TAB 11

PP. 35-36

[Indexed as: **Canadian Airlines Corp., Re**]

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c.B-15., as amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Resurgence Asset Management LLC, Applicant and Canadian Airlines Corporation and Canadian Airlines International Ltd., Respondents

Alberta Court of Appeal [In Chambers]

Wittmann J.A.

Heard: May 18, 2000

Judgment: May 29, 2000

Docket: Calgary Appeal 00-18816, 2000 ABCA 149

D. Haigh, Q.C., and *D. Nishimura*, for Applicant.
A.L. Friend, Q.C., and *H.M. Kay, Q.C.*, for Respondents.
S. Dunphy, for Air Canada.
A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.
P.T. McCarthy, Q.C., for Price Waterhouse Coopers.

Corporations —— Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues —— Applicant was unsecured creditor of C Corp. — Board appointed by A Corp. caused C Corp. to commence proceedings under CCAA under which A Corp. stood to gain substantial benefits — Proposed plan of compromise and arrangement filed under Act — Order made that classification of creditors not be fragmented to exclude A Corp. as separate class from applicant in terms of unsecured creditors, that A Corp. be entitled to vote on plan pursuant to s. 6 of Act, that there be no separation of unsecured creditors of two divisions of C Corp. for voting purposes, and that votes in respect of claims assigned to A Corp. be recorded and tabulated separately for purpose of consideration in application for court approval of plan — Applicant brought application for leave to appeal that order — Application dismissed — Decisions of supervising judge under Act entitled to considerable deference — Person seeking leave to appeal required to show error in principle of law or palpable and overriding error of fact — Exercise of discretion by reviewing judge not subject to review so long as discretion exercised judicially — Reviewing judge made no error of law — Applicant failed to make out prima facie meritorious case — Granting of leave would likely unduly hinder progress of action — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6.

Cases considered by *Wittmann J.A.*:

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186 (Alta. C.A.) — referred to

Blue Range Resource Corp., Re, (sub nom. *Blue Range Resources Corp., Re)* 250 A.R. 172, (sub nom. *Blue Range Resources Corp., Re)* 213 W.A.C. 172, 15 C.B.R. (4th) 160, 2000 ABCA 3 (Alta. C.A. [In Chambers]) — referred to

Blue Range Resource Corp., Re (2000), (sub nom. *Blue Range Resources Corp., Re)* 250 A.R. 239, (sub nom. *Blue Range Resources Corp., Re)* 213 W.A.C. 239, 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]) — referred to

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 71, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32 (N.S. T.D.) — referred to

Med Finance Co. S.A. v. Bank of Montreal (1993), 24 B.C.A.C. 318, 40 W.A.C. 318, 22 C.B.R. (3d) 279 (B.C. C.A.) — referred to

Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — referred to

Northland Properties Ltd., Re (1988), 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166 (B.C. S.C.) — referred to

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — referred to

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (N.S. T.D.) — referred to

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

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 19 C.P.C. (3d) 396 (B.C. C.A.) — referred to

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

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321 (Alta. C.A.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — referred to

Smoky River Coal Ltd., Re, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — referred to

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

Sovereign Life Assurance Co. v. Dodd (1891), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — referred to

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

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206 (B.C. S.C.) — referred to

Statutes considered:

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

s. 2 "secured creditor" — considered

s. 2 "unsecured creditor" — considered

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 6(a) — considered

s. 6(b) — considered

s. 13 — considered

APPLICATION for leave to appeal from judgment reported at (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.).

Memorandum of decision. *Wittmann J.A.*:

Introduction

1 This is an application for leave to appeal the decision of Paperny, J. made on May 12, 2000, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*). The applicant, Resurgence Asset Management LLC (Resurgence), is an unsecured creditor by virtue of its holding 58.2 per cent of U.S. $100,000,000.00 unsecured notes issued by Canadian Airlines Corporation (CAC)

2 CAC and Canadian Airlines International Ltd. (CAIL) (collectively Canadian) commenced proceedings under the *CCAA* on March 24, 2000.

3 A proposed Plan of Compromise and Arrangement (the Plan) has been filed in this matter regarding CAC and CAIL, pursuant to the CCAA.

4 The decision of Paperny, J. May 12, 2000 (the Decision) ordered, among other things, that the classification of creditors not be fragmented to exclude Air Canada as a separate class from Resurgence in terms of the unsecured creditors; that Air Canada should be entitled to vote on the Plan pursuant to s. 6 of the *CCAA* at the creditors' meeting to be held May 26, 2000; that there be no separation of unsecured creditors of CAC from unsecured creditors of CAIL for voting purposes; and that votes in respect of claims assigned to Air Canada, be recorded and tabulated separately, for the purpose of consideration in the application for court approval of the Plan (the Fairness Hearing).

Leave to Appeal Under the CCAA

5 The section of the *CCAA* governing appeals to this Court is as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom 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.

6 The criterion to be applied in an application for leave to appeal pursuant to the *CCAA* is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: *Re Multitech Warehouse Direct Inc.* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Re Smoky River Coal Ltd.* (1999), 237 A.R. 83 (Alta. C.A.); *Re Blue Range Resource Corp.* (1999), 244 A.R. 103 (Alta. C.A.); *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).

7 Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C. C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p.397:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point raised is of significance to the action itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

These elements have been considered and applied by this Court, and were not in dispute before me as proper elements of the applicable criterion.

Facts

8 On or about October 19, 1999, Air Canada announced its intention to make a bid for CAC and to proceed to complete a merger subject to a restructuring of Canadian's debt. On or about November 5, 1999, following a ruling by the Quebec Superior Court, a competing offer by Airline Industry Revitalization Co. Inc. was withdrawn and Air Canada indicated that it would proceed with its offer for CAC.

9 On or about November 11, 1999, Air Canada caused the incorporation of 853350 Alberta Ltd. (853350), for the sole purpose of acquiring the majority of the shares of CAC. At the time of incorporation, Air Canada held 10 per cent of the shares of 853350. Paul Farrar, among others, holds the remaining 90 per cent of the shares of 853350.

10 On or about November 11, 1999, Air Canada, through 853350, offered to purchase the outstanding shares of CAC at a price of $2.00 per share for a total

TAB 12

RE CHEF READY FOODS LTD. et al.; CHEF READY FOODS LTD. v. HONGKONG BANK OF CANADA

Indexed as: Hongkong Bank of Canada v. Chef Ready Foods Ltd.

British Columbia Court of Appeal,
Carrothers, Cumming and Gibbs JJ.A.

Heard – October 12, 1990.
Judgment – October 29, 1990.

Corporations – Arrangements and compromises – Where conflict between Companies' Creditors Arrangement Act and rights of holder of s. 178 Bank Act security, the broad scope of the Companies' Creditors Arrangement Act is to prevail – Appeal dismissed – Bank Act, R.S.C. 1985, c. B-1 – Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

The bank held a s. 178 *Bank Act* security on the debtor's accounts receivables. The bank demanded payment of the debt. When the debtor failed to pay, the bank appointed an agent under the general assignment of book debts with instructions to the agent to realize upon the accounts. The debtor filed a petition for relief under the *Companies' Creditors Arrangement Act*. An order was granted pursuant to s. 11 of the *Companies' Creditors Arrangement Act* staying realization upon, or other dealings with, any security on the undertaking, property and assets of the debtor. The bank appealed and sought that the stay order be varied to exclude the s. 178 security.

Held – The appeal was dismissed.

The purpose of the *Companies' Creditors Arrangement Act* was to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company was able to continue in business. The statute did not exempt any creditors of a debtor company from its provisions. The *Companies' Creditors Arrangement Act* did not detract from the title held by the bank, it merely postponed the exercise of the right to seize and sell. Nor did the *Bank Act* exclude the operation of the *Companies' Creditors Arrangement Act*.

In contrast to ss. 178 and 179 of the *Bank Act*, which focussed on the competing rights and duties of the borrower and the lender, the *Companies' Creditors Arrangement Act* served the interests of a broad constituency of investors, creditors and employees. To grant a bank holding a s. 178 *Bank Act* security immunity from the *Companies' Creditors Arrangement Act* would render the protection afforded that constituency illusory and frustrate the public policy objectives of the *Companies' Creditors Arrangement Act*. Realization by the bank on its security would destroy the company as a going concern.

Cases considered

Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 46 B.L.R. 161, 9 P.P.S.A.C. 177, 65 D.L.R. (4th) 361, 104 N.R. 110, 82 Sask. R. 120 – considered.

Feifer and Frame Manufacturing Corp., Re, [1947] Que. K.B. 348, 28 C.B.R. 124

(C.A.) – referred to.
Flintoff v. Royal Bank, [1964] S.C.R. 631, 7 C.B.R. (N.S.) 78, 49 W.W.R. 301, 47 D.L.R. (2d) 141 – referred to.
Meridian Developments Inc. v. Toronto-Dominion Bank, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.) – referred to.
Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., 72 C.B.R. (N.S.) 20, [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 139 (Q.B.) – referred to.
Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) – referred to.
Wynden Canada Inc. v. Gaz Métropolitain Inc. (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.) [affirmed 45 C.B.R. (N.S.) 11 (Que. C.A.)] – referred to.

Statutes considered

Bank Act, R.S.C. 1985, c. B-1 –
  s. 178, as am. R.S.C. 1985 (3rd Supp.), c. 25, s. 26
  s. 179
Bankruptcy Act, R.S.C. 1927, c. 11.
Companies' Creditors Arrangement Act, S.C. 1932-33, c. 36.
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 –
  s. 8
  s. 11
Company Act, R.S.B.C. 1979, c. 59.
Limitation of Civil Rights Act, The, R.S.S. 1978, c. L-16 –
  ss. 19-36
Winding-up Act, R.S.C. 1927, c. 213.

Words and phrases considered

creditor – as used in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, includes a bank holding a security under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1.
security – as used in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, includes a security under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1.

APPEAL from order of Maczko J. dated August 30, 1990, granting stay pursuant to s. 11 of *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [reported 4 C.B.R. (3d) 307].

D.I. Knowles and *H.M. Ferris*, for appellant bank.
R.H. Sahrmann and *L.D. Goldberg*, for respondent debtor.

(Doc. Vancouver CA12944)

October 29, 1990. The judgment of the Court was delivered by

1 GIBBS J.A.: – The sole issue on this appeal is whether a stay order made by a chambers Judge under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, is a bar to realization by the Hongkong Bank of Canada (the "bank") on security granted to it under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1.

2 The facts relevant to resolution of the issue are not in dispute. The respondent Chef Ready Foods Ltd. ("Chef Ready") is in the business of manufacturing and wholesaling fresh and frozen pizza products. The appellant bank provided credit and other banking services to Chef Ready. As part of the security for its indebtedness Chef Ready executed the appropriate documentation and filed the appropriate notices under s. 178 of the *Bank Act*. Accordingly, the bank holds what is commonly referred to as "section 178 security."

3 Chef Ready encountered financial difficulties. On August 22, 1990, following upon some fruitless negotiations, the bank, through its solicitors, demanded payment from Chef Ready. The debt then stood at $365,318.69 with interest accruing thereafter at $150.43 per day. Chef Ready did not pay.

4 On August 27, 1990, the bank commenced proceedings upon debenture security which it held and upon guarantees by the principals of Chef Ready. Also on August 27, 1990, the bank appointed an agent under a general assignment of book debts which it held, with instructions to the agent to realize upon the accounts. In the meantime, on August 23, 1990, so as to qualify under the *Companies' Creditors Arrangement Act* (the "C.C.A.A."), Chef Ready had granted a trust deed to a trustee and issued an unsecured $50 bond. On August 28, 1990, the day after the bank commenced its debenture and guarantee proceedings, Chef Ready filed a petition seeking various forms of relief under the C.C.A.A. On the same day Chef Ready filed an application, ex parte, as they were entitled to do under the C.C.A.A., for an order to be issued that day granting the relief claimed in the petition.

5 The application was heard in chambers in the afternoon of August 28, 1990 and the following day. The bank learned "on the grapevine" of the application and appeared on the hearing and was given standing to make submissions. It also filed affidavit evidence which appears to have been taken into account by the chambers Judge. The affidavit evidence had appended to it, inter alia, the s. 178 security documentation. On August 30, 1990, the chambers Judge granted the order and delivered oral reasons at the end of which he said:

> "I therefore conclude that the *Companies' Creditors Arrangement Act* is an overriding statute which gives the court power to stay all proceedings including the right of the bank to collect the accounts receivable."

6 The reasons refer specifically to the accounts receivable because the bank was then poised ready to take possession of those accounts and collect the amounts owing. Its right to do so arose under

the general assignment of book debts and under cl. 4 of the s. 178 security instrument:

> "4. If the Customer shall sell the property or any part thereof, the proceeds of any such sale, including cash, bills, notes, evidence of title, and securities, and the indebtedness of any purchaser in connection with such sales shall be the property of the Bank to be forthwith paid or transferred to the Bank, and until so paid or transferred to be held by the Customer on behalf of and in trust for the Bank. Execution by the Customer and acceptance by the Bank of an assignment of book debts shall be deemed to be in furtherance of this declaration and not an acknowledgement by the Bank of any right or title on the part of the Customer to such book debts."

7 The formal order made by the chambers Judge contains a paragraph which stays realization upon or otherwise dealing with any securing on "the undertaking, property and assets" of Chef Ready:

> "THIS COURT FURTHER ORDERS THAT all proceedings taken or that might be taken by any of the Petitioners' creditors or any other person, firm or corporation under the *Bankruptcy Act* (Canada) or the *Winding-up Act* (Canada) shall be stayed until further Order of this Court upon 2 days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until the further Order of this Court upon 2 days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of this Court upon 2 days notice to the Petitioners and subject to such terms as this Court may impose and that *the right of any person, firm or corporation to realize upon or otherwise deal with any property, right or security held by that person, firm or corporation on the undertaking, property and assets of the Petitioners be and the same is postponed.*" [Emphasis added.]

8 The jurisdiction in the Court to make such a stay order is found in s. 11 of the C.C.A.A.:

> "11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes."

9 The question of whether a step, not involving any court or litigation process, taken to realize upon the accounts receivable is a "suit, action or other proceeding . . . against the company" is not before the Court on this appeal. The bank does not put its case forward on that footing. Its contention is more general in nature. It is that s. 178 security is beyond the reach of the C.C.A.A.; put another way, that whatever the scope of the C.C.A.A., it does not go so far as to impede or qualify, or give jurisdiction to make orders which will impede or qualify, the rights of realization of a holder of s. 178 security. Consistent with that position, by way of relief on the appeal the bank asks only that the stay order be varied to free up the s. 178 security:

"(NATURE OF ORDER SOUGHT)

> An order that the appeal of the Appellant be allowed and an order be made the Order of the Judge in the Court below be set aside insofar as it restrains the Appellant from exercising its rights under its section 178 security . . ."

10 The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.

11 There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the Act qua creditors is even underscored by s. 8, which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. But that does not dispose of the issue. There is the *Bank Act* to consider.

12 There is nothing in the Loans and Security division of the *Bank Act* either, where s. 178 is found, which specifically excludes direct or indirect impact by the C.C.A.A. Nonetheless, the bank's position, in essence, is that there is a notional cordon sanitaire around s. 178 and other sections associated with it such that neither the C.C.A.A. nor orders made under it can penetrate. In support of its position, the bank relies heavily upon the recent unanimous judgment of the Supreme Court of Canada in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 46 B.L.R. 161, 9 P.P.S.A.C. 177, 65 D.L.R. (4th) 361, 104 N.R. 110, 82 Sask. R. 120, and to a lesser degree upon an earlier unanimous Supreme Court of Canada judgment in *Flintoft v. Royal Bank*, [1964] S.C.R. 631, 7 C.B.R. (N.S.) 78, 49 W.W.R. 301, 47 D.L.R. (2d) 141.

13 The principal issue in *Hall* was whether ss. 19 to 36 of the Saskatchewan *Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16 applied to a security taken under ss. 178 and 179 of the *Bank Act*. The Court held that it was beyond the competence of the Saskatchewan Legislature "to superadd conditions governing realization over and above those found within the confines of the *Bank Act*" (p. 154 [S.C.R.]). In the course of arriving at its decision, the Court considered the property interest acquired by a bank under s. 178 security, the legislative history leading up to the present ss. 178 and 179, the purposes intended to be achieved by the legislation, and the rights of a bank holding s. 178 security. All of those considerations have application to the issue here, and the judgment merits reading in full to appreciate the relevance of all of its parts. However, a few extracts will serve to illustrate the bank's reliance:

> Page 134:
>
> " . . . a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower . . ."

TAB 13

operation of that order until the first day of December, 1986. The court would order that each party pay their own costs.

Application granted.

PP. 301-302
310-313

[Indexed as: **General Chemical Canada Ltd., Re**]

HARBERT DISTRESSED INVESTMENT FUND, L.P. and HARBERT DISTRESSED INVESTMENT MASTER FUND, LTD. (Plaintiffs) and GENERAL CHEMICAL CANADA LTD. (Defendant)

Ontario Superior Court of Justice [Commercial List]

Mesbur J.

Heard: May 29, 30, 2006

Judgment: July 28, 2006

Docket: 05-CL-6160

Ashley John Taylor for Interim Receiver, PricewaterhouseCoopers Inc.
Robert Staley, Kevin Zych, Alan Gardner for Plaintiffs
Mark Zigler, Andrew Hatnay for Morneau Sobeco Limited Partnership in its capacity as Administrator of General Chemical Canada Ltd.'s pension plans
Ronald Carr for Ministry of the Environment
Tim Hogan for Sherway Contracting
Tyco Manson for Honeywell ASCA

Bankruptcy and insolvency —— Priorities of claims — Claims of Crown — Provincial — General principles —— Environmental cleanup costs — Bankrupt was chemical company — Debt of bankrupt to creditor involved creditor becoming major shareholder of bankrupt — Minister claimed entitlement to costs related to environmental clean-up — Interim receiver brought motion for interim distribution of $3.75 million — Funds in question came from operation of business, rather than real estate holdings — Motion opposed by administrators of bankrupt's pension plan, and Minister — Motion granted — Minister was unsecured creditor and was not entitled to special priority for cleanup costs — As assets which generated funds were not connected to property which created environmental damage, no lien or priority existed — Provisions of Companies' Creditors Arrangement Act were inapplicable, as no arrangement in place and bankruptcy had commenced — Company did not have freestanding obligation to remedy environmental contamination, as receiver did not create environmental contamination out of gross negligence or willful misconduct.

Pensions —— Payment of pension — Bankruptcy or insolvency of employer — General principles —— Priority — Bankrupt was chemical company — Debt of bankrupt to creditor involved creditor becoming major shareholder of bankrupt — MInister claimed costs related to environmental clean-up — Interim receiver brought motion for interim distribution of $3.75 million — Funds in question came from operation of business, rather than real estate holdings — Motion opposed by administrators of bankrupt's pension plan, and Minister — Motion granted — Any lien created by Pension Benefits Act was at variance with Bankruptcy and Insolvency Act and therefore invalid.

Bankruptcy and insolvency — Priorities of claims — Unsecured claims — General principles — Equitable alteration of priorities — Bankrupt was chemical company — Debt of bankrupt to creditor involved creditor becoming major shareholder of bankrupt — MInister claimed costs related to environmental clean-up — Interim receiver brought motion for interim distribution of $3.75 million — Funds in question came from operation of business, rather than real estate holdings — Motion opposed by administrators of bankrupt's pension plan, and Minister — Motion granted — No equitable alteration of priorities should be made — Transaction between creditor and bankrupt was true debt and not equity transaction — All financing was approved during related proceedings in United States — Bankrupt received direct financial benefit from transactions — Terms of financing documents indicated that transaction represented true debt — Equitable subordination used only in rare circumstances — No wrongdoing on part of bankrupt or creditors — Transaction regarding assets was not inequitable.

Cases considered by *Mesbur J.*:

Blue Range Resource Corp., Re (2000), 2000 CarswellAlta 12, 76 Alta. L.R. (3d) 338, [2000] 4 W.W.R. 738, 15 C.B.R. (4th) 169, 259 A.R. 30, 2000 ABQB 4, [2000] A.J. No. 14 (Alta. Q.B.) — followed

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711, EYB 1989-66987, [1989] S.C.J. No. 78 (S.C.C.) — considered

Bulut v. Brampton (City) (2000), 2000 CarswellOnt 1063, 185 D.L.R. (4th) 278, 48 O.R. (3d) 108, 15 P.P.S.A.C. (2d) 213, (sub nom. *Bulut v. Sun Life Assurance Co. of Canada)* 131 O.A.C. 52, 16 C.B.R. (4th) 41, [2000] O.J. No. 1062 (Ont. C.A.) — followed

Calla, Re (1975), 9 O.R. (2d) 755, 20 C.B.R. (N.S.) 234, 61 D.L.R. (3d) 627, 1975 CarswellOnt 92 (Ont. Bktcy.) — referred to

Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1992), 5 Alta. L.R. (3d) 193, [1992] 3 S.C.R. 558, 16 C.B.R. (3d) 154, 7 B.L.R. (2d) 113, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 131 A.R. 321, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 25 W.A.C. 321, 97 D.L.R. (4th) 385, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 143 N.R. 321, 1992 CarswellAlta 298, 1992 CarswellAlta 790, EYB 1992-66961 (S.C.C.) — followed

Canadian Exotic Cattle Breeders' Co-operative, Re (1979), 14 B.C.L.R. 183, 31 C.B.R. (N.S.) 217, 103 D.L.R. (3d) 112, 1979 CarswellBC 573 (B.C. S.C.) — referred to

Christian Brothers of Ireland in Canada, Re (2004), 2004 CarswellOnt 574, 69 O.R. (3d) 507, 49 C.B.R. (4th) 12 (Ont. S.C.J. [Commercial List]) — considered

Clayton's Case, Re (1816), 35 E.R. 781, 1 Mer. 572, [1814-23] All E.R. Rep. 1 (Eng. Ch. Div.) — followed

Condominium Plan No. 762 0380 v. Edmonton (City) (2001), 2001 ABQB 97, 2001 CarswellAlta 155, 38 R.P.R. (3d) 279, 24 C.B.R. (4th) 9, [2001] 6 W.W.R. 316, 90 Alta. L.R. (3d) 329, 284 A.R. 62 (Alta. Q.B.) — referred to

Continental Casualty Co. v. MacLeod-Stedman Inc. (1996), 141 D.L.R. (4th) 36, [1997] 2 W.W.R. 516, 13 C.C.P.B. 271, 43 C.B.R. (3d) 211, 113 Man. R. (2d) 212, 131 W.A.C. 212, 1996 CarswellMan 537, C.E.B. & P.G.R. 8318 (headnote only), [1996] M.J. No. 551 (Man. C.A.) — referred to

Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board) (1985), [1985] 1 S.C.R. 785, 19 D.L.R. (4th) 577, [1985] 4 W.W.R. 481, 60 N.R. 81, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241, 1985 CarswellAlta 319, 1985 CarswellAlta 613 (S.C.C.) — referred to

First Truck Lines, Inc., Re (1995), 48 F.3d 210 (U.S. C.A. 6th Cir.) — considered

Graphicshoppe Ltd., Re (2005), 2005 CarswellOnt 7008, 49 C.C.P.B. 63, 15 C.B.R. (5th) 207, C.E.B. & P.G.R. 8178, 21 E.T.R. (3d) 1, 260 D.L.R. (4th) 713, (sub nom. *Graphicshoppe Ltd. (Bankrupt), Re)* 205 O.A.C. 113, 78 O.R. (3d) 401, [2005] O.J. No. 5184 (Ont. C.A.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 188 N.R. 1, 24 C.L.R. (2d) 131, 1995 CarswellSask 739, 1995 CarswellSask 740, EYB 1995-67967, [1995] S.C.J. No. 77 (S.C.C.) — followed

Ivaco Inc., Re (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213, [2005] O.J. No. 3337 (Ont. S.C.J. [Commercial List]) — followed

Matter of Mobile Steel Co. (1977), 563 F.2d 692 (U.S. C.A. 5th Cir.) — followed

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315 (Alta. C.A.) — distinguished

Rauf, Re (1974), 5 O.R. (2d) 31, 1974 CarswellOnt 79, 20 C.B.R. (N.S.) 143, 49 D.L.R. (3d) 345 (Ont. Bktcy.) — referred to

Rockland Chocolate & Cocoa Co., Re (1921), 1 C.B.R. 452, 50 O.L.R. 66, 61 D.L.R. 363, 1921 CarswellOnt 4 (Ont. S.C.) — referred to

United Air Lines Inc., Re (2005), 2005 CarswellOnt 1078, (sub nom. *United Air Lines Inc. (Bankrupt), Re)* C.E.B. & P.G.R. 8145, 9 C.B.R. (5th) 159, 45 C.C.P.B. 151 (Ont. S.C.J. [Commercial List]) — referred to

671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2000), 2000 CarswellOnt 67, [2000] O.J. No. 77 (Ont. S.C.J.) — followed

671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2000), 2000 CarswellOnt 3414, [2000] O.J. No. 3378 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — considered

s. 14.06(1.1) [en. 1997, c. 12, s. 15(1)] — considered

s. 14.06(7) [en. 1997, c. 12, s. 15(1)] — referred to

s. 14.06(7)(a) [en. 1997, c. 12, s. 15(1)] — considered

s. 14.06(7)(b) [en. 1997, c. 12, s. 15(1)] — considered

s. 47 — referred to

s. 67(1)(a) — considered

s. 183 — considered
s. 243(2) "receiver" — referred to
s. 244 — considered
s. 244(1) — considered
Cattle Lien Act, R.S.B.C. 1960, c. 44
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered
Environmental Protection Act, R.S.O. 1990, c. E.19
Generally — considered
s. 168.19(1) [en. 2001, c. 17, s. 2(39)] — referred to
s. 168.20(1) [en. 2001, c. 17, s. 2(39)] — referred to
Innkeepers Act, R.S.O. 1990, c. I.7
Generally — referred to
s. 3 — referred to
Legal Aid Act, R.S.O. 1990, c. L.9
Generally — referred to
Legal Aid Services Act, 1998, S.O. 1998, c. 26
s. 48(1) — referred to
s. 48(2) — considered
Mechanics' and Wage-Earners Lien Act, R.S.O. 1914, c. 140
Generally — referred to
Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — considered
s. 57 — considered
s. 57(1) — considered
s. 57(3) — considered
s. 57(4) — considered
s. 57(5) — considered
s. 57(6) — considered
s. 69(1)(c) — considered
Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — considered
s. 4(1)(a) — referred to
s. 4(1)(b) — referred to
s. 20(1)(a)(i) — referred to
s. 20(2)(a)(i) — referred to

MOTION by interim receiver for interim payment to creditor.

Mesbur J.:

Nature of the motions and the positions of the parties

1 This series of motions arose out of the interim receiver, PricewaterhouseCoopers (PwC) moving to request the court's authorization to make an interim distribution of $3.75 million to the plaintiffs ("Harbert") as secured creditor of the defendant, General Chemical. The funds in question are a portion

of the $6.5 million that has been generated from General Chemical's working capital assets, that is, its cash, accounts receivable and inventory, as opposed to being derived from any of its real estate assets. Harbert supports the interim receiver's motion, while the Administrator of General Chemical's two pension plans, and the Ministry of the Environment (MOE) both oppose it.

2 The Administrator takes the position that it has a lien over General Chemical's assets in relation to unpaid pension contributions and plan solvency issues, and that its lien takes priority over Harbert's alleged security. On this basis, it says there should be no interim distribution to Harbert. The Administrator goes even further, and says, first, that the Harbert secured loan transaction is really an equity acquisition disguised as debt, and should be treated as what it really is, and enjoy no priority at all. Second, it says that even if the transaction created valid security for Harbert, in priority to all or part of what it says is the Administrator's lien, the equities of the case require that Harbert's security be subordinated to the interests of the pension plan. The Administrator moves for declarations that it has a valid lien and charge on General Chemical's assets, and is a secured creditor ranking in priority to Harbert.

3 The MOE says that General Chemical and PwC as interim receiver have both statutory and court-ordered obligations to comply with provincial environmental safety requirements. It says they have failed to do so, and as a result, there are significant potential environmental cleanup costs, that exceed General Chemical's financial assurance under the *Environmental Protection Act*[1] (EPA). The MOE says that General Chemical has an obligation to meet those costs, and takes the position that until the environmental obligations have been quantified, it is premature to make any distribution to anyone, since to do so may have the result of leaving no assets to meet the costs of any environmental cleanup.

4 In order to understand the positions of the parties, it will be helpful to outline some of the history of the General Chemical, and its American parent, their respective restructuring efforts, and General Chemical's underlying business.

Some background facts

5 General Chemical produces calcium chloride, a chemical that is used primarily for melting ice in winter, and controlling dust in summer. It is a Canadian company, and is a wholly owned subsidiary of an American company, General Chemical Industrial Products Inc. ("Industrial"). General Chemical's business operations create significant chemical by-products, which in turn, create environmental issues in and around their plant facilities.

6 General Chemical's Canadian operations are centred primarily in a plant in Amherstberg, Ontario.

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[1]R.S.O. 1990 c. E.19

Industrial's Chapter 11 proceedings

7 In December of 2003, General Chemical's parent, Industrial, entered Chapter 11 protection pursuant to the United States Bankruptcy Code. Harbert was an Industrial bondholder. As such, it was a creditor of Industrial, and thus participated in the Chapter 11 proceedings. Industrial's initial debtor in possession (DIP) financing had been provided by JP Morgan Chase Bank in December of 2003. The DIP facility consisted of both a revolving line of credit, which the parties refer to as the Revolver, and a term loan facility.

8 Under the JP Morgan Chase Revolver, General Chemical is described as a primary borrower, and is entitled to take advances under the facility. Industrial is also a primary borrower, with similar rights. Each company provided security and also cross-guaranteed the obligations of the other. The term loan was advanced only to Industrial, secured against Industrial's assets, with General Chemical guaranteeing those obligations, and providing security for its guarantee.

9 JP Morgan continued as DIP lender until March of 2004, when it no longer was prepared to participate in Industrial's restructuring. At that point, Harbert took over that role.

Harbert's financing of Industrial and General Chemical

10 On March 31, 2004, General Chemical entered into a number of financing arrangements with Harbert. These also comprised a revolving loan facility and a term loan facility. Both were structured in the same way as the JP Morgan Chase Bank loans. Both were secured against the assets of both General Chemical and Industrial. Both companies cross-guaranteed the other's liabilities.

11 As was the case with the JP Morgan Chase financing, the Harbert term loan was made to Industrial only, with Industrial granting security in relation to the term loan, and General Chemical guaranteeing the term loan as well. General Chemical's guarantee was secured against General Chemical's assets.

12 The Revolver was stated as being to both General Chemical and Industrial. Harbert advanced $9 million to General Chemical on March 31, 2004, which in turn was used to pay JP Morgan Chase, to retire the Revolver. This had the effect of paying off Industrial's DIP financing, and provided exit capital for Industrial to emerge from Chapter 11 protection on April 1, 2004. Industrial's restructuring was successful, and it continues to operate as an active company.

13 After the $9 million advance on March 31, 2004, General Chemical drew down on the Revolver between April 4, 2004 and January 10, 2005, for an additional $7.5 million. During the same period, General Chemical made repayments totalling just over $3,070,000 on the Revolver.

creates what is called a "deemed trust" against the employer's assets in an amount equal to the unpaid payments.[8] It goes further, and creates a lien in favour of the pension administrator. This is described as a "lien and charge" on the employer's assets, in an amount equal to the amounts deemed to be held in trust by the deemed trust provisions.[9]

42 The PPSA sets up a scheme for "perfection" of security interests in personal property. An unperfected security interest will be subordinated to a perfected security interest in the same collateral.[10] While registration of a financing statement is the way to perfect general security agreements, such as those at issue in this case, this does not apply to certain statutory liens, which do not require registration.[11] The PPSA, and thus its registration requirements, do not apply to either statutory liens, or deemed trusts arising out of a statute. Thus, the PPSA does not apply to the deemed trusts or statutory liens established by the PBA in favour of the pension administrator. In situations where a debtor is bankrupt, however, the PPSA says that these statutory liens arise on the effective date of the bankruptcy.[12]

43 I propose to discuss the law, and analyse the positions of the parties by first considering the validity of the MOE's position. Having done that, I will consider the Administrator's position, first by determining whether it has a lien. If I decide that it does, I will then consider whether its lien has priority in whole or in part over Harbert's security. I will also decide whether, as the Administrator suggests, the Harbert transaction is really equity acquisition, not debt. Lastly, I will consider the Administrator's submission that even if Harbert has priority, its priority should be subordinated to the interests of the pension plans for equitable reasons.

