 7th Report, ABC Tab 11, p. 171 at para. 19.

permanently shut down in 2013, after being idle since 2010. Its operations now consist of certain finishing lines and two galvanizing lines which are used to process steel to meet specific customer requirements.[8]

7. The Union is one of the most significant stakeholders in these proceedings. It represents workers, retirees, and beneficiaries of USSC's defined benefit pension plans.[9]

B. The Claims Process Order and the USS Claims

8. On November 13, 2014, the Superior Court of Justice made an order establishing a claims process for USSC to identify, determine, and resolve certain claims of its creditors (the "Claims Process Order").[10]

9. The Claims Process Order created a separate process for the identification, determination, and resolution of USS's claims against its subsidiary, USSC (the "USS Claims").[11] The USS Claims comprise 14 distinct claims totaling approximately CAD $2.2 billion, including secured claims of approximately USD$122.4 million.[12]

10. The bulk of the USS Claims represent amounts which USS either:

(a) paid to acquire USSC's predecessor Stelco;

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[8] Monitor's 7th Report, ABC Tab 11, p. 172 at para. 23.
[9] Union's Notice of Objection, ABC Tab 7, p. 90 at para. 2.
[10] Claims Process Order, November 13, 2014, ABC Tab 5, p. 61.
[11] Claims Process Order, November 13, 2014, ABC Tab 5, p. 77 at para. 28. "USS Claims" is defined to include claims of USS and a number of its affiliates and subsidiaries: Claims Process Order, November 13, 2014, ABC Tab 5, p. 70, s. 2(qq).
[12] Monitor's 7th Report, ABC Tab 11, p. 170 at para. 8.

(b) notionally advanced to conduct a reorganization of Stelco/USSC two months after its acquisition of Stelco; or

(c) notionally advanced to USSC to fund working capital and cash needs.[13]

11. Given the size of the USS Claims, many of the Union's members risk loss of their jobs, pensions, and other post-employment benefits if the USS Claims are accepted as proven claims pursuant to the Claims Process Order.

12. The Claims Process Order provided that the Monitor would review the USS Claims and prepare a report detailing its review of all USS Claims and recommendations it had, if any, with respect to the determination of these claims.[14]

C. USS's motion for the approval of its claims

13. The Monitor released its report on the USS Claims in March, 2015. The Monitor's "review did not include a consideration of the potential application of equitable principles, doctrines or remedies contained in the [*Bankruptcy and Insolvency Act* (Canada), the *Fraudulent Conveyances Act* (Ontario), and the *Assignments and Preferences Act* (Ontario)] that might be claimed to alter the rights created by written agreement."[15] The Monitor recommended that USS bring a motion to approve its claims, and that a schedule be set for an early hearing of USS's motion. That schedule would

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[13] Monitor's 7th Report, ABC Tab 11, pp. 181-96 at paras. 68-135.
The Union also opposes USS's motion for the approval of a number of third party claims which USS purchased and took assignment of.

[14] Claims Process Order, November 13, 2014, ABC Tab 5, p. 77 at para. 28.

[15] Monitor's 7th Report, ABC Tab 11, p. 188 at para. 95.

include a timetable for determination and consideration of any objections to the USS Claims.[16]

14. USS served and filed its notice of motion seeking an order approving the USS Claims as "Proven Claims" pursuant to the Claims Process Order.[17]

D. The objections to the USS Claims

15. The Union, Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario) in his capacity as administrator of the Pension Benefits Guarantee Fund (collectively, the "Province"), Robert and Sharon Milbourne, and Representative Counsel to the Non-USW Active Salaried Employees and Non-USW Salaried Retirees ("Representative Counsel") filed Notices of Objection to the USS Claims.[18]

16. The Union's objections to the USS Claims can be classified as follows:

(a) an objection to the granting of security interests on the assets of USSC (the "Security Objection");

(b) an objection to the characterization of much of USS's claim as "debt" when it is properly characterized as equity (the "Debt/Equity Objection");

(c) an objection grounded in USS's conduct in relation to its Canadian plants, unionized pensioners, pension plan members, and beneficiaries, which

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[16] Monitor's 7th Report, ABC Tab 11, p. 171 at para. 17.

[17] USS Notice of Motion, March 13, 2015, ABC Tab 6, p. 83.

