RECONSIDERING EQUITABLE SUBORDINATION

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(2994 exclusive of footnotes and table of contents)

I. INTRODUCTION

Historically, it was thought that insolvency law's statutory schemes of distribution should not be disturbed.[1] Adherence to this conventional view of distribution appeared to waiver as the American doctrine of equitable subordination became a persuasive basis to alter the priority of claims. Until recently, the application of the doctrine in the Canadian restructuring context was uncertain. The Ontario Court of Appeal in *US Steel Canada Inc., (Re)* however, held that there was no statutory authority under the *Companies' Creditors Arrangement Act* (*CCAA*) to apply equitable subordination. This paper will ask whether it was correct to do so. To answer this question, the treatment of the doctrine in Canadian insolvency will be examined by drawing on Thomas Telfer's *Transplanting Equitable Subordination: The New Free-Wheeling Equitable Discretion in Canadian Insolvency Law*. Further, the substantive merits of the *US Steel* decision will be reviewed. This paper will contend that the Ontario Court of Appeal was too brash in closing the door on equitable subordination. A purposive approach to interpreting the *CCAA*; and consideration for the objectives of the statute and the appropriateness of discretionary remedies under section 11, reveals the statutory authority for the doctrine. Given that the Supreme Court is unlikely to have the opportunity to clarify the matter in the near future, the *ex ante* and *ex post* efficiency implications of importing the doctrine warrant consideration.

[1] Roderick J. Wood, *Essentials of Canadian Bankruptcy and Insolvency Law* (Toronto: Irwin Law Inc., 2009) at 263–264 print [*Essentials of*].

II. EQUITABLE SUBORDINATION & ITS TREATMENT IN CANADIAN INSOLVENCY

The Doctrine of Equitable Subordination

Taylor v Standard Gas Electric and *Pepper v Litton* are taken to be the origin of equitable subordination in American Bankruptcy law.[2] In each, the Supreme Court of the United States invoked broad principles of fairness and equity to subordinate the claims of creditors who had wrongfully preferred their interests to the detriment of other creditors.[3] The result was a nebulous formulation of equitable subordination.[4] Recognizing its amorphous nature, the Fifth Circuit refined the doctrine in *Re Mobile Steel*. Specifically, the Court introduced a three-part test to be satisfied prior to the use of equitable subordination. These include that:

> (i) [t]he claimant must have engaged in some type of inequitable conduct; (ii) [t]he misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; (iii) [e]quitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.[5]

The doctrine was later codified in section 510(c) of the Bankruptcy Code[6] and has continued to be subject to academic and judicial debate. The doctrine permits American courts to subordinate the claim of a creditor to those of others with formally lower priority.[7]

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[2] Tomas G.W. Telfer, "Transplanting Equitable Subordination: The New Free-Wheeling Equitable Discretion in Canadian Insolvency Law" 36:36 CBLJ 36 at 40 [Transplanting Equitable Subordination].
[3] See *Taylor v Standard Gas and Electric*, [1939] 306 US 307 at 550–551 [*Taylor*]; see *Pepper v Litton*, [1939] 308 US 295 at 305—311.
[4] Transplanting Equitable Subordination, *supra* note 2 at 42.
[5] *Re Mobile Steel,* [1977] 563 F2d 692 5th Cir at 700 [*Mobile Steel*]. See also *Ibid*; *US Steel Canada Inc. (Re)* 2016 ONCA 662 [*US Steel*]; *Essentials of, supra* note 1 at 264.
[6] Transplanting Equitable Subordination, *supra* note 1 at 42–43. According to Telfer, Congress deliberately used broad language when codifying equitable subordination to permit courts flexibility to develop the doctrine. *Bankruptcy Reform Act*, 11 USC s510(c)(1).
[7] *Ibid* at 36; *US Steel*, *supra* note 5 at para 20; Davis E. Baird, *Baird's Practical Guide to the Companies' Creditors Arrangement Act*, (Toronto: Thomson Reuters Canada Limited, 2009) at 439 print [*Baird's Practical Gudie*].

The treatment of equitable subordination within Canadian insolvency law has been inconsistent. There is no express statutory provision in either the *BIA*[8] or *CCAA*[9] permitting courts to apply equitable subordination as a remedy.[10] Whether a Canadian court can apply the doctrine pursuant to its inherent jurisdiction, section 183 of the *BIA* in the bankruptcy context, or section 11 of the *CCAA* within restructuring proceedings, remains unclear.