The MOE's position

44 One of the roles of the MOE is to protect the public against environmental hazards. For this reason, the MOE is given special status in the BIA. As stated above, it has security on the contaminated property, and any contiguous property related to the activity that caused the contamination. The MOE's security is enforceable in the same way as a mortgage, and has priority over any other security in the same property.

45 Here, the MOE has valid concerns about the sufficiency of its security on realty to cover all the considerable cleanup costs relating to the SASB. Its posi-

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[8]PBA, s. 57(1),(3) and (4)

[9]PBA, s. 57(5)

[10]*Personal Property Security Act*, section 20(1)(a)(i)

[11]PPSA, ss 4(1)(a) and (b)

[12]PPSA, section 20(2)(a)(i)

tion is that the current Financial Assurance it has from General Chemical is insufficient to meet any shortfall from the secured real property to pay the cleanup costs. In fact, in the CCAA proceedings, the MOE sought unsuccessfully to have the CCAA stay lifted to increase General Chemical's Financial Assurance. What it is seeking to do here, in delaying any distribution, is much the same.

46 Apart from its security, the MOE is an unsecured creditor like any other, and must prove its claim in the General Chemical bankruptcy. To permit the MOE to delay distribution to a secured creditor would give the MOE a quasi-priority to other unsecured creditors, and would defeat or delay the legitimate interests of secured creditors. I have been pointed to no precedent that would permit the court to do so.

47 The MOE argues that the court should apply similar principles here to those applied in CCAA proceedings, in considering whether a distribution should be made. The CCAA proceedings have been terminated. General Chemical is in bankruptcy, and its first secured creditor has had an interim receiver appointed. I fail to see how CCAA principles are applicable here.

48 Here, the assets that have generated the funds to be paid out are not derived from any real property that General Chemical owns. The MOE can have no lien or priority in relation to these funds.

49 The MOE suggests that somehow both General Chemical and the Receiver have an additional obligation to meet the unsecured liability for environmental cleanup. As I see it, this position runs contrary to both the initial CCAA order, the current order appointing the interim receiver, and the provisions of the BIA.

50 The initial CCAA order provided that General Chemical's obligations concerning any statutes or regulations administered by the MOE were not alleviated or altered in any way by the CCAA stay. The order also did not prohibit the MOE from exercising its jurisdiction with respect to "matters involving existing or imminent significant environmental effects". There is no suggestion General Chemical has failed to comply with any statutes or regulations. There is also no evidence of any imminent environmental effects.

51 The order appointing the interim receiver contains the following provision:

> 9. THIS COURT ORDERS that all rights and remedies against the Debtor or affecting the Property are hereby stayed and suspending pending written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (a) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (b) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environmental or other mandatory statutory or regulatory provisions of applicable law ... or (e) prevent the Ministry of the Environment from issuing orders or other instruments pursuant to the *Environmental Protection Act* in respect of this Property.

52 Lastly, the BIA itself has provisions concerning the rights and obligations of trustees and receivers concerning environmental issues. These are found in section 14.06. First, section 14.06(1.1) provides that the section applies equally to a bankruptcy trustee, a proposal trustee and an interim receiver within the meaning of subsection 243(2).

53 The section goes on to state in subsection (2) that a trustee is not personally liable for any environmental damage that arose prior to the trustee's appointment, or after the trustee's appointment unless the condition arose because of the trustee's gross negligence or wilful misconduct.

54 The MOE suggests that the provisions of the order appointing the interim receiver are sufficient to require both General Chemical and the receiver to comply with all provisions of the *Environmental Protection Act*, including complying with orders issued by the MOE. It says that because the current financial assurance is insufficient to meet the costs of cleanup for the SASB, it should be able to require an increase in the financial assurance, and require the company to pay it. This may well be correct, as far as it goes. The position fails to consider, however, the status of the obligation in relation to the rights of secured creditors. The provisions of the order do not create a secured claim for the MOE's orders, nor do they suggest the MOE has priority over the interests of secured creditors.

55 As I read these provisions, and consider their interrelationships, I am drawn to the conclusion that first, none of General Chemical, the interim receiver or the trustee have any personal obligation to pay the cost of environmental cleanup; and second, the MOE can be nothing more than an unsecured creditor in the General Chemical bankruptcy for cleanup costs to the extent General Chemical's real property and the existing financial assurance are insufficient to meet those costs. As a result, I see no basis on which the court can delay the requested distribution on the bases advanced by the MOE.

56 In coming to this conclusion I have considered the MOE's argument concerning the applicability of the *Panamericana* decision[13] from the Alberta Court of Appeal. In *Panamericana*, the Alberta Court of Appeal found that a bankrupt company had an inchoate liability for the ultimate abandonment (or clean closure) of certain oil wells. The court found that the liability for the wells passed to the receiver-manager, who had been appointed pursuant to a secured creditor's security under s. 47 of the BIA. The court held that the Alberta statutory requirements concerning abandonment did not directly conflict with the scheme of distribution under the BIA, and thus the doctrine of paramountcy had no application. Even though this result meant less money for distribution in the bankruptcy, the court imposed the obligation.

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[13] *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 8 C.B.R. (3d) 31 (Alta. C.A.)

57 At first glance, the reasoning in *Panamericana* seems somewhat compelling. However, it must be kept in mind that it was decided before section 14.06(7) of the BIA was enacted. It seems to me that section 14.06(7) now specifically legislates concerning the issue of priority of any environmental cleanup costs. That being the case, the provisions of the BIA must take precedence over any provincial legislation. The field has now been occupied, and any provincial effort to extend further rights to the Crown in respect of environmental contamination must be viewed as being in conflict with the provisions of the federal statute.

58 In addition, Harbert points out that *Panamericana* can also be distinguished on the basis that in *Panamericana* the interim receiver had taken possession of the contaminated wells pursuant to the secured creditor's security. Here, the Harbert security does not include the SASB, and thus the interim receiver is not in possession of the contaminated site.

59 As to the MOE's suggestion that the receiver and the company have free-standing personal obligations to remedy the contamination, that argument must also fail, in light of the fact that there is no suggestion the receiver has created environmental problems through gross negligence or wilful misconduct.

60 For these reasons, I reject the MOE's suggestion that an interim distribution should be delayed. I turn now to the more complex and vexing questions raised by the position of the Administrator.

Does the Administrator have a lien?

61 The Administrator relies on section 57(5) of the PBA to support its position that it has a valid lien against General Chemical's assets. Section 57 of the PBA deals with both trust obligations of employers regarding pension contributions, and the creation of a lien and charge in favour of a plan administrator.

62 Since both of General Chemical's pension plans are employer-funded, it is not necessary to consider section 57(1), which deals with the employer's obligation to hold employee contributions in trust until they are paid into the plan. In employer-funded plans, there are trust provisions relating to employer contributions. These are set out in section 57(3), which reads as follows:

> An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension pan an amount of money equal to the to the employer contributions due and not paid not the pension fund.

63 In subsection (4), section 57 goes on to make provision for what happens on a wind up of a pension plan. Section 57(4) says:

> Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

TAB 14

[Indexed as: **General Chemical Canada Ltd., Re**]

HARBERT DISTRESSED INVESTMENT FUND, L.P. and HARBERT DISTRESSED INVESTMENT MASTER FUND, LTD. (Plaintiffs / Respondents) And GENERAL CHEMICAL CANADA LTD. (Defendant / Respondent)

Ontario Court of Appeal

S.T. Goudge, R.A. Blair, J. MacFarland JJ.A.

Heard: March 21-22, 2007

Judgment: September 6, 2007

Docket: CA C45784, C45800, 2007 ONCA 600

Mark Zigler, Andrew J. Hatnay, Fred L. Myers, Lawrence J. Swartz for Appellant, Morneau Sobeco Limited Partnership in its capacity as administrator of General Chemical Canada Ltd.'s pension plans

Ronald Carr for Appellant, Ministry of Environment

Ashley John Taylor for Pricewaterhouse Coopers Inc., interim receiver of General Chemical Canada Ltd.

Richard B. Swan, Robert Staley, Linda Visser for Respondents, Harbinger Capital Partners Fund, L.P., Harbinger Capital Partners Master Fund I, Ltd.

Tycho M.J. Manson for Honeywell ASCa Inc.

Pensions —— Payment of pension — Bankruptcy or insolvency of employer — General principles —— Priority — Bankrupt was chemical company — Bankrupt's contributions to employees' pension plans fell in arrears — Interim receiver accumulated $6.5 million from bankrupt's operating assets — Interim receiver successfully brought motion to make interim distribution to secured creditor in amount of $3.75 million — Motion judge found that lien created by s. 57(5) of Pension Benefits Act ("PBA") was not enforceable under Bankruptcy and Insolvency Act ("BIA") — Administrator of pension plans appealed — Appeal dismissed — Bankrupt was deemed to hold in trust for beneficiaries of pension plans amount equal to its unpaid contributions under s. 57(3) of PBA, but this did not create trust as contemplated by s. 67(1)(a) of BIA — Section 57(5) of PBA did not qualify administrator as secured creditor for purposes of BIA — Lien and charge accorded to administrator under s. 57(5) of PBA secured employer's obligation to pay unpaid contributions to pension funds, but it did not secure debt owed to administrator.

Bankruptcy and insolvency —— Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous liens or charges —— Bankrupt was chemical company — Bankrupt's contributions to employees' pension plans fell in arrears — Interim receiver accumulated $6.5 million from bankrupt's operating assets — Interim receiver successfully brought motion to make interim distribution to secured creditor in amount of $3.75 million — Motion judge found that lien created by s. 57(5) of Pension Benefits Act ("PBA") was not enforceable under Bankruptcy and Insolvency Act ("BIA") — Administrator of pension plans appealed — Appeal dismissed — Bankrupt was deemed to hold in trust for beneficiaries of pension plans amount equal to its unpaid contributions under s. 57(3) of PBA, but this did not create trust as contemplated by s.

67(1)(a) of BIA — Section 57(5) of PBA did not qualify administrator as secured creditor for purposes of BIA — Lien and charge accorded to administrator under s. 57(5) of PBA secured employer's obligation to pay unpaid contributions to pension funds, but it did not secure debt owed to administrator.

Bankruptcy and insolvency —— Priorities of claims — Claims of Crown — Provincial — General principles —— Environmental cleanup costs — Bankrupt was chemical company — Ministry of Environment claimed that bankrupt failed to comply with provincial environmental safety regulations by depositing by-products in basin — Basin was contaminated site and remedial costs exceeded bankrupt's financial assurance given under Environmental Protection Act — Interim receiver accumulated $6.5 million from bankrupt's operating assets — Interim receiver successfully brought motion to make interim distribution to secured creditor in amount of $3.75 million — Ministry appealed — Appeal dismissed — There was no basis to interfere with discretion of motion judge to order interim distribution — Ministry was unsecured creditor against operating assets — Ministry had security against bankrupt's real property — Secured creditor's security did not extend to basin nor did interim receiver have possession of that real property — Motion judge found no evidence of non-compliance with environmental orders nor any threat of imminent environmental harm.

Cases considered by *S.T. Goudge J.A.*:

British Columbia v. Henfrey Samson Belair Ltd. (1989), 1989 CarswellBC 711, [1989] 1 T.S.T. 2164, 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, 1989 CarswellBC 351, EYB 1989-66987, [1989] S.C.J. No. 78 (S.C.C.) — referred to

Clayton's Case, Re (1816), 1 Mer. 572, [1814-23] All E.R. Rep. 1, 35 E.R. 781 (Eng. Ch. Div.) — considered

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161, EYB 1995-67967, [1995] S.C.J. No. 77 (S.C.C.) — considered

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 1991 CarswellAlta 315, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (Alta. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
  Generally — referred to
  s. 2 "secured creditor" — considered
  s. 14.06(7) [en. 1997, c. 12, s. 15(1)] — considered
  s. 14.06(8) [en. 1997, c. 12, s. 15(1)] — referred to
  s. 67(1)(a) — considered
  s. 136(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
  Generally — referred to

Environmental Protection Act, R.S.O. 1990, c. E.19
  Generally — referred to

tor for GCCL contributions required after that date but not paid would rank after Harbert's secured interest.

36 Given my conclusion that the Administrator is not a secured creditor for *BIA* purposes, I need not address this issue either. In any event, on the assumption she makes of constitutionality, I would not interfere with the motion judge's conclusion. In my view, it was open to her on the facts before her to adopt the evidentiary presumption suggested by the rule in *Clayton's Case, Re.* Since there is no evidence from GCCL, the then administrator, concerning what indebtedness the overpayments in October and November 2004 were intended to apply to, and that the present Administrator was not in place when those overpayments were received or applied, I would conclude that the motion judge could properly resort to the default presumption suggested by the general principle. Nor do I see any equitable basis for not doing so. This is not a case where there is any suggestion that such a conclusion would reflect any attempt by GCCL to adversely affect pension plan members.

37 To summarize, I would dismiss the Administrator's appeal for the reasons I have given.

The MOE Appeal

38 At the root of the MOE opposition to the distribution ordered by the motion judge is one simple fact. In manufacturing calcium chloride at its Amherstburg plant, GCCL produced by-products that were deposited in what was called the Soda Ash Settling Basin ("SASB"). It is now a contaminated site and remedial costs could reach $64 million. The MOE is anxious to see that GCCL assets are available to pay for this clean up.

39 The MOE has a number of regulatory tools to use to protect the environment. In 1997, it issued a Provisional Certificate of Approval to GCCL which *inter alia* required GCCL to provide for the closure of the SASB and assurance that the costs of the closure would be paid for by the company. The latter was provided by a financial assurance that was subject to annual review by the MOE. In March 2004, the MOE accepted $3.4 million as the appropriate amount required of GCCL. Since then, the MOE has vastly increased its estimate of the cost of clean up, to as much as $64 million.

40 The *CCAA* order stayed the MOE's right to review and increase GCCL's financial assurance. In August 2005, the MOE sought the lifting of the stay to permit it to increase that amount, but it was unsuccessful.

41 The November 18, 2005 order appointing the interim receiver did not exempt either the receiver or GCCL from compliance with environmental regulations, nor did it prevent the MOE from issuing orders in respect of the SASB. However, that order expressly excluded the SASB from the property of GCCL over which the interim receiver was appointed.

42 It is uncontested that Harbert's security does not extend to the SASB. Rather, it expressly excludes it. Moreover, the MOE does not assert a security interest in GCCL's operating assets over which Harbert does have security. Section 14.06(7) of the *BIA* does give the MOE a security interest in the bankruptcy in GCCL's contaminated real property and any contiguous property related to the activity that caused the environmental damage. This security ranks above any other security against the same property.

43 However, it is the MOE's position that the decision to distribute on an interim basis should be guided by what is fair and reasonable having regard to all stakeholders, akin to the considerations applied under the *CCAA*. It argues that the "polluter pays" principle for environmental remediation requires no distribution until there can be an assurance that GCCL's assets are sufficient to clean up the SASB.

44 The motion judge found against the MOE and concluded that, in her discretion, the distribution should proceed. She held that the MOE was an unsecured creditor in relation to the GCCL operating assets that generated the funds to be paid out, that to permit the MOE to effect a delay in distribution would be to give it a *quasi* priority over other unsecured creditors, and in any event it has security over the SASB. She also found no evidence of any imminent environmental effects or any non-compliance by GCCL with any environmental regulations.

45 In this court, the MOE repeats its arguments below and raises, as it did there, the case of *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280 (Alta. C.A.). In that case, the court found that provincial environmental legislation concerning oilwell clean up costs did not conflict with the scheme of distribution under the *BIA*, and had to be complied with even though that reduced the amounts otherwise available for distribution in the bankruptcy.

46 I agree with the motion judge that the reasoning in that case has been overtaken because of subsequent amendments to the *BIA*. Section 14.06(7) now expressly provides for priority to be accorded to environmental clean up costs and s. 14.06(8) now ensures that a claim against the debtor for environmental clean up costs is a provable claim. Neither were in effect at the time of *Panamericana*. To give effect to provincial environmental legislation in the face of these amendments to the *BIA* would impermissibly affect the scheme of priorities in the federal legislation.

47 Beyond that, I see no basis to interfere with the discretion of the motion judge to order the interim distribution. Harbert is the only creditor secured against the GCCL operating assets that generated the funds for distribution. In that regard, the MOE is an unsecured creditor. The MOE does, however, have security against GCCL's real property, as provided by the *BIA*. Harbert's security does not extend to the SASB, nor does the interim receiver have possession

of that real property. The motion judge found no evidence of non-compliance with environmental orders nor any threat of imminent environmental harm. In these circumstances, I see nothing unreasonable in the interim distribution going forward.

48 I would therefore dismiss the MOE appeal. In the result, both appeals are dismissed.

49 Neither the Administrator nor Harbert sought costs. While the receiver sought costs against the MOE, the latter neither sought costs nor invited an adverse costs award. In the circumstances, I would order no costs to any party.

***R.A. Blair J.A.*:**

I agree.

***J. MacFarland J.A.*:**

I agree.

Appeals dismissed.

TAB 15

IN THE MATTER OF the Bankruptcy of Carol Anne Giffen

R. West & Associates Inc. and the Attorney General of British Columbia *Appellants*

PP. 118-120

v.

Telecom Leasing Canada (TLC) Limited *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario and the Attorney General for Alberta *Interveners*

INDEXED AS: GIFFEN (RE)

File No.: 25193.

1997: October 8; 1998: February 12.

Present: L'Heureux-Dubé, Sopinka,* Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and insolvency — Personal property security — Company employee leasing vehicle — Lessor failing to register financing statements under B.C. Personal Property Security Act and thus perfect its security interest — Employee making assignment in bankruptcy — Property of bankrupt vesting in trustee under Bankruptcy and Insolvency Act — Unperfected security interest in collateral not effective against trustee under Personal Property Security Act — Whether trustee entitled to proceeds of sale of vehicle — Personal Property Security Act, S.B.C. 1989, c. 36, s. 20(b)(i) — Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, ss. 67(1), 71(2).

The respondent lessor leased a car to a company which in turn leased it to G, one of its employees. The lease between G and her employer was for more than one year and gave G the option of purchasing the vehicle from the lessor. Although the lessor was not a party

* Sopinka J. took no part in the judgment.

DANS L'AFFAIRE DE la faillite de Carol Anne Giffen

R. West & Associates Inc. et le procureur général de la Colombie-Britannique *Appelants*

c.

Telecom Leasing Canada (TLC) Limited *Intimée*

et

Le procureur général du Canada, le procureur général de l'Ontario et le procureur général de l'Alberta *Intervenants*

RÉPERTORIÉ: GIFFEN (RE)

N° du greffe: 25193.

1997: 8 octobre; 1998: 12 février.

Présents: Les juges L'Heureux-Dubé, Sopinka*, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Sûreté mobilière — L'employée d'une société loue un véhicule — La bailleresse omet d'enregistrer une déclaration de financement en application de la Personal Property Security Act de la Colombie-Britannique et donc, de parfaire sa sûreté — L'employée produit une cession de faillite — Les biens de la faillite sont dévolus au syndic en vertu de la Loi sur la faillite et l'insolvabilité — La sûreté non parfaite grevant un bien est inopposable au syndic de faillite en vertu de la Personal Property Security Act — Le syndic a-t-il droit au produit de la vente? — Personal Property Security Act, S.B.C. 1989, ch. 36, art. 20b)(i) — Loi sur la faillite et l'insolvabilité, L.R.C. (1985), ch. B-3, art. 67(1), 71(2).

La bailleresse intimée a loué une voiture à une société qui, à son tour, l'a louée à G, l'une de ses employés. Le bail intervenu entre G et son employeur était d'une durée supérieure à une année et il stipulait, au profit de G, une option d'achat du véhicule. Bien qu'elle n'ait pas

* Le juge Sopinka n'a pas pris part au jugement.

to the lease agreement, it played an important role in the arrangement. The lessor received a deposit from G, it fixed the lease rates, and it was entitled to receive payments directly from G if her employer stopped paying her. The lessor and G were also named as the owners of the vehicle in the registration and insurance documents; the lessor was described as the "lessor" and G was described as the "lessee". G made an assignment in bankruptcy. Neither the lessor nor the employer had registered financing statements under the British Columbia *Personal Property Security Act* ("*PPSA*") in respect of their leases, with the result that the lessor's security interest in the car was not perfected. The lessor seized the vehicle and sold it with the appellant trustee's consent. The trustee subsequently brought a motion for an order that it was entitled to the proceeds of sale, relying on s. 20(b)(i) of the *PPSA*, which provides that a security interest in collateral is not effective against a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy. The lessor opposed the claim on the grounds that the bankrupt never owned the car and that the trustee could not have a better claim to the car than the bankrupt had. The trial judge held that the lessor's unperfected security interest was of no effect as against the trustee. The Court of Appeal reversed the decision and held that the proceeds properly belonged to the lessor.

Held: The appeal should be allowed.

The definition of "security interest" in the *PPSA* explicitly includes leases for a term of more than one year. The lessor's interest in the car is the reservation of title in the car; this interest, created by the lease agreement, falls within the ambit of the *PPSA*. Since the lessor did not have possession of the car and did not register its security interest, it held an unperfected security interest in the car prior to the bankruptcy. The bankrupt's right to use and possession of the car constitutes "property" for the purposes of the *Bankruptcy and Insolvency Act* ("*BIA*"), which passed to the trustee by virtue of s. 71(2). Section 12(2) of the *PPSA* also recognizes that a lessee obtains a proprietary interest in leased goods. Here, the trustee's possessory interest in the car comes into competition with the unperfected security interest of the lessor. On a plain reading of s. 20(b)(i) of the *PPSA*, the lessor's interest in the car is ineffective

été partie au contrat de location, la bailleresse jouait un rôle important dans le régime qui y était prévu. La bailleresse a reçu un dépôt de G, elle a fixé le taux de location et elle avait le droit de recevoir les paiements directement de G dans l'éventualité où l'employeur de cette dernière cessait de la payer. En outre, la bailleresse et G étaient désignées comme propriétaires du véhicule dans les documents d'immatriculation et d'assurance concernant la voiture; la bailleresse y était mentionnée en tant que «bailleresse» et G, en tant que «preneuse à bail». G a produit une cession de faillite. Ni la bailleresse ni l'employeur n'avaient enregistré une déclaration de financement relativement à leur bail en application de la *Personal Property Security Act* («*PPSA*») de la Colombie-Britannique. En raison de cette omission, la sûreté grevant la voiture au profit de la bailleresse n'était pas parfaite. La bailleresse a saisi le véhicule et l'a vendu avec le consentement du syndic appelant. Par la suite, le syndic a présenté une requête en vue d'obtenir une ordonnance portant qu'il avait droit au produit de la vente, en se fondant sur le sous-al. 20b)(i) de la *PPSA*, lequel prévoit que la sûreté grevant un bien est inopposable au syndic de faillite si, à la date de la faillite, elle est non parfaite. La bailleresse s'est opposée en faisant valoir que la voiture n'avait jamais appartenu à la faillie et que la réclamation du syndic ne pouvait être mieux fondée que celle qu'aurait exercée la faillie elle-même. Le juge de première instance a conclu que la sûreté non parfaite de la bailleresse était inopposable au syndic. La Cour d'appel a annulé la décision et conclu que le produit de la vente appartenait légitimement à la bailleresse.

Arrêt: Le pourvoi est accueilli.

La définition du mot «sûreté» qui figure dans la *PPSA* vise expressément les baux d'une durée de plus d'une année. L'intérêt de la bailleresse à l'égard de la voiture est constitué par la réserve du titre de propriété du véhicule; cet intérêt, issu du contrat de location, est visé par la *PPSA*. Vu que la bailleresse n'avait pas la possession de la voiture et qu'elle n'a pas enregistré sa sûreté, elle était titulaire, avant la faillite, d'une sûreté non parfaite grevant la voiture. Le droit de la faillie d'utiliser la voiture et d'en avoir la possession constitue un «bien» pour l'application de la *Loi sur la faillite et l'insolvabilité* («*LFI*») qui a été dévolu au syndic en vertu du par. 71(2). Le paragraphe 12(2) de la *PPSA* reconnaît également que le preneur à bail obtient un intérêt propriétal à l'égard des biens pris à bail. En l'espèce, l'intérêt fondé sur la possession dont est titulaire le syndic à l'égard de la voiture entre en concurrence avec la sûreté against the trustee. While the effect of s. 20(b)(i), on the present facts, is that the trustee ends up with full rights to the car when the bankrupt had only a right of use and possession, s. 20(b)(i) modifies the principle that a trustee is limited to the rights in the property enjoyed by the bankrupt. The issue is not ownership of the vehicle, but rather priority to it. Although federal bankruptcy legislation provides that a trustee shall step into the shoes of the bankrupt and as a general rule acquires no higher right in the property of the bankrupt than that which the bankrupt enjoyed, it is a policy choice of the legislature that an unsecured creditor's position, as represented by the trustee, is more meritorious than the unperfected security interest of a secured creditor.

non parfaite de la bailleresse. Il ressort d'une lecture ordinaire du sous-al. 20b)(i) de la *PPSA* que l'intérêt de la bailleresse à l'égard de la voiture n'est pas opposable au syndic. Certes, dans les circonstances du présent pourvoi, cette disposition a pour effet d'accorder au syndic la plénitude des droits à l'égard de la voiture, alors que la faillie n'avait que le droit d'usage et de possession, mais le sous-al. 20b)(i) modifie le principe selon lequel ne sont dévolus au syndic que les droits dont le failli était titulaire sur les biens visés. La question en litige n'est pas de savoir à qui appartient le véhicule, mais plutôt à qui doit être accordée la priorité à l'égard de celui-ci. Bien que la législation fédérale en matière de faillite prévoie qu'un syndic doit prendre la place du failli et que, règle générale, il n'obtient pas plus de droits sur les biens du failli que n'en avait ce dernier, le législateur a décidé — et il s'agit là d'un choix de politique générale — que la position du créancier non garanti représenté par le syndic est plus méritoire que celle du créancier garanti titulaire d'une sûreté non parfaite.

The trustee can sell the car and confer good title. The lessor could have made a claim against the car under s. 81 of the *BIA*. This claim would have been defeated by the trustee in reliance on s. 20(b)(i) of the *PPSA*. Both the defeat of a claim and the failure to make a claim under s. 81 result in the effective abandonment or relinquishment of any claim to the car.

Le syndic peut vendre la voiture et conférer un titre libre. La bailleresse aurait pu présenter une réclamation à l'égard de la voiture en vertu de l'art. 81 de la *LFI*. La réclamation se serait heurtée au syndic sur le fondement du sous-al. 20b)(i) de la *PPSA*. Le rejet de la réclamation tout comme la non-présentation de la réclamation visée à l'art. 81 entraînent, en fait, le délaissement ou l'abandon de toute réclamation à l'égard de la voiture.

Section 20(b)(i) of the *PPSA* does not offend the priorities set out in the *BIA*, but rather is only one element of the provincial legislation which serves to define the rights of the parties involved in a bankruptcy. More particularly, s. 20(b)(i) serves, on the present facts, to define the rights of the lessor and indicates that for the purpose of the bankruptcy, the lessor does not have the status of a secured creditor. Even though bankruptcy is clearly a federal matter, and even though it has been established that the federal Parliament alone can determine distribution priorities, the *BIA* is dependent on provincial property and civil rights legislation in order to inform the terms of the *BIA* and the rights of the parties involved in the bankruptcy.

Le sous-alinéa 20b)(i) de la *PPSA* ne porte pas atteinte aux priorités établies dans la *LFI*; il n'est que l'un des éléments de la législation provinciale qui sert à définir les droits des parties impliquées dans une faillite. Plus particulièrement, le sous-al. 20b)(i) définit, en l'espèce, les droits de la bailleresse et énonce qu'aux fins de la faillite, la bailleresse n'a pas la qualité de créancière garantie. Bien que la faillite soit clairement une matière fédérale et bien qu'il ait été établi que seul le législateur fédéral pouvait arrêter l'ordre de priorité en matière de distribution, il faut nécessairement se référer aux lois provinciales en matière de propriété et de droits civils pour définir les termes utilisés dans la *LFI* et les droits des parties impliquées dans la faillite.

Since s. 20(b)(i) of the *PPSA* provides that the lessor's unperfected security interest is ineffective against the interest acquired by the trustee, the trustee need not make an election under s. 30(1)(*k*) of the *BIA* in order to realize its interest in the car.

Vu que le sous-al. 20b)(i) de la *PPSA* prévoit que la sûreté non parfaite du bailleur est inopposable à l'intérêt acquis par le syndic, celui-ci n'a pas à faire de choix en vertu de l'al. 30(1)*k*) de la *LFI* pour réaliser son intérêt à l'égard de la voiture.

G did not hold the car on resulting trust for the lessor, since the contract of lease does not contemplate the creation of a trust.

G ne détenait pas la voiture pour la bailleresse en vertu d'une fiducie par déduction, étant donné que le contrat de location ne prévoit pas la création d'une fiducie.

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Personal Property Security Act, S.B.C. 1989, c. 36, ss. 1 "security interest", 2(1), 3 [rep. & sub. 1993, c. 28, s. 16], 12(1)(b), (2), 20(b)(i), 21 [rep. & sub. 1990, c. 11, s. 5], 24, 25.

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Personal Property Security Act, S.B.C. 1989, ch. 36, art. 1 «*security interest*» («sûreté»), 2(1), 3 [abr. & rempl. 1993, ch. 28, art. 16], 12(1)b), (2), 20b)(i), 21 [abr. & rempl. 1990, ch. 11, art. 5], 24, 25.

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who thereupon may sell or dispose of the property free of any lien, right, title or interest of the claimant". Section 81 does not specifically deal with the circumstances where a claimant's claim is defeated, but presumably the trustee would be able to sell the good free of the claim.

The lessor could have made a claim under s. 81 of the *BIA*. This claim would have been defeated by the trustee in reliance on s. 20(b)(i) of the *PPSA*. In my view, both the defeat of a claim and the failure to make a claim under s. 81 result in the effective abandonment or relinquishment of any claim to the car; the trustee can therefore sell the car and confer good title.

G. *The Federal Priority Scheme, Which Is Subject to the Rights of Secured Creditors, Is Not Disturbed*

Section 136 of the *BIA* sets out a priority scheme for the division of the property of the bankrupt; the interests of the various creditors are all "[s]ubject to the rights of secured creditors". Section 67 describes that which constitutes the property of the bankrupt.

This Court has held on a number of occasions that provincial legislatures cannot enact legislation which operates to interfere with the priority of distribution set out in the *BIA*, nor can they confer secured creditor status on a class of creditors not entitled to such status under the *BIA*. A very recent example is *Husky Oil*, *supra*, where a majority of the Court held that s. 133 of the *Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, was inapplicable in a bankruptcy because it operated to secure the Workers' Compensation Board's claim against the bankrupt's estate in violation of the priority of the Board's claim as set out in s. 136 of the *BIA*.

Previous to *Husky Oil* were the so-called "quartet" of judgments on this issue. In *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35, and *Deloitte Haskins and Sells Ltd. v. Workers' Com-*

sans que le réclamant retienne un privilège, droit, titre ou intérêt en l'espèce». L'article 81 ne traite pas expressément du cas où la réclamation est rejetée, mais on peut présumer que le syndic pourrait, dans une telle situation, vendre le bien, purgé de la réclamation.

La bailleresse aurait pu présenter une réclama- 59
tion en vertu de l'art. 81 de la *LFI*. Cependant, la réclamation se serait heurtée au syndic sur le fondement du sous-al 20b)(i) de la *PPSA*. À mon avis, le rejet de la réclamation tout comme la non-présentation de la réclamation visée à l'art. 81 entraînent, en fait, le délaissement ou l'abandon de toute réclamation à l'égard de la voiture; le syndic peut donc la vendre et conférer un titre libre.

G. *L'ordre de priorité établi par la loi fédérale, lequel est assujetti aux droits des créanciers garantis, n'est pas altéré*

L'article 136 de la *LFI* établit un ordre de prio- 60
rité en ce qui concerne le partage des biens du failli; les intérêts des divers créanciers sont tous assujettis aux «droits des créanciers garantis». L'article 67 définit les biens du failli.