[18] Notice of Objection of the Union, ABC Tab 7, p. 89; Notice of Objection of the Province, ABC Tab 8, p. 127; Notice of Objection of Representative Counsel, ABC Tab 9, p. 137; Notice of Objection of Robert J. Milbourne and Sharon P. Milbourne, ABC Tab 10, p. 146.

gives rise to claims of oppression and breaches of fiduciary duty (collectively, the "Conduct Objections").

17. The Union's Security Objection and Debt/Equity Objection overlap significantly, if not completely, with objections raised by the Province and Representative Counsel.[19]

18. The Union seeks a broad range of remedies flowing from the Conduct Objections which could have significant consequences for the USS Claims, including an order subordinating the USS Claims in whole or in part to the Union's claims against USSC.[20]

19. It is in this context that the doctrine of equitable subordination arises in this proceeding. As described in greater detail below, equitable subordination is well-established in American jurisprudence. It enables a bankruptcy court to subordinate the claims of one creditor to those of other creditors in circumstances where the creditor has engaged in some type of inequitable conduct that has secured for it an unfair advantage over, or that has resulted in injury to, other creditors or the debtor.

E. The decision appealed from

20. USS and USSC objected to the inclusion of the Conduct Objections within this CCAA Proceeding, and the court directed the parties to make written submissions on a "process for determination" of those Conduct Objections.

21. The motion judge held that while the Conduct Objections would not be determined pursuant to the Claims Process Order, they should still be decided within this CCAA Proceeding.[21]

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[19] Notice of Objection of the Province, ABC Tab 8, p. 127.
[20] Notice of Objection of the Union, ABC Tab 7, p. 93 at para. 4.

22. Though the issue was not before him, and was not argued by the parties, the motion judge also considered and decided the availability of the doctrine of equitable subordination in CCAA proceedings generally. He held that if the court did have the authority to apply the doctrine equitable subordination, such authority would be found in s. 11 of the CCAA, which provides:

> 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.[22]

23. The motion judge concluded that there were "restrictions set out in this Act" which precluded the court from applying the doctrine of equitable subordination. He inferred these restrictions from the silence of Parliament and the Supreme Court of Canada on the availability of the doctrine.

24. First, the motion judge relied on the fact that there was no case law supporting the court's authority to apply the doctrine of equitable subordination. He interpreted the fact that the Supreme Court had on two occasions declined to consider the existence of the doctrine of equitable subordination in Canadian law as a rejection of the principle.[23]

25. Second, the motion judge reasoned that Parliament could have, but did not, refer to the doctrine of equitable subordination in the definition of "equity claim" and s. 36.1 of the CCAA. In his view, this silence implied a "restriction" within the meaning of s. 11 of

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[21] Reasons for Decision of Justice Wilton-Siegel, August 13, 2015 ("Reasons"), ABC Tab 3, p. 29 at para. 106.

[22] *CCAA*, *supra*, s. 11 [emphasis added]; Reasons, ABC Tab 3, p. 18 at para. 46.

[23] Reasons, ABC Tab 3, p. 18 at para. 49, citing *Canada Deposit Insurance Corp. v. Canadian Commercial Bank,* [1992] 3 S.C.R. 558, BOA Tab 2 [*CCB*] and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, BOA Tab 3.

the CCAA and evinced an intention to exclude the operation of the doctrine under the CCAA.[24]

26. The CCAA defines an "equity claim" as follows:

> "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,
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> (*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" 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; [25]

27. The motion judge reasoned that within the definition of "Claim", Parliament could have provided a CCAA court with authority to order that a "Claim"[26] should be treated as a subordinated claim or an "Equity Claim" based on the creditor's conduct. He concluded that it deliberately chose not to do so.[27]

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[24] Reasons, ABC Tab 3, p. 19 at para. 51.

[25] *CCAA*, *supra*, s. 2.

[26] The *CCAA* defines "Claim" as "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*": *CCAA*, *supra*, s. 2.

[27] Reasons, ABC Tab 3, p. 18 at para. 48.

28. The motion judge also relied on Parliament's silence with respect to equitable subordination in s. 36.1 of the CCAA. That section provides the court with authority to disallow a secured claim of a creditor if the court determines that the security constituted a fraudulent preference or a transaction at undervalue. He held that Parliament could have drafted s. 36.1 of the CCAA to extend beyond the specific circumstances in which a security is a fraudulent preference or a transfer at undervalue, but that it did not.[28]

PART IV. STATEMENT OF ISSUES AND ARGUMENT

29. There is one issue to be determined on this appeal: did the motion judge err in concluding that the court lacks the authority under s. 11 of the CCAA to apply the doctrine of equitable subordination? The Union submits that the CCAA contains no such restriction. The motion judge erred and the appeal should be allowed.