Equitable Subordination Pre-US Steel

For Telfer, Canadian courts have either rejected, accepted or remained ambivalent to the doctrine of equitable subordination.[11] The Supreme Court of Canada had the opportunity to consider the doctrine in *Canada Deposit Insurance Corp. v Canadian Commercial Bank* and *Sun Indalex Finance LLC v United Steelworkers*.[12] In both instances, the Court declined to provide an answer as to the applicability of equitable subordination and decided the case on other grounds. Similarly, the Ontario Court of Appeal, in *Olympia & York Developments Ltd. v Royal Trust Co.* did not feel compelled to provide clarity on whether the doctrine had application under the *CCAA*.[13] The Ontario Supreme Court's decision in *Unisource Canada v Hongkong Bank of Canada* and the Ontario Superior Court of Justice's rulings in *I. Waxman & Sons Ltd. (Re)* are categorized here amongst this line of ambivalent cases.[14]

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[8] *Bankruptcy and Insolvency Act,* RSC 1985 c B-3.
[9] *Companies' Creditors Arrangement Act*, RSC 1985 c C-36.
[10] Transplanting Equitable Subordination, *supra* note 2 at 54.
[11] *Ibid* at 63.
[12] *Canada Deposit Insurance Corp. v Canadian Commercial Bank*, [1992] 3 SCR 558 at 609 [*Canadian Commercial Bank*]; *Sun Indalex Finance, LLC v United Steelworkers* 2013 SCC 6, [2013] 1 SCR 271 at para 77. See generally, *US Steel, supra* note 5 at para 22.
[13] *Olympia & York Developments Ltd. v Royal Trust Co.,* [1993] 14 OR (3d) 1 (CA) at 84 [*Olympia*].
[14] *Unisource Canada v Hongkong Bank of Canada*, [1998] 43 BLR (2d) 226 at para 135 (affirmed on appeal); *I. Waxman & Sons Limited (Re)* (2008), 89 OR (3d) 427 at para 34. See generally, *New Solutions Financial Corporation v 952339 Ontario Limited* (2007), 29 CBR (5th) 222 at para 35 and *National Bank of Canada v Merit Energy Ltd.* (2001), 10 WWR 305 at para 67 where the Ontario Superior Court of Justice and Alberta Court of Queens Bench respectively, considered the doctrine of equitable subordination but, did not make a decisions as to whether it was applicable in Canadian insolvency law.

Though the Supreme Court decided to leave the question of whether equitable subordination applied in Canada for "another day,"[15] other courts have shown a clear preference in one direction. Amongst the first decisions to seemingly reject equitable subordination was *Aevo Co. v D & A Macleod Co.* where Chadwick J. stated, "that to introduce the doctrine would create chaos."[16] Chadwick J. affirmed his stance on the inapplicability of equitable subordination in Canada in *Re/Max Metro City Realty Ltd. v Baker (Trustee of)* and *Matticks v B & M Construction Inc*.[17] The Supreme Court of British Columbia was equally unreceptive to equitable subordination in *Pioneer Distributors Ltd. v Bank of Montreal*.[18] In contrast, *Laronge Realty Ltd. v Golconda Investments Ltd.*, *Blue Range Resource Corp (Re)*, *Christian Brothers of Ireland (Re)*, and *Oppenheim v J.J. Lacey Insurance Limited* demonstrate a willingness on the part of some courts to embrace equitable subordination.[19]

III. THE ONTARIO COURT OF APPEAL CLOSES THE DOOR IN *US STEEL*

Evidently, the applicability of equitable subordination, particularly in the context of restructuring, has been uncertain. As the above discussion illustrates, the Supreme Court and appellate courts appear reluctant to make a definitive pronouncement on the issue. Accordingly, *US Steel* presented an opportunity for the Ontario Court of Appeal to abandon its previous ambivalence in *Olympia & York Developments* to clarify whether equitable subordination was applicable under the *CCAA*.