Notre Cour a statué à plusieurs reprises que le 61
législateur provincial ne pouvait adopter une loi qui modifie l'ordre de priorité établi dans la *LFI* en matière de distribution, ni conférer la qualité de créancier garanti à une catégorie de créanciers n'y ayant pas droit en vertu de la *LFI*. À titre d'exemple très récent, je signale l'arrêt *Husky Oil*, précité, dans lequel les juges majoritaires de notre Cour ont conclu que l'art. 133 de la *Workers' Compensation Act, 1979*, S.S. 1979, ch. W-17.1, était inapplicable dans le cas d'une faillite parce qu'il avait pour effet de garantir la réclamation de la Commission des accidents du travail à l'égard des biens du failli et de modifier le rang attribué à la réclamation de la Commission par l'art. 136 de la *LFI*.

Avant que l'arrêt *Husky Oil* ne soit rendu, il 62
existait ce qu'on appelle un «quatuor» de jugements sur cette question. Dans les arrêts *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S.

pensation Board, [1985] 1 S.C.R. 785, this Court held that a province cannot claim to be a secured creditor in a bankruptcy pursuant to provincial legislation where the Crown claim is listed as a preferred claim with a particular ranking in the *BIA*. In *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, the Court held that, where a secured creditor liquidates his security outside the bankruptcy proceedings, the property constituting the security is still property of the bankrupt and payment from the proceeds must be determined by the federal bankruptcy priorities and not in accordance with provincial law. Finally, in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, the Court held that the province cannot deem a statutory trust to remove property from the estate of a bankrupt and thereby create its own priorities.

35, et *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785, notre Cour a conclu qu'une province ne pouvait revendiquer, en vertu du droit provincial, la qualité de créancière garantie dans le cadre d'une faillite alors que la réclamation de la Couronne est classée par la *LFI* parmi les créances prioritaires occupant un rang particulier. Dans l'arrêt *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061, la Cour a décidé que, lorsqu'un créancier garanti réalise sa sûreté hors du cadre de la procédure de faillite, les biens constituant la sûreté sont toujours des biens du failli et l'ordre de paiement du produit de la vente doit être déterminé en fonction des priorités établies par le droit fédéral en matière de faillite et non selon le droit provincial. Enfin, dans l'arrêt *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24, la Cour a jugé que la province ne pouvait créer une fiducie légale afin de soustraire des biens de l'actif d'une faillite et établir son propre ordre de priorité.

63 The Court of Appeal applied this Court's decision in *Husky Oil* to conclude that a provincial law cannot add to the estate of a bankrupt property which the bankrupt never had. In my view, the Court of Appeal erred in its characterization of s. 20(b)(i). Section 20(b)(i) of the *PPSA* does not offend the priorities set out in the *BIA* as interpreted by the quartet and *Husky Oil*; rather, s. 20(b)(i) is but one element of the provincial legislation which serves to define the rights of the parties involved in a bankruptcy. More particularly, s. 20(b)(i) serves, on the present facts, to define the rights of the lessor and indicates that for the purpose of the bankruptcy, the lessor does not have the status of a secured creditor.

La Cour d'appel a appliqué l'arrêt *Husky Oil* de notre Cour pour conclure qu'une loi provinciale ne pouvait ajouter au patrimoine du failli des biens qui ne lui ont jamais appartenu. À mon avis, la Cour d'appel a commis une erreur en qualifiant le sous-al. 20b)(i). Cette disposition de la *PPSA* ne porte pas atteinte aux priorités établies dans la *LFI*, telles qu'elles ont été interprétées dans le quatuor d'arrêts et dans *Husky Oil*; le sous-al. 20b)(i) n'est que l'un des éléments de la législation provinciale qui sert à définir les droits des parties impliquées dans une faillite. Plus particulièrement, le sous-al. 20b)(i) définit, en l'espèce, les droits de la bailleresse et énonce qu'aux fins de la faillite, la bailleresse n'a pas la qualité de créancière garantie.

64 Even though bankruptcy is clearly a federal matter, and even though it has been established that the federal Parliament alone can determine distribution priorities, the *BIA* is dependent on provincial property and civil rights legislation in order to inform the terms of the *BIA* and the rights of the parties involved in the bankruptcy. Section 72(1)

Bien que la faillite soit clairement une matière fédérale et bien qu'il ait été établi que seul le législateur fédéral pouvait arrêter l'ordre de priorité en matière de distribution, il faut nécessairement se référer aux lois provinciales en matière de propriété et de droits civils pour définir les termes utilisés dans la *LFI* et les droits des parties impliof the *BIA* contemplates interaction with provincial legislation.

This Court has recognized the important role that provincial legislation plays in the event of bankruptcy in *Husky Oil*. Gonthier J. stated, at p. 481:

> It is trite to observe that the *Bankruptcy Act* is contingent on the provincial law of property for its operation. The Act is superimposed on those provincial schemes when a debtor declares bankruptcy. As a result, provincial law necessarily affects the "bottom line", but this is contemplated by the *Bankruptcy Act* itself.

And I stated the following for the minority in *Husky Oil*, at p. 531:

> [P]rovincial legislation is deeply involved in determining the priority, registration, and amount of indebtedness in the bankruptcy process. In fact, the proprietary and contractual rights that are regulated by the bankruptcy process are usually created by virtue of provincial law.

J. S. Ziegel lucidly underlined the role which provincial law plays in bankruptcy in his article "Personal Property Security and Bankruptcy: There Is No War!" (1993), 72 *Can. Bar Rev.* 44, at p. 50:

> The answer is confirmed by the opening words of section 136(1), "Subject to the rights of secured creditors . . .". How are those rights (and obligations) to be determined? Since the Bankruptcy [and Insolvency] Act does not spell them out the reply must surely be: by consulting the law that gave them birth, and that law, in the absence of conflicting federal prescriptions, also determines what conditions and restrictions are imposed on the recognition and enforceability of the security interest.

Section s. 20(b)(i) does not reorder federal priorities. Compliance with the perfection requirements of the *PPSA* is a precondition to maintaining secured creditor status under the *BIA*. In the event of bankruptcy, the consequences of a failure to perfect are spelled out in s. 20(b)(i). In effect, the secured party with an unperfected security interest becomes an unsecured creditor of the bankrupt:

quées dans la faillite. Le paragraphe 72(1) de la *LFI* prévoit précisément une interaction avec les lois provinciales.

Dans l'arrêt *Husky Oil*, notre Cour a reconnu le 65
rôle important que jouaient les lois provinciales en matière de faillite. Le juge Gonthier a dit, à la p. 481:

> C'est un truisme de dire que la *Loi sur la faillite* dépend, pour son application, du droit provincial en matière de propriété. La Loi se superpose à ces régimes provinciaux lorsqu'un débiteur déclare faillite. C'est pourquoi le droit provincial modifie nécessairement le «résultat final», mais cela est prévu par la *Loi sur la faillite* elle-même.

J'ai moi-même dit, au nom des juges minoritaires dans l'arrêt *Husky Oil*, à la p. 531:

> [L]es lois provinciales jouent un rôle important dans la détermination du rang, des modalités d'enregistrement et du montant des créances dans le processus de faillite. En fait, les droits de propriété et de nature contractuelle qui sont réglementés par le processus de faillite sont habituellement créés en vertu d'une loi provinciale.

J. S. Ziegel a souligné de façon lumineuse le 66
rôle que joue le droit provincial en matière de faillite dans son article intitulé «Personal Property Security and Bankruptcy: There Is No War!» (1993), 72 *Can. Bar Rev.* 44, à la p. 50:

> [TRADUCTION] La réponse est confirmée par les premiers mots du par. 136(1), «[s]ous réserve des droits des créanciers garantis . . .» Comment faut-il déterminer ces droits (et obligations)? Vu que la *Loi sur la faillite [et l'insolvabilité]* ne les définit pas, la réponse s'impose: il faut consulter la loi qui les a créés et cette loi, en l'absence de dispositions fédérales contraires, détermine également les conditions et restrictions qui s'appliquent relativement à la reconnaissance et au caractère exécutoire de la sûreté.

Le sous-alinéa 20b)(i) ne modifie pas l'ordre de 67
priorité établi par la loi fédérale. Le respect des exigences prévues par la *PPSA* relativement à la perfection des sûretés est une condition préalable à la conservation de la qualité de créancier garanti en vertu de la *LFI*. En cas de faillite, les conséquences du défaut de parfaire la sûreté sont énoncées au sous-al. 20b)(i). En fait, le titulaire d'une sûreté non parfaite devient un créancier non garanti du failli:

. . . any secured party with a security interest in personal property, who fails to meet the requirements of the Act for perfecting its security interest prior to the date a petition is filed or an assignment is made, loses the status of a secured creditor in the bankruptcy and is relegated to unsecured status.

(Cuming, *supra*, at pp. 25-26.)

H. *Other Arguments*

68 The respondent raised three other arguments which I need discuss only briefly. The lessor submits that s. 30(1)(*k*) of the *BIA* requires that the trustee either elect to retain or disclaim its rights to any property leased by the bankrupt. The lessor argues that, if the trustee did have any proprietary rights to the car, these rights were disclaimed as a result of the trustee's failure to retain the lease by making the lease payments.

69 In my view, s. 30(1)(*k*) of the *BIA* has no bearing on the resolution of the present appeal. Section 20(b)(i) provides that the lessor's unperfected security interest is ineffective against the interest acquired by the trustee; the trustee need not make an election under s. 30(1)(*k*) of the *BIA* in order to realize its interest in the car. If the lessor had a valid and enforceable security interest in the car then the trustee could choose, pursuant to s. 30(1)(*k*), to continue with the lease or return the car to the lessor, but none of that applies in this case.

70 The respondent also submits that the bankrupt held the car on resulting trust for the lessor; consequently, by virtue of s. 67(1) of the *BIA*, the car is excluded from the "property of the bankrupt". Like the trial judge, I find no merit in this argument. The contract of lease does not contemplate the creation of a trust. Further, a resulting trust arises only where

legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to

[TRADUCTION] . . . tout titulaire d'une sûreté grevant un bien personnel qui ne satisfait pas aux exigences de la Loi relativement à la perfection des sûretés avant la date de la cession ou du dépôt de la pétition perd la qualité de créancier garanti eu égard à la faillite et est relégué au rang de créancier non garanti.

(Cuming, *loc. cit.*, aux pp. 25 et 26.)

H. *Autres arguments*

L'intimée a fait valoir trois autres arguments qu'il sera seulement nécessaire d'aborder brièvement. La bailleresse soutient que l'al. 30(1)*k*) de la *LFI* exige du syndic qu'il décide soit de retenir, soit de désavouer ses droits se rattachant à tout bien pris à bail par la faillie. La bailleresse prétend que même si le syndic avait effectivement des droits propriétaux sur la voiture, il a renoncé à ces droits lorsqu'il a omis de retenir le bail en effectuant les paiements prévus au contrat.

À mon avis, l'al. 30(1)*k*) de la *LFI* n'a aucune incidence sur l'issue du présent pourvoi. Le sous-alinéa 20b)(i) prévoit que la sûreté non parfaite du bailleur est inopposable à l'intérêt acquis par le syndic; le syndic n'a pas à faire de choix en vertu de l'al. 30(1)*k*) de la *LFI* pour réaliser son intérêt à l'égard de la voiture. Le syndic pourrait décider, conformément à l'al. 30(1)*k*), de maintenir le bail ou encore de remettre la voiture à la bailleresse si la sûreté constituée au profit de cette dernière sur la voiture était valide et exécutoire, mais ce n'est pas le cas en l'espèce.

L'intimée soutient également que la faillie détenait la voiture pour la bailleresse en vertu d'une fiducie par déduction; par conséquent, en vertu du par. 67(1) de la *LFI*, la voiture ne faisait pas partie des «biens du failli». À l'instar du juge de première instance, j'estime que cet argument est dénué de fondement. Le contrat de location ne prévoit pas la création d'une fiducie. En outre, la fiducie par déduction n'existe que si les conditions suivantes sont réunies:

[TRADUCTION] . . . le titre de propriété en common law ou en *equity* est au nom d'une partie, mais celle-ci, parce qu'elle est fiduciaire ou parce qu'elle n'a pas obtenu le bien visé à titre onéreux, a l'obligation de rendre le bien au détenteur original du titre ou à la personne return it to the original title owner, or to the person who *did* give value for it. [Emphasis in original.]

(D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 299.)

The transferee, who obtains the property gratuitously, holds the property on trust for the transferor, who is the rightful owner, because equity does not assume gifts (Waters, at p. 300).

In this case, the lessor holds title to the car and is its rightful owner, having purchased it. But the lessor entered into a contract of lease wherein the lessee, for value, obtained the right to use and possession of the car. In my opinion, the facts at hand cannot give rise to a resulting trust.

Finally, the respondent argues that the trustee is estopped from asserting a claim to the car because the lessee, whose interests the trustee succeeds, signed documents which indicated that she did not have ownership of the car. I also must reject this argument. First, the lessee's understanding of the transaction is not at issue here. Second, ownership of the car is not at issue; rather, the contest, as discussed above, is not one of title, but priority.

6. Conclusion and Disposition

In accordance with s. 20(b)(i), the lessor's unperfected security interest is ineffective against the possessory interest acquired by the trustee in bankruptcy. The trustee's interest in the car takes priority over that of the lessor; the trustee is therefore entitled to the proceeds of the car.

For the foregoing reasons, I would therefore allow the appeal with costs throughout, set aside the judgment of the British Columbia Court of Appeal, and restore the disposition ordered by the trial judge.

Appeal allowed with costs.

qui *a* effectivement obtenu le bien à titre onéreux. [En italique dans l'original.]

(D. W. M. Waters, *Law of Trusts in Canada* (2e éd. 1984), à la p. 299.)

Le bénéficiaire du transfert, qui obtient le bien à titre gratuit, détient ce bien en fiducie pour l'auteur du transfert qui en est le propriétaire légitime, parce qu'en *equity*, la disposition à titre gratuit ne se présume pas (Waters, à la p. 300).

En l'espèce, la bailleresse détient le titre de propriété de la voiture et elle en est le propriétaire légitime, l'ayant achetée. Cependant, elle a conclu un contrat de location en vertu duquel la preneuse à bail a obtenu, à titre onéreux, le droit d'utiliser la voiture et d'en avoir la possession. À mon avis, les faits de l'espèce ne donnent pas lieu à une fiducie par déduction. 71

Enfin, l'intimée prétend que le syndic n'est pas admis à réclamer la voiture parce que la preneuse à bail, dont les intérêts ont été dévolus au syndic, a signé des documents mentionnant que la voiture ne lui appartenait pas. Je dois également rejeter cet argument. Premièrement, la façon dont la preneuse à bail a interprété l'opération n'est pas en cause dans le présent pourvoi. Deuxièmement, la propriété de la voiture n'est pas non plus en cause; comme il a été dit précédemment, le différend ne porte pas sur le titre de propriété mais plutôt sur l'ordre de priorité. 72

6. Conclusion et dispositif

En vertu du sous-al. 20b)(i), la sûreté non parfaite de la bailleresse est inopposable à l'intérêt fondé sur la possession acquis par le syndic de faillite. L'intérêt du syndic à l'égard de la voiture prime sur celui de la bailleresse; par conséquent, le syndic a droit au produit de la vente de la voiture. 73

Pour ces motifs, je suis donc d'avis d'accueillir le pourvoi avec dépens dans toutes les cours, d'infirmer l'arrêt de la Cour d'appel de la Colombie-Britannique et de rétablir la décision rendue par le juge de première instance. 74

Pourvoi accueilli avec dépens.

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Procureur de l'intervenant le procureur général de l'Alberta: Le ministère de la Justice, Edmonton.

TAB 16

Industrial Wood & Allied Workers of Canada, Local 700 *Appellant/Respondent on cross-appeal*

v.

GMAC Commercial Credit Corporation — Canada *Respondent/Appellant on cross-appeal*

and

T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., KPMG Inc., the Interim Receiver and Trustee in Bankruptcy of T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc., and TCT Logistics Inc., TCT Acquisition No. 1 Ltd., Atomic TCT Logistics Inc., Atomic TCT (Alberta) Logistics Inc., TCT Canada Logistics Inc., Inter-Ocean Terminals (B.C.) Ltd., Atomic Transport Inc., TCT Warehousing Logistics Inc., TCT Warehousing Logistics No. 2 Inc., R.R.S. Transport (1998) Inc., TCT Acquisition No. 2 Ltd., Tri-Line Expressways Ltd. (a successor to Tri-Line Expressways Ltd. and TCT Acquisition No. 3 Ltd.), Tri-Line Expressways, Inc., 2984008 Canada Inc., High-Tech Express & Distribution Inc., 606965 British Columbia Ltd. and 606966 British Columbia Ltd. *Respondents*

INDEXED AS: GMAC COMMERCIAL CREDIT CORP. — CANADA *v.* T.C.T. LOGISTICS INC.

Neutral citation: 2006 SCC 35.

File No.: 30391.

2005: November 16; 2006: July 27.

Present: McLachlin C.J. and Major,* Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

* Major J. took no part in the judgment.

Syndicat des travailleurs de l'industrie du bois et leurs alliés, section locale 700 *Appelant/Intimé au pourvoi incident*

c.

Société de crédit commercial GMAC — Canada *Intimée/Appelante au pourvoi incident*

P. 145

et

T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., KPMG Inc., séquestre intérimaire et syndic de faillite de T.C.T. Logistics Inc. et T.C.T. Warehousing Logistics Inc., et TCT Logistics Inc., TCT Acquisition No. 1 Ltd., Atomic TCT Logistics Inc., Atomic TCT (Alberta) Logistics Inc., TCT Canada Logistics Inc., Inter-Ocean Terminals (B.C.) Ltd., Atomic Transport Inc., TCT Warehousing Logistics Inc., TCT Warehousing Logistics No. 2 Inc., R.R.S. Transport (1998) Inc., TCT Acquisition No. 2 Ltd., Tri-Line Expressways Ltd. (successeur de Tri-Line Expressways Ltd. et de TCT Acquisition No. 3 Ltd.), Tri-Line Expressways, Inc., 2984008 Canada Inc., High-Tech Express & Distribution Inc., 606965 British Columbia Ltd. et 606966 British Columbia Ltd. *Intimées*

RÉPERTORIÉ : SOCIÉTÉ DE CRÉDIT COMMERCIAL GMAC — CANADA *c.* T.C.T. LOGISTICS INC.

Référence neutre : 2006 CSC 35.

N° du greffe : 30391.

2005 : 16 novembre; 2006 : 27 juillet.

Présents : La juge en chef McLachlin et les juges Major*, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

* Le juge Major n'a pas pris part au jugement.

Bankruptcy and insolvency — Bankruptcy court — Jurisdiction — Whether bankruptcy judge lacks jurisdiction to determine whether interim receiver is successor employer under provincial labour relations legislation — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 47, 72(1).

Bankruptcy and insolvency — Procedure — Action against interim receiver — Bankruptcy legislation precluding proceedings against interim receiver without leave of court — Union seeking leave to bring "successor employer" application against interim receiver — Whether Mancini test applicable — Whether test different when dispute relates to receiver's obligations to debtors' employees represented by union — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 215.

The company TCT became insolvent and its largest secured creditor applied for an order appointing an interim receiver. The order appointing KPMG states that the receiver's employment-related actions could not be considered those of a "successor employer", and prohibits proceedings being taken against the interim receiver unless the court grants leave. After TCT was assigned in bankruptcy, KPMG sold most of the assets of the warehousing business to a new company. All unionized employees at the Toronto warehouse were terminated by KPMG, but some of them were later hired by the new company. Except for a change in location, the only major difference between TCT's operations and those of the new company was the absence of the union as representative of TCT's former employees.

The union applied to the Ontario Labour Relations Board seeking, in particular, a declaration that, as a successor employer to TCT or KPMG, the new company was bound by the collective agreement pursuant to s. 69 of the *Labour Relations Act, 1995* ("*LRA*"). After a stay was granted on the basis that s. 215 of the *Bankruptcy and Insolvency Act* ("*BIA*") precludes proceedings against an interim receiver or trustee without leave of the court, the union sought the necessary court approval. The bankruptcy judge amended the paragraph relating to the "successor employer" protection in the order appointing the interim receiver, but denied leave. The Court of Appeal unanimously concluded that only the labour board had jurisdiction

Faillite et insolvabilité — Tribunal de faillite — Compétence — Les juges de faillite sont-ils incompétents pour décider si un séquestre intérimaire est un employeur successeur pour l'application des lois provinciales sur les relations de travail? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 47, 72(1).

Faillite et insolvabilité — Procédure — Action contre un séquestre intérimaire — Disposition législative sur la faillite interdisant l'engagement de procédures contre un séquestre intérimaire sans autorisation judiciaire préalable — Permission demandée par un syndicat en vue d'être autorisé à déposer contre un séquestre intérimaire une requête touchant le statut d'« employeur successeur » — Le critère énoncé dans l'arrêt Mancini est-il applicable? — Un critère différent s'applique-t-il lorsque le litige a trait aux obligations du séquestre envers les employés syndiqués du débiteur? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 215.

La société TCT est devenue insolvable et le principal créancier garanti de celle-ci a demandé la nomination d'un séquestre intérimaire. L'ordonnance portant nomination de KPMG précisait que les mesures prises par le séquestre intérimaire en matière d'emploi ne pouvaient être considérées comme celles d'un « employeur successeur » et interdisait l'engagement de procédures contre le séquestre intérimaire, sauf avec l'autorisation de la cour. Après cession des biens de TCT au profit des créanciers, KPMG a vendu la plupart des éléments d'actif de l'entreprise d'entreposage à une société nouvellement formée. KPMG a mis fin à l'emploi de tous les employés syndiqués de l'entrepôt de Toronto, mais certains d'entre eux ont été réembauchés subséquemment par la nouvelle société. Exception faite du nouvel emplacement des activités, la seule différence importante dans l'exploitation de l'entreprise par TCT et par la nouvelle société était l'absence du syndicat comme représentant des anciens employés de TCT.

Le syndicat a présenté à la Commission des relations de travail de l'Ontario une requête dans laquelle il sollicitait notamment une déclaration portant que, en tant qu'employeur succédant à TCT ou KPMG, la nouvelle société était liée par la convention collective conformément à l'art. 69 de la *Loi de 1995 sur les relations de travail* (« *LRT* »). Après que sa requête eût été suspendue pour le motif que l'art. 215 de la *Loi sur la faillite et l'insolvabilité* (« *LFI* ») interdit l'introduction d'actions contre un séquestre intérimaire ou un syndic de faillite sans la permission du tribunal, le syndicat a demandé cette permission. Le juge a modifié le paragraphe relatif à la protection touchant le statut d'« employeur successeur » dans l'ordonnance nommant le to determine who was a successor employer, but divided over the test under s. 215 for granting leave to bring successor employer applications. The majority was of the view that the traditional *Mancini* test represented too low a threshold when the proposed proceedings were successor employer applications, and that other factors should be considered to take account to a greater extent of the impact of such litigation on the bankruptcy process. Accordingly, the majority set aside the bankruptcy judge's refusal to grant leave and remitted the leave application back to him for reconsideration based on the enhanced enumerated factors. The union appealed the Court of Appeal's order denying leave, and the secured creditor cross-appealed on the issue of the bankruptcy judge's jurisdiction.

séquestre intérimaire, mais il a refusé la permission demandée. La Cour d'appel a conclu à l'unanimité que seule la Commission avait compétence pour se prononcer sur le statut d'employeur successeur, mais elle s'est divisée sur le critère applicable pour décider, en vertu de l'art. 215 *LFI*, s'il y a lieu d'accorder ou non la permission de présenter une demande concernant le statut d'employeur successeur. La majorité a estimé que le critère traditionnel formulé dans *Mancini* n'était pas assez exigeant lorsqu'il s'agissait d'instances relatives au statut d'employeur successeur et qu'il fallait considérer d'autres facteurs pour tenir davantage compte des conséquences de telles demandes en justice sur le processus de faillite. La majorité a en conséquence annulé le refus du juge d'accorder la permission et lui a renvoyé la demande pour qu'il la réexamine en fonction des facteurs additionnels énumérés. Le syndicat se pourvoit contre l'ordonnance de la Cour d'appel qui lui a refusé la permission d'engager des procédures, et le créancier garanti a formé un appel incident sur la question de la compétence du juge de faillite.

Held (Deschamps J. dissenting on the appeal): The appeal should be allowed and the cross-appeal dismissed.

Arrêt (la juge Deschamps est dissidente quant au pourvoi principal) : Le pourvoi principal est accueilli et le pourvoi incident est rejeté.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.: The bankruptcy court does not have jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the *LRA*. The powers given to the bankruptcy court under s. 47(2) *BIA* are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes. Further, s. 72(1) *BIA* declares that unless there is a conflict, any legislation relating to property and civil rights is deemed to be supplemental to, not abrogated by the Act. The right to seek a successor employer declaration pursuant to the *LRA* does not conflict with the bankruptcy court's authority under s. 47(2). If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all rights. Explicit language would be required before such a sweeping power could be attached to s. 47. [4] [43-51]

La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Fish, Abella et Charron : Le tribunal de faillite n'a pas le pouvoir de décider si un séquestre intérimaire est un employeur successeur au sens de la *LRT.* Le paragraphe 47(2) *LFI* accorde au tribunal de faillite le pouvoir d'enjoindre au séquestre intérimaire de faire certaines choses. Cette disposition n'a pas pour effet d'habiliter — ni explicitement ni implicitement — le tribunal de faillite à rendre des jugements déclaratoires unilatéraux sur les droits de tiers en fonction d'autres régimes législatifs. En outre, le par. 72(1) *LFI* énonce que celle-ci n'a pas pour effet d'abroger des dispositions législatives non incompatibles avec elle se rapportant à la propriété et aux droits civils, ces dispositions étant réputées s'y ajouter. Le droit de demander une déclaration touchant le statut d'employeur successeur conformément à la *LRT,* n'est pas incompatible avec le pouvoir que le par. 47(2) accorde au tribunal de faillite. Si l'article 47 pouvait recevoir une interprétation assez large pour permettre de porter atteinte à tous les droits qui, bien que protégés par la loi, gênent le processus de faillite, il pourrait être invoqué pour éteindre tout droit. Il faudrait un texte explicite pour que l'art. 47 confère un pouvoir aussi étendu. [4] [43-51]

The bankruptcy judge erred in not granting leave to the union to bring a successor employer application against the interim receiver. Under the *Mancini* test, the threshold for granting leave under s. 215 *BIA* is not

Le juge de faillite a fait erreur en refusant d'accorder au syndicat la permission de présenter contre le séquestre intérimaire une demande relative à la qualité d'employeur successeur. Le critère énoncé dans *Mancini* à a high one. The question under s. 215 is whether the evidence provides the required support for the cause of action sought to be asserted. If the evidence discloses a *prima facie* case, leave should be granted. The focus of the inquiry is not a determination of the merits. The threshold of the *Mancini* test strikes the appropriate balance between the protection of trustees and receivers from frivolous suits, while preserving to the maximum extent possible the rights of creditors and others as against a trustee or receiver. As a result, *Mancini* is consistent with the requirement that there be explicit statutory language before the *BIA* is interpreted so as to deprive persons of rights conferred under provincial law. Where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly. In the absence of such express protection, the bankruptcy court should not convert the leave mechanism in s. 215 into blanket insulation for court-appointed officers. There is no reason to create a more stringent test to be applied only to claims by employees represented by unions. To impose a higher s. 215 threshold in a case involving a labour board issue is to read into the *BIA* a lower tolerance for the rights of employees represented by unions than for other creditors. Nothing in the Act suggests this dichotomy. Finally, the *Mancini* test does not in any way interfere with the protections that Parliament has deemed necessary to preserve the ability of trustees and receivers to discharge their duties flexibly and efficiently. In this case, since it cannot be said that the Union's claim is frivolous or without an evidentiary foundation, it should be allowed to proceed. [7] [55-61] [67-72] [80]

l'égard des demandes de permission fondées sur l'art. 215 *LFI* n'est pas très exigeant. Pour l'application de cette disposition, il s'agit de déterminer si la preuve étaye la cause d'action invoquée. S'il existe une preuve *prima facie*, la permission demandée doit être accordée. Cet examen n'a pas pour objet de trancher la question au fond. Le critère énoncé dans *Mancini* établit un juste équilibre entre, d'une part, la protection des syndics et des séquestres contre les poursuites frivoles, et, d'autre part, la protection — dans la plus large mesure possible — des droits des créanciers et autres intéressés contre les décisions et les actes des syndics et des séquestres. En ce sens, l'arrêt *Mancini* est compatible avec l'exigence selon laquelle il faut une disposition législative explicite pour que la *LFI* puisse être interprétée de manière à priver une personne de droits conférés par une province. Lorsque le législateur a voulu protéger les syndics ou les séquestres contre certains recours, il l'a fait explicitement. En l'absence de dispositions expresses de ce genre, le tribunal de faillite ne devrait pas convertir la procédure d'autorisation établie à l'art. 215 en mesure de protection générale en faveur des auxiliaires de justice désignés par les tribunaux. Il n'existe aucune raison de créer un critère plus exigeant, qui s'appliquerait uniquement aux recours des employés syndiqués. Resserrer le critère d'application de l'art. 215 lorsque le litige porte sur une question relevant d'une commission des relations de travail équivaut à reconnaître à la *LFI*, par interprétation, une sensibilité moins grande envers les droits des employés syndiqués qu'envers ceux des autres créanciers. Rien dans cette loi ne suggère une telle distinction. Enfin, le critère de l'arrêt *Mancini* ne restreint nullement les mesures de protection que le législateur a jugé nécessaires d'établir pour préserver la capacité des syndics et des séquestres de s'acquitter de leurs fonctions avec souplesse et efficacité. En l'espèce, comme il est impossible d'affirmer que la demande du syndicat est frivole ou n'est appuyée d'aucune preuve, celui-ci doit être autorisé à la présenter. [7] [55-61] [67-72] [80]

Per Deschamps J. (dissenting on the appeal): A judge who must decide whether to grant leave to bring proceedings against a trustee under s. 215 *BIA* must determine the actual scope of the remedy being sought, identify potential conflicts and tailor the leave so as to avoid a situation in which proceedings based on provincial law have the effect of hindering the discharge of the trustee's duties and responsibilities under the *BIA*. Since conflicts of jurisdiction are not tolerated in constitutional law, proceedings that lead to a constitutional conflict have no basis in law and the judge must therefore deny leave to bring them. [154]

La juge Deschamps (dissidente quant au pourvoi principal) : Le juge appelé à décider s'il y a lieu d'accorder la permission de poursuivre un syndic en vertu de l'art. 215 *LFI* doit évaluer concrètement la portée du recours recherché, identifier les conflits potentiels et moduler l'autorisation de façon à éviter qu'une poursuite fondée sur le droit provincial n'ait pour effet d'entraver l'exécution des devoirs et responsabilités imposés au syndic par la *LFI*. Comme le droit constitutionnel ne tolère pas les conflits de compétence, une poursuite entraînant un conflit constitutionnel n'a pas de fondement juridique et le juge doit alors refuser la permission demandée. [154]

The decision to continue operating the business is central to the trustee's role under the *BIA* and, in principle, a trustee should not be bound by obligations that interfere with the resolution of the bankruptcy. The provisions of the *BIA* that protect trustees against proceedings are a clear indication of Parliament's intent to give trustees the flexibility they need to discharge the duties imposed on them by the *BIA*. The successor employer declaration is not free of pitfalls when it applies to a trustee. The effect of such a declaration is that the trustee becomes a party to the collective agreement and becomes liable to perform all the obligations set out in that agreement, including those that were binding on the former employer before the business was transferred. Although it is common ground that the *LRA* confers the exclusive power to decide who is a "successor employer" on the Ontario Labour Relations Board, the *LRA* cannot frustrate the purpose of the *BIA*. It is therefore important to strike a balance between the trustee's duties and immunities under the *BIA* and the employees' rights under the *LRA*. In the event of conflict, the parties must refer to constitutional principles. Courts that hear disputes relating to the difficulty of applying federal and provincial statutes concurrently must attempt to reconcile the application of those statutes in a manner consistent with the respective jurisdictions of the two levels of government. Where conflict is unavoidable, however, the federal statute is paramount to the provincial statute. Hence the importance of the screening mechanism of s. 215 *BIA*, which serves the purpose of ensuring that provincial and federal statutes do not conflict with each other. Since the bankruptcy of a business affects the interests of all the creditors, not just of the employees, the bankruptcy judge is in a better position to evaluate the interests at stake and prevent conflicts. [91] [101] [103] [111-112] [116-117] [123] [127-128]

Although the criteria established in *Mancini* for applying s. 215 are easy to apply to a simple action in damages based on wrongdoing by the trustee, they must, in other cases, be tailored to the specific nature of each application for leave. The judge must assess the nature and scope of the proceeding in light of the evidence. This review does not have the effect of giving special or different treatment to successor employer declarations. When reviewing the seriousness of the cause of action, the bankruptcy judge must be vigilant and make provision for conflicts. By ensuring that the conclusions being sought do not impair the application of the *BIA* and, if need be, limiting the scope of proceedings based on a provincial statute, the bankruptcy judge permits

La décision de continuer les activités de l'entreprise est au cœur de la mission confiée au syndic par la *LFI* et, en principe, le syndic ne doit pas être assujetti à des obligations qui entravent le règlement de la faillite. Les dispositions de la *LFI* protégeant le syndic contre les poursuites indiquent clairement l'intention du Parlement de lui accorder la marge de manœuvre dont il a besoin pour accomplir les devoirs que lui impose la *LFI*. La déclaration attribuant la qualité d'employeur successeur n'est pas sans créer d'embûches lorsqu'elle vise un syndic. Une telle déclaration a pour effet de faire du syndic une partie liée par la convention collective et de le rendre responsable de toutes les obligations y afférentes, y compris celles qui incombaient à l'ancien employeur avant le transfert de l'entreprise. Bien qu'il soit admis que la *LRT* confère à la Commission des relations de travail de l'Ontario le pouvoir exclusif de décider qui est « employeur successeur », la *LRT* ne saurait entraver la réalisation de l'objet de la *LFI*. Il est donc important d'identifier le point d'équilibre entre les devoirs et immunités du syndic en vertu de la *LFI* et les droits reconnus aux employés par la *LRT*. En cas de conflit, les parties doivent se reporter aux règles constitutionnelles. Les tribunaux saisis de contestations portant sur la difficulté d'appliquer concurremment des lois fédérales et provinciales doivent tenter de concilier l'application de ces lois de façon à respecter les champs de compétence respectifs des deux ordres de gouvernement. Cependant, lorsque le conflit est inévitable, la loi fédérale a prépondérance sur la loi provinciale. De là l'importance du mécanisme de filtrage de l'art. 215 *LFI* qui sert de mesure de contrôle permettant d'éviter que des lois provinciale et fédérale n'entrent en conflit l'une avec l'autre. Comme la faillite d'une entreprise met en cause les intérêts de tous les créanciers et non pas seulement ceux des employés, le juge de la cour de faillite est dans une meilleure position pour évaluer les intérêts en cause et prévenir les conflits. [91] [101] [103] [111-112] [116-117] [123] [127-128]

D'application facile lorsqu'il s'agit d'une simple poursuite en dommages-intérêts fondée sur la faute du syndic, les critères d'application de l'art. 215 énoncés dans l'arrêt *Mancini* doivent, dans les autres cas, être adaptés à la nature particulière de chaque demande. Le juge doit évaluer la nature et la portée du recours à la lumière de la preuve. Cet examen n'a pas pour effet d'accorder un traitement particulier ou différent aux déclarations attribuant la qualité d'employeur successeur. Dans l'examen du sérieux de la cause d'action, le juge de faillite doit être vigilant et prévoir les conflits. En s'assurant que les conclusions recherchées n'entravent pas l'application de la *LFI* et, au besoin, en limitant la portée d'une poursuite fondée sur une loi provinciale, the federal statute and provincial legislation to be applied simultaneously. A judge who denies leave to bring proceedings merely avoids a conflict by relying on the paramountcy doctrine in a preventive manner. However, the bankruptcy judge must take care not to supplant the court or tribunal that will rule on the merits. The judge's first task is to enquire into the actual effect of the application, not a vaguely defined effect on the administration of the bankruptcy. The judge will be justified in limiting the scope of proceedings or denying leave to bring them only if the proceedings would genuinely hinder the trustee's work. An approach that focussed too much on the management flexibility required by the trustee could all too easily lead the judge to find that a conflict exists and would hardly be in keeping with s. 72 *BIA*, which makes express provision for the application of provincial legislation that is compatible with the federal statute. [124] [135] [143-153]

In the instant case, the unqualified conclusions sought by the union are likely to result in direct conflicts with the application of the *BIA*. Neither the facts in the record nor the positions advanced by the parties are sufficient for this Court to engage in the review that is the Superior Court's responsibility. The matter must therefore be remitted not only for a review from the constitutional standpoint, but also for a review of the seriousness of the cause of action and the sufficiency of the evidence. [162] [166]

Cases Cited

By Abella J.