A. Standard of review

30. This appeal raises a pure question of statutory interpretation and thus law. The standard of review is correctness.[29]

B. Equitable subordination generally

31. Though the Union submits that this appeal turns on a question of statutory interpretation, the American and Canadian jurisprudence with respect to equitable subordination provide context to the motion judge's decision.

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[28] Reasons, ABC Tab 3, p. 19 at para. 50.

[29] *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8, BOA Tab 4. See also *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587 at para. 40, BOA Tab 5 (standard of review for questions of law arising out of a CCAA order is correctness).

32. The doctrine of equitable subordination has developed in the United States to ensure that injustice or unfairness is not done in the administration of the bankrupt estate.[30] The development of the doctrine culminated in the seminal ruling of the United States Court of Appeals for the Fifth Circuit in *Re Mobile Steel*.[31] In that case, the Court reviewed the jurisprudence on equitable subordination and articulated a three-part test, which the Supreme Court of Canada cited in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* ("*CCB*"):

> (1) the claimant must have engaged in some type of inequitable conduct;
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> (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and
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> (3) equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.[32]

33. One year after the decision in *Mobile Steel*, in the United States, the *Bankruptcy Reform Act* of 1978 amended the *Bankruptcy Code* to codify the doctrine of equitable subordination.[33]

34. The status and scope of equitable subordination in Canadian law has not yet been decided. The leading Canadian authorities are two Supreme Court decisions which left the doctrine's status in Canada to be decided in a more appropriate case. They did not, as the motion judge concluded, "reject" the principle of equitable subordination.

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[30] *Pepper v. Litton*, 308 U.S. 295 (1939), BOA Tab 6.
[31] 563 F.2d 692 (1977), BOA Tab 7.
[32] *CCB*, *supra* at 609, BOA Tab 2, citing *Re Mobile Steel*, *supra* and other American authorities and texts.
[33] 11 USC §510(c)(1).

35. In *CCB,* Iacobucci J. left the availability of the doctrine "open for another day", since the facts of that case did not "call for an intervention with the *pari passu* ranking of the [creditors] in the name of equity."[34]

36. More recently, in *Sun Indalex Finance, LLC v. United Steelworkers*, Deschamps J. similarly wrote that there was no need for the court to consider the doctrine, as there was no evidence that the creditor had engaged in wrongdoing or inequitable conduct.[35]

37. Canadian appellate courts have considered the doctrine but have not reached a consistent conclusion as to its status or availability. Indeed, courts have tended to avoid dealing squarely with the question. In *I. Waxman & Sons Limited (Re)*,[36] this Court found that equitable subordination would not be engaged even if it were an accepted doctrine of law. Similarly, in *C.C. Petroleum Ltd. v. Allen*, this Court overturned the portion of a judgment below which subordinated a secured claim, having disposed of the appeal on alternate grounds: "[g]iven the uncertain state of the law on [the equitable subordination] point, that portion of the judgment should be deleted as it is unnecessary."[37]

38. In *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*,[38] Mesbur J. at first instance applied the test for equitable subordination set out in *CCB* in a proceeding under the *Bankruptcy and Insolvency Act* but found that two of the three

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[34] *CCB*, *supra* at 612, BOA Tab 2.
[35] *Sun Indalex*, *supra* at para. 77, per Deschamps J., BOA Tab 3.
[36] 2010 ONCA 447 at paras. 50-52, BOA Tab 8.
[37] 2003 CanLII 48445 at para. 16 (Ont. C.A.), BOA Tab 9.
[38] 2006 CanLII 25540 (Ont. S.C.J. [Commercial List]), BOA Tab 10.

prongs of the test were not met on the facts. This Court dismissed the appeal on purely alternative grounds without addressing equitable subordination.[39]

39. Judges at first instance have come to both negative and positive conclusions about the doctrine's status. Justice Chadwick explicitly rejected it in proceedings under the *Bankruptcy Act* in *AEVO Co. v. D & A Macleod Co.*[40] Conversely, more recently, the Newfoundland and Labrador Supreme Court applied the doctrine to subordinate a claim in bankruptcy proceedings in *Oppenheim v. J.J. Lacey Insurance Limited.*[41]