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[15] *Canadian Commercial Bank, supra* note 12 at 612.
[16] *Aevo Co. v D & A Macleod Co.*, [1991] 4 OR (3d) 368 at 372; see also *Essentials of*, *supra* note 1 at 264.
[17] *Re/Max Metro City Realty Ltd. v Baker (Trustee of)*, [1993] 16 CBR (3d) 308; Transplanting Equitable Subordination, *supra* note 1 at 63. See generally, *Matticks v B & M Construction Inc.*, [1992] 11 OR (3d) 156.
[18] *Pioneer Distributors Ltd. v Bank of Montreal*, [1994] 1 WWR 48 at 22–23.
[19] *Laronge Realty Ltd. v Golconda Investments Ltd.*, [1986] 7 BCLR (2d) 90 at paras 28–29; *Blue Range Resource Corp (Re)* (2000), 4 WWR 738 at paras 56–57; *Re Christian Brothers of Ireland (Re)* (2003), 69 OR (3d) 507 at paras 103–109; *Oppenheim v J.J. Lacey Insurance Limited* 2009 NLTD 148, [2009] NLSCTD 148 at para 54. See also, *Essentials of, supra* note 1 at 264.

Relevant Facts & Reasons of the Ontario Court of Appeal

U.S. Steel Canada Inc. (USSC) was owned by USS at the time it entered *CCAA* protection in September 2014.[20] The claims process order created by the *CCAA* judge established the method by which nearly $2.2 billion in claims by USS against USSC would be resolved.[21] Four notices of objections were filed in response to USS's proofs of claims.[22] The most notable objections were those raised by the Union and former employees. In particular, the Union contended that USS breached its fiduciary duty by deliberately causing USSC to underperform.[23] According to the Union, USS's conduct was motivated by a desire to ensure that USSC would be unable to meet its pension obligations in the event of restructuring.[24] On this basis, the Union argued that USS's claims be subordinated.[25] Relying principally on the doctrine of equitable subordination, two former employees claimed that the conduct described by the Union supported the subordination of USS's claims to those of other unsecured creditors.[26] Ultimately, these arguments proved unsuccessful because the *CCAA* judge concluded that he had no jurisdiction to apply equitable subordination.[27]

Writing for the court, Strathy C.J.O characterized the issue on appeal as: whether the *CCAA* judge had jurisdiction to apply the doctrine of equitable subordination pursuant to the *CCAA*.[28] According to the Court, this question had to be answered in the negative.[29] Strathy C.J.O began

[20] *US Steel*, *supra* note 5 at paras 1–4.
[21] *Ibid* at para 6.
[22] *Ibid* at para 7.
[23] *Ibid* at paras 11–12.
[24] *Ibid* at para 12.
[25] *Ibid.*
[26] *Ibid* at para 13.
[27] *Ibid* at para 19.
[28] *Ibid* at paras 27 and 33.
[29] *Ibid* at para 2.

his analysis by endorsing the Supreme Court's recognition that "in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation."[30] Applying Driedger's modern principles of statutory interpretation,[31] the Court found that the *CCAA* seeks to assist companies and their creditors arrive at plans of compromise or arrangement while allowing the debtor to continue business and avoid the effects of commercial bankruptcy.[32] With this context, the Court proceeded to consider whether the application of equitable subordination under the *CCAA* would be appropriate pursuant to section 11. For the Court, an order made on the express or implied authority of section 11 of the *CCAA* must further its purposes.[33] Strathy C.J.O concluded that nothing in the *CCAA* granted jurisdiction to apply equitable subordination.[34] Moreover, that its application was not supported by the objective of the statute which, "focuses on the implementation of a plan of arrangement or compromise."[35]

US Steel Was Substantively Incorrect

Ostensibly at least, it appears that *US Steel* has closed the door to the application of equitable subordination in *CCAA* proceedings. The potential positive implications are laudable and include improving *ex ante* efficiency by: increasing certainty, reducing risk for creditors, and eliminating costly litigation. Though not without its merits, there are a number of issues surrounding the appropriateness of rejecting equitable subordination under the *CCAA*.

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[30] *Century Services Inc. v Canada (Attorney General)* 2010 SCC 60, [2010] 3 SCR 379 at para 66 [*Century*]; *Ibid* at para 44.
[31] Elmer A. Driedger, *The Construction of Statutes*, 2 ed (Toronto: Butterworths, 1983) at p 87 print.
[32] *US Steel*, *ibid* at para 47.
[33] *US Steel*, *ibid* at paras 51–52. Here, the Court's approach is informed by the Supreme Court in *Century Services Inc. v Canada (Attorney General)* (2010) 3 S.C.R. 379 at para 75, where Deschamps J. stated that "[a]ppropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*."
[34] *US Steel*, *ibid* at para 101.
[35] *Ibid*.