Applied: *Mancini (Bankrupt) v. Falconi* (1993), 61 O.A.C. 332; **referred to:** *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31; *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146, aff'd (2004), 46 C.B.R. (4th) 126; *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, 2004 SCC 3; *Randfield v. Randfield* (1861), 3 De G. F. & J. 766, 45 E.R. 1075; *In re Diehl v. Carritt* (1907), 15 O.L.R. 202; *Danny's Cabaret Ltd. v. Horner*, [1980] B.C.J. No. 1293 (QL); *Virden Credit Union Ltd. v. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113; *RoyNat Inc. v. Allan* (1988), 61 Alta. L.R. (2d) 165; *B.N.R. Holdings Ltd. v. Royal Bank* (1992), 14 C.B.R. (3d) 233; *Toronto Dominion Bank v. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6; *Nicholas v. Anderson* (1996), 40 C.B.R. (3d) 32; *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9;

le juge de faillite permet l'application simultanée de la loi fédérale et des lois provinciales. Le juge qui refuse d'autoriser une poursuite ne fait qu'éviter le conflit en recourant de façon préventive à la doctrine de la prépondérance. Le juge de faillite doit toutefois prendre garde de ne pas se substituer au tribunal qui statuera sur le fond. La tâche première du juge consiste à s'interroger sur l'effet concret de la demande et non sur quelque effet diffus de celle-ci sur l'administration de la faillite. Seule une entrave réelle au travail du syndic justifie de limiter la portée du recours ou de refuser la permission d'intenter celui-ci. Une approche trop axée sur la flexibilité requise par le syndic dans sa gestion risquerait d'amener trop facilement à conclure à l'existence d'un conflit et serait peu respectueuse de l'art. 72 *LFI* qui prévoit expressément l'application des lois provinciales compatibles avec la loi fédérale. [124] [135] [143-153]

Dans la présente affaire, les conclusions sans réserve sollicitées par le syndicat sont susceptibles d'entraîner des conflits directs avec l'application de la *LFI*. Ni les faits consignés au dossier ni les positions avancées par les parties ne permettent à notre Cour de procéder à l'examen auquel la Cour supérieure doit se livrer. Le renvoi du dossier s'impose donc non seulement pour l'évaluation du dossier sous l'angle constitutionnel, mais aussi pour l'examen du sérieux de la cause d'action et du caractère suffisant de la preuve. [162] [166]

Jurisprudence

Citée par la juge Abella

Arrêt appliqué : *Mancini (Bankrupt) c. Falconi* (1993), 61 O.A.C. 332; **arrêts mentionnés :** *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641; *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21; *Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture)*, [2002] 2 R.C.S. 146, 2002 CSC 31; *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146, conf. par (2004), 46 C.B.R. (4th) 126; *Crystalline Investments Ltd. c. Domgroup Ltd.*, [2004] 1 R.C.S. 60, 2004 CSC 3; *Randfield c. Randfield* (1861), 3 De G. F. & J. 766, 45 E.R. 1075; *In re Diehl c. Carritt* (1907), 15 O.L.R. 202; *Danny's Cabaret Ltd. c. Horner*, [1980] B.C.J. No. 1293 (QL); *Virden Credit Union Ltd. c. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113; *RoyNat Inc. c. Allan* (1988), 61 Alta. L.R. (2d) 165; *B.N.R. Holdings Ltd. c. Royal Bank* (1992), 14 C.B.R. (3d) 233; *Toronto Dominion Bank c. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6; *Nicholas c. Anderson* (1996), make declarations with respect to successorship rights.

GMAC cross-appealed the Court of Appeal's amendments to para. 15, taking issue with the court's unanimous conclusion that a bankruptcy judge lacks jurisdiction to declare whether a receiver is a successor employer under the *Labour Relations Act, 1995*.

II. Analysis

A. *Can a Bankruptcy Court Judge Determine Successor Rights Issues?*

The first issue decided by the Court of Appeal, and raised in the cross-appeal, relates to whether the bankruptcy court has jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the *Labour Relations Act, 1995*. The unanimous conclusion of the Court of Appeal was that it had no such jurisdiction. I agree.

The bankruptcy court's authority to supervise the interim receiver is found in s. 47(2) of the *Bankruptcy and Insolvency Act*, which states:

> 47. . . .
>
> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (*a*) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (*b*) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (*c*) take such other action as the court considers advisable.

These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended.

la Commission. Il a également demandé la radiation du par. 15 modifié par la Cour d'appel, dans la mesure où celui-ci comporte encore des déclarations relatives au statut d'employeur successeur.

42 GMAC a formé un appel incident relativement à la modification du par. 15 par la Cour d'appel, contestant la conclusion unanime de celle-ci selon laquelle les juges de faillite n'ont pas compétence pour décider si un séquestre intérimaire est un employeur successeur pour l'application de la *Loi de 1995 sur les relations de travail*.

II. Analyse

A. *Le juge de faillite peut-il trancher des questions touchant le statut d'employeur successeur?*

43 La première question qu'a tranchée la Cour d'appel et qui est soulevée dans l'appel incident concerne le pouvoir du tribunal de faillite de décider si un séquestre intérimaire est un employeur successeur au sens de la *Loi de 1995 sur les relations de travail*. La Cour d'appel a conclu à l'unanimité que le tribunal de faillite ne possède pas ce pouvoir. Je suis du même avis.

44 Le pouvoir du tribunal de faillite de contrôler l'action du séquestre intérimaire est prévu au par. 47(2) de la *Loi sur la faillite et l'insolvabilité*, qui est rédigé ainsi :

> 47. . . .
>
> (2) Le tribunal peut enjoindre au séquestre intérimaire :
>
> *a*) de prendre possession de tout ou partie des biens du débiteur mentionnés dans la nomination;
>
> *b*) d'exercer sur ces biens ainsi que sur les affaires du débiteur le degré de contrôle que le tribunal estime indiqué;
>
> *c*) de prendre toute autre mesure qu'il estime indiquée.

45 Bien qu'ils soient assez souples pour permettre une vaste gamme de mesures en rapport avec la prise en charge, la gestion et l'aliénation éventuelle des biens du débiteur, ces paramètres

The powers given to the bankruptcy court under s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.

46 Any doubt about whether s. 47(2) was intended to dispense such jurisdictional largesse vanishes when it is read in conjunction with s. 72(1) of the *Bankruptcy and Insolvency Act*, which states:

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

47 The effect of s. 72(1) is that the *Bankruptcy and Insolvency Act* is not intended to extinguish legally protected rights unless those rights are in conflict with the *Bankruptcy and Insolvency Act*. The right in issue here is the right found in s. 69 of the Ontario *Labour Relations Act, 1995* to seek a declaration that a subsequent employer is bound by the employment obligations found in the collective agreements of its predecessor. I agree with Feldman J.A. who concluded:

. . . the first half of [s. 72] clearly states that the *BIA* will not abrogate or supercede any provincial law unless that law is in conflict with the *BIA*. The language of s. 47(2) of the *BIA* does not conflict with the successor employer sections of the *LRA* and therefore does not abrogate or supercede that Act. [para. 30]

48 Section 114(1) of the *Labour Relations Act, 1995* states:

législatifs n'ont pas une portée illimitée. Le paragraphe 47(2) accorde au tribunal de faillite le pouvoir d'enjoindre au séquestre intérimaire de faire certaines choses. Cette disposition n'a pas pour effet d'habiliter — ni explicitement ni implicitement — le tribunal de faillite à rendre des jugements déclaratoires unilatéraux sur les droits de tiers en fonction d'autres régimes législatifs.

Enfin, s'il subsiste encore quelque doute que le par. 47(2) pourrait avoir eu pour but d'attribuer des pouvoirs aussi larges, ce doute est dissipé lorsqu'on lit cette disposition en corrélation avec le par. 72(1) de la *Loi sur la faillite et l'insolvabilité*, lequel prévoit ce qui suit :

72. (1) La présente loi n'a pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.

Suivant cette disposition, la *Loi sur la faillite et l'insolvabilité* n'a pas pour effet d'éteindre des droits garantis par la loi, sauf si ces droits sont incompatibles avec la *Loi sur la faillite et l'insolvabilité*. En l'espèce, il s'agit du droit de demander, sur le fondement de l'art. 69 de la *Loi de 1995 sur les relations de travail* de l'Ontario, un jugement déclarant qu'un employeur subséquent est lié par les obligations en matière d'emploi prévues par les conventions collectives signées par son prédécesseur. Je souscris à la conclusion suivante de la juge Feldman :

[TRADUCTION] . . . la première moitié de [l'art. 72] énonce clairement que la *LFI* n'a pas pour effet d'abroger ou de remplacer une règle de droit provinciale sauf si celle-ci est incompatible avec la *LFI*. Il n'y a pas d'incompatibilité entre le libellé du par. 47(2) de la *LFI* et les dispositions de la *LRT* concernant le successeur de l'employeur, et, par conséquent, ce paragraphe n'a pas pour effet d'abroger ou de remplacer cette dernière Loi. [par. 30]

Le paragraphe 114(1) de la *Loi de 1995 sur les relations de travail* dispose ainsi :

114. (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

This means the labour board has exclusive jurisdiction to make a successor employer determination. It is difficult to see how the right to seek such a declaration conflicts in any way with the bankruptcy court's authority under s. 47(2) to direct and supervise the interim receiver's effective management of the debtor's assets.

Trustees, receivers and the specialized courts by which they are supervised, are entitled to a measure of deference consistent with their undisputed expertise in the effective management of a bankruptcy. Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the *Bankruptcy and Insolvency Act.*

If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under s. 47(2)(*c*). Explicit language would be required before such a sweeping power could be attached to s. 47 in the face of the preservation of provincially created civil rights in s. 72. As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, 2004 SCC 3:

. . . explicit statutory language is required to divest persons of rights they otherwise enjoy at law. . . . [S]o long as the doctrine of paramountcy is not triggered,

114. (1) La Commission a compétence exclusive pour exercer les pouvoirs que lui confère la présente loi ou qui lui sont conférés en vertu de celle-ci et trancher toutes les questions de fait ou de droit soulevées à l'occasion d'une affaire qui lui est soumise. Ses décisions ont force de chose jugée. Toutefois, la Commission peut à l'occasion, si elle estime que la mesure est opportune, réviser, modifier ou annuler ses propres décisions, ordonnances, directives ou déclarations.

Cela signifie que la Commission a compétence 49
exclusive pour se prononcer sur le statut d'employeur successeur. Il est difficile de voir en quoi le droit de demander une déclaration sur cette question serait incompatible avec le pouvoir que le par. 47(2) accorde au tribunal de faillite de diriger et superviser l'administration efficace de l'actif du débiteur par le séquestre intérimaire.

Il convient de faire preuve, envers les syndics et 50
les séquestres ainsi qu'envers les tribunaux spécialisés qui les supervisent, du degré de déférence correspondant à leur expertise incontestée en matière de gestion efficace des faillites. Il va de soi que la souplesse est indispensable pour solutionner les problèmes que pose une faillite donnée. Toutefois, la protection de cette souplesse au moyen de dispositions standard immunisant ces intervenants contre l'engagement de procédures les visant dépasse le pouvoir thérapeutique de la *Loi sur la faillite et l'insolvabilité.*

Si l'article 47 pouvait recevoir une interprétation 51
assez large pour permettre de porter atteinte à tous les droits qui, bien que protégés par la loi, gênent le processus de faillite, il pourrait être invoqué pour éteindre tous les droits en matière d'emploi si le tribunal de faillite estimait qu'il s'agit d'une mesure « indiquée » aux termes de l'al. 47(2)*c*). Pour que l'art. 47 confère un pouvoir aussi étendu, en dépit de l'existence de l'art. 72 protégeant les droits civils d'origine provinciale, il faudrait un texte explicite. Comme l'a indiqué le juge Major dans l'arrêt *Crystalline Investments Ltd. c. Domgroup Ltd.*, [2004] 1 R.C.S. 60, 2004 CSC 3 :

. . . il faut une disposition législative explicite pour priver une personne de droits dont elle jouit par ailleurs en droit. [. . .] [T]ant que la doctrine de la primauté des federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

The language of s. 47(2) falls well short of this standard. The bankruptcy court can undoubtedly mandate employment-related conduct by the receiver, but as s. 47(2) of the *Bankruptcy and Insolvency Act* is presently worded, the court cannot, on its own, abrogate the right to seek relief at the labour board.

52 Accordingly, the Court of Appeal was correct to conclude that the bankruptcy judge had no jurisdiction to make a declaration about or immunize the receiver from successor employer liability. To the extent that any provision of the order does so, including the amendments added by the Court of Appeal, they should be set aside.

B. *Is a Unique Test Required Under Section 215 for Leave to Bring Successor Rights Applications?*

53 Having concluded that the bankruptcy judge has no jurisdiction either to make a determination as to the receiver's status as a successor employer, or to immunize it from such a determination by the labour board, the remaining issue is whether to set aside the bankruptcy judge's refusal to permit the Union remedial access to the Ontario Labour Relations Board.

54 The debate between the parties is over the extent of the bankruptcy court's discretion when leave is sought by a union to bring a successor employer application against the receiver or trustee. This shifts the focus to s. 215 of the *Bankruptcy and Insolvency Act*, which states:

> **215.** Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any

lois fédérales n'entre pas en jeu, on ne saurait utiliser des procédures en matière de faillite et d'insolvabilité régies par le droit fédéral pour écarter des droits de propriété et autres droits civils régis par le droit provincial. [par. 43]

Le texte du par. 47(2) est loin de satisfaire à cette condition. Le tribunal de faillite peut indubitablement donner au séquestre des instructions en matière d'emploi, mais, compte tenu du libellé actuel du par. 47(2) de la *Loi sur la faillite et l'insolvabilité*, le tribunal n'est pas habilité à abroger de son propre chef le droit de présenter une demande à une commission des relations de travail.

Par conséquent, la Cour d'appel a eu raison de conclure que le juge de faillite n'avait pas compétence pour statuer sur la responsabilité du séquestre en tant qu'employeur successeur ni pour le mettre à l'abri de cette responsabilité. Dans la mesure où quelque élément de l'ordonnance, y compris les modifications apportées par la Cour d'appel, a cet effet, il y a lieu de supprimer cet élément.

B. *L'application de l'art. 215 requiert-elle un critère particulier pour les demandes d'autorisation touchant au statut d'employeur successeur?*

Vu la conclusion que le juge de faillite n'a compétence ni pour décider si le séquestre a le statut d'employeur successeur ni pour le protéger contre une décision de cette nature de la Commission, il reste à se demander s'il faut infirmer la décision du juge de faillite de refuser au Syndicat la permission de s'adresser à la Commission.

La question en litige concerne la portée du pouvoir discrétionnaire du tribunal de faillite lorsqu'un syndicat requiert la permission de présenter contre le séquestre ou le syndic une demande relative à la qualité d'employeur successeur. La disposition pertinente de la *Loi sur la faillite et l'insolvabilité* est alors l'art. 215, qui énonce ce qui suit :

> **215.** Sauf avec la permission du tribunal, aucune action n'est recevable contre le surintendant, un séquestre officiel, un séquestre intérimaire ou un syndic

TAB 17

Workers' Compensation Board *Appellant (Respondent)*

v.

PP. 480-481,

Husky Oil Operations Ltd. *Respondent (Applicant)*

531 - 534

and

Her Majesty The Queen in right of Canada, as represented by the Minister of National Revenue, Her Majesty The Queen in right of the Province of Saskatchewan, as represented by the Minister of Human Resources, Labour and Employment, Her Majesty The Queen in right of the province of Saskatchewan, as represented by the Minister of Finance, Bank of Montreal, Eric Zimmerman, Garth Price, Trevor Brown, Arthur Gingras, Kelly Houston, Darcy Kuzio, Hans Bohle, Charles Pshebenicki, Terry Sapergia, SBW—Wright Construction Inc., Campbell West (1991) Ltd., Fuller Austin Insulation Inc., United Industrial Equipment Rentals Ltd., Atco Enterprises Ltd. and Deloitte & Touche Inc., as Trustee in Bankruptcy of the Estate of Metal Fabricating & Construction Ltd. *Respondents*

and

The Attorney General for Saskatchewan *Respondent (Intervener in the Court of Appeal)*

and

The Attorney General for Ontario,
the Attorney General for New Brunswick,
the Attorney General of British Columbia,
the Attorney General for Alberta,
the Workers' Compensation Board of Ontario,

Workers' Compensation Board *Appelante (Intimée)*

c.

Husky Oil Operations Ltd. *Intimée (Requérante)*

et

Sa Majesté la Reine du chef du Canada, représentée par le ministre du Revenu national, Sa Majesté la Reine du chef de la province de la Saskatchewan, représentée par le ministre des Ressources humaines, du Travail et de l'Emploi, Sa Majesté la Reine du chef de la province de la Saskatchewan, représentée par le ministre des Finances, Banque de Montréal, Eric Zimmerman, Garth Price, Trevor Brown, Arthur Gingras, Kelly Houston, Darcy Kuzio, Hans Bohle, Charles Pshebenicki, Terry Sapergia, SBW—Wright Construction Inc., Campbell West (1991) Ltd., Fuller Austin Insulation Inc., United Industrial Equipment Rentals Ltd., Atco Enterprises Ltd. et Deloitte & Touche Inc., syndic de faillite de l'actif de Metal Fabricating & Construction Ltd. *Intimés*

et

Le procureur général de la Saskatchewan *Intimé (Intervenant en Cour d'appel)*

et

Le procureur général de l'Ontario,
le procureur général du Nouveau-Brunswick,
le procureur général de la Colombie-Britannique,
le procureur général de l'Alberta,

the Workers' Compensation Board of British Columbia,
the Workers' Compensation Board of Alberta and
the Yukon Workers' Compensation Health and Safety Board *Interveners*

INDEXED AS: HUSKY OIL OPERATIONS LTD. v. MINISTER OF NATIONAL REVENUE

File No.: 23936.

1995: January 25; 1995: October 19.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Bankruptcy — Priorities — Set-off — Provincial law allowing Board to seek payments of monies owed by bankrupts from the bankrupt's creditors and the creditors entitled to set off that amount from any payment made to trustee in bankruptcy — Whether or not conflict with priorities established by Bankruptcy Act — The Workers' Compensation Act, 1979, S.S. 1979, c. W-17.1, ss. 133(1), (3) — Bankruptcy Act, R.S.C., 1985, c. B-3, ss. 97(3), 136.

Constitutional law — Division of powers — Paramountcy — Conflict between provincial and federal law — Provincial law allowing Board to seek payments of monies owed by bankrupts from the bankrupt's creditors and the creditors entitled to set off that amount from any payment made to trustee in bankruptcy — Whether or not conflict with priorities established by Bankruptcy Act.

Husky Oil Operations Ltd. (Husky) owed Metal Fabricating & Construction Ltd. (Metal Fab), a firm which, after being formally notified of its arrears to the Workers' Compensation Board (the Board) and after making a general assignment of its book debts to the Bank of Montreal, made an assignment in bankruptcy and ceased operations. The Board, when it learned that Metal Fab had ceased operations, looked to Husky for payment under s. 133(1) of *The Workers' Compensation Act, 1979*. Section 133(1) of the Saskatchewan *Workers' Compensation Act, 1979*, permitted the Board to obtain amounts owing its Injury Fund from a principal of a

la Commission des accidents du travail de l'Ontario,
la Workers' Compensation Board de la Colombie-Britannique,
la Workers' Compensation Board de l'Alberta et
la Commission de la santé et de la sécurité au travail du Yukon *Intervenants*

RÉPERTORIÉ: HUSKY OIL OPERATIONS LTD. c. MINISTRE DU REVENU NATIONAL

Nº du greffe: 23936.

1995: 25 janvier; 1995: 19 octobre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Faillite — Ordre de priorité — Compensation — Loi provinciale permettant à la Commission d'obtenir des créanciers d'un failli paiement des sommes dues par celui-ci et aux créanciers d'opérer compensation entre ce montant et tout paiement fait au syndic de la faillite — Y a-t-il conflit avec l'ordre de priorité établi par la Loi sur la faillite? — The Workers' Compensation Act, 1979, S.S. 1979, ch. W-17.1, art. 133(1), (3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 97(3), 136.

Droit constitutionnel — Partage des pouvoirs — Prépondérance — Conflit entre une loi provinciale et une loi fédérale — Loi provinciale permettant à la Commission d'obtenir des créanciers d'un failli paiement des sommes dues par celui-ci et aux créanciers d'opérer compensation entre ce montant et tout paiement fait au syndic de la faillite — Y a-t-il conflit avec l'ordre de priorité établi par la Loi sur la faillite?

Husky Oil Operations Ltd. (Husky) était propriétaire de Metal Fabricating & Construction Ltd. (Metal Fab), une firme qui, après avoir été dûment avisée des arrérages qu'elle devait à la Workers' Compensation Board (la Commission) et après avoir fait une cession générale de ses comptes débiteurs à la Banque de Montréal, a fait cession de ses biens et cessé ses opérations. Lorsqu'elle a appris la cessation des opérations de Metal Fab, la Commission s'est adressée à Husky pour obtenir paiement en vertu du par. 133(1) de *The Workers' Compensation Act, 1979*. Le paragraphe 133(1) de *The Workers' Compensation Act, 1979*, de la Saskatchewan permettait defaulting contractor. Husky in turn would be able to recover the amount paid on the Metal Fab's behalf by setting off that amount, pursuant to s. 133(3), from the amount it would otherwise pay Metal Fab. Husky and Metal Fab's creditors maintained that the operation of s. 133 conflicted with s. 136 of the federal *Bankruptcy Act*, which sets out the priorities of creditors on bankruptcy, in that the Board was able to obtain full payment to the detriment of the creditors who had a higher priority under the *Bankruptcy Act*. On a non-suit application made by Husky, *The Workers' Compensation Act, 1979*, was found to be inapplicable in a bankruptcy scenario and the Court of Appeal upheld this finding. The constitutional questions queried whether, in situations where the contractor is bankrupt, these provisions are constitutionally non-operational because of conflict with the *Bankruptcy Act* and whether they applied in the circumstances of this case.

Held (Sopinka, Cory, Iacobucci and Major JJ. dissenting): The appeal should be dismissed. Section 133 is inapplicable in bankruptcy when s. 133(1) of *The Workers' Compensation Act, 1979*, operates in tandem with s. 133(3). Section 133 was inapplicable when the contractor entered bankruptcy.

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The gravamen of this appeal was the alleged conflict between s. 133 of the Saskatchewan *Workers' Compensation Act, 1979*, and s. 136(1)(*h*) of the *Bankruptcy Act* which set the priorities for recovery. The question, however, was not whether the provisions in s. 133 were independently valid, but rather, whether when combined they had the effect of reordering priorities in bankruptcy. The combined effect of the statutory deemed debt and the right to set off against property of the bankrupt, when s. 133(1) is read with s. 133(3), is to secure the Board's claim against the bankrupt's estate. In so doing, s. 133 read as a whole conflicts with Parliament's intention to accord the Board's claim the priority established in s. 136 of the *Bankruptcy Act*.

The first goal of ensuring an equitable distribution of a debtor's assets is to be pursued in accordance with the federal system of bankruptcy priorities. The quartet (*Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers'*

à la Commission d'obtenir du commettant d'un entrepreneur fautif les montants dus à sa caisse des accidents. Husky pourrait ensuite recouvrer le montant versé pour le compte de Metal Fab en opérant compensation, conformément au par. 133(3), entre ce montant et tout montant qu'elle paierait par ailleurs à Metal Fab. Les créanciers de Husky et de Metal Fab ont soutenu que l'application de l'art. 133 était incompatible avec l'art. 136 de la *Loi sur la faillite* fédérale, qui établit l'ordre de priorité des créanciers de la faillite, du fait que la Commission pouvait se faire payer intégralement au détriment des créanciers qui occupaient un rang supérieur en vertu de la *Loi sur la faillite*. À la suite d'une demande de non-lieu présentée par Husky, il a été conclu que *The Workers' Compensation Act, 1979*, n'était pas applicable dans le contexte d'une faillite, et la Cour d'appel a confirmé cette conclusion. Les questions constitutionnelles consistaient à se demander si, dans le cas où l'entrepreneur est en faillite, ces dispositions sont inopérantes du point de vue constitutionnel pour cause de conflit avec la *Loi sur la faillite*, et si elles s'appliquaient dans les circonstances de la présente affaire.

Arrêt (les juges Sopinka, Cory, Iacobucci et Major sont dissidents): Le pourvoi est rejeté. L'article 133 est inapplicable en matière de faillite lorsque les par. 133(1) et (3) de *The Workers' Compensation Act, 1979*, s'appliquent ensemble. L'article 133 était inapplicable lorsque l'entrepreneur a fait faillite.

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Gonthier et McLachlin: L'essence du présent pourvoi est le conflit qui existerait entre l'art. 133 de *The Workers' Compensation Act, 1979*, de la Saskatchewan et l'al. 136(1)*h*) de la *Loi sur la faillite*, qui établit l'ordre de priorité de recouvrement. Cependant, il s'agissait de déterminer non pas si ces dispositions étaient valides indépendamment l'une de l'autre, mais plutôt si elles avaient pour effet conjugué de modifier l'ordre de priorité en matière de faillite. Lorsque le par. 133(1) est lu conjointement avec le par. 133(3), la créance légale réputée et le droit à la compensation sur les biens du failli ont pour effet conjugué de garantir la réclamation de la Commission contre l'actif du failli. De ce fait, l'art. 133, pris dans son ensemble, est incompatible avec l'intention du législateur fédéral d'accorder à la réclamation de la Commission la priorité établie à l'art. 136 de la *Loi sur la faillite*.

Il faut chercher à atteindre le premier objectif, celui d'assurer un partage équitable de l'actif du débiteur, en respectant l'ordre de priorité établi par le régime fédéral en matière de faillite. Le quatuor d'arrêts (*Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35, *Deloitte*

Compensation Board, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24) does not stand for the sole proposition that the provinces cannot "jump the queue" but rather embodies a consistent and general philosophy as to the purposes of the federal system of bankruptcy and its relation to provincial property arrangements. The following propositions can be distilled from the quartet:

(1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the *Bankruptcy Act*;

(2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred s. 136(1) of the *Bankruptcy Act* determines the status and priority of the claims specifically dealt with in that section;

(3) if the provinces could create their own priorities or affect priorities under the *Bankruptcy Act* this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;

(4) the definition of terms such as "secured creditor", if defined under the *Bankruptcy Act*, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for the purposes of the *Bankruptcy Act*;

(5) in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly; and

(6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.

The fifth and sixth propositions bear a close resemblance to the doctrine of colourability, but with two fun-

Haskins and Sells Ltd. c. Workers' Compensation Board, [1985] 1 R.C.S. 785, *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061, et *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24) ne signifie pas uniquement qu'il ne saurait y avoir «anticipation de rang» par les provinces, mais il s'en dégage plutôt une philosophie cohérente et générale quant aux objets du régime fédéral de la faillite et au lien qu'il a avec les dispositions provinciales en matière de droit des biens. Les propositions suivantes se dégagent du quatuor:

(1) les provinces ne peuvent ni créer des priorités entre les créanciers ni modifier le plan de répartition en matière de faillite, prévu au par. 136(1) de la *Loi sur la faillite*;

(2) bien qu'une loi provinciale puisse validement modifier l'ordre de priorité dans un contexte autre que celui d'une faillite, dès qu'il y a faillite, c'est le par. 136(1) de la *Loi sur la faillite* qui détermine le statut et l'ordre de priorité des réclamations qui y sont visées expressément;

(3) si les provinces pouvaient créer leur propre ordre de priorité ou modifier celui établi en vertu de la *Loi sur la faillite*, cela aurait pour effet d'inciter à l'établissement, en matière de faillite, d'un plan de répartition différent d'une province à l'autre, ce qui est inacceptable;

(4) en matière de faillite, des expressions comme «créancier garanti», lorsqu'elles sont définies dans la *Loi sur la faillite*, doivent être interprétées selon la définition que leur donne le législateur fédéral et non celle que leur donnent les législatures provinciales. Les provinces ne peuvent modifier la façon dont ces expressions sont définies aux fins de la *Loi sur la faillite*;

(5) pour déterminer le lien qui existe entre une loi provinciale et la *Loi sur la faillite*, il ne faut pas que la forme du droit créé par la province l'emporte sur le fond. Les provinces n'ont pas le droit de faire indirectement ce qui leur est interdit de faire directement; et

(6) pour que la loi provinciale soit inapplicable, il n'est pas nécessaire que la province ait eu l'intention d'empiéter sur la compétence fédérale exclusive en matière de faillite et d'être en conflit avec la *Loi sur la faillite*. Il suffit que la loi provinciale ait cet effet.