C. "Restrictions" on the court's authority must be express, not inferred

40. This appeal turns on the proper interpretation of the phrase "subject to the restrictions set out in this Act" in s. 11 of the CCAA, which provides:

> 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.[42]

41. As with any statutory provision, s. 11 must be interpreted according to Driedger's modern rule of statutory interpretation:

> [t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[43]

42. The Union submits that the motion judge erred in law in concluding that there were implied restrictions on the court's authority to apply the doctrine of equitable

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[39] 2007 ONCA 600, BOA Tab 10A.
[40] (1991), 4 O.R. (3d) 368 (Gen. Div.), BOA Tab 11.
[41] 2009 NLTD 148, BOA Tab 12.
[42] *CCAA*, *supra*, s. 11 [emphasis added]; Reasons, ABC Tab 3, p. 18 at para. 46.
[43] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, BOA Tab 13.

subordination. Properly interpreted, any restrictions on the court's s. 11 discretion must be expressly set out in the Act. This interpretation accords with the statute's grammatical and ordinary sense, the scheme and object of the Act, and the legislative history.

43. The Act contains no express restrictions on the court's authority to apply the doctrine of equitable subordination. The Union submits that it remains open for a CCAA judge to apply the doctrine in the appropriate circumstances.

1. The ordinary meaning of s. 11 is that restrictions must be express

44. As a starting point, the ordinary and grammatical meaning of s. 11 is that any "restrictions" must be "set out in" the CCAA. An implication is not, by definition, something which can be "set out". Only an express restriction can be set out.

2. In accordance with the scheme and object of the CCAA, restrictions must be express

(a) Section 11's role in the statutory scheme

45. The scheme and object of the CCAA require that any restrictions on the court's s. 11 discretion be expressly provided for. The s. 11 discretion lies at the heart of the CCAA's scheme for avoiding "the social and economic losses resulting from liquidation of an insolvent company."[44] It is trite that all statutory provisions must be interpreted "harmoniously with the scheme of the Act".[45]

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[44] *Century Services*, *supra* at para. 70, BOA Tab 1
[45] *Bell ExpressVu*, *supra* at para. 26, BOA Tab 13.

46. This Court has aptly described the CCAA as a "skeletal" statute which enables judges to exercise a broad discretion to make the orders which are necessary to avoid liquidation and further the CCAA's purpose:

> [t]he CCAA ... does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy. As Farley J. noted in *Dylex Ltd. (Re)*, "[t]he history of CCAA law has been an evolution of judicial interpretation".[46]

47. As this Court has recognized, "[t]he section 11 discretion is the engine that drives this broad and flexible statutory scheme".[47] So, while the CCAA also provides for a number of specific orders, s. 11 ensures that there are no gaps in a court's power to make any order necessary to facilitate the CCAA's remedial purposes in "the hothouse of real-time litigation".[48] Inferring limitations to the court's broad discretionary power is inconsistent with the statutory scheme.

48. Indeed, in this case, the motion judge concluded that the broad jurisdiction granted under s. 11 permitted the court to exercise its discretion and determine inter-creditor claims within the CCAA process.[49]

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[46] *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, *supra* at para. 44, BOA Tab 5 [citations omitted].

[47] *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833 at para. 33, BOA Tab 14, citing *Stelco Inc. (Bankruptcy), Re* (2005), 75 O.R. (3d) 5 at para. 36 (C.A.), BOA Tab 15. This characterization remains accurate after the 2009 CCAA amendments: see e.g. *Canwest Global Communications Corp.*, 2011 ONSC 2215 at para. 24, BOA Tab 16.

[48] *Century Services*, *supra* at para. 58, BOA Tab 1.

[49] Reasons, ABC Tab 3, p. 24 at para. 73.

(b) The scheme of the statute: the CCAA contains express restrictions

49. A review of the statute reveals that "restrictions" on the court's discretion under the CCAA are clear and unequivocal, not inferred by silence or implication. For example, s. 11.06 provides that:

> [n]o 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.[50]

50. Similarly, subsection 34(11) provides another express restriction:

> [n]o order may be made under this Act if the order would have the effect of subordinating financial collateral.[51]

51. The CCAA's other "restrictions" on the court's authority are similarly drafted.[52] This is a deliberately structured legislative scheme where restrictions are clearly marked as such.