The decision in *US Steel* hinged on the Court's interpretation of the *CCAA*, and more narrowly, on its belief that equitable subordination would not constitute an appropriate order considering the statutory objectives. These points warrant further analysis.

The *CCAA* is skeletal legislation to be accorded a large and liberal interpretation, recognizing the equities in each instance.[36] The breadth and remedial nature of the *CCAA* grants courts a great deal of discretion to achieve the objectives of the legislation.[37] These objectives have been explored in the common law and were recently consolidated by the Alberta Court of Queen's Bench in *Re Kerr Interior Systems Ltd.* The purposes include:

> (i) permitting debtors to continue in business and, where possible, avoid the social and economic costs of liquidation […];
> (ii) balancing stakeholder interests […];
> (iii) protecting creditors' interests and permitting an orderly administration of the debtor's affairs […];
> (iv) rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.[38]

Authority under the *CCAA* has been conferred on superior courts which also have inherent and equitable jurisdiction.[39] The broadest statutory discretion vested in courts under the *CCAA* is found in section 11 which provides that, "if an application is made under this Act […] the court […] may, subject to the restrictions set out in this Act, make any order that it considers appropriate in the

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[36] *Century, supra* note 30 at para 57; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)* 2008 ONCA 587, [2008] 92 OR (3d) 513 at para 44 [*Metcalfe*]; Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act,* (Toronto: Thomson Canada Limited, 2007) at 58 print [*Rescue!*]; *Baird's Practical Guide*, *supra* note 7 at 68;
[37] Frank Bennett, *Bennett on Bankruptcy*, 18th ed (Toronto: LexisNexis Canada Inc., 2015) at 1624 print.
[38] *Kerr Interior Systems Ltd. (Re)* 2011 ABQB 214, [2011] 517 AR 186 at para 23. The first and fourth aim of the statute were drawn from the Supreme Court in *Century Services Inc. v Canada (Attorney General)* at paras 15 and 18 respectively. The Alberta Court of Queen's Bench borrowed the second objective from *Nova Metal Products Ltd. v Comiskey (Trustee of)* and *Air Canada (Re)*. The third aim of the CCAA was drawn from *Meridian Development Inc. v Toronto Dominion Bank*. See also, *ibid* at 1625.
[39] *Bennett on Bankruptcy*, *supra* note 37 at 1625; *Rescue!*, *supra* note 36 at 61.

circumstances."[40] If equitable subordination is to be applied in the *CCAA* context, a court's express or implied authority to do so will be found in section 11. If the statute is incapable of providing the jurisdiction to employ equitable subordination, only then should a court look to its inherent or equitable jurisdiction.

In the case of equitable subordination, a purposive and liberal interpretation of the *CCAA* suggests that the discretion to apply the doctrine can be grounded in section 11. Applying such an approach to section 11 of the *CCAA* would be congruent with the Ontario Court of Appeal's previous decisions in *Metcalfe & Mansfield Alternative Investments II Corp., (Re)* and *Indalex Limited (Re)* as well as other Canadian jurisprudence. In *Metcalfe*, the Court observed that the *CCAA* "is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy." Similarly, in *Indalex* the Court observed that "the CCAA regime is designed to deal with all matters during an insolvent company's attempt to reorganize" and that the "regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions."[41] To this end, courts have granted orders for interim financing and super-priority charges, as well as approved the release of claims against third parties despite the *CCAA*'s silence on these issues.[42]

To be sure, the discretion conferred by the *CCAA* on judges to craft innovative solutions responsive to commercial realities is not unlimited. For this reason, the Supreme Court has cautioned that courts exercising discretion pursuant to section 11 of the Act must consider the "requirements of

[40] *Supra* note 9.
[41] *Metcalfe*, *supra* note 36 at para 44; *Indalex Limited (Re)* 2011 ONCA 265, [2011] 104 OR (3d) 641 at paras 154–155.
[42] *Century*, *supra* note 30 at para 62; *Bennett on Bankruptcy*, *supra* note 37 at 1673-1674.