Les cinquième et sixième propositions ont une proche parenté avec la théorie du détournement de pouvoir, damental differences. First, the doctrine of colourability is a concept which only applies in assessing the pith and substance of the impugned legislation whereas propositions 5 and 6 continue to apply after the validity of the impugned provincial law has been determined. None of the quartet cases was concerned with colourable provincial legislation. Second, a legislative intention to intrude into an exclusive federal sphere is neither necessary nor sufficient to scrutinize the applicability of provincial law. The intrusion, and not the intention to intrude, is determinative for division of powers purposes.

mais à deux différences fondamentales près. Premièrement, la théorie du détournement de pouvoir est un concept qui ne s'applique qu'en examinant le caractère véritable de la loi attaquée, alors que les cinquième et sixième propositions continuent de s'appliquer une fois établie la validité de la loi provinciale attaquée. Aucun des arrêts du quatuor ne portait sur une loi provinciale déguisée. Deuxièmement, il n'est ni nécessaire ni suffisant que le législateur ait eu l'intention d'empiéter sur un domaine de compétence fédérale exclusive pour que puisse être examinée l'applicabilité d'une loi provinciale. C'est l'empiétement, et non l'intention d'empiéter, qui est déterminant aux fins du partage des pouvoirs.

When ss. 133(1) and (3) operate in tandem, the contractor discharges its own liability to the Board, mediated through the legally compelled agency of the principal. This is not a scheme of joint and several liability, since the principal and the contractor are not joint codebtors at the outset and since the Board does not have an unfettered choice as to which party to sue for recovery for outstanding fund payments. This provision, rather, is more accurately characterized as creating a form of involuntary, statutory suretyship.

Si les par. 133(1) et (3) sont appliqués ensemble, l'entrepreneur s'acquitte de sa propre obligation envers la Commission, par l'intermédiaire du commettant comme l'exige la Loi. Il ne s'agit pas d'un régime de responsabilité solidaire puisque le commettant et l'entrepreneur ne sont pas codébiteurs au départ et que la Commission n'est pas libre de choisir la partie contre qui elle intentera une action en recouvrement des montants non payés à la caisse. En réalité, il est plus exact de dire que cette disposition crée une forme de cautionnement légal involontaire.

While the contractor is potentially liable for two debts (the debt to the Board for the unpaid assessment and the potential debt to the principal if the principal pays the contractor's assessment) in a formal way, these in reality are one and the same as against the contractor. The contractor cannot be liable for both cumulatively. There is thus an inseparable nexus between the Board's claim against the contractor and the principal's potential claim against the contractor.

Même si, formellement, l'entrepreneur peut éventuellement être responsable de deux dettes (celle envers la Commission au titre de la cotisation impayée et la dette potentielle envers le commettant si ce dernier paie la cotisation en question), il reste qu'il s'agit d'une seule et même dette exigible de l'entrepreneur. L'entrepreneur ne peut être responsable des deux cumulativement. Il existe donc un lien indissociable entre la réclamation de la Commission contre l'entrepreneur et la réclamation potentielle du commettant contre l'entrepreneur.

When s. 133(1) operates in combination with s. 133(3), the effect is to secure the claim of the Board against assets of the contractor. This is accomplished through the combined operation of the statutorily deemed debt imposed on the principal in the event of the contractor's default and the right of the principal to withhold and be indemnified from monies owing to the contractor. Thus, the combined effect of the deemed debt in s. 133(1) and set-off in s. 133(3) secures the Board's claim against the contractor's assets.

L'application conjuguée des par. 133(1) et (3) a pour effet de garantir la réclamation de la Commission de la Saskatchewan contre les biens de l'entrepreneur. C'est ce qui se produit lorsque l'on conjugue la dette réputée que la loi impose au commettant en cas de défaut de paiement de la part de l'entrepreneur et le droit du commettant de faire des retenues et de s'indemniser sur les sommes dues à l'entrepreneur. En conséquence, la dette réputée, visée au par. 133(1), et la compensation prévue au par. 133(3) ont pour effet conjugué de garantir la réclamation de la Commission contre les biens de l'entrepreneur.

Parliament has recognized that the "law of set-off applies to all claims made against the estate of the bankrupt" (s. 97(3) of the *Bankruptcy Act*). In the bankruptcy

Le législateur fédéral a reconnu que «[l]es règles de la compensation s'appliquent à toutes les réclamations produites contre l'actif du failli» (par. 97(3) de la *Loi sur la* context, the law of set-off allows a debtor of a bankrupt who is also a creditor of the bankrupt to refrain from paying the full debt owing to the estate, since it may be that the estate will only fulfil a portion, if that, of the bankrupt's debt. But there is an inherent limit to this deference to the provincial law of set-off. While the operation of set-off is permitted to allow for the party claiming set-off to recover from the estate ahead of the stipulated order of his claim under the *Bankruptcy Act*, it most emphatically is not permitted to allow for the operation of provincial legislation to reorder the priorities of third parties against the estate.

The operation of s. 133 has the effect of reordering federal priorities with respect to the claims of any third parties against the estate. Prior to bankruptcy, the security device created by s. 133(3) and triggered by s. 133(1) is within the province's jurisdiction. However, if applicable in the event of bankruptcy, it would enter into conflict with the scheme of distribution under the *Bankruptcy Act*. Parliament has expressly indicated in s. 136(1)(*h*) that "all indebtedness of the bankrupt under any Workmen's Compensation Act" is to rank eighth in the list of preferred claims and is to be distributed after the claims of secured creditors. By contrast, the combined effect of ss. 133(1) and (3) of the Saskatchewan *Workers' Compensation Act, 1979*, is to secure the Board's claim against the bankrupt's estate ahead of its priority under the *Bankruptcy Act*. The two laws in their operation give rise to different and inconsistent orders of priority and are thereby in conflict.

Section 133(4), which states that "[a]ll questions as to the right to and the amount of such indemnity shall be determined by the board", also has the effect of intruding into the exclusive federal sphere of bankruptcy. If allowed to apply in bankruptcy, this provision would have the effect of empowering a creditor of the estate (here the Board) to determine unilaterally the extent of its claim against the estate. As a result, the Board would be empowered to decide the size of the estate which is to remain available for the other secured, preferred and ordinary creditors. A province cannot empower a creditor of a bankrupt to determine the extent of a bankrupt's estate which is to be available for distribution. Thus, while otherwise perfectly valid provincial law, s. 133(4) is also inapplicable in the event of bankruptcy.

faillite). Dans le contexte de la faillite, les règles de la compensation permettent au débiteur d'un failli, qui en est aussi le créancier, de s'abstenir de régler la totalité de la dette qu'il a envers la faillite, de crainte que celle-ci ne règle qu'une partie, et encore, de la dette du failli. Cependant, il existe une limite inhérente à ce respect envers les règles provinciales de la compensation. Bien qu'on permette que la compensation autorise la partie qui l'invoque à être colloquée plus favorablement qu'elle ne le serait suivant l'ordre de priorité établi en vertu de la *Loi sur la faillite*, elle ne peut absolument pas être admise de façon à ce que l'application d'une loi provinciale modifie l'ordre de priorité des réclamations de tierces parties contre la faillite.

L'application de l'art. 133 a pour effet de modifier l'ordre de priorité établi par la loi fédérale relativement aux réclamations produites par des tierces parties contre l'actif. Avant une faillite, l'instrument de garantie, créé par le par. 133(3) et déclenché par le par. 133(1), relève de la compétence de la province. Cependant, s'il était applicable en cas de faillite, il entrerait en conflit avec le plan de répartition établi par la *Loi sur la faillite*. Le législateur fédéral a expressément indiqué, à l'al. 136(1)*h*), que «toutes dettes contractées par le failli sous l'autorité d'une loi sur les accidents du travail» occupent le huitième rang dans la liste des réclamations privilégiées et passent après les réclamations des créanciers garantis. Par contre, les par. 133(1) et (3) de *The Workers' Compensation Act, 1979*, de la Saskatchewan ont pour effet conjugué de colloquer plus favorablement la réclamation de la Commission contre l'actif du failli qu'elle ne le serait en vertu de la *Loi sur la faillite*. Ces deux lois, dans leur application, établissent des ordres de priorité différents et incompatibles et sont de ce fait en conflit.

Le paragraphe 133(4), qui prévoit que «[l]a commission tranche toutes les questions relatives au droit à cette indemnité et à son montant», a aussi pour effet d'empiéter sur la compétence fédérale exclusive en matière de faillite. Si on en permettait l'application en matière de faillite, cette disposition aurait pour effet d'habiliter un créancier de l'actif (en l'espèce la Commission) à déterminer unilatéralement l'étendue de sa réclamation contre l'actif. La Commission serait alors habilitée à déterminer la taille de l'actif qui devrait servir au paiement des autres créanciers garantis, privilégiés et ordinaires. Une province ne saurait permettre à un créancier d'un failli de déterminer la taille de l'actif d'un failli qui doit servir au partage. En conséquence, bien qu'il constitue une disposition législative provinciale par ailleurs parfaitement valide, le par. 133(4) est également inapplicable en cas de faillite.

Section 133 is inapplicable, rather than inoperable, in bankruptcy for intruding into an exclusive federal sphere because bankruptcy is an exclusive federal domain within which provincial legislation does not apply, as distinguished from areas of joint or overlapping jurisdiction where federal legislation will prevail, rendering provincial legislation inoperable to the extent of any conflict. As bankruptcy is carved out from the domain of property and civil rights of which it is conceptually a part, valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, provincial legislation which conflicts with federal law must yield to the extent of the conflict and it becomes inapplicable to that extent. Consistent with the presumption of constitutionality — that the enacting body is presumed to have intended to enact provisions which do not transgress the limits of its constitutional powers — the provincial law should be interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body.

L'article 133 est inapplicable, plutôt qu'inopérant, en matière de faillite parce qu'il empiète sur un chef de compétence fédérale exclusive et du fait que la faillite est un domaine de compétence fédérale exclusive à l'intérieur duquel les lois provinciales ne s'appliquent pas, ce qui est différent des domaines où il y a compétence concurrente ou chevauchement de compétence, auquel cas la loi fédérale l'emporte et rend la loi provinciale inopérante dans la mesure du conflit. Puisque le domaine de la faillite est dégagé de celui de la propriété et des droits civils dont il relève au niveau conceptuel, une loi provinciale valide d'application générale continue de s'appliquer en matière de faillite jusqu'à ce que le législateur fédéral légifère conformément à sa compétence exclusive en matière de faillite et d'insolvabilité. À ce moment, la loi provinciale cède le pas à la loi fédérale dans la mesure où il y a conflit entre les deux et devient inapplicable dans cette mesure. Conformément à la présomption de constitutionnalité — l'autorité législative étant présumée avoir eu l'intention d'adopter des dispositions à l'intérieur de son champ de compétence constitutionnelle — la loi provinciale doit être interprétée de façon à ne pas s'appliquer à la matière qui ne relève pas de la compétence de l'autorité qui l'a adoptée.

Where federal and provincial legislation potentially conflict, it must be first determined whether the laws are respectively valid federal or provincial legislation. If so, the actual operation of the laws must be examined to determine whether they are in operational conflict, and if so, the federal legislation prevails and the provincial legislation is without effect to the extent of this conflict. If the operational conflict is in a field of exclusive federal jurisdiction, the provincial legislation will be inapplicable as being *ultra vires* to that extent. If the conflict is in an area of concurrent or overlapping jurisdictions, the provincial legislation will remain *intra vires* but be inoperative. To the extent that there is operational conflict, there is no room for an incidental or ancillary effect of provincial legislation. If, on the other hand, there is no operational conflict, then both laws continue to operate and both continue to have effect to the extent that operational conflict does not arise. Short of operational conflict, provincial law may validly have an effect on bankruptcy. A clear operational conflict existed here in that ss. 133(1) and (3) in their operation together entailed a reordering or subverting of the federal order of priorities under the *Bankruptcy Act*. Such an intrusion

En cas de possibilité de conflit entre une loi fédérale et une loi provinciale, il faut d'abord décider s'il s'agit de lois fédérale et provinciale valides. Dans l'affirmative, il faut examiner leur application concrète pour déterminer s'il existe une incompatibilité d'application entre les deux, auquel cas la loi fédérale l'emporte et la loi provinciale est sans effet dans la mesure du conflit. S'il existe une incompatibilité d'application dans un domaine de compétence fédérale exclusive, la loi provinciale sera inapplicable comme étant inconstitutionnelle dans cette mesure. Si le conflit se situe dans un domaine où il y a compétence concurrente ou chevauchement de compétence, la loi provinciale demeurera constitutionnelle, mais sera inopérante. Dans la mesure où il y a incompatibilité d'application, une loi provinciale ne peut avoir un effet incident ou accessoire. Par contre, s'il n'y a pas d'incompatibilité d'application, alors les deux lois continuent de s'appliquer et d'avoir effet dans la mesure où aucune incompatibilité d'application ne surgit. À moins d'une incompatibilité d'application, une loi provinciale peut validement avoir une incidence sur la faillite. Il existe, en l'espèce, une incompatibilité d'application manifeste vu que l'application conjuguée des par. 133(1) et (3) a pour effet de modifier l'ordre de priorité établi par la *Loi sur la faillite* fédérale, ou d'y contrevenir. Un tel empiétement sur un domaine de compétence fédérale exclusive constitue into an exclusive federal sphere necessarily goes far beyond an incidental and ancillary effect.

Since as outlined s. 133 has no application in the event of bankruptcy, a number of threshold factual questions need not be addressed.

Per Sopinka, Cory, Iacobucci and Major JJ. (dissenting): Sections 133(1) and (3) of *The Workers' Compensation Act, 1979*, are severable and should be considered separately. Both are valid even where the contractor is or becomes bankrupt.

The doctrine of paramountcy, which arises where there is clear operational conflict between valid federal and provincial legislation, requires that the provincial legislation be declared inoperational to the extent of the conflict. Conflict for purposes of paramountcy analysis is found when compliance with the enactment of one level of government entails defiance with that of the other. Courts in applying the paramountcy doctrine should be restrained and look for co-existence rather than conflict.

A review of the legislative history and purpose of workers' compensation statutes did not give any indication that s. 133 was enacted for the purpose of improving the ranking of the Board in a bankruptcy.

The quartet of cases dealing with the paramountcy of the *Bankruptcy Act* over provincial enactments which directly interfered with the scheme of priorities established by s. 136 of the Act (*Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24) should be given a narrow interpretation. The quartet stands for the position that only those provincial laws which directly improve the priority of a claim upon the actual property of the bankrupt over that accorded by the *Bankruptcy Act* are inoperative. The broader approach, which would find a province to be improperly attempting to alter the priorities of distribution any time provincial law affected the final result of a bankruptcy, would produce unacceptable results because it risks nullifying the broad array of provincial legislation underpinning the *Bankruptcy Act*.

nécessairement bien plus qu'un effet incident et accessoire.

Puisque, tel qu'exposé, l'art. 133 ne s'applique pas en matière de faillite, il n'est pas nécessaire de répondre à un certain nombre de questions de fait préliminaires.

Les juges Sopinka, Cory, Iacobucci et Major (dissidents): Les paragraphes 133(1) et (3) de *The Workers' Compensation Act, 1979*, sont dissociables et devraient être examinés séparément. Les deux sont valides même dans le cas où l'entrepreneur est ou devient failli.

La règle de la prépondérance, qui s'applique lorsqu'il y a clairement un conflit d'application entre une loi fédérale et une loi provinciale, toutes deux valides, exige que la loi provinciale soit déclarée inopérante dans la mesure du conflit. Pour les fins de l'analyse de la prépondérance, il y a conflit lorsque l'observance d'une loi d'un palier de gouvernement entraîne l'inobservance de celle de l'autre palier de gouvernement. En appliquant la règle de la prépondérance, les tribunaux devraient faire preuve de retenue et chercher la coexistence plutôt que des conflits.

Un examen de l'historique et de l'objet des lois sur l'indemnisation des accidents du travail n'a donné aucune raison de croire que l'art. 133 a été adopté dans le but d'améliorer le rang de la Commission dans une faillite.

Le quatuor d'arrêts portant sur la prépondérance de la *Loi sur la faillite* sur des lois provinciales qui modifiaient directement l'ordre de priorité établi à l'art. 136 de la Loi (*Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35, *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785, *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061, et *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24) devrait recevoir une interprétation restrictive. Le quatuor d'arrêts étaye le point de vue selon lequel ne sont inopérantes que les lois provinciales qui améliorent directement le rang d'une réclamation contre l'actif réel du failli par rapport à l'ordre de priorité établi dans la *Loi sur la faillite*. L'interprétation large, selon laquelle une province se trouverait à tenter irrégulièrement de modifier l'ordre de priorité en matière de partage chaque fois qu'une loi provinciale touche l'issue d'une faillite, produirait des résultats inacceptables puisqu'elle risque d'annuler le vaste éventail de lois provinciales qui sous-tendent l'application de la *Loi sur la faillite*.

Provincial law plays a critical role in defining both the number and type of participants in the bankruptcy process and the size of the bankrupt's estate. A bankruptcy priority is a category and its precise content can and does vary to some extent from one province to the next. Because the federal legislation already contemplates that provincial law will impact upon the bankruptcy process, the respondents must do more than simply show that s. 133 has an effect on a particular bankruptcy. They must demonstrate that s. 133 actually reorders the federally established priority scheme with regard to the property of the bankrupt by directly creating interests in that property.

Les lois provinciales jouent un rôle crucial dans la détermination tant du nombre que du type de participants au processus de faillite et de la taille de l'actif du failli. Une priorité de rang en matière de faillite est une catégorie et son contenu précis peut varier jusqu'à un certain point d'une province à l'autre, et c'est effectivement le cas. Parce que la loi fédérale prévoit déjà que les lois provinciales auront une incidence sur le processus de faillite, les intimés doivent faire plus que simplement établir que l'art. 133 a une incidence sur une faillite particulière. Ils doivent démontrer que l'art. 133 modifie en fait l'ordre de priorité fédéral applicable aux biens du failli, en créant directement des droits sur ces biens.

Section 133(1) has nothing to do with the property of the bankrupt. It creates a strict *in personam* obligation from the principal owing to the Board. The property of the principal is in no way subject to the *Bankruptcy Act*. The bankrupt is not even involved. The provision simply creates a third-party guarantee by the principal that the contractor will pay its debts to the board. Section 133(1) only alters the Board's recovery by permitting it to recover from a non-bankrupt third-party. No direct conflict within the meaning of the quartet or of paramountcy doctrine more generally exists between s. 133(1) and the *Bankruptcy Act*. Nothing in the *Bankruptcy Act* precludes any creditor, even if specifically mentioned in s. 136, from pursuing its remedies against a third-party as well as or instead of proving a claim in bankruptcy. Section 133(1) does not involve property that is related to or part of the estate of the bankrupt and it is consequently not in operational conflict with the bankruptcy scheme. Section 136 encompasses a claim against the property of the bankrupt. The Board claim under s. 133(1) targets a solvent principal. The two provisions are co-extensive and complementary, not mutually exclusive.

Le paragraphe 133(1) n'a rien à voir avec les biens du failli. Il assujettit le commettant à une obligation personnelle stricte envers la Commission. Les biens du commettant ne sont aucunement assujettis à la *Loi sur la faillite*. Le failli n'est même pas en cause. Cette disposition crée simplement une garantie, de la part d'un tiers, le commettant, que l'entrepreneur paiera ses dettes à la Commission. Le paragraphe 133(1) ne modifie le recouvrement par la Commission qu'en lui permettant de s'adresser à un tiers non failli. Il n'existe pas de conflit direct, au sens du quatuor d'arrêts ou plus généralement de la règle de la prépondérance, entre le par. 133(1) et la *Loi sur la faillite*. Rien dans la *Loi sur la faillite* n'empêche un créancier, même expressément mentionné à l'art. 136, de s'adresser à un tiers pour obtenir réparation ou de faire la preuve d'une réclamation en matière de faillite, ou encore les deux à la fois. Le paragraphe 133(1) ne touche pas les biens qui ont un rapport avec l'actif du failli ou qui en font partie, et il ne présente donc aucune incompatibilité d'application avec le régime de faillite. L'article 136 vise une réclamation contre les biens du failli. La réclamation de la Commission, fondée sur le par. 133(1), vise un commettant solvable. Les deux dispositions coïncident et se complètent, et ne s'excluent pas mutuellement.

Section 133(3) engages a more direct interference with the bankruptcy scheme than subs. (1) because, since it is the actual property of the bankrupt that is involved in the restitutionary claim launched by the principal, it constitutes the only linkage between the property of the principal and the estate of the bankrupt contractor.

Le paragraphe 133(3) enclenche une ingérence plus directe dans le régime de faillite que le par. (1) du fait que, puisque c'est l'actif réel du failli qui est en cause dans la demande de restitution présentée par le commettant, il constitue le seul lien entre les biens du commettant et le patrimoine de l'entrepreneur failli.

Section 133(3) is merely declaratory of two different remedies existing at equity, set-off and indemnification. Set-off is the more intrusive of the two since it permits the principal to stand first in the priority scheme by taking away the property of the bankrupt before it enters the estate. A claim for indemnification would have only

Le paragraphe 133(3) ne fait que déclarer deux réparations différentes qui existent en *equity*: la compensation et l'indemnisation. La compensation est la plus envahissante des deux puisqu'elle permet au commettant d'occuper le premier rang dans l'ordre de priorité, en enlevant au failli des biens avant qu'ils ne fassent an ancillary effect on the bankrupt's estate since it only permits the principal to join the ranks of the unsecured creditors. Neither remedy is invalid as s. 97(3) of the *Bankruptcy Act*, which provides that the law of set-off is to persist in bankruptcy, reconciles the priority scheme of the Act with the common law of set-off (and implicity, of indemnification), and the claims embodied in s. 133(3) are merely reflective of those common law causes of action. Absent s. 133(3), such a claim would exist according to the law of restitution or the law of contract. In terms of restitution, it is settled that a person may claim for recoupment or reimbursement of monies expended by that person under compulsion of law if the effect of such a payment is to discharge the liability of another.

Set-off, independent of s. 133(3), also arises from the contractual relationship. The contracts oblige the contractor to "comply with all laws" and indemnify the principal from any expense arising from the "negligent performance, purported performance or non-performance of the contract" by the contractors.

The fact that the property of the bankrupt has been assigned to the Bank and, thus, that the debt is no longer technically owed to Metal Fab but to the Bank of Montreal, does not militate against a finding that the law of set-off applies. Equitable set-off (unlike legal set-off) can operate within the context of an assignment. The only pre-requisite to set-off against the assignee is that the claim against the assignee is to arise out of the same contract or series of events which gave rise to the original claim or be closely connected with that contract or series of events.

Although s. 133 renders the principal and the contractor jointly and severally liable to the Board, as between the principal and contractor, the primary liability lies with the contractor and, consequently, the solicitation of contribution for payments made on behalf of that contractor by the principal is consonant with commercial fairness.

Section 133(1) is still fully applicable in cases where there is either no indebtedness between the principal and the contractor or insufficient indebtedness to cover the full liability involved. To this end, not only does s. 133(1) operate in isolation of the bankruptcy, it also operates independently from s. 133(3). Subsection (1) is

partie de son actif. Une demande d'indemnisation n'aurait qu'une incidence accessoire sur l'actif du failli puisqu'elle ne permet au commettant que de joindre les rangs des créanciers non garantis. Ni l'une ni l'autre de ces réparations n'est invalide étant donné que le par. 97(3) de la *Loi sur la faillite*, qui prévoit que les règles de la compensation continuent de s'appliquer en matière de faillite, concilie l'ordre de priorité établi par la Loi et les règles de compensation (et, implicitement d'indemnisation) reconnues en common law, et que les réclamations visées au par. 133(3) reflètent simplement ces causes d'action reconnues en common law. En l'absence du par. 133(3), une telle réclamation existerait en vertu du droit en matière de restitution ou du droit des contrats. En ce qui concerne la restitution, il est bien établi qu'une personne peut réclamer le recouvrement ou le remboursement de sommes dépensées sous contrainte légale si l'effet de ce paiement est de dégager une autre personne de toute responsabilité.

La compensation, indépendamment du par. 133(3), découle aussi du lien contractuel. Les contrats obligent l'entrepreneur à «se conformer à toutes les lois» et à indemniser le commettant de toute dépense résultant «de l'exécution négligente, de la prétendue exécution ou de l'inexécution du contrat» par les entrepreneurs.

Le fait que les biens du failli aient été cédés à la Banque et, par conséquent, que la dette ne soit plus techniquement envers Metal Fab, mais envers la Banque de Montréal, ne justifie pas de ne pas conclure à l'application des règles de la compensation. La compensation en *equity* (contrairement à la compensation en common law) peut s'appliquer dans le contexte d'une cession. La seule condition préalable pour qu'il y ait compensation opposable au cessionnaire est que la réclamation contre celui-ci découle du même contrat ou de la même série d'événements à l'origine de la réclamation initiale, ou qu'elle leur soit étroitement reliée.

Bien que l'art. 133 rende le commettant et l'entrepreneur solidairement responsables envers la Commission, en ce qui les concerne, c'est l'entrepreneur qui est principalement responsable et, par conséquent, la demande de cotisation pour les paiements que le commettant a effectués pour le compte de cet entrepreneur est compatible avec l'équité commerciale.

Le paragraphe 133(1) est pleinement applicable dans le cas où soit qu'il n'y aura pas de dette entre le commettant et l'entrepreneur, soit que la dette sera insuffisante pour couvrir le plein montant de la responsabilité en cause. À cette fin, non seulement le par. 133(1) s'applique-t-il indépendamment de la faillite, mais encore il the key feature of s. 133 as a whole. It aims at preserving the integrity of the Injury Fund. Section 133(3) is clearly secondary in this regard and s. 133(1) accordingly was not intended to operate solely in conjunction with s. 133(3). While s. 133(3) and the equitable rights it codifies might not be able to operate independently from s. 133(1), s. 133(1) can operate independently from s. 133(3).

s'applique indépendamment du par. 133(3). Le paragraphe (1) est l'élément clé de l'art. 133. Il vise à préserver l'intégrité de la caisse des accidents. Le paragraphe 133(3) joue nettement un rôle secondaire à cet égard, et le par. 133(1) n'était donc pas destiné qu'à s'appliquer conjointement avec le par. 133(3). Bien qu'il se puisse que le par. 133(3) et les droits d'*equity* qu'il codifie ne soient pas applicables indépendamment du par. 133(1), le par. 133(1) peut, quant à lui, s'appliquer indépendamment du par. 133(3).

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By Iacobucci J. (dissenting)

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Arrêts examinés: *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24; **arrêt critiqué:** *Ontario (Workers' Compensation Board) c. Evelyn Stevens Interiors Ltd. (Trustee of)* (1993), 100 D.L.R. (4th) 742; **arrêts mentionnés:** *Royal Bank of Canada c. Larue*, [1928] A.C. 187, conf. [1926] R.C.S. 218; *Director of Labour Standards of Nova Scotia and Workers' Compensation Board of Nova Scotia c. Trustee in Bankruptcy* (1981), 38 C.B.R. (N.S.) 253; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Madden c. Nelson and Fort Sheppard Railway Co.*, [1899] A.C. 626; *Comté de Parkland nº 31 c. Stetar*, [1975] 2 R.C.S. 884; *Re Melton; Milk c. Towers*, [1918] 1 Ch. 37; *Re Coughlin & Co.* (1923), 4 C.B.R. 294; *Lister c. Hooson*, [1908] 1 K.B. 174; *Fredericton Co-operative Ltd. c. Smith* (1921), 2 C.B.R. 154; *Atlantic Acceptance Corp. c. Burns & Dutton Construction (1962) Ltd.* (1970), 14 D.L.R. (3d) 175; *Stein c. Blake*, [1995] 2 All E.R. 961; *Re Invitation Prêt-à-Porter Inc.; Miller c. Polbro Realty Co.* (1979), 31 C.B.R. (N.S.) 54; *Tennant c. Union Bank of Canada*, [1894] A.C. 31; *Crown Grain Co. c. Day*, [1908] A.C. 504; *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121.

Citée par le juge Iacobucci (dissident)

Sous-ministre du Revenu c. Rainville, [1980] 1 R.C.S. 35; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24; *Ontario (Workers' Compensation Board) c. Evelyn Stevens Interiors Ltd. (Trustee of)* (1993), 100

(1993), 100 D.L.R. (4th) 742, rev'g *Re Evelyn Stevens Interiors Ltd.* (1990), 72 D.L.R. (4th) 712; *Serdula Construction Management Inc. v. Workers' Compensation Board*, Q.B. (Regina), Q.B.M. 126/91 (April 12, 1991); *Attorney-General of Ontario v. Attorney-General for the Dominion of Canada*, [1894] A.C. 189; *Royal Bank of Canada v. Larue*, [1928] A.C. 187, aff'g [1926] S.C.R. 218; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272; *Reference re Workers' Compensation Act, 1983 (Nfld.)* (1987), 44 D.L.R. (4th) 501, aff'd [1989] 1 S.C.R. 992; *Re Black Forest Restaurant Ltd.* (1981), 37 C.B.R. (N.S.) 176; *TransGas Ltd. v. Mid-Plains Contractors Ltd.*, [1994] 3 S.C.R. 753; *Ecarnot (Trustee of) v. Western Credit Union Ltd.* (1991), 7 C.B.R. (3d) 207; *John M. M. Troup Ltd. v. Royal Bank of Canada*, [1962] S.C.R. 487; *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, [1991] 5 W.W.R. 577; *Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753; *Re French River Contracting Co.*, [1937] O.W.N. 665; *MacDonald v. Vapour Canada Ltd.*, [1977] 2 S.C.R. 134; *Holt v. Telford*, [1987] 2 S.C.R. 193; *Lister v. Hooson*, [1908] 1 K.B. 174; *Moule v. Garrett* (1872), L.R. 7 Ex. 101; *Brook's Wharf and Bull Wharf, Ltd. v. Goodman Brothers*, [1937] 1 K.B. 534; *Government of Newfoundland v. Newfoundland Railway Co.* (1888), 13 App. Cas. 199; *Hanak v. Green*, [1958] 2 All E.R. 141; *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, [1985] 6 W.W.R. 14; *Federal Commerce and Navigation Ltd. v. Molena Alpha Inc.*, [1978] 3 All E.R. 1066, aff'd [1979] A.C. 757; *New Brunswick v. Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201; *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101; *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671; *R. v. Amway Corp.*, [1989] 1 S.C.R. 21; *Board of Industrial Relations v. Avco Financial Services Realty Ltd.*, [1979] 2 S.C.R. 699.