52. The CCAA also contains a number of provisions which authorize the court to make specific orders, but which are then accompanied by certain express restrictions on the court's authority to issue those orders. For example, subsection 11.3(1) specifically authorizes a court to make an order assigning to another person the rights and obligations of a debtor company's contract.[53] This power is restricted by subsection 11.3(4):

> [t]he 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

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[50] *CCAA*, *supra*, s. 11.06.
[51] *CCAA*, *supra*, s. 34(11).
[52] See *CCAA*, *supra*, s. 34(9). See also *CCAA*, *supra*, s. 11.01 ("[n]o order made under section 11 or 11.02 has the effect of ...").
[53] *CCAA*, *supra*, s. 11.3(1).

> 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.[54]

(c) The motion judge's interpretation is contrary to this scheme

53. The motion judge's analysis turns the CCAA's structure on its head. The purpose of s. 11 is to give the court the discretion to make orders which are appropriate and necessary to further the purposes of the Act, but are not specifically provided for elsewhere in the statute. But he held that the *absence* of a specific provision for the court to make a particular order—in this case the absence of a provision for the court to apply the doctrine of equitable subordination[55]—amounts to a "restriction" on the court's authority. Put differently, the motion judge effectively held that unless an order is expressly provided for, the CCAA court has no jurisdiction to grant the order.

54. This interpretation would produce absurd results.[56] For example, this reasoning would effectively read out of the CCAA well-established powers such as the power to make a claims process order, which is not specifically provided for in the CCAA.[57] Applying the motion judge's analysis to that kind of order: "Parliament could have provided the authority to [make a claims process order]. It chose not to. There is no language in the ["Claims" section of the CCAA] that gives a court the authority to [make a claims process order]."[58] This cannot be correct.

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[54] *CCAA*, *supra*, s. 11.3(4).

[55] Reasons, ABC Tab 3, p. 19 at para. 50.

[56] See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, BOA Tab 17 ("[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences" at para. 27).

[57] See generally *ScoZinc Ltd., Re*, 2009 NSSC 136, BOA Tab 18 at paras. 17-31.

[58] Reasons, ABC Tab 3, p. 19 at para. 50.

55. The motion judge's interpretation would also read out of the CCAA the power to order payments to creditors without a plan of arrangement—something that is "often ordered"[59] by CCAA judges. Other courts have expressly rejected such efforts to restrict the CCAA to the specific powers it provides for. In *AbitibiBowater inc. (Arrangement relatif à)*,[60] a group of bondholders opposed a proposed distribution on the basis that the CCAA did not specifically authorize the distribution of cash to a creditor group prior to approval of a plan of arrangement.[61] Justice Gascon (as he then was) held that the bondholders' logic was backwards and authorized the proposed distribution, on the basis that "[n]othing in the CCAA prevents similar interim distribution of monies."[62]

56. Similarly, in *Re Nortel Networks Corporation et al*,[63] this Court held that nothing in the CCAA prevented courts from applying the interest stops rule in insolvency proceedings, and upheld Newbould J.'s application of the doctrine. The Court reasoned that

> in order to achieve the remedial purpose of the CCAA, CCAA courts have been innovative in their interpretation of their stay power and in the exercise of their authority in the administration of CCAA proceedings. This approach has been specifically endorsed by the Supreme Court of Canada in *Century Services* and would no doubt guide the court should the need arise.[64]

57. The motion judge's constrained interpretation of section 11 is antithetical to this approach.

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[59] *Re Nortel Networks Corporation et al*, 2014 ONSC 4777 at para. 55, BOA Tab 19, aff'd on other grounds, 2015 ONCA 681, BOA Tab 20.
[60] 2009 QCCS 6461, BOA Tab 21.
[61] *Ibid.* at para. 56, BOA Tab 21.
[62] *Ibid.* at para. 71, BOA Tab 21
[63] 2015 ONCA 681, BOA Tab 20.
[64] *Ibid.* at para. 48, BOA Tab 20 [references omitted].

3. Amendments to the CCAA reflect Parliament's intention

58. The 2009 amendments to the CCAA make it particularly clear that Parliament intended for a CCAA court's s. 11 discretion to be subject only to express restrictions. In 2009, Parliament amended the court's s. 11 authority from being "subject to this Act" to being "subject to the restrictions set out in this Act". Whereas previously, the scope of the court's authority was expressly delineated in the Act, the amendments expanded the scope of the court's authority so that it is now subject only to restrictions in the Act.