appropriateness, good faith, and due diligence."[43] According to Deschamps J., "appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*." In *US Steel*, the Ontario Court of Appeal was mindful of Deschamps J.'s instruction in *Century Services*. In fact, much of Strathy C.J.O's analysis centred on whether employing equitable subordination would be appropriate in view of the scheme and objectives of the *CCAA*. What the Court of Appeal seems to have given less attention to was Deschamps J.'s subsequent remark that, "appropriateness extends not only to the purpose of the order, but also to the means it employs […] chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit."[44] Deschamp J.'s concern for fairness is hardly new.[45]

Equitable Subordination May Advance the Objectives of the CCAA

One of the principal instruments of the *CCAA* is the structure it provides for negotiations of plans of arrangement or compromise.[46] This framework is safeguarded by the oversight of courts. That is, courts seek to protect and balance the rights of the parties within the negotiation in a way that aligns with the statutory framework and its objectives. This process must recognize and account for existing power imbalances and informational asymmetries. Where creditors try to circumvent the statute's distribution rules and acquire an advantage not afforded to other parties the efficacy of negotiation is diminished. Rules regarding fraudulent conveyance, preference and transfers at undervalue restrict creditors from gaining such advantages to the detriment of others. If viewed as

[43] *Century, ibid* at para 70; *Bennett on Bankruptcy*, *ibid* at 1659.
[44] *Ibid*.
[45] *Skeena Cellulose Inc. v Clear Creek Contracting Ltd.* 2003 BCCA 344, [2003] 13 BCLR (4th) 236 at para 38.
[46] *Rescue!*, *supra* note 36 at 11.

a tool to supplement these rules,[47] equitable subordination reinforces the *CCAA*'s ability to facilitate efficient negotiations and balance the rights of creditors.

Understanding equitable subordination as a means of reinforcing the *CCAA's* framework for negotiations aligns with Canadian perspectives on the purposes of insolvency law. Neither Thomas Jackson and Douglas Baird's creditors' bargain theory and collectivism or Elizabeth Warren's enterprise theory, obviates equitable subordination within insolvency law. If the aim of insolvency law is to enhance creditor recovery by encouraging collective action as Jackson and Baird offer,[48] equitable subordination may serve as a tool to limit individual collection efforts that hinder value maximization for all creditors. Conversely, if insolvency law is concerned with business failure and the distribution of its impacts as Warren suggests,[49] equitable subordination may prevent creditors from attempting to shift losses towards other stakeholders.

Accepting equitable subordination as supplementary to fraudulent conveyance, preference, or transfers at undervalue is relevant to both *US Steel* and *Target*. As explored earlier, in the case of *US Steel*, USSC incurred significant debt obligations to its parent USS which were filed as claims in the *CCAA* proceedings. Similarly, in *Target*, Target Canada Co entered several leaseback arrangements with the Canadian affiliates of its parent company, Target Canada Property LP and

[47] See Roderick J. Wood, "Assessing Institutional Abuse Claims in Liquidation Proceedings: Re Christian Brothers of Ireland in Canada" 20 BFLR 449 at 461. Here Professor Wood notes that equitable subordination, as applied within the US, "seeks to protect the *pro rata* distribution rules from the misconduct of persons who seek to undermine it. As such, it supplements and reinforces fraudulent conveyance and fraudulent preference law."
[48] Tushara Weerasooriya, Adam Maerov, Caireen Hanert, and Kourtney Rylands "Pre-Packs under the *Companies' Creditors Arrangement Act*: Has the Push for Efficiency Undermined Fairness" in Janis P. Sarra and Justice Barbara Romaine, *Annual Review of Insolvency Law 2016* (Toronto: Thomson Reuters Canada Limited 2017) at 362–363 print.
[49] *Ibid* at 365.

Target Canada Property LLC.[50] Target Canada's termination of these agreements resulted in a combined $3.36 billion in claims.[51] In each case, creditor's attempts to re-characterize the debt as equity, or establish a fraudulent conveyance, preference or transfer at undervalue were unsuccessful.[52] Without recourse to equitable subordination, creditors had no means of limiting the effect of intercorporate debt on their recovery.