D.L.R. (4th) 742, inf. *Re Evelyn Stevens Interiors Ltd.* (1990), 72 D.L.R. (4th) 712; *Serdula Construction Management Inc. c. Workers' Compensation Board*, B.R. Sask. (Regina), Q.B.M. 126/91 (12 avril 1991); *Attorney-General of Ontario c. Attorney-General for the Dominion of Canada*, [1894] A.C. 189; *Royal Bank of Canada c. Larue*, [1928] A.C. 187, conf. [1926] R.C.S. 218; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121; *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641; *Medwid c. Ontario* (1988), 48 D.L.R. (4th) 272; *Reference re Workers' Compensation Act, 1983 (Nfld.)* (1987), 44 D.L.R. (4th) 501, conf. par [1989] 1 R.C.S. 992; *Re Black Forest Restaurant Ltd.* (1981), 37 C.B.R. (N.S.) 176; *TransGas Ltd. c. Mid-Plains Contractors Ltd.*, [1994] 3 R.C.S. 753; *Ecarnot (Trustee of) c. Western Credit Union Ltd.* (1991), 7 C.B.R. (3d) 207; *John M. M. Troup Ltd. c. Royal Bank of Canada*, [1962] R.C.S. 487; *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.*, [1991] 5 W.W.R. 577; *Robinson c. Countrywide Factors Ltd.*, [1978] 1 R.C.S. 753; *Re French River Contracting Co.*, [1937] O.W.N. 665; *MacDonald c. Vapour Canada Ltd.*, [1977] 2 R.C.S. 134; *Holt c. Telford*, [1987] 2 R.C.S. 193; *Lister c. Hooson*, [1908] 1 K.B. 174; *Moule c. Garrett* (1872), L.R. 7 Ex. 101; *Brook's Wharf and Bull Wharf, Ltd. c. Goodman Brothers*, [1937] 1 K.B. 534; *Government of Newfoundland c. Newfoundland Railway Co.* (1888), 13 App. Cas. 199; *Hanak c. Green*, [1958] 2 All E.R. 141; *Coba Industries Ltd. c. Millie's Holdings (Canada) Ltd.*, [1985] 6 W.W.R. 14; *Federal Commerce and Navigation Ltd. c. Molena Alpha Inc.*, [1978] 3 All E.R. 1066, conf. par [1979] A.C. 757; *New Brunswick c. Estabrooks Pontiac Buick Ltd.* (1982), 44 R.N.-B. (2ᵉ) 201; *Manitoba Fisheries Ltd. c. La Reine*, [1979] 1 R.C.S. 101; *Vickery c. Cour suprême de la Nouvelle-Écosse (Protonotaire)*, [1991] 1 R.C.S. 671; *R. c. Amway Corp.*, [1989] 1 R.C.S. 21; *Commission des relations de travail c. Avco Financial Services Realty Ltd.*, [1979] 2 R.C.S. 699.

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Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 2, 17(1), 67, 72(1), 95, 97(3), 136, 141, 148, 158*a*), 198*a*).

Workers' Compensation Act, 1979, S.S. 1979, ch. W-17.1, art. 133(1), (3), (4).

Workers' Compensation Amendment Act, 1993, S.S. 1993, ch. 63, art. 40.

Speaking for the majority, McLachlin J. noted at p. 30 that the impugned deemed statutory trust lacked the essential attributes of a trust under general principles of trust law, namely the possibility of being identified and traced. She stated at p. 33:

To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

Significantly, McLachlin J. also stated, at pp. 33-34, the Court's preference for an interpretation of s. 47(*a*) consistent with "the clear intention of Parliament, in enacting the *Bankruptcy Act*, of setting up a clear and orderly scheme for the distribution of the bankrupt's assets".

Moving to the nature of the legal interests created by s. 18 of the *Social Service Tax Act*, McLachlin J. noted at p. 34 that at the moment of collection the "trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law". However, she was cautious to note that the trust monies are soon mingled with other money in the hands of the merchant and converted to other property, and as a result they could not be traced. She observed at p. 34:

. . . as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt. [Emphasis added.]

McLachlin J. was thus at pains to stress that the reality of the property interest created by the

24 Le juge McLachlin a fait remarquer, au nom de la Cour à la majorité, à la p. 30, que la fiducie légale réputée qui était contestée ne possédait pas les attributs essentiels d'une fiducie selon les principes généraux du droit des fiducies, soit la possibilité d'identifier ou de retracer les biens. Elle affirme, à la p. 33:

Interpréter l'al. 47*a*) comme s'appliquant non seulement aux fiducies établies en vertu du droit général, mais aussi aux fiducies légales établies par les provinces, qui ne possèdent pas les attributs des fiducies de *common law*, reviendrait à permettre aux provinces d'établir leur propre ordre de priorité applicable à la *Loi sur la faillite* et à ouvrir la porte à l'établissement de régimes de répartition en cas de faillite différents d'une province à l'autre.

25 Fait révélateur, le juge McLachlin a aussi dit, à la p. 34, que notre Cour préférait une interprétation de l'al. 47*a*) qui soit compatible avec «l'intention clairement exprimée par le législateur, en adoptant la *Loi sur la faillite*, d'établir un régime clair et ordonné de répartition de l'actif d'un failli».

26 Passant à l'examen de la nature des droits créés par l'art. 18 de la *Social Service Tax Act*, le juge McLachlin a souligné, à la p. 34, qu'au moment de la perception «le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit». Cependant, elle a pris soin de préciser que les sommes en fiducie sont bientôt confondues avec d'autres sommes que détient le marchand et affectées à l'acquisition d'autres biens, de sorte qu'il est impossible de les retracer. Elle fait observer, à la p. 34:

. . . comme l'existence de la disposition déterminative le reconnaît tacitement, en réalité, après l'affectation de la somme, la fiducie légale ressemble peu à une fiducie véritable. Il n'y a pas de bien qu'on puisse considérer comme sujet à la fiducie. Aussi, pour cette raison, le par. 18(2) ajoute que la taxe impayée emporte un privilège sur la totalité des biens de celui qui l'a perçue, c'est-à-dire un droit tenant d'une créance garantie. [Je souligne.]

Le juge McLachlin a donc pris soin de préciser que la substance du droit de propriété créé par la province ought to govern over the form, and as a result the province's claim necessarily failed.

province devait l'emporter sur la forme, et que, par conséquent, la réclamation de la province devait nécessairement échouer.

27 McLachlin J. also addressed the province's contention that it remained sovereign over the definition of what constitutes a trust. She made the following important observations at p. 35:

> The province . . . argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of "trust" which is operative for purposes of exemption under the *Bankruptcy Act* must be that of the federal Parliament, not the provincial legislatures. The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the *Bankruptcy Act*: *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*. [Emphasis added.]

Le juge McLachlin a aussi examiné l'argument de la province selon lequel il lui était entièrement loisible de définir ce qui constitue une fiducie. Elle fait les observations importantes suivantes, à la p. 35:

> La province soutient [. . .] qu'il lui est loisible de définir le mot «fiducie» comme elle l'entend puisque la propriété et les droits civils relèvent de sa compétence. À cette affirmation, il suffit de répondre que la définition applicable du mot «fiducie» pour les fins des exceptions prévues à la *Loi sur la faillite* est celle du législateur fédéral et non celle des législateurs provinciaux. Les provinces peuvent définir à leur gré le mot «fiducie» pour les matières relevant de leur compétence, mais elles ne peuvent imposer au Parlement la définition que la fiducie doit recevoir pour les fins de la *Loi sur la faillite*: voir l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*. [Je souligne.]

28 As a result, McLachlin J. ruled that the provincial legislation was inapplicable in bankruptcy and that the province's claim was governed by s. 107(1)(*j*) of the *Bankruptcy Act*.

En conséquence, le juge McLachlin a statué que la loi provinciale était inapplicable en matière de faillite et que la réclamation de la province était régie par l'al. 107(1)*j*) de la *Loi sur la faillite*.

(ii) The Principles and Philosophy Embodied in the Quartet

(ii) Les principes et la philosophie qui se dégagent du quatuor d'arrêts

29 What principles should be distilled from the quartet? The intervener Attorney General for Saskatchewan suggested that there are two possible interpretations of these decisions: what it called a broader "bottom line" approach which posits that "any time provincial law affects the final result of a bankruptcy, the province is improperly attempting to alter the priorities of distribution"; and a narrower "jump the queue" approach to the effect that "the province cannot attempt to alter the position of a person within the scheme of distribution created by Parliament, vis à vis the other creditors who are claiming from the bankrupt's estate".

Quels principes devrait-on dégager du quatuor d'arrêts? L'intervenant le procureur général de la Saskatchewan affirme que ces arrêts peuvent s'interpréter de deux manières: ce qu'il appelle la méthode plus générale du «résultat final», qui part du principe voulant que [TRADUCTION] «chaque fois qu'une loi provinciale touche l'issue d'une faillite, la province se trouve alors à tenter irrégulièrement de modifier l'ordre de priorité en matière de partage»; et la méthode plus restrictive de l'«anticipation de rang», selon laquelle [TRADUCTION] «la province ne peut tenter de modifier le rang d'une personne au sein du plan de répartition établi par le législateur fédéral, par rapport aux autres créanciers qui produisent une réclamation contre l'actif du failli».

30 My colleague Iacobucci J. properly rejects the broader "bottom line" approach since, as he indi-

Mon collègue le juge Iacobucci rejette à bon droit la méthode plus générale du «résultat final» cates, such an approach "risks nullifying the broad array of provincial legislation underpinning the *Bankruptcy Act*" (para. 142). It is trite to observe that the *Bankruptcy Act* is contingent on the provincial law of property for its operation. The Act is superimposed on those provincial schemes when a debtor declares bankruptcy. As a result, provincial law necessarily affects the "bottom line", but this is contemplated by the *Bankruptcy Act* itself. Indeed, it is no exaggeration to say that there is no "bottom line" without provincial law. The "bottom line" approach is therefore not the appropriate characterization of the quartet.

car, comme il l'indique, une telle méthode «risque d'annuler le vaste éventail de lois provinciales qui sous-tendent l'application de la *Loi sur la faillite*» (par. 142). C'est un truisme de dire que la *Loi sur la faillite* dépend, pour son application, du droit provincial en matière de propriété. La Loi se superpose à ces régimes provinciaux lorsqu'un débiteur déclare faillite. C'est pourquoi le droit provincial modifie nécessairement le «résultat final», mais cela est prévu par la *Loi sur la faillite* elle-même. En fait, il n'est pas exagéré de dire qu'il n'y a pas de «résultat final» en l'absence du droit provincial. La méthode du «résultat final» ne reflète donc pas correctement la pensée du quatuor d'arrêts.

However, even rejecting the simplistic "bottom line" approach, I do not agree that the quartet stands for the sole proposition that the provinces cannot "jump the queue". In my opinion, the quartet embodies a consistent and general philosophy as to the purposes of the federal system of bankruptcy and its relation to provincial property arrangements. That philosophy cannot be captured in the pithy but limited proposition that the provinces cannot "jump the queue".

Cependant, même si je rejette la méthode simpliste du «résultat final», je n'accepte pas que le quatuor d'arrêts signifie uniquement qu'il ne saurait y avoir «anticipation de rang» par les provinces. À mon avis, il se dégage du quatuor une philosophie cohérente et générale quant aux objets du régime fédéral de la faillite et au lien qu'il a avec les dispositions provinciales en matière de droit des biens. Cette philosophie ne saurait s'exprimer par la proposition concise, mais restreinte, selon laquelle il ne saurait y avoir «anticipation de rang» par les provinces. 31

The quartet is better stated, in my view, as standing for a number of related propositions which are themselves part of a consistent philosophy. In their lucid and thorough study of the quartet, "The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankruptcy Act: The War is Over" (1992), 71 *Can. Bar Rev.* 77, at pp. 78-79, Andrew J. Roman and M. Jasmine Sweatman state that the quartet stands for the following four propositions:

(1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;

(2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once

À mon avis, il est préférable d'affirmer que le quatuor d'arrêts étaye un certain nombre de propositions connexes qui s'inscrivent elles-mêmes dans le cadre d'une philosophie cohérente. Dans leur étude lucide et approfondie du quatuor d'arrêts, intitulée «The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankruptcy Act: The War is Over» (1992), 71 *R. du B. can.* 77, aux pp. 78 et 79, Andrew J. Roman et M. Jasmine Sweatman affirment que le quatuor d'arrêts permet de formuler les quatre propositions suivantes: 32

[TRADUCTION]

(1) les provinces ne peuvent ni créer des priorités entre les créanciers ni modifier le plan de répartition en matière de faillite, prévu au par. 136(1) de la Loi sur la faillite;

(2) bien qu'une loi provinciale puisse validement modifier l'ordre de priorité dans un contexte

bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;

(3) if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; and

(4) the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act.

33 See also for concurrence with Roman and Sweatman's general conclusions drawn from the quartet, Jacob S. Ziegel, "Personal Property Security and Bankruptcy: There is no War! — A Reply to Roman and Sweatman" (1993), 72 *Can. Bar Rev.* 44, at p. 45.

34 My colleague Iacobucci J. states at para. 141 that the quartet "stands for the position that only those provincial laws which directly improve the priority of a claim upon the actual property of the bankrupt over that accorded by the *Bankruptcy Act* are inoperative" (emphasis added). This statement falls within Roman and Sweatman's proposition 1. However, as my summary of those cases has hopefully indicated, the quartet is clearly not limited to provincial "laws which directly improve the priority of a claim". To quote Roman and Sweatman, *supra*, at p. 78:

> . . . the reasoning in [the quartet] is not limited to trusts, nor to situations of colourable legislation attempting to give an artificial preference to government. Rather, these rulings are broad enough to encompass any potential area of conflict between provincial power to legislate in the area of property and civil rights, and exclusive federal jurisdiction over bankruptcy and insolvency.

autre que celui d'une faillite, dès qu'il y a faillite, c'est le par. 136(1) de la Loi sur la faillite qui détermine le statut et l'ordre de priorité des réclamations qui y sont visées expressément;

(3) si les provinces pouvaient créer leur propre ordre de priorité ou modifier celui établi en vertu de la Loi sur la faillite, cela aurait pour effet d'inciter à l'établissement, en matière de faillite, d'un plan de répartition différent d'une province à l'autre, ce qui est inacceptable;

(4) en matière de faillite, des expressions comme «créancier garanti», lorsqu'elles sont définies dans la Loi sur la faillite, doivent être interprétées selon la définition que leur donne le législateur fédéral et non celle que leur donnent les législatures provinciales. Les provinces ne peuvent modifier la façon dont ces expressions sont définies aux fins de la Loi sur la faillite.

Voir aussi, à l'appui des conclusions générales que Roman et Sweatman tirent du quatuor d'arrêts, l'article de Jacob S. Ziegel, «Personal Property Security and Bankruptcy: There is no War! — A Reply to Roman and Sweatman» (1993), 72 *R. du B. can.* 44, à la p. 45.

Mon collègue le juge Iacobucci affirme, au par. 141, que le quatuor d'arrêts «étaye le point de vue selon lequel ne sont inopérantes que les lois provinciales qui améliorent directement le rang d'une réclamation contre l'actif réel du failli par rapport à l'ordre de priorité établi dans la *Loi sur la faillite*» (je souligne). Cela correspond à la première proposition de Roman et Sweatman. Cependant, comme mon résumé du quatuor l'a indiqué, je l'espère, le quatuor d'arrêts n'est clairement pas limité aux cas où des «lois provinciales [. . .] améliorent directement le rang d'une réclamation». Pour reprendre les propos de Roman et Sweatman, *loc. cit.*, à la p. 78:

> [TRADUCTION] . . . le raisonnement [du quatuor d'arrêts] n'est aucunement limité aux fiducies ou aux cas de législation déguisée qui tente d'accorder une préférence artificielle au gouvernement. Ces arrêts ont plutôt une portée suffisamment large pour englober toute possibilité de conflit entre le pouvoir d'une province de légiférer dans le domaine de la propriété et des droits civils d'une part, et la compétence fédérale exclusive en matière de faillite et d'insolvabilité, d'autre part.

Lamer J. went on to note that as provincial statutes cannot affect the priorities created by the federal statute, consistency in the order of priority in bankruptcy situations is ensured from one province to another.

Finally, in *Henfrey Samson*, *supra*, this Court reiterated its position in the three previous cases, holding that a deemed statutory trust created by s. 18(1) of the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388, over all amounts collected as taxes under the Act could not give the province priority over other creditors under the *Bankruptcy Act*, R.S.C. 1970, c. B-3. The issue was whether the deemed statutory trust could qualify as a trust within s. 47(*a*) of the *Bankruptcy Act* so as to exclude the amounts so held from the property of the bankrupt and instead require them to be given entirely to the provincial government. McLachlin J., writing for the majority, held at p. 33 that:

> To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

In *Henfrey Samson*, no common law trust was found since the monies in the impugned trust had been mixed with other monies. Consequently, the s. 47(*a*) definition of trust was not triggered. However, the important point to be taken from *Henfrey Samson* is that if the province were to have drafted its tax collection legislation in a way that created a valid trust under the terms of the *Bankruptcy Act*, that money would have been excluded from the property of the bankrupt. From another perspective, the province would be able to affect the outcome of the bankruptcy; yet, because it would not have altered the priorities of distribution, the legislation would have survived paramountcy analysis. In *Henfrey Samson*, Cory J. dissented regarding the applicability of the questions of law to the spe-

Le juge Lamer fait ensuite remarquer que, puisque les lois provinciales ne peuvent modifier les priorités établies par la loi fédérale, l'uniformité de l'ordre de priorité en matière de faillite est donc assurée d'une province à l'autre.

136 Enfin, dans l'arrêt *Henfrey Samson*, précité, notre Cour a réitéré la position qu'elle avait adoptée dans les trois arrêts antérieurs, statuant qu'une fiducie réputée, créée par le par. 18(1) de la *Social Service Tax Act* de la Colombie-Britannique, R.S.B.C. 1979, ch. 388, relativement à tous les montants de taxe perçus en vertu de la Loi ne pouvait conférer à la province la priorité sur les autres créanciers en vertu de la *Loi sur la faillite*, S.R.C. 1970, ch. B-3. Il s'agissait de déterminer si cette fiducie légale réputée pouvait être qualifiée de fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite* de façon à exclure les montants ainsi détenus du patrimoine du failli et à exiger qu'ils soient remis entièrement au gouvernement provincial. Le juge McLachlin affirme, au nom de la Cour à la majorité, à la p. 33:

> Interpréter l'al. 47*a*) comme s'appliquant non seulement aux fiducies établies en vertu du droit général, mais aussi aux fiducies légales établies par les provinces, qui ne possèdent pas les attributs des fiducies de *common law*, reviendrait à permettre aux provinces d'établir leur propre ordre de priorité applicable à la *Loi sur la faillite* et à ouvrir la porte à l'établissement de régimes de répartition en cas de faillite différents d'une province à l'autre.

137 Dans l'arrêt *Henfrey Samson*, on a conclu à l'inexistence d'une fiducie de common law puisque les sommes comprises dans la fiducie attaquée avaient été mélangées à d'autres sommes. En conséquence, la définition de la fiducie, contenue à l'al. 47*a*), n'était pas applicable. Cependant, le point important qui se dégage de l'arrêt *Henfrey Samson* est le suivant: si la province avait rédigé sa loi sur la perception des taxes de façon à créer une fiducie valide en vertu de la *Loi sur la faillite*, les sommes en cause n'auraient pas fait partie des biens du failli. Vu sous un autre angle, la province pourrait modifier l'issue de la faillite; cependant, la loi aurait résisté à une analyse fondée sur la prépondérance, du fait qu'elle n'aurait pas modifié l'ordre de priorité en matière de partage. Dans l'ar-

cific facts at hand, holding that a valid trust was created and that there was no conflict between the provincial and federal legislation since the *Bankruptcy Act* specifically gave priority to a trust.

rêt *Henfrey Samson*, le juge Cory était dissident relativement à l'applicabilité des questions de droit aux faits en cause; il était d'avis qu'une fiducie valide avait été constituée et qu'il n'existait pas de conflit entre la loi fédérale et la loi provinciale puisque la *Loi sur la faillite* accordait expressément la priorité à une fiducie.

138 In my view, the quartet has given rise to two interpretations. One is broad, the other narrow.

À mon avis, le quatuor d'arrêts a donné lieu à deux interprétations: une interprétation large et une interprétation restrictive.

139 The respondents in the instant appeal advocate the broad interpretation, according to which any time provincial law affects the final result of a bankruptcy, the province is improperly attempting to alter the priorities of distribution. The Attorney General for Saskatchewan refers to this as the "bottom line" approach. Under such an approach, s. 133, since it affects the end result of the bankruptcy process, would be deemed invalid.

Les intimés en l'espèce préconisent l'interprétation large selon laquelle chaque fois qu'une loi provinciale touche l'issue d'une faillite, la province se trouve alors à tenter irrégulièrement de modifier l'ordre de priorité en matière de partage. Le procureur général de la Saskatchewan dit qu'il s'agit du critère du «résultat final». Selon ce critère, l'art. 133 serait réputé non valide puisqu'il touche l'issue du processus de faillite.

140 The appellants, on the other hand, advocate a narrower interpretation: the quartet precludes a province only from altering the position of a creditor vis-à-vis the other creditors claiming from the same estate within the scheme of distribution created by s. 136(1). In other words, the only thing the province cannot do is "jump the queue" set up by Parliament. Consequently, in order to impugn a provincial law affecting the bankruptcy process, there must be an attempt to reallocate the priority scheme by directly creating interests in the property of the bankrupt.

Les appelants, par contre, préconisent une interprétation plus restrictive: le quatuor d'arrêts empêche seulement une province de modifier la position d'un créancier par rapport aux autres qui produisent une réclamation contre le même actif, selon le plan de répartition établi au par. 136(1). En d'autres termes, il est seulement interdit à la province de bénéficier d'une «anticipation de rang» dans l'ordre établi par le législateur fédéral. En conséquence, pour pouvoir être contestée, une loi provinciale modifiant le processus de faillite doit tenter de modifier l'ordre de priorité en créant directement des droits sur les biens du failli.

141 In my opinion, the second interpretation is the correct one. The quartet stands for the position that only those provincial laws which directly improve the priority of a claim upon the actual property of the bankrupt over that accorded by the *Bankruptcy Act* are inoperative. This accords with the facts of the cases in the quartet. In each case, the provincial governments endeavoured to change the priorities of preferred creditors in s. 136(1) by elevating a lower ranked claim to a higher rank. In *Re Bourgault* and *Henfrey Samson*, the province attempted to "queue jump" claims of the Crown ranked last by s. 136(1)(*j*) by declaring such debts to be "privi-

À mon avis, c'est la seconde interprétation qui est la bonne. Le quatuor d'arrêts étaye le point de vue selon lequel ne sont inopérantes que les lois provinciales qui améliorent directement le rang d'une réclamation contre l'actif réel du failli par rapport à l'ordre de priorité établi dans la *Loi sur la faillite*. Cette interprétation est compatible avec les faits dont il était question dans le quatuor d'arrêts. Dans chaque cas, un gouvernement provincial avait tenté de modifier l'ordre de priorité des créanciers privilégiés visés au par. 136(1), en améliorant le rang de la créance dans la collocation. Dans les arrêts *Re Bourgault* et *Henfrey Samson*, la leges" (*Re Bourgault*) or deeming them to be "trust money" and hence outside the distribution scheme (*Henfrey Samson*). In *Deloitte Haskins*, the province attempted to elevate its claim through a proposed security interest and, finally, in *FBDB*, the province once again endeavoured to use the mechanism of a privilege/lien.

In many ways, the broad approach propounded by the respondents would produce unacceptable results since it risks nullifying the broad array of provincial legislation underpinning the *Bankruptcy Act*. I am sensitive to the arguments by the Saskatchewan Attorney General that provincial legislation is deeply involved in determining the priority, registration, and amount of indebtedness in the bankruptcy process. In fact, the proprietary and contractual rights that are regulated by the bankruptcy process are usually created by virtue of provincial law. All of these enactments somehow affect the "bottom line".

For example, provincial personal property security legislation establishes security interests (such as that relied upon by the Bank of Montreal in the instant appeal) that create secured creditors and validate claims against the estate of the bankrupt. Of similar import is builders' and mechanics' lien legislation that has been held to be constitutionally valid in *TransGas Ltd. v. Mid-Plains Contractors Ltd.*, [1994] 3 S.C.R. 753; see also *Ecarnot (Trustee of) v. Western Credit Union Ltd.* (1991), 7 C.B.R. (3d) 207 (Sask. C.A.) and *John M. M. Troup Ltd. v. Royal Bank of Canada*, [1962] S.C.R. 487, at p. 494, *per* Judson J.

Other valid provincial legislation invariably affecting the "bottom line" includes: consumer protection and warranties legislation; land titles statutes; sale of goods laws; and a further array of

province avait tenté de bénéficier d'une «anticipation de rang» par rapport aux réclamations de la Couronne, colloquées au dernier rang en vertu de l'al. 136(1)*j*), en déclarant que ces dettes constituaient des «privilèges» (*Re Bourgault*) ou étaient réputées constituer des «fonds en fiducie», et n'étaient donc pas visées par le plan de répartition (*Henfrey Samson*). Dans l'arrêt *Deloitte Haskins*, la province tentait d'améliorer son rang dans la collocation en faisant valoir l'existence d'une garantie, et enfin, dans l'arrêt *BFD*, la province avait de nouveau tenté de recourir au mécanisme du privilège.

À de nombreux égards, l'approche générale préconisée par les intimés produirait des résultats inacceptables puisqu'elle risque d'annuler le vaste éventail de lois provinciales qui sous-tendent l'application de la *Loi sur la faillite*. Je suis conscient des arguments du procureur général de la Saskatchewan, voulant que les lois provinciales jouent un rôle important dans la détermination du rang, des modalités d'enregistrement et du montant des créances dans le processus de faillite. En fait, les droits de propriété et de nature contractuelle qui sont réglementés par le processus de faillite sont habituellement créés en vertu d'une loi provinciale. Tous ces textes législatifs influent d'une certaine façon sur le «résultat final». 142

Par exemple, les lois provinciales sur les sûretés mobilières établissent des garanties (comme celle qu'invoque la Banque de Montréal en l'espèce) qui créent des créanciers garantis et valident des réclamations contre l'actif du failli. Dans la même veine, mentionnons le texte législatif relatif au privilège du constructeur et du fournisseur de matériaux que notre Cour a jugé constitutionnel dans *TransGas Ltd. c. Mid-Plains Contractors Ltd.*, [1994] 3 R.C.S. 753; voir aussi *Ecarnot (Trustee of) c. Western Credit Union Ltd.* (1991), 7 C.B.R. (3d) 207 (C.A. Sask.), et *John M. M. Troup Ltd. c. Royal Bank of Canada*, [1962] R.C.S. 487, à la p. 494, le juge Judson. 143

Parmi les autres lois provinciales valides qui influent immanquablement sur le «résultat final», on compte les lois sur la protection du consommateur et les garanties, les lois sur les titres fonciers, 144 specific statutes such as *The Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1, s. 44 (protecting and exempting farmland and farm equipment from the property of the bankrupt's estate), the *Forest Act*, R.S.B.C. 1979, c. 140, s. 142, and the *Employment Standards Act*, S.B.C. 1980, c. 10, s. 19.

les lois sur la vente de biens et un éventail de lois spécifiques comme *The Saskatchewan Farm Security Act*, S.S. 1988-89, ch. S-17.1, art. 44 (protégeant et soustrayant de l'actif du failli les terres agricoles et l'équipement agricole), la *Forest Act*, R.S.B.C. 1979, ch. 140, art. 142, et l'*Employment Standards Act*, S.B.C. 1980, ch. 10, art. 19.

145 The fact that federal bankruptcy legislation is often contingent on provincial initiatives in the area of property and civil rights has been noted by Professor Hogg (*Constitutional Law of Canada* (3rd ed. 1992), at p. 25-9):

> The term "secured creditor" is defined [in federal bankruptcy legislation] . . . in terms so general that the validity and effect of "a mortgage, pledge, charge, lien or privilege" is left to be determined under the provincial law relating to secured transactions. For example, if a creditor claims to hold a first mortgage on land in Ontario, the trustee in bankruptcy . . . will look to Ontario's law of mortgages to determine whether the creditor is indeed a secured creditor and, if so, the extent to which the creditor can resort to the land in priority to all other creditors. In this way, provincial law has a profound, albeit indirect, effect on the distribution of the bankrupt's assets. [Emphasis added.]

To my mind, there is nothing inherently undesirable about this interplay between federal and provincial statutory initiatives in the regulation of the bankruptcy process.

Le professeur Hogg (*Constitutional Law of Canada* (3e éd. 1992), à la p. 25-9) fait remarquer que la loi fédérale en matière de faillite est souvent subordonnée à des mesures provinciales dans le domaine de la propriété et des droits civils:

> [TRADUCTION] L'expression «créancier garanti» est définie [dans la loi fédérale sur la faillite] [. . .] de façon si générale que la validité et l'incidence d'«une hypothèque, [d']un nantissement, [d']une charge, [d']un gage ou [d']un privilège» doivent être déterminées en vertu de la loi provinciale relative aux opérations garanties. Par exemple, si un créancier prétend détenir une première hypothèque sur un bien-fonds en Ontario, le syndic de faillite [. . .] examinera la loi ontarienne sur les hypothèques pour déterminer si le créancier est vraiment un créancier garanti, et, dans l'affirmative, dans quelle mesure ce créancier peut avoir priorité sur tous les autres créanciers pour recourir à ce bien-fonds. La loi provinciale a ainsi une incidence profonde, quoique indirecte, sur le partage des biens du failli. [Je souligne.]

À mon avis, cette interaction entre les mesures législatives fédérales et provinciales, dans le domaine de la réglementation du processus de faillite, n'a rien d'indésirable en soi.

146 The Alberta Court of Appeal has, for its part, also demonstrated a reluctance to invalidate provincial legislation which simply touches upon bankruptcy proceedings. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, [1991] 5 W.W.R. 577, the issue before the court was whether the *Bankruptcy Act* prevented a court-appointed receiver-manager of an insolvent and bankrupt oil company from complying with an order requiring that receiver-manager, in the interests of environmental integrity, carry out proper abandonment procedures on seven suspended oil wells. That work would be done at the expense of the secured creditors' entitlement under

La Cour d'appel de l'Alberta s'est, quant à elle, montrée hésitante à invalider une loi provinciale qui ne fait que toucher les procédures de faillite. Dans l'arrêt *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.*, [1991] 5 W.W.R. 577, la cour devait déterminer si la *Loi sur la faillite* empêchait l'administrateur-séquestre d'une société pétrolière insolvable et en faillite, nommé par le tribunal, de se conformer à une ordonnance lui enjoignant, au nom de l'intégrité environnementale, d'entreprendre des procédures régulières d'abandon de sept puits de pétrole dont l'exploitation avait été interrompue. Cette tâche serait accomplie au détriment du droit des créanthe *Bankruptcy Act*. At page 599, Laycraft C.J.A. held for the court:

In my view, there is no . . . direct conflict in this case. The Alberta legislation regulating oil and gas wells in this province is a statute of general application within a valid provincial power. It is general law regulating the operation of oil and gas wells, and safe practices relating to them, for the protection of the public. It is not aimed at subversion of the scheme of distribution under the *Bankruptcy Act* though it may incidentally affect that distribution in some cases. It does so, not by a direct conflict in operation, but because compliance by the receiver with the general law means less money will be available for distribution.

Northern Badger thus echoes the proposition that provincial laws of general application continue to apply in bankruptcy even though they may incidentally alter the amount of proceeds available in the bankrupt's estate for distribution.

Provincial law plays a critical role in defining both the number and type of participants in the bankruptcy process and the size of the bankrupt's estate. A number of this Court's decisions have emphasized the value of standardizing bankruptcy priorities across the country. But it is important to remember that a bankruptcy priority is a category. The precise content of that category can and does vary to some extent from one province to the next. It seems to me that s. 72(1) of the *Bankruptcy Act* is an example of the recognition of provincial diversity. Section 72(1) reads as follows:

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

ciers garantis en vertu de la *Loi sur la faillite*. Le juge en chef Laycraft affirme, au nom de la cour, à la p. 599:

[TRADUCTION] À mon avis, il n'y a pas [. . .] de conflit direct en l'espèce. La loi albertaine régissant les puits de pétrole et de gaz naturel dans la province est une loi d'application générale relevant d'un chef de compétence provinciale valide. C'est une loi générale qui réglemente, pour la protection du public, l'exploitation des puits de pétrole et de gaz naturel et les pratiques en matière de sécurité s'y rapportant. Elle ne vise pas à bouleverser le plan de répartition établi dans la *Loi sur la faillite*, bien qu'elle puisse modifier indirectement cette répartition dans certains cas. Cela se produit, non pas en raison d'une incompatibilité directe d'application, mais parce que l'observance de la loi générale par le séquestre signifie qu'il y aura moins d'argent à partager.

L'arrêt *Northern Badger* reprend donc la proposition voulant que les lois provinciales d'application générale continuent de s'appliquer en matière de faillite, même si elles peuvent modifier indirectement les sommes de l'actif du failli qui sont susceptibles d'être partagées.