59. Prior to the amendments, s. 11 read:

> [n]otwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.[65]

60. It now reads:

> [d]espite 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.[66]

61. The Supreme Court has explained that in making this amendment, "Parliament appears to have endorsed the broad reading of CCAA authority developed by the jurisprudence."[67]

62. In considering the meaning of an amended provision, courts must be mindful that the legislator does not speak in vain.[68] Rather than speaking in vain, it becomes clear

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[65] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11(1), as it appeared prior to September 18, 2009 [emphasis added[.

[66] *CCAA*, *supra*, s. 11 [emphasis added].

[67] *Century Services*, *supra* at para. 68, BOA Tab 1.

that Parliament's decision to add the phrase "subject to the restrictions set out in this Act" to s. 11 must mean only express restrictions: there is no reason why Parliament would have amended s. 11 in this manner if it intended to permit the s. 11 discretion to be limited by implication.

4. Other courts have required "restrictions" on s. 11 authority to be express

63. The British Columbia Court of Appeal's recent decision in *North American Tungsten Corporation v. Global Tungsten and Powders Corp.*[69] confirms that "restrictions" on the court's s. 11 authority must be express. At issue in that case was whether s. 21 of the CCAA is a "restriction" on the court's ability under s. 11 to stay rights of set-off. Section 21, however, merely provides that the law of set-off applies under the CCAA without expressly adding any further restrictive effect:

> [t]he 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 company were plaintiff or defendant, as the case may be.[70]

64. The Court rejected the argument that this provision operated as a "restriction" on the court's power under s. 11 to stay set-off rights. After analyzing the discretionary, skeletal structure of the CCAA in general, the Court observed that "where other provisions of the statute are intended to restrict the powers under ss. 11 and 11.02 of the statute, they do so in unequivocal terms."[71]

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[68] *Bell Expressvu*, *supra* at para. 37, BOA Tab 13.

[69] 2015 BCCA 426, BOA Tab 22. This proceeding appears to be the only one in which the meaning of the phrase "subject to the restrictions set out in this Act" has been expressly raised: see also *North American Tungsten Corporation v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, BOA Tab 22A, denying leave to appeal to 2015 BCSC 1382, BOA Tab 22B.

[70] *CCAA*, *supra*, s. 21.

[71] *North American Tungsten*, 2015 BCCA 426 at para. 34.

65. This analysis applies equally to the definition of "Equity Claim" and section 36.1 of the CCAA. Definitions and authorizing provisions have no restrictive effect in their ordinary sense. The contrary conclusion would undermine the scheme of the CCAA.

5. The "restrictions" implied by the motion judge do not, on their face, imply restrictions on the court's authority

66. The "restrictions" the motion judge purported to identify in the CCAA on the Court's authority to apply equitable subordination simply do not have any restrictive effect in their ordinary sense.

67. The definition of "Equity Claim" is just that—a definition, not a restriction on the court's discretion.

68. Section 36.1, the "transfers at undervalue" provision, merely authorizes the court to invalidate certain transactions based on the conduct *of the debtor company*. This is an authorizing provision that also has no restrictive effect in its ordinary sense.

69. Section 36.1 is not even tangentially related to the purpose of equitable subordination, a doctrine that focuses on the actions *of creditors* vis-à-vis one another.[72] Section 36.1 deals with transactions between the debtor company and the creditors. It strains the meaning of s. 36.1 to read it as restricting the court from making unrelated orders with respect to the actions of a creditor. Such an interpretation is also inconsistent with the Supreme Court of Canada's directive that "the general language of

[72] In his Reasons, the motion judge himself recognized that section 36.1 does not "engage the principle of equitable subordination": ABC Tab 3, p. 17 at para. 44.

the CCAA should not be read as being restricted by the availability of more specific orders."[73]

PART V. ORDER SOUGHT

70. The Union respectfully requests a declaration that the CCAA contains no "restrictions" within the meaning of s. 11 of the CCAA on the court's authority to apply the doctrine of equitable subordination, and the costs of this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of December, 2015

Gordon Capern / Kristian Borg-Olivier / Denise Cooney

Paliare Roland Rosenberg Rothstein LLP

Lawyers for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

per Sharon White

Inch Hammond Professional Corporation

Lawyers for Local 1005

[73] *Century Services*, *supra* at para. 70, BOA Tab 1.