Ultimately, a purposive interpretation of the *CCAA* and its objectives as well as fulsome consideration for the appropriateness of a remedy establishes authority for equitable subordination. Contrary to its own jurisprudence, the Ontario Court of Appeal, in *US Steel* characterized the *CCAA* narrowly.[53] Its restrictive view of the purposes of the Act blunted its approach as to whether equitable subordination would constitute an appropriate remedy under the *CCAA*. The Court seems to have given little weight to the *CCAA*'s related purposes of balancing stakeholder interests and the protection of creditors. Further, the relationship between these objectives and considerations of fairness in determining whether an exercise of discretion is appropriate went unnoticed. While rejecting the application of equitable subordination under the *CCAA* the Court suggested that the remedy may be better founded under section 183 of the *BIA*.[54]

[50] Jeremy Opolsky, "Intercorporate Debt and Equitable Subordination: One Case Forward and One Case Back" in Janis P. Sarra, *Annual Review of Insolvency Law 2015* (Toronto: Thomson Reuters Canada Limited 2016) at 49–50 print.

[51] *Ibid*.
[52] *Ibid* at 48–52.
[53] *US Steel*, *supra* note 5 at para 47.
[54] *Ibid* at para 104.

IV. REVISITING EQUITABLE SUBORDINATION

The negative impacts of *US Steel* may be fourfold. First, courts' future exercise of judicial discretion under the *CCAA* in furtherance of the statute's objectives may be curtailed when faced with novel commercial realities. Unfortunately, this means that the innovative approaches said by the Ontario Court of Appeal to give the Act its efficacy[55] may be stunted. Second, creditors may lose a meaningful avenue of relief when faced with severely inequitable conduct. Third, absent legislative guidance, courts may encounter greater difficulty supervising negotiations of plans of compromise or arrangement that balance the rights of creditors and stakeholders. Fourth, the law's capacity to deter inequitable behavior adopted at the detriment of other creditors may be limited. This effect may be pronounced in the context of intercorporate debt. Ultimately, these concerns may affect the regime's *ex ante* and *ex post* efficiency.

The implications of *US Steel* warrant reconsidering the place for equitable subordination in Canada. Telfer's discussion in *Transplanting Equitable Subordination* may prove a useful starting point. For Telfer, any attempt to apply equitable subordination in Canada must be tempered by existing legal remedies, principles recently adopted in American jurisprudence to limit the doctrine, contextual analysis, and a finding of misconduct.[56] Of importance are American developments in characterizing "inequitable conduct" and the extent to which that conduct might be captured by the *Canada Business Corporation Act*'s oppression remedy.[57] While these considerations are instructive, the nature of contemporary restructuring should be at the forefront of this discussion. *CCAA* proceedings are likely to continue to increase in complexity. In the

[55] *Metcalfe*, *supra* note 36 at para 44.
[56] Transplanting Equitable Subordination, *supra* note 2 at 88.
[57] *Canada Business Corporations Act,* RSC 1985 c C-44.

absence of a rules-based regime, the role that a judge has in supervising proceedings, mitigating prejudice to the involved parties, and taming the activities of powerful creditors is paramount.[58] Stripping a judge of a tool that assists them structure the negotiations of plans of compromise or arrangement in the public interest may have undesirable consequences for fairness to creditors.

V. CONCLUSION

In *Dylex Ltd., Re* Farley J. stated "the history of CCAA law has been an evolution of judicial interpretation."[59] This paper has suggested that the interpretation offered by the Ontario Court of Appeal in *US Steel* neither enriches this history nor comports with the objectives of the statute. Employing a purposive approach, support for the application of equitable subordination can be found under section 11 of the *CCAA*. If applied, the doctrine may further the Act's objectives of balancing stakeholder interests and protecting creditors. Where the circumstances permit, granting the discretionary remedy of equitable subordination to ensure fairness to the parties may facilitate the negotiation of plans of compromise or arrangement. In this way, equitable subordination may improve the possibility of effective reorganization. To be sure, importing the doctrine into Canadian restructuring is not without its challenges. Considering the nature of restructuring, alternative remedies, and lessons from American courts dealing with the doctrine may ensure that its use does not come at an unacceptable cost to certainty and efficiency in *CCAA* proceedings.

[58] *Rescue!*, *supra* note 36 at 10–11.
[59] *Dylex Ltd., Re*, [1995] 31 CBR (3d) 106 at para 10.

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