Les lois provinciales jouent un rôle crucial dans 147
la détermination tant du nombre que du type de participants au processus de faillite et de la taille de l'actif du failli. Notre Cour a, dans un certain nombre d'arrêts, souligné l'importance de normaliser l'ordre de priorité en matière de faillite au Canada. Cependant, il importe de se rappeler qu'une priorité de rang en matière de faillite est une catégorie. Le contenu précis de cette catégorie peut varier jusqu'à un certain point d'une province à l'autre, et c'est effectivement le cas. Il me semble que le par. 72(1) de la *Loi sur la faillite* est un exemple de reconnaissance de la diversité provinciale. En voici le libellé:

72. (1) La présente loi n'a pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.

148 Because the federal legislation already contemplates that provincial law will impact upon the bankruptcy process, the respondents must do more than simply show that s. 133 has an effect on a particular bankruptcy. Indeed, in *Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753, Beetz J., commenting on the precursor to s. 72(1) (s. 50(6)), wrote (at pp. 808-9):

> . . . I am of the view that s. 50, subs. (6) of the *Bankruptcy Act* [R.S.C. 1970, c. B-3] provides a clear indication that Parliament, far from intending to depart from the rule of operational conflict, did in fact aim at the highest possible degree of legal integration of federal and provincial laws. . . . [Emphasis added.]

Parce que la loi fédérale prévoit déjà que les lois provinciales auront une incidence sur le processus de faillite, les intimés doivent faire plus que simplement établir que l'art. 133 a une incidence sur une faillite particulière. En fait, dans l'arrêt *Robinson c. Countrywide Factors Ltd.*, [1978] 1 R.C.S. 753, à la p. 809, le juge Beetz affirme ce qui suit au sujet de la disposition qui a précédé le par. 72(1) (le par. 50(6)):

> . . . je suis d'avis que l'art. 50, par. (6) de la *Loi sur la faillite* [S.R.C. 1970, ch. B-3] fournit une indication claire que le Parlement, loin de renoncer à la règle d'incompatibilité d'application, a en fait visé au plus haut niveau possible d'intégration légale des lois fédérales et provinciales. [Je souligne.]

149 I conclude that within the context of the bankruptcy process judicial authority and common sense militate in favour of a guarded approach to invalidation under the paramountcy doctrine. When this analysis is applied to the case at bar, it obliges the respondents, in order to prevail, to demonstrate that s. 133 of the impugned provincial Act actually reorders the federally established priority scheme with regard to the property of the bankrupt Metal Fab by directly creating interests therein. I now turn to this issue.

Je conclus que, dans le contexte du processus de faillite, la jurisprudence et le bon sens exigent d'aborder avec prudence l'invalidation en vertu de la règle de la prépondérance. En l'espèce, cette analyse oblige les intimés, s'ils veulent avoir gain de cause, à démontrer que l'art. 133 de la loi provinciale attaquée modifie en fait l'ordre de priorité fédéral applicable aux biens du failli Metal Fab, en créant directement des droits sur ces biens. Je passe maintenant à l'examen de cette question.

D. *Application of the Law to Section 133 of The Saskatchewan Workers' Compensation Act, 1979*

D. *Application des règles de droit à l'article 133 de The Workers' Compensation Act, 1979, de la Saskatchewan*

(i) The Validity of Section 133(1)

(i) La validité du paragraphe 133(1)

150 I reproduce s. 133(1), with its important portion underscored:

> 133. — (1) Where a person, whether carrying on an industry included under this Act or not, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, for the execution by or under the contractor of the whole or any part of any work for the principal, it is the duty of the principal to ensure that any sum that the contractor or any subcontractor is liable to contribute to the fund is paid and, where the principal fails to do so and the sum is not paid, he is personally liable to pay that sum to the board. [Emphasis added.]

Je reproduis le par. 133(1), en en soulignant le passage important:

> [TRADUCTION] 133. — (1) Si une personne, appelée le commettant dans le présent article, qu'elle exploite ou non une industrie visée par la présente loi, conclut un contrat avec une autre personne, appelée l'entrepreneur dans le présent article, pour l'exécution, par l'entrepreneur ou sous sa direction, de la totalité ou d'une partie d'un travail pour le compte du commettant, il incombe à ce dernier de veiller à ce que toute somme que l'entrepreneur ou un sous-traitant est tenu de verser à la caisse soit versée. Le commettant qui néglige de le faire est, à défaut de paiement, personnellement tenu de payer cette somme à la commission. [Je souligne.]

TAB 18

PP. 638-643, 647-651

Imperial Oil Ltd. *Appellant*

v.

Attorney General of Quebec for and on behalf of the Minister of the Environment, André Boisclair (formerly Paul Bégin) *Respondent*

and

Administrative Tribunal of Québec, City of Lévis, Ginette Tanguay, Marc Turgeon, Lucie Munger, Nicolas Pelletier, Christine Duhaime, Succession of Claude Maheux, Christine Bédard, Nancy Kidd, André Martin, Jacques Desmeules, Claude Nadeau, Brigitte Michaud, Lucien Bélanger, Carole Roseberry, Reynald Landry, Bernard Côté, Groupe B. Côté, Caisse populaire Desjardins of Saint-David, Les Entreprises Michel Verret inc., André Blais, Sylvie Bourget, Céline Couture, Jacques Marquis, Normand Rodrigue, Chantale Jean, Jean-Marc Bergeron, Jocelyne Giasson, Lini Fortin, Martine Ringuet, Marielle Vallières, Gilbert Caron, Rita Nolin, Renée-Claude Gagné, Danny Gracez and Corporation Adélaîde Capitale inc. *Mis en cause*

and

Attorney General of Ontario and Friends of the Earth *Interveners*

INDEXED AS: IMPERIAL OIL LTD. *v.* QUEBEC (MINISTER OF THE ENVIRONMENT)

Neutral citation: 2003 SCC 58.

File No.: 28835.

2003: February 14; 2003 : October 30.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Compagnie pétrolière Impériale ltée *Appelante*

c.

Procureur général du Québec pour et au nom du ministre de l'Environnement, André Boisclair (anciennement Paul Bégin) *Intimé*

et

Tribunal administratif du Québec, Ville de Lévis, Ginette Tanguay, Marc Turgeon, Lucie Munger, Nicolas Pelletier, Christine Duhaime, Succession de Claude Maheux, Christine Bédard, Nancy Kidd, André Martin, Jacques Desmeules, Claude Nadeau, Brigitte Michaud, Lucien Bélanger, Carole Roseberry, Reynald Landry, Bernard Côté, Groupe B. Côté, Caisse populaire Desjardins de Saint-David, Les Entreprises Michel Verret inc., André Blais, Sylvie Bourget, Céline Couture, Jacques Marquis, Normand Rodrigue, Chantale Jean, Jean-Marc Bergeron, Jocelyne Giasson, Lini Fortin, Martine Ringuet, Marielle Vallières, Gilbert Caron, Rita Nolin, Renée-Claude Gagné, Danny Gracez et Corporation Adélaîde Capitale inc. *Mis en cause*

et

Procureur général de l'Ontario et Ami(e)s de la Terre *Intervenants*

RÉPERTORIÉ : CIE PÉTROLIÈRE IMPÉRIALE LTÉE *c.* QUÉBEC (MINISTRE DE L'ENVIRONNEMENT)

Référence neutre : 2003 CSC 58.

N° du greffe : 28835.

2003 : 14 février; 2003 : 30 octobre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Administrative law — Discretion — Procedural fairness — Duty of impartiality — Conflict of interest — Minister of the Environment issuing characterization order against former owner of land polluted by hydrocarbons when he was himself sued for damages by present owners of land — Whether Minister fulfilled his duty of impartiality in issuing characterization order — Environment Quality Act, R.S.Q., c. Q-2, s. 31.42.

Environmental law — Decontamination and restoration — Characterization of land — Order of Minister — Nature of functions and powers assigned to Minister in connection with administration of Environment Quality Act — Content of rules of procedural fairness relevant to performance of Minister's functions — Environment Quality Act, R.S.Q., c. Q-2, s. 31.42.

When contamination caused problems at a site that had been operated by Imperial Oil, Quebec's Minister of the Environment ordered Imperial, pursuant to s. 31.42 of the *Environment Quality Act* ("*EQA*"), to prepare at its own expense a site characterization study which would also include appropriate decontamination measures and submit it to the Ministère. Imperial declined to do the study and asked the Administrative Tribunal of Québec to quash the Minister's order. It argued, *inter alia*, that there had been a violation of the rules of procedural fairness that applied to the Minister's decision since the Minister was in a conflict of interest because he had been involved in the earlier decontamination work and was now being sued concerning the contamination of the site by the present owners of the land. The Tribunal dismissed the appeal, but the Superior Court allowed the application for judicial review. It concluded that the Minister's order should be set aside because the Tribunal had adopted an unreasonable interpretation of s. 31.42 *EQA*, but also because the Minister was in a conflict of interest. The Minister therefore did not have the appearance of impartiality required by the rules of procedural fairness. The Quebec Court of Appeal set aside this decision and affirmed the Minister's order.

Held: The appeal should be dismissed.

The Minister had the authority to issue the kind of order at stake in the present case under the *EQA*. Section 31.42, which sets out what is called the polluter-pay principle, allows for the use of a broad discretion by

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit administratif — Pouvoir discrétionnaire — Équité procédurale — Obligation d'impartialité — Conflit d'intérêts — Ministre de l'Environnement rendant une ordonnance de caractérisation contre l'ancien propriétaire de terrains pollués par des hydrocarbures alors qu'il est lui-même poursuivi en dommages-intérêts par les propriétaires actuels des terrains — Le ministre a-t-il respecté son obligation d'impartialité en rendant l'ordonnance de caractérisation? — Loi sur la qualité de l'environnement, L.R.Q., ch. Q-2, art. 31.42.

Droit de l'environnement — Décontamination et restauration — Caractérisation des terrains — Ordonnance du ministre — Nature des fonctions et des pouvoirs confiés au ministre dans l'application de la Loi sur la qualité de l'environnement — Contenu des normes d'équité procédurale pertinentes à l'exécution des fonctions du ministre — Loi sur la qualité de l'environnement, L.R.Q., ch. Q-2, art. 31.42.

À la suite de problèmes de contamination d'un site qu'avait exploité la Compagnie pétrolière Impériale, le ministre de l'Environnement du Québec lui ordonne, conformément à l'art. 31.42 de la *Loi sur la qualité de l'environnement* (« *LQE* »), de préparer à ses frais et de remettre au ministère une étude de caractérisation des lieux et des mesures de décontamination appropriées. Impériale refuse d'exécuter l'étude et demande au Tribunal administratif du Québec d'annuler l'ordonnance du ministre. Elle invoque, entre autres, une violation des règles d'équité procédurale applicables à la décision du ministre, ce dernier se trouvant en conflit d'intérêts puisqu'il est intervenu dans les travaux antérieurs de décontamination et qu'il est maintenant poursuivi au sujet de la contamination du site par les propriétaires actuels des terrains. Le Tribunal rejette l'appel, mais la Cour supérieure fait droit à la demande de révision judiciaire. Elle conclut que l'ordonnance du ministre doit être annulée parce que le Tribunal a adopté une interprétation déraisonnable de l'art. 31.42 *LQE*, mais aussi parce que le ministre se trouvait en situation de conflit d'intérêts. Le ministre ne possédait donc pas l'apparence d'impartialité requise par les règles d'équité procédurale. La Cour d'appel du Québec annule cette décision et confirme l'ordonnance du ministre.

Arrêt : Le pourvoi est rejeté.

Le ministre a pris un type d'ordonnance qu'il pouvait rendre en vertu de la *LQE*. L'article 31.42, qui exprime le principe dit du pollueur-payeur, accorde un large pouvoir discrétionnaire au ministre. Ce dernier peut, en vertu de the Minister. Under that provision, the Minister may impose an obligation on the parties responsible for the contamination of the environment to conduct the studies required in order to ascertain the nature of the problem identified, to submit a plan for the corrective work and, where applicable, to have that work performed at their own expense. In the application of s. 31.42, the Minister is performing a mainly political role which involves his authority, and his duty, to choose the best course of action, from the standpoint of the public interest, in order to achieve the objectives of the environmental protection legislation. He is not performing an adjudicative function. On the contrary, he is performing his functions of management and application of environmental protection legislation.

Imperial's challenge rests on an erroneous understanding of the Minister's functions and of the nature of the relevant rules of procedural fairness. Having regard to the context, which includes the Minister's functions viewed in their entirety, as well as to the framework within which his power to issue orders is exercised, the concept of impartiality governing the work of the courts does not apply to his decision. The contextual nature of the content of the duty of impartiality, like that of all of the rules of procedural fairness, may vary in order to reflect the context of a decision-maker's activities and the nature of its functions. Here, the Minister certainly had to comply with the procedural fairness obligations set out in the law, such as the requirements that notice be given to interested persons and that reasons for the decision be given. Once those requirements had been met, the principles of procedural fairness that applied to the situation, and that were in fact codified by the *Act respecting Administrative Justice*, required only that he comply with the procedural obligations set out in the law and that he carefully and attentively consider the representations made by the person subject to the law he administered. Moreover, the interests in issue certainly did not amount to a personal interest within the meaning applied to that expression in the case law. The only interests the Minister was representing were the public interest in protecting the environment and the interest of the State, which is responsible for preserving the environment. In the circumstances of this case, it was difficult to separate those interests. In exercising his discretion, the Minister could properly consider a solution that would save some public money. Accordingly, he applied one of the organizing principles of the *EQA*, the polluter-pay principle. There was no conflict of interest such as would warrant judicial intervention, let alone any abuse or misuse of power. The Minister acted within the framework provided by the applicable law and in accordance with that law. There was no need to rely on the theory of overlapping duties or the theory of necessity

cette disposition, imposer aux auteurs d'une contamination de l'environnement l'obligation d'effectuer les études nécessaires pour préciser la nature du problème appréhendé, de présenter un plan de travaux correctifs et, le cas échéant, d'exécuter ces derniers à leurs propres frais. Dans l'application de l'art. 31.42, le ministre remplit un rôle largement politique, qui fait appel à son pouvoir et à son devoir de choisir les meilleures méthodes d'intervention, avec le souci de protéger l'intérêt public, pour atteindre les objectifs de la législation sur la protection de l'environnement. Il ne remplit pas alors une fonction juridictionnelle. Au contraire, il exécute ses fonctions d'administration et d'application de la législation sur la protection de l'environnement.

La contestation d'Impériale repose sur une conception erronée des fonctions du ministre et de la nature des normes d'équité procédurale pertinentes. Compte tenu du contexte de l'ensemble des fonctions du ministre comme du cadre de la mise en œuvre de son pouvoir d'ordonnance, la notion d'impartialité rattachée à l'action des tribunaux de l'ordre judiciaire ne s'applique pas à sa décision. Le contenu de l'obligation d'impartialité, tout comme celui de l'ensemble des règles d'équité procédurale, est susceptible de varier pour s'adapter au contexte de l'activité d'un décideur administratif et à la nature de ses fonctions. Dans la présente affaire, le ministre devait certes se conformer aux obligations d'équité procédurale prévues par la loi, comme les avis aux intéressés et la motivation de la décision. Cela fait, les principes d'équité procédurale pertinents à la situation, codifiés d'ailleurs par la *Loi sur la justice administrative*, exigeaient seulement qu'il exécute les obligations procédurales prévues par la loi et qu'il considère avec soin et attention les observations de l'administré. Par ailleurs, les intérêts en cause ne correspondaient sûrement pas à un intérêt personnel au sens de la jurisprudence. Les seuls intérêts que défendait le ministre étaient l'intérêt public dans la protection de l'environnement et celui de l'État, chargé de préserver celui-ci. Dans le contexte de cette affaire, ces intérêts se dissociaient difficilement. Dans le cadre de l'exercice de son pouvoir discrétionnaire, le ministre pouvait légitimement prendre en compte une solution qui se révélait moins dispendieuse pour le trésor public. Ce faisant, il mettait en application un des principes organisateurs de la *LQE*, celui du pollueur-payeur. Il n'existait pas de situation de conflit d'intérêts donnant ouverture à une intervention judiciaire, encore moins d'abus ou de détournement de pouvoir. Le ministre agissait dans le cadre prévu par le droit applicable et conformément à celui-ci. Il n'est utile d'invoquer ni la théorie du chevauchement des fonctions ni celle de la nécessité, car aucun moyen ne donnait ouverture à des procédures since there was no ground on which proceedings to review the decision of the Administrative Tribunal of Québec dismissing the appeal from the Minister's decision were available.

en révision de la décision du Tribunal administratif du Québec, rejetant l'appel de la décision du ministre.

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shall be conducted in keeping with the duty to act fairly.

. . .

15. The Tribunal has the power to decide any question of law or fact necessary for the exercise of its jurisdiction.

In the case of the contestation of a decision, the Tribunal may confirm, vary or quash the contested decision and, if appropriate, make the decision which, in its opinion, should have been made initially.

. . .

137. Each party may plead any ground of law or fact relevant to the determination of his rights and obligations.

V. Analysis

A. *The Issues*

15 A clear understanding of the nature of the issues between the parties in this Court is essential in order to avoid getting sidetracked by related problems. We need to go straight to the precise question the answer to which will determine the outcome of this appeal. Prior to that, however, I will summarize the arguments and problems no longer raised by the parties in this Court. The analysis will then focus on the question that really remains at issue in this appeal.

16 The Administrative Tribunal, the Superior Court and the Court of Appeal all had to determine whether the Minister had the authority to issue two orders in succession, the first concerning the characterization of the site and the second the performance of the work. They considered the requirements to be met before the characterization order could be issued, and discussed the evidence introduced on that point. None of that remains in issue in this Court.

17 The sole issue now at stake in this appeal is the question of procedural fairness or natural justice in relation to the Minister's decision. It remains, though, an important issue. The appellant submits that there was bias, or at the least an appearance of bias, that completely vitiated the decision to issue a characterization order. That argument is

par la loi, sont conduites dans le respect du devoir d'agir équitablement.

. . .

15. Le Tribunal a le pouvoir de décider toute question de droit ou de fait nécessaire à l'exercice de sa compétence.

Lorsqu'il s'agit de la contestation d'une décision, il peut confirmer, modifier ou infirmer la décision contestée et, s'il y a lieu, rendre la décision qui, à son avis, aurait dû être prise en premier lieu.

. . .

137. Toute partie peut présenter tout moyen pertinent de droit ou de fait pour la détermination de ses droits et obligations.

V. Analyse

A. *L'identification des questions en litige*

Devant notre Cour, la nature du débat qui oppose maintenant les parties doit être bien comprise. Il faut éviter de s'égarer dans des problèmes connexes. Il importe d'aller droit à la question précise, dont la solution réglera le sort du pourvoi. Il convient toutefois, auparavant, de résumer les moyens et les problèmes que les parties ne soulèvent plus devant notre Cour. Ensuite, l'analyse portera sur la définition du problème qui demeure vraiment en cause dans le présent appel.

Le Tribunal administratif, la Cour supérieure, puis la Cour d'appel ont dû déterminer si le ministre pouvait rendre deux ordonnances successives, la première portant sur la caractérisation du site et la seconde sur l'exécution des travaux. On s'est interrogé sur les conditions d'ouverture à la prise de l'ordonnance de caractérisation, on a discuté la preuve présentée à ce sujet. Rien de ceci n'est encore en jeu devant notre Cour.

L'appel ne pose plus qu'une question, certes importante, d'équité procédurale ou de justice naturelle à l'égard de la décision du ministre. L'appelante soulève l'existence d'une situation de partialité ou, à tout le moins, d'apparence de partialité, qui vicierait radicalement la décision de prendre une ordonnance de caractérisation. L'argument repose sur le based on the premise that the Minister was bound by a duty of impartiality that he could not fulfil because of the existence of a conflict of interest. The conflict, it is submitted, arose both from the involvement of the Ministère in the decontamination operations performed earlier and from the economic consequences of the legal action that had been taken or was being threatened against it. The Quebec Court of Appeal based its reasoning on the same premise, but then sought to restrict its scope of application through the identification of exceptions to the duty of impartiality, such as necessity. We will therefore have to consider the nature and effects of that duty, and the conditions and scope of its application to an administrative decision-maker such as the Minister. If the argument that the Minister must be impartial, as framed by the appellant, is found to be without merit, the legal basis for the entire challenge to the decisions of the Tribunal and the Minister will fall apart. The application for judicial review will then have to be dismissed.

B. *The Statutory Framework Created by the Environment Quality Act*

Although the appeal heard by the Court raises an administrative law issue in the context of an application for judicial review, the question relates to an environmental protection problem in Quebec. It cannot be resolved without first examining the statutory framework that governs this field in Quebec. The examination of this framework will then make possible the proper identification and definition of the nature of the functions and powers assigned to the Minister, in connection with the administration of environmental legislation. With an accurate understanding of the objectives and operation of that scheme, we will then be better able to ascertain the content of the rules of procedural fairness which are relevant to the performance of the Minister's functions, and to determine whether they were breached when the characterization order was issued (*Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 886, *per* Iacobucci J.).

The Quebec legislation reflects the growing concern on the part of legislatures and of society

postulat voulant que le ministre soit assujetti à une obligation d'impartialité qu'il ne pouvait respecter en raison d'une situation de conflit d'intérêts. Celle-ci résulterait tant de l'implication du ministère dans les opérations de décontamination exécutées antérieurement que des conséquences économiques des poursuites engagées contre lui ou dont il est encore menacé. La Cour d'appel du Québec a fondé son raisonnement sur ce même postulat, en tempérant son contenu par la recherche d'exceptions à l'obligation d'impartialité, comme la nécessité. Il faudra alors s'interroger sur la nature et les effets de cette obligation et sur les conditions et les limites de son application à un décideur administratif tel que le ministre. Si le moyen relatif à l'existence d'une obligation d'impartialité du ministre, dans les termes définis par l'argumentation de l'appelante, s'avère mal fondé, toute la contestation de la décision du Tribunal et du ministre se trouve dépourvue de fondement juridique. Le rejet de la demande de révision judiciaire s'impose alors.

B. *Le cadre législatif établi par la Loi sur la qualité de l'environnement*

Bien que le pourvoi examiné par la Cour pose un problème de droit administratif dans le cadre d'un recours en révision judiciaire, la question en jeu se rattache à un problème de protection de l'environnement au Québec. Elle ne peut être résolue sans étudier au préalable le cadre législatif qui régit ce domaine au Québec. Cette étude permettra d'identifier et de définir correctement la nature des fonctions et des pouvoirs confiés au ministre dans l'application de la législation environnementale. Une compréhension exacte des objectifs et du fonctionnement de ce régime permettra alors de mieux définir le contenu des normes d'équité procédurale pertinentes à l'exécution des fonctions du ministre et de vérifier si elles ont été respectées lors de la prise de l'ordonnance de caractérisation (*Pearlman c. Comité judiciaire de la Société du Barreau du Manitoba*, [1991] 2 R.C.S. 869, p. 886, le juge Iacobucci). 18

La législation québécoise reflète la préoccupation croissante du législateur et de la société d'assurer la 19 about the safeguarding of the environment. That concern does not reflect only the collective desire to protect it in the interests of the people who live and work in it, and exploit its resources, today. It may also be evidence of an emerging sense of inter-generational solidarity and acknowledgement of an environmental debt to humanity and to the world of tomorrow (*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, at para. 1, *per* L'Heureux-Dubé J.).

préservation de l'environnement. Ce souci ne correspond pas seulement à la volonté collective de le protéger dans l'intérêt de ceux qui, aujourd'hui, y vivent, y travaillent ou en exploitent les ressources. Il témoigne peut-être de la naissance d'un sentiment de solidarité entre les générations et d'une dette environnementale envers l'humanité et le monde de demain (*114957 Canada Ltée (Spraytech, Société d'arrosage) c. Hudson (Ville)*, [2001] 2 R.C.S. 241, 2001 CSC 40, par. 1, la juge L'Heureux-Dubé).

20 The centrepiece of Quebec's environmental legislation is the *Environment Quality Act*, which was originally enacted in 1972. That Act recognizes that every person is entitled to a healthy environment and to the protection of the living species inhabiting it (s. 19.1 *EQA*). To ensure that this right may be effectively exercised, and that the duties created to give effect to it are executed, the Act provides for a variety of mechanisms for taking action. Various schemes are established for authorizing and monitoring activities that could threaten the environment. Others prohibit or restrict the emission of contaminants and impose obligations to decontaminate. There are also sometimes severe penal sanctions for breaches of the Act. The Superior Court is given broad powers of injunction, to prevent or stop any act that might interfere with the fundamental right to the preservation of the quality of the environment (s. 19.2 *EQA*).

La pièce centrale de la législation environnementale québécoise se retrouve dans la *Loi sur la qualité de l'environnement*. Adoptée à l'origine en 1972, cette loi reconnaît en effet le droit de toute personne à la qualité de l'environnement et à la sauvegarde des espèces vivantes qui y habitent (art. 19.1 *LQE*). Pour assurer la mise en œuvre de ce droit et l'exécution des obligations créées pour y donner effet, la loi a prévu des mécanismes d'intervention variés. Des régimes divers d'autorisation et de contrôle encadrent les activités susceptibles de menacer l'environnement. D'autres interdisent ou limitent l'émission de contaminants et imposent des obligations de décontamination. Des sanctions pénales parfois sévères punissent les infractions à la loi. Enfin, la Cour supérieure possède un pouvoir d'injonction étendu, pour prévenir ou arrêter tout acte susceptible de mettre en péril le droit fondamental à la préservation de la qualité de l'environnement (art. 19.2 *LQE*).

21 The Minister of the Environment plays a key role in the administration of the Act and the regulations under it, and in the implementation of the general policy on which they are based. The legislature has delegated substantial and diverse functions and powers to the Minister for such purposes. Broadly speaking, the Minister prepares plans for the conservation and protection of the environment and sees that they are carried out (s. 2(*c*) *EQA*). The legislature has also assigned the Minister the task of issuing authorizations, depollution certificates and permits required for any activity that might result in the discharge of contaminants into the environment or reduce the quality of the environment (ss. 22 and 31.11 *EQA*). In addition, the Act gives the

Le ministre de l'Environnement est appelé à jouer un rôle clé dans l'application de la loi, ainsi que de ses règlements d'application, et dans la mise à exécution des politiques générales qui les inspirent. Le législateur a, en effet, investi le ministre de fonctions et pouvoirs importants et diversifiés à ces fins. En gros, le ministre élabore les plans de conservation et de protection de l'environnement et veille à leur mise en œuvre (al. 2*c*) *LQE*). Le législateur le charge, de plus, d'accorder les autorisations, attestations d'assainissement et permis requis pour toute activité susceptible d'entraîner le rejet de contaminants dans l'environnement ou de diminuer la qualité de celui-ci (art. 22 et 31.11 *LQE*). La loi attribue aussi au ministre des pouvoirs

Minister broad powers to act in order to prevent harm to the quality of the environment by making various categories of orders prescribing various corrective measures (see, for example, ss. 25 and 27 *EQA*). Morever, the Minister may institute the civil or penal proceedings that are necessary for the proper enforcement of the Act (s. 19.3 *EQA* and ss. 106 to 115 *EQA*). The Minister may also have the necessary corrective work executed and its cost recovered from the offenders (ss. 113 to 115.1 *EQA*).

The power to make orders that is in issue in this appeal belongs to a class of powers delegated to the Minister which allow him to take action whenever contaminants are found in the environment. Other provisions in the Act, such as ss. 113 and 115.1, authorize the Minister to have the work needed to eliminate the contaminants executed, and to try to recover its cost from the parties responsible later. Section 31.42 provides for a different approach. Under that provision, the Minister may impose an obligation on the parties responsible for the contamination of the environment to conduct the studies required in order to ascertain the nature of the problem identified, to submit a plan for the corrective work and, where applicable, to have that work performed at their own expense. As we have seen, the order issued under s. 31.42 is subject to appeal to the ATQ. As well, neglect or refusal to carry out such an order entitles the Minister to initiate the civil or penal proceedings provided for in, *inter alia*, Division XIII of the Act. We need not examine the legal rules applicable to the proceedings in this appeal. Nor, in the context of this appeal, do we need to examine the nature and scope of the defences that could be raised in the course of proceedings. Those questions will undoubtedly provide the subject matter of future developments in the case law.

Section 31.42 *EQA*, which was enacted in 1990 (S.Q. 1990, c. 26, s. 4), applies what is called the polluter-pay principle, which has now been incorporated into Quebec's environmental legislation. In fact, that principle has become firmly entrenched in environmental law in Canada. It is found in almost all federal and provincial

d'intervention considérables pour prévenir les atteintes à la qualité de l'environnement au moyen de catégories variées d'ordonnances prescrivant des correctifs divers (voir, par exemple, art. 25 et 27 *LQE*). Il peut, de même, engager les procédures civiles ou pénales nécessaires à la bonne exécution de la loi (art. 19.3 *LQE* et art. 106 à 115 *LQE*). Enfin, la législation lui reconnaît le droit de faire exécuter les travaux correctifs nécessaires et d'en recouvrer le coût des contrevenants (art. 113 à 115.1 *LQE*).

22 Le pouvoir d'ordonnance en cause dans le présent appel représente l'un des pouvoirs d'intervention accordés au ministre en cas de présence de contaminants dans l'environnement. D'autres dispositions de la loi, comme les art. 113 et 115.1, lui permettent de faire exécuter lui-même les travaux nécessaires pour les éliminer et de tenter d'en recouvrer plus tard le coût des auteurs de la contamination. L'article 31.42 prévoit une approche différente. En vertu de cette disposition, le ministre peut imposer aux auteurs d'une contamination de l'environnement l'obligation d'effectuer les études nécessaires pour préciser la nature du problème appréhendé, de présenter un plan de travaux correctifs et, le cas échéant, d'exécuter ces derniers à leurs propres frais. Comme on l'a vu plus haut, l'ordonnance rendue en vertu de l'art. 31.42 est sujette à appel devant le TAQ. Par ailleurs, le défaut ou le refus d'exécuter une telle ordonnance donne ouverture à des procédures judiciaires civiles ou pénales prévues notamment à la section XIII de la loi, dont nous n'avons pas à examiner le régime juridique dans le présent appel. Dans le contexte de ce dernier, il n'y a pas lieu non plus d'étudier la nature et la portée des moyens de défense qui pourraient être opposés à ces procédures. Ces questions feront sans doute l'objet de développements jurisprudentiels dans l'avenir.

23 Adopté en 1990 (L.Q. 1990, ch. 26, art. 4), l'art. 31.42 *LQE* applique le principe dit du pollueur-payeur, maintenant intégré dans la législation environnementale du Québec. Ce principe est d'ailleurs bien établi dans le droit de l'environnement du Canada. Il se retrouve dans presque toutes les lois fédérales ou provinciales sur

environmental legislation, as may be seen: *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33; *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12, ss. 6, 7; *Fisheries Act*, R.S.C. 1985, c. F-14, s. 42; *Waste Management Act*, R.S.B.C. 1996, c. 482, ss. 26.5(1), 27(1), 27.1, 28.2, 28.5; *Environment Management Act*, R.S.B.C. 1996, c. 118, s. 6(3); *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 2(i), 112, 113(1), 114(1), 116; *Environmental Management and Protection Act, 2002*, S.S. 2002, c. E-10.21, ss. 7, 9, 12, 14, 15, 46; *Contaminated Sites Remediation Act*, S.M. 1996, c. 40, ss. 1(1)(c)(i), 9(1), 15(1), 17(1), 21(a); *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 7, 8, 43, 93, 97, 99, 150, 190(1); *Pesticides Act*, R.S.O. 1990, c. P.11, ss. 29, 30; *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, ss. 16.1, 32, 84, 91; *Crown Forest Sustainability Act, 1994*, S.O. 1994, c. 25, s. 56(1); *Environment Act*, S.N.S. 1994-95, c. 1, ss. 2(c), 69, 71, 78(2), 88, 89, 90; *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, ss. 8(1), 9, 28, 29, Part XIII; *Environmental Protection Act*, R.S.P.E.I. 1988, c. E-9, ss. 7, 7.1, 21; *Environmental Protection Act*, R.S.N.W.T. 1988, c. E-7, ss. 4(2), 5.1, 6, 7, 16. (See R. Daigneault, "La portée de la nouvelle loi dite 'du pollueur-payeur'" (1991), 36 *McGill L.J.* 1027.) That principle is also recognized at the international level. One of the best examples of that recognition is found in the sixteenth principle of *Rio Declaration on Environment and Development*, UN Doc. A/Conf. 151/5/Rev. 1 (1992).