CERTIFICATE OF ESTIMATED TIME FOR ARGUMENT

I, Denise Cooney, certify that

(i) an Order under subrule 61.09(2) (original record and exhibits) is not required; and

(ii) the time required for the appellants' argument is approximately one hour, not including reply.

December 23, 2015

Denise Cooney

Paliare Roland Rosenberg Rothstein LLP

Lawyers for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

SCHEDULE "A"

LIST OF AUTHORITIES

1. *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6461
2. *AEVO Co. v. D & A Macleod Co.* (1991), 4 O.R. (3d) 368 (Gen. Div.)
3. *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42
4. *Canwest Global Communications Corp.*, 2011 ONSC 2215
5. *C.C. Petroleum Ltd. v. Allen*, 2003 CanLII 48445 (Ont. C.A.)
6. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank,* [1992] 3 S.C.R. 558
7. *Century Services v. Canada (Attorney General)*, 2010 SCC 60
8. *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, 2006 CanLII 25540 (Ont. S.C.J. [Commercial List]), aff'd, 2007 ONCA 600
9. *Housen v. Nikolaisen*, 2002 SCC 33
10. *I. Waxman & Sons Limited (Re)*, 2010 ONCA 447
11. *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587
12. *North American Tungsten Corporation v. Global Tungsten and Powders Corp.*, 2015 BCCA 426, aff'g 2015 BCCA 390, aff'g 2015 BCSC 1382
13. *Oppenheim v. J.J. Lacey Insurance Limited*, 2009 NLTD 148
14. *Pepper v. Litton*, 308 U.S. 295 (1939)
15. *Re Mobile Steel*, 563 F.2d 692 (1977)
16. *Re Nortel Networks Corporation et al*, 2014 ONSC 4777
17. *Re Nortel Networks Corporation et al*, 2015 ONCA 681
18. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27
19. *ScoZinc Ltd., Re*, 2009 NSSC 136
20. *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833
21. *Stelco Inc. (Bankruptcy), Re* (2005), 75 O.R. (3d) 5 (C.A.)
22. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Definitions

2. ... "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

...

Preferences

95. (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

> (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
>
> (b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Definitions

(3) In this section,

"clearing house" means a body that acts as an intermediary for its clearing members in effecting securities transactions;

"clearing member" means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary;

"creditor" includes a surety or guarantor for the debt due to the creditor;

"margin deposit" means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations.

...

Transfer at undervalue

96. (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Meaning of "person who is privy"

(3) In this section, a "person who is privy" means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

Protected transactions

97. (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

(a) a payment by the bankrupt to any of the bankrupt's creditors;

(b) a payment or delivery to the bankrupt;

(c) a transfer by the bankrupt for adequate valuable consideration; and

(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

Definition of "adequate valuable consideration"

(2) The expression "adequate valuable consideration" in paragraph (1)(c) means a consideration of fair and reasonable money value with relation to that of the property assigned or transferred, and in paragraph (1)(d) means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

Law of set-off or compensation

(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

Recovering proceeds if transferred

98. (1) If a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside or, in the Province of Quebec, null or annullable and set aside, and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee.

Trustee may recover

(2) The trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds of the property as fully and effectually as the trustee could have recovered the property if it had not been so sold, disposed of, realized or collected.

Operation of section

(3) Notwithstanding subsection (1), where any person to whom the property has been sold or disposed of has paid or given therefor in good faith adequate valuable consideration, he is not subject to the operation of this section but the trustee's recourse shall be solely against the person entering into the transaction with the bankrupt for recovery of the consideration so paid or given or the value thereof.

Trustee subrogated

(4) Where the consideration payable for or on any sale or resale of the property or any part thereof remains unsatisfied, the trustee is subrogated to the rights of the vendor to compel payment or satisfaction.

...

General assignments of book debts ineffective

98.1 (1) If a person engaged in any trade or business makes an assignment of their existing or future book debts, or any class or part of those debts, and subsequently becomes bankrupt, the assignment of book debts is void as against, or, in the Province of Quebec, may not be set up against, the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

Foregoing provisions not to apply in some cases

(2) Subsection (1) does not apply to an assignment of book debts that is registered under any statute of any province providing for the registration of assignments of book debts if the assignment is valid in accordance with the laws of the province.

Other cases

(3) Nothing in subsection (1) renders void or, in the Province of Quebec, null any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made in good faith and for adequate valuable consideration.

Definition of "assignment"

(4) For the purposes of this section, "assignment" includes assignment by way of security, hypothec and other charges on book debts.

Dealings with undischarged bankrupt

99. (1) All transactions by a bankrupt with any person dealing with the bankrupt in good faith and for value in respect of property acquired by the bankrupt after the bankruptcy, if completed before any intervention by the trustee, are valid against the trustee, and any estate, or interest or right, in the property that by virtue of this Act is vested in the trustee shall determine and pass in any manner and to any extent that may be required for giving effect to any such transaction.

Receipt of money by banker

(2) For the purposes of this section, the receipt of any money, security or negotiable instrument from or by the order or direction of a bankrupt by his banker and any

payment and any delivery of any security or negotiable instrument made to or by the order or direction of a bankrupt by his banker shall be deemed to be a transaction by the bankrupt with his banker dealing with him for value.

100. [Repealed, 2005, c. 47, s. 76]

Inquiry into dividends and redemptions of shares

101. (1) Where a corporation that is bankrupt has paid a dividend, other than a stock dividend, or redeemed or purchased for cancellation any of the shares of the capital stock of the corporation within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into the transaction to ascertain whether it occurred at a time when the corporation was insolvent or whether it rendered the corporation insolvent.

Judgment against directors

(2) If a transaction referred to in subsection (1) has occurred, the court may give judgment to the trustee against the directors of the corporation, jointly and severally, or solidarily, in the amount of the dividend or redemption or purchase price, with interest on the amount, that has not been paid to the corporation if the court finds that

(a) the transaction occurred at a time when the corporation was insolvent or the transaction rendered the corporation insolvent; and

(b) the directors did not have reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or the transaction would not render the corporation insolvent.

Criteria

(2.1) In making a determination under paragraph (2)(b), the court shall consider whether the directors acted as prudent and diligent persons would have acted in the same circumstances and whether the directors in good faith relied on

(a) financial or other statements of the corporation represented to them by officers of the corporation or the auditor of the corporation, as the case may be, or by written reports of the auditor to fairly reflect the financial condition of the corporation; or

(b) a report relating to the corporation's affairs prepared pursuant to a contract with the corporation by a lawyer, notary, accountant, engineer, appraiser or other person whose profession gave credibility to the statements made in the report.

Judgment against shareholders

(2.2) Where a transaction referred to in subsection (1) has occurred and the court makes a finding referred to in paragraph (2)(a), the court may give judgment to the trustee against a shareholder who is related to one or more directors or to the corporation or who is a director not liable by reason of paragraph (2)(b) or subsection (3), in the amount of the dividend or redemption or purchase price referred to in subsection (1) and the interest thereon, that was received by the shareholder and not repaid to the corporation.

Directors exonerated by law

(3) A judgment pursuant to subsection (2) shall not be entered against or be binding on a director who had, in accordance with any applicable law governing the operation of the corporation, protested against the payment of the dividend or the redemption or purchase for cancellation of the shares of the capital stock of the corporation and had thereby exonerated himself or herself under that law from any liability therefor.

Directors' right to recover

(4) Nothing in this section shall be construed to affect any right, under any applicable law governing the operation of the corporation, of the directors to recover from a shareholder the whole or any part of any dividend, or any redemption or purchase price, made or paid to the shareholder when the corporation was insolvent or that rendered the corporation insolvent.

Onus of proof — directors

(5) For the purposes of subsection (2), the onus of proving

> (a) that the corporation was not insolvent at the time the transaction occurred and that the transaction did not render the corporation insolvent, or
>
> (b) that the directors had reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or that the transaction would not render the corporation insolvent lies on the directors.

Onus of proof — shareholder

(6) For the purposes of subsection (2.2), the onus of proving that the corporation was not insolvent at the time the transaction occurred and that the transaction did not render the corporation insolvent lies on the shareholder.

Definitions

2. (1) In this Act,

"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;

"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" 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;

...

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.

11. [as it read prior to September 18, 2009] Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person

interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

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.

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 specified by the court and agrees to the assignment.

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.

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

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 Actapply, 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".

11 U.S. Code – Bankruptcy

§ 510 - Subordination

(a) A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.

(b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

(c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may—

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

...

Court of Appeal File No. C61331

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

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

COURT OF APPEAL FOR ONTARIO

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