24 To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.

25 The procedure which authorizes the Minister to issue an order against whoever is responsible for the pollution under s. 31.42 *EQA* and its

l'environnement, comme on peut le constater : *Loi canadienne sur la protection de l'environnement (1999)*, L.C. 1999, ch. 33; *Loi sur la prévention de la pollution des eaux arctiques*, L.R.C. 1985, ch. A-12, art. 6, 7; *Loi sur les pêches*, L.R.C. 1985, ch. F-14, art. 42; *Waste Management Act*, R.S.B.C. 1996, ch. 482, art. 26.5(1), 27(1), 27.1, 28.2, 28.5; *Environment Management Act*, R.S.B.C. 1996, ch. 118, art. 6(3); *Environmental Protection and Enhancement Act*, R.S.A. 2000, ch. E-12, art. 2(i), 112, 113(1), 114(1), 116; *Environmental Management and Protection Act, 2002*, S.S. 2002, ch. E-10.21, art. 7, 9, 12, 14, 15, 46; *Loi sur l'assainissement des lieux contaminés*, L.M. 1996, ch. 40, art. 1(1)c)(i), 9(1), 15(1), 17(1), 21a); *Loi sur la protection de l'environnement*, L.R.O. 1990, ch. E.19, art. 7, 8, 43, 93, 97, 99, 150, 190(1); *Loi sur les pesticides*, L.R.O. 1990, ch. P.11, art. 29, 30; *Loi sur les ressources en eau de l'Ontario*, L.R.O. 1990, ch. O.40, art. 16.1, 32, 84, 91; *Loi de 1994 sur la durabilité des forêts de la Couronne*, L.O. 1994, ch. 25, art. 56(1); *Environment Act*, S.N.S. 1994-95, ch. 1, art. 2c), 69, 71, 78(2), 88, 89, 90; *Environmental Protection Act*, S.N.L. 2002, ch. E-14.2, art. 8(1), 9, 28, 29, Part XIII; *Environmental Protection Act*, R.S.P.E.I. 1988, ch. E-9, art. 7, 7.1, 21; *Loi sur la protection de l'environnement*, L.R.T.N.-O. 1988, ch. E-7, art. 4(2), 5.1, 6, 7, 16. (Voir R. Daigneault, « La portée de la nouvelle loi dite "du pollueur-payeur" » (1991), 36 *R.D. McGill* 1027.) Ce principe est aussi reconnu au niveau international. L'un des meilleurs exemples de cette reconnaissance se trouve dans le seizième principe de la *Déclaration de Rio sur l'environnement et le développement*, Doc. NU A/Conf. 151/5/Rev. 1 (1992).

Dans une optique de développement durable, ce principe impose aux pollueurs la responsabilité de corriger les situations de contamination dont ils sont responsables et d'assumer directement et immédiatement les coûts de la pollution. Il cherche en même temps à rendre les auteurs de celle-ci plus soucieux des impératifs de la préservation des écosystèmes, dans le cours de leurs activités économiques.

La procédure d'ordonnance rendue par le ministre et dirigée contre l'auteur de la pollution, qu'instituent l'art. 31.42 *LQE* et les dispositions related provisions represents one of the most important enforcement tools available in Quebec's environmental legislation. The adaptation of such a procedure appeared of singular importance in the search for a solution to soil contamination problems. On that point, it should be noted that the decision of the ATQ quoted passages from the debates of the National Assembly of Quebec in 1990 confirming that legislative objective. Section 31.42 allows for the use of a broad discretion in pursuit of that objective. The Minister may issue a characterization order or prescribe that a work program be carried out. The Act authorizes the Minister to issue an order when he believes on reasonable grounds that a contaminant harmful to the environment is present in a place and may cause harm to human beings or the ecosystem. The order may be made against whoever is responsible for the contamination, including anyone whose activity occurred before the coming into force of the Act in 1990. As discretionary and broad as the power to make orders appears to be, nonetheless important procedural requirements circumscribe it. We must now examine them.

Those procedural rules provide more guidance about certain aspects of the general duty of procedural fairness that s. 2 of the *Act respecting Administrative Justice* imposes on administrative decision-makers, by codifying a consistent line of decisions in Canadian administrative law (P. Issalys and D. Lemieux, *L'action gouvernementale: Précis de droit des institutions administratives* (2nd ed. 2002), at p. 847). First, s. 31.44 *EQA* requires that the Minister give 15 days' prior notice of his intention to issue an order. Such a notice shall state, *inter alia*, that the person to whom it is directed may present observations within the time specified, and shall describe the reasons for the proposed decision. Section 31.44 then refers to s. 5 of the *Act respecting Administrative Justice*, which describes the obligations with which an administrative authority such as the Minister must comply before making an individual and unfavourable decision in respect of a citizen. That provision restates the requirement that the interested parties be given prior notice, also sets out the right to present observations and produce

connexes à celui-ci, représente l'un des instruments d'intervention les plus importants dans la législation environnementale du Québec. En effet, l'adoption de cette procédure paraissait particulièrement appropriée pour trouver une solution aux problèmes de contamination de terrains. La décision du TAQ a d'ailleurs cité, à ce propos, certains extraits des débats de l'Assemblée nationale du Québec, en 1990, qui confirment l'existence de cet objectif législatif. Pour mettre ce dernier en application, l'art. 31.42 accorde un pouvoir discrétionnaire large. Le ministre peut rendre une ordonnance de caractérisation ou prescrire l'exécution d'un programme de travaux. La loi autorise la prise de l'ordonnance lorsque le ministre a des motifs raisonnables de croire qu'un contaminant nuisible à l'environnement est présent dans un lieu et peut porter atteinte à la personne humaine ou à l'écosystème. L'ordonnance peut viser tous les auteurs de la contamination, y compris ceux dont l'activité est antérieure à l'entrée en vigueur de la loi, en 1990. Si discrétionnaire, si large qu'il paraisse, ce pouvoir d'ordonnance se trouve cependant encadré par des exigences procédurales importantes, qu'il faut maintenant examiner.

Ces règles procédurales précisent certains aspects de l'obligation générale de respect de l'équité procédurale que l'art. 2 de la *Loi sur la justice administrative* impose aux décideurs administratifs, en codifiant ainsi une jurisprudence constante en droit administratif canadien (P. Issalys et D. Lemieux, *L'action gouvernementale : Précis de droit des institutions administratives* (2e éd. 2002), p. 847). D'abord, l'art. 31.44 *LQE* exige que le ministre donne un préavis de 15 jours de son intention de rendre une ordonnance. Cet avis indique notamment que la personne visée peut transmettre ses observations dans les délais précisés et décrit les motifs justifiant la décision envisagée. L'article 31.44 renvoie ensuite à l'art. 5 de la *Loi sur la justice administrative*. Celui-ci décrit les obligations dont doit s'acquitter une autorité administrative comme le ministre avant de prendre une décision particulièrement défavorable à un administré. Cette disposition réitère l'exigence de l'avis préalable à l'administré. Elle rappelle aussi le droit de ce dernier de présenter des observations 26 documents concerning the proposed decision and reiterates that reasons must be given in support of the decision.

27 The record confirms that the necessary notices were given. The appellant had an opportunity to present its observations, which the Minister reviewed before issuing a decision, for which reasons were given. The procedural framework established by the Act was therefore followed. As we have seen, the debate then focused on another issue which is also a component of the principles of natural justice: the nature and scope of the duty of impartiality that applies to the decision-maker, the Minister. That issue was incorrectly addressed, however, on the basis of an erroneous understanding both of the duty of impartiality of the Minister and of the consequences of the conflict of interest to which a breach of that principle allegedly gave rise. At the outset of the analysis, a preferred approach would have been to attempt to determine the applicability of the concept of impartiality relied upon by the appellant, in its full potential reach. In this perspective, the scope of the duty of impartiality upon an administrative decision-maker such as the Minister in the exercise of an essentially discretionary and political power, and the manner in which that duty is discharged, would then have had to be examined.

C. *The Duty of Impartiality in Administrative Law and Variations of That Duty*

28 The duty of impartiality ranks among the fundamental obligations of the courts. The *Canadian Charter of Rights and Freedoms* recognizes the right of any person charged with an offence to be tried by an independent and impartial tribunal (s. 11(*d*)). In the matters which fall within the legislative jurisdiction of Quebec, s. 23 of the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, recognizes the right to a fair hearing by an independent and impartial tribunal as a fundamental human right. The concept of impartiality refers to the decision-maker's state of mind (*Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685, *per* Le Dain J.). The decision-maker must approach the issue submitted to him or her with an open mind,

et des documents au sujet de la décision projetée et exige que cette dernière soit motivée.

Le dossier confirme que les avis nécessaires ont été donnés. L'appelante a pu présenter ses observations que le ministre a examinées, avant de communiquer une décision motivée. Le cadre procédural prévu par la loi a donc été respecté. Comme on l'a vu, le débat s'est alors noué autour d'une autre question, qui appartient, elle aussi, aux principes de justice naturelle, celle de la nature et de la portée de l'obligation d'impartialité qui s'imposerait au décideur, le ministre. Ce débat s'est toutefois mal engagé, à partir d'une conception erronée tant de la nature du devoir d'impartialité imposé au ministre que des conséquences des conflits d'intérêts que sa violation aurait provoqués. Au départ, il aurait mieux valu chercher à déterminer la pertinence de l'application, dans toute son ampleur, du concept d'impartialité qu'invoque l'appelante. Dans cette optique, il aurait fallu examiner l'étendue et les modalités de l'application de cette obligation d'impartialité à un décideur administratif, tel que le ministre, alors qu'il exerce un pouvoir essentiellement discrétionnaire, à caractère politique.

C. *La nature et les modulations de l'obligation d'impartialité en droit administratif*

L'exigence d'impartialité constitue l'une des obligations fondamentales des tribunaux de l'ordre judiciaire. La *Charte canadienne des droits et libertés* reconnaît le droit de tout prévenu à un procès devant un tribunal impartial et indépendant (al. 11*d*)). Dans les domaines relevant de la compétence législative du Québec, l'art. 23 de la *Charte des droits et libertés de la personne*, L.R.Q., ch. C-12, range parmi les droits fondamentaux de la personne, celui d'obtenir une audition impartiale devant un tribunal indépendant et sans préjugés. Cette notion d'impartialité réfère à l'état d'esprit du décideur (*Valente c. La Reine*, [1985] 2 R.C.S. 673, p. 685, le juge Le Dain). Celui-ci doit trancher le problème qui lui est soumis en toute liberté d'esprit, not influenced by personal interests or outside pressure. It is not sufficient that the decision-maker be impartial in his or her own mind, internally, to the satisfaction of his or her own conscience. It is also necessary that the decision-maker appear impartial in the objective view of a reasonable and well-informed observer (*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, *per* de Grandpré J.; also : *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, 2003 SCC 36, at para. 17, *per* McLachlin C.J. and Bastarache J.). The duty of impartiality, which originated with the judiciary, has now become part of the principles of administrative justice.

The principles of natural justice do undeniably govern the actions of administrative decision-makers, as is in fact evidenced by s. 2 of the *Act respecting Administrative Justice* (P. Garant, *Droit administratif* (4th ed. 1996), vol. 2, *Le contentieux*, at pp. 319-320 and 338; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at p. 1190, *per* Sopinka J.; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 20, *per* L'Heureux-Dubé J.). Imperial therefore argues that the duty of impartiality applies in its full rigour and that the Minister did not meet its requirements.

The appellant argued that the Minister had placed himself in an insoluble conflict of interest because of his unfortunate involvement in the failed decontamination of the Lévis Marina site and the legal and financial consequences of that involvement for the Minister. The appellant underlines that the decisions made by the Minister, and the actions taken by him, in the course of those decontamination operations even resulted in the loss of any appearance of impartiality. Accordingly, the appellant submits, his capacity to make an impartial decision was irremediably compromised in the eyes of any properly informed, objective and reasonable observer. However, that is not the full extent of the problem. The appellant then points out that legal action has already been initiated against the Minister by a number of owners of contaminated land, claiming substantial damages from him. In

sans être influencé par des intérêts personnels et des pressions externes. Il ne suffit pas qu'il soit impartial en lui-même, intérieurement, à la satisfaction de sa conscience. Il importe aussi qu'il paraisse impartial au regard objectif d'un observateur raisonnable et bien informé (*Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, p. 394, le juge de Grandpré; aussi : *Bell Canada c. Association canadienne des employés de téléphone*, [2003] 1 R.C.S. 884, 2003 CSC 36, par. 17, la juge en chef McLachlin et le juge Bastarache). Née dans l'ordre judiciaire, cette obligation fait aussi partie maintenant des principes de la justice administrative.

Indéniablement, en effet, les principes de justice naturelle régissent l'action des décideurs administratifs, comme l'atteste d'ailleurs l'art. 2 de la *Loi sur la justice administrative* (P. Garant, *Droit administratif* (4^{e} éd. 1996), vol. 2, *Le contentieux*, p. 319-320 et 338; *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170, p. 1190, le juge Sopinka; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 20, la juge L'Heureux-Dubé). Impériale plaide alors que l'obligation d'impartialité s'applique dans toute sa rigueur et que le ministre ne l'a pas respectée. 29

En effet, le ministre se serait trouvé placé dans une situation de conflit d'intérêts insoluble, en raison de son implication malheureuse dans la décontamination ratée du site de la Marina de Lévis et des conséquences juridiques et financières qu'elle entraîne pour lui. L'appelante souligne que les décisions prises par le ministre et les gestes qu'il a posés lors de ces opérations de décontamination le privaient même de toute apparence d'impartialité. Dès lors, son aptitude à prendre une décision impartiale aurait été irrémédiablement compromise aux yeux de tout observateur correctement informé, objectif et raisonnable. Ce n'est toutefois pas tout. L'appelante rappelle alors que le ministre a déjà été poursuivi par quelques propriétaires de terrains contaminés qui lui réclament des dommages-intérêts substantiels. De plus, des mises en demeure ont été envoyées au ministère dans plusieurs dossiers où d'autres actions 30 addition, notices have been sent to the Ministère in a number of cases in which further actions in damages remain possible. The potential risks of damage judgments in those cases put the Minister in a situation in which he is incapable of acting with the necessary independence in applying s. 31.42. In the appellant's submission, the decision to proceed by issuing a characterization order is necessarily tainted by the suspicion that the Minister's intention in so doing was to insulate himself from the possible legal consequences of his unfortunate involvement in the decontamination operations at the Marina site. Allowing the Minister to act with impunity in these circumstances would amount to ratifying a genuine abuse or misuse of power.

31 The appellant's reasoning thus treats the Minister, for all intents and purposes, like a member of the judiciary, whose personal interest in a case would make him apparently biased in the eyes of an objective and properly informed third party. This line of argument overlooks the contextual nature of the content of the duty of impartiality which, like that of all of the rules of procedural fairness, may vary in order to reflect the context of a decision-maker's activities and the nature of its functions (*Baker*, *supra*, at para. 21; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, *per* L'Heureux-Dubé J.; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 323-24, *per* Gonthier J.; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636, *per* Cory J.). These variations in the actual content of the principles of natural justice acknowledge the great diversity in the situations of administrative decision-makers and in the roles they play, as intended by legislatures (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, at para. 24, *per* McLachlin C.J.). The categories of administrative bodies involved range from administrative tribunals whose adjudicative functions are very similar to those of the courts, such as grievance arbitrators in labour law, to bodies that perform multiple tasks and whose adjudicative functions are merely one aspect of broad duties and powers that sometimes include regulation-making

en dommages-intérêts demeurent possibles. Les risques de condamnations pécuniaires dans ces affaires placent alors le ministre dans une situation où il se trouve incapable d'agir avec l'indépendance nécessaire dans l'application de l'art. 31.42. Selon l'appelante, sa décision de recourir à la procédure de l'ordonnance de caractérisation demeure nécessairement entachée du soupçon qu'il entendait ainsi se soustraire aux conséquences judiciaires possibles de son implication malencontreuse dans les opérations de décontamination du site de la Marina. Laisser le ministre agir impunément en pareilles circonstances équivaudrait à ratifier un véritable abus ou détournement de pouvoir.

Le raisonnement de l'appelante traite ainsi le ministre, à toutes fins utiles, comme un juge de l'ordre judiciaire, que son intérêt personnel dans une affaire rendrait apparemment partial aux yeux d'un tiers objectif et correctement informé. On oublie alors que le contenu de l'obligation d'impartialité, tout comme celui de l'ensemble des règles d'équité procédurale, est susceptible de varier pour s'adapter au contexte de l'activité d'un décideur administratif et à la nature de ses fonctions (*Baker*, précité, par. 21; *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653, p. 682, la juge L'Heureux-Dubé; *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, p. 323-324, le juge Gonthier; *Newfoundland Telephone Co. c. Terre-Neuve (Board of Commissioners of Public Utilities)*, [1992] 1 R.C.S. 623, p. 636, le juge Cory). Cette variabilité du contenu effectif des principes de justice naturelle reflète la très grande diversité des situations des décideurs administratifs et des rôles qu'ils sont appelés à jouer, conformément à la volonté des législateurs (*Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 R.C.S. 781, 2001 CSC 52, par. 24, la juge en chef McLachlin). Les catégories d'organismes administratifs visés vont du tribunal administratif qui, dans son travail juridictionnel, est très voisin des tribunaux judiciaires, comme par exemple les arbitres de griefs en droit du travail, aux organismes remplissant des tâches multiples, où la fonction juridictionnelle ne constitue qu'un aspect d'attributions power. The notion of administrative decision-maker also includes administrative managers such as ministers or officials who perform policy-making discretionary functions within the apparatus of government. The extent of the duties imposed on the administrative decision-maker will then depend on the nature of the functions to be performed and on the legislature's intention. In each case, the entire body of legislation that defines the functions of an administrative decision-maker, and the framework within which his or her activities are carried on, will have to be carefully examined. The determination of the actual content of the duties of procedural fairness that apply requires such an analysis.

étendues qui incluent parfois l'exercice de pouvoirs réglementaires. La notion de décideur administratif inclut enfin des gestionnaires administratifs comme des ministres ou des fonctionnaires appelés à remplir des fonctions discrétionnaires, à contenu politique, au sein de l'appareil gouvernemental. L'intensité des obligations que les principes de justice naturelle imposent au décideur administratif dépend alors de la nature des fonctions exercées et de la volonté du législateur. Il faut à chaque fois examiner attentivement l'ensemble des dispositions qui définissent les fonctions d'un décideur administratif et le cadre de son action. Seule cette analyse permet de déterminer le contenu effectif des obligations d'équité procédurale pertinentes.

In his management of the Marina file, the Minister made a decision that especially targeted Imperial. That decision may impose substantial expenses on the parties which the Minister considers to be the authors of the pollution of the site in question. There is no doubt that the characterization order calls for major studies in order to determine the condition of the site and for the preparation of recommendations about the measures which should be taken to remedy the contamination of the site. Given these circumstances, we need a concrete definition of the nature and extent of the rules of procedural fairness that apply to the Minister's decision. Is the Minister bound by a duty of impartiality, in its full scope and rigour, as are judges or administrative tribunals that essentially perform adjudicative functions, such as the ATQ or grievance arbitrators in the case of labour law? On this point, the decisions of this Court stress the crucial importance of a careful examination of the applicable legislation in order to determine the nature and scope of the rules of procedural fairness that apply to action taken by an administrative decision-maker (*Ocean Port Hotel*, *supra*, at paras. 20 and 22; *Bell Canada*, *supra*, at para. 22).

32 Dans le cours de sa gestion du dossier de la Marina, le ministre a pris une décision qui visait Impériale de façon particulière. Cette décision peut imposer des dépenses importantes à celui que le ministre considère comme l'auteur de la pollution du site en cause. En effet, l'ordonnance de caractérisation exige sans doute des études importantes pour déterminer l'état du site et préparer des recommandations sur les mesures propres à porter remède à la contamination des lieux. Dans ce contexte, on doit alors rechercher concrètement la nature et les limites des règles d'équité procédurale pertinentes à la décision du ministre. Une obligation d'impartialité s'applique-t-elle à lui dans toute son ampleur et sa rigueur, comme dans le cas des juges de l'ordre judiciaire ou des tribunaux administratifs remplissant essentiellement des fonctions juridictionnelles, comme le TAQ ou les arbitres de griefs en droit du travail? À cet égard, la jurisprudence de notre Cour souligne l'importance critique d'un examen attentif de la législation applicable pour déterminer la nature et la portée des règles d'équité procédurale applicables à l'action d'un décideur administratif (*Ocean Port Hotel*, précité, par. 20 et 22; *Bell Canada*, précité, par. 22).

The *Environment Quality Act* defines the nature and extent of the procedural fairness obligations by which the Minister is bound when he issues a characterization order. Those procedural obligations result from the express terms of the Act, such as requirements respecting the structure for managing

33 La *Loi sur la qualité de l'environnement* définit la nature et les limites des obligations d'équité procédurale qui lient le ministre lorsqu'il rend une ordonnance de caractérisation. Ces obligations procédurales résultent des termes exprès de la loi comme des exigences de la structure de gestion des problèmes

environmental problems and the type of functions assigned to the Minister for that purpose. The method of managing environmental problems selected by the legislature creates a situation that the legislature clearly intended to create and to which it clearly agreed. The role assigned to the Minister by the legislation sometimes inevitably places the Minister in a conflict with those subject to the law he administers, in the course of the implementation of environmental legislation.

34 When the Minister has to make a specific decision concerning someone subject to the law, he must comply with precise procedural obligations, which were described earlier. Generally speaking, those obligations require that he give notice to the person concerned, receive and review the representations and information submitted by that person and give reasons to that person for his decision. The effect of this procedural framework is that the Minister must carefully and attentively examine the observations submitted to him. However, that obligation is not equivalent to the impartiality that is required of a judge or an administrative decision-maker whose primary function is adjudication. In performing his functions, the Minister is involved in the management of an environmental protection system. He must make decisions in a context in which the need for the long-term management of environmental problems plays a prominent role, and in which he must ensure that the fundamental legislative policy on which the interpretation and application of environment quality legislation are based is implemented. The Minister has the responsibility of protecting the public interest in the environment, and must make his decisions in consideration of that interest.

35 What remains to be considered is the problem of the Minister's personal interest, as that interest was expressed by the trial judge. The decision in *Pearlman*, *supra*, provided necessary guidance on the nature of the personal interest that would put an administrative decision-maker in a conflict of interest within the meaning of the principles of procedural fairness. That case dealt with disciplinary proceedings taken by the Manitoba Law Society against one of its members, who argued

d'environnement et du type de fonctions attribuées au ministre dans ce cadre. Le mode de gestion des problèmes environnementaux choisi par le législateur crée une situation clairement voulue et acceptée par celui-ci. Le rôle que la législation a attribué au ministre place parfois celui-ci inévitablement en conflit avec des administrés, dans le cours de ses activités d'application de la législation environnementale.

Lorsqu'il est appelé à prendre une décision particulière à l'égard d'un administré, le ministre doit se conformer à des obligations procédurales précises, qui ont été décrites plus haut. Celles-ci lui demandent, en gros, de donner des avis à l'administré, de prendre en considération ses observations et ses informations et de lui communiquer les motifs de sa décision. Ce cadre procédural implique que le ministre doit examiner avec soin et attention les observations qui lui sont transmises. Cette obligation ne correspond toutefois pas à l'impartialité exigée d'un juge de l'ordre judiciaire ou d'un décideur administratif chargé principalement de fonctions juridictionnelles. Dans le cadre de ses fonctions, le ministre, en effet, gère un système de protection de l'environnement. Il doit prendre ses décisions dans un contexte marqué par les exigences de la gestion de longue durée de problèmes environnementaux, où il doit assurer la mise en œuvre des politiques législatives fondamentales qui inspirent l'interprétation et l'application de la législation sur la qualité de l'environnement. Responsable de la préservation de l'intérêt public dans le domaine de l'environnement, le ministre doit arrêter ses décisions en fonction de celui-ci.

Reste maintenant à examiner le problème de l'intérêt personnel du ministre, selon le vocabulaire utilisé par le juge de première instance. L'arrêt *Pearlman*, précité, a apporté des précisions nécessaires sur la nature de l'intérêt personnel qui placerait un décideur administratif dans une situation de conflit d'intérêts, au sens des principes d'équité procédurale. Cette affaire portait sur des procédures disciplinaires engagées par le Barreau du Manitoba contre l'un de ses membres. Celui-ci soutenait que that the members of the Law Society's Discipline Committee were in an unavoidable conflict of interest. The enabling statute of the professional body in question allowed it to award the costs of a disciplinary proceeding against a lawyer subject to those proceedings. In the submission of the appellant Pearlman, the members of the committee therefore had a pecuniary interest in ordering that costs be paid. They would benefit from payment of those costs as members of the Law Society, and that situation created an unacceptable appearance of conflict of interest (*Pearlman*, at p. 883, *per* Iacobucci J.).

les membres du comité de discipline du Barreau se trouvaient placés dans un conflit d'intérêts inextricable. En effet, la loi constitutive de ce corps professionnel permettait de condamner le prévenu aux dépens d'une instance disciplinaire. Selon l'appelant *Pearlman*, les membres du comité avaient alors un intérêt financier à ordonner le paiement de frais. Ils bénéficieraient du paiement de ceux-ci en tant que membres du Barreau. Cette situation créerait une apparence inadmissible de conflit d'intérêts (*Pearlman*, p. 883, le juge Iacobucci).

The Court rejected that argument. It again stressed that the manner in which the rules of natural justice are applied depends on the context (pp. 884-85). The duty to remain untainted by personal interest applied in a context in which the members of the Discipline Committee were performing their duties in the common interests of the profession and for the protection of the public, not for their personal benefit. Any interest they may have had in recovering the costs of the proceedings was too remote and attenuated to give rise to a reasonable apprehension of bias in the eyes of an objective and properly informed observer (pp. 891-92, *per* Iacobucci J.).

La Cour rejeta ce moyen. Elle souligna à nouveau le caractère contextuel de l'application des règles de justice naturelle (p. 884-885). L'obligation de désintéressement se situait dans un contexte où les membres du comité de discipline accomplissaient leur tâche dans l'intérêt commun de la profession et pour la protection du public, et non pour leur bénéfice personnel. Leur intérêt éventuel au recouvrement des dépens de la procédure conservait un caractère trop éloigné et trop minime pour créer une apparence raisonnable de partialité aux yeux d'un observateur objectif et correctement informé (p. 891-892, le juge Iacobucci). 36

In light of the foregoing, I am of the view that the Minister was merely defending, in the context of this case, the inseparable interests of the public and the state in the protection of the environment.

À la lumière de ce qui précède, j'estime que le ministre ne défendait, dans le contexte de la présente affaire, que les intérêts indissociables du public et de l'État dans la protection de l'environnement. 37

VI. Application of the Rules of Procedural Fairness

VI. L'application des règles d'équité procédurale

In this case, as was discussed above, the Minister used a discretionary political power for the purposes of the application of s. 31.42 *EQA*. A contamination problem had to be dealt with, and he had to choose the solution that he considered to be the most appropriate. That choice fell within the discretion assigned to him by the Act (Issalys and Lemieux, *supra*, at p. 127). He had to choose among doing nothing, carrying out the necessary investigations and work and then trying to recover the cost from the persons responsible for the contamination of the site, and going directly to those persons and trying

Dans la présente affaire, le ministre, rappelons-le, exerçait un pouvoir discrétionnaire, à caractère politique, dans l'application de l'art. 31.42 *LQE*. Face à un problème de contamination, il devait choisir la solution qu'il jugeait la plus appropriée. Ce choix tombait dans la discrétion que lui reconnaissait la loi (Issalys et Lemieux, *op. cit.*, p. 127). Il lui fallait opter entre ne rien faire, exécuter les investigations et travaux nécessaires, puis essayer d'en récupérer le coût des responsables de la contamination des lieux, ou s'adresser directement à ceux-ci pour tenter de les contraindre à prendre les mesures requises à 38 to compel them to take the necessary action at their own expense. The Minister was not performing an adjudicative function in which he was acting as a sort of judge. On the contrary, he was performing his functions of management and application of environmental protection legislation. The Minister was performing a mainly political role which involved his authority, and his duty, to choose the best course of action, from the standpoint of the public interest, in order to achieve the objectives of the environmental protection legislation.

39 Having regard to the context, which includes the Minister's functions viewed in their entirety, as well as to the framework within which his power to issue orders is exercised, the concept of impartiality governing the work of the courts did not apply to his decision. Certainly, the Minister must comply with the procedural fairness obligations set out in the law such as the requirements that notice be given to interested persons and that reasons for the decision be given. Once those requirements have been met, the principles of procedural fairness that apply to the situation, and that are in fact, as we have seen, codified by the *Act respecting Administrative Justice*, required only that he comply with the procedural obligations set out in the law and that he carefully and attentively consider the representations made by the person subject to the law he administers. Moreover, applying the principles stated in *Pearlman*, the interests in issue certainly did not amount to a personal interest within the meaning applied to that expression in the case law. The only interests the Minister was representing were the public interest in protecting the environment and the interest of the State, which is responsible for preserving the environment. In the circumstances of this case, it would be difficult to separate those interests. In exercising his discretion, the Minister could properly consider a solution that might save some public money. Accordingly, he applied one of the organizing principles of the *Environment Quality Act*, the polluter-pay principle. There was no conflict of interest such as would warrant judicial intervention, let alone any abuse or misuse of power. The Minister acted within the framework provided by the applicable law and in accordance with that law. There was no need to rely on the theory of

leurs propres frais. Le ministre ne remplissait pas alors une fonction juridictionnelle, où il aurait agi comme une sorte de juge. Au contraire, il exécutait ses fonctions d'administration et d'application de la législation sur la protection de l'environnement. Le ministre remplissait un rôle largement politique, qui faisait appel à son pouvoir et à son devoir de choisir les meilleures méthodes d'intervention, avec le souci de protéger l'intérêt public, pour atteindre les objectifs de la législation sur la protection de l'environnement.

Compte tenu du contexte de l'ensemble des fonctions du ministre comme du cadre de la mise en œuvre de son pouvoir d'ordonnance, la notion d'impartialité rattachée à l'action des tribunaux de l'ordre judiciaire ne s'appliquait pas à sa décision. Le ministre doit certes se conformer aux obligations d'équité procédurale prévues par la loi, comme les avis aux intéressés et la motivation de la décision. Cela fait, les principes d'équité procédurale pertinents à la situation, codifiés d'ailleurs, comme on l'a vu, par la *Loi sur la justice administrative*, exigeaient seulement qu'il exécute les obligations procédurales prévues par la loi et qu'il considère avec soin et attention les observations de l'administré. Par ailleurs, suivant les principes posés dans l'arrêt *Pearlman*, les intérêts en cause ne correspondaient sûrement pas à un intérêt personnel au sens de la jurisprudence. Les seuls intérêts que défendait le ministre étaient l'intérêt public dans la protection de l'environnement et celui de l'État, chargé de préserver celui-ci. Dans le contexte de cette affaire, ces intérêts se dissocieraient difficilement. Dans le cadre de l'exercice de son pouvoir discrétionnaire, le ministre pouvait légitimement prendre en compte une solution qui se révélerait moins dispendieuse pour le trésor public. Ce faisant, il mettait en application l'un des principes organisateurs de la *Loi sur la qualité de l'environnement*, celui du pollueur-payeur. Il n'existait pas de situation de conflit d'intérêts donnant ouverture à une intervention judiciaire, encore moins d'abus ou de détournement de pouvoir. Le ministre agissait dans le cadre prévu par le droit applicable et conformément à celui-ci. Il n'est utile d'invoquer ni la théorie du chevauchement des fonctions ni celle de la nécessité, car aucun moyen ne donnait ouverture à des procédures en révision overlapping duties or the theory of necessity since there was no ground on which proceedings to review the decision of the Administrative Tribunal of Québec dismissing the appeal from the Minister's decision were available. The appellant's entire challenge rested on an erroneous understanding of the Minister's functions and of the nature of the relevant rules of procedural fairness.

VII. Conclusion

For these reasons, the appeal must be dismissed. I would award costs to the Attorney General of Quebec.

Appeal dismissed with costs.

Solicitors for the appellant: Desjardins Ducharme Stein Monast, Montréal.

Solicitor for the respondent: Department of Justice, Québec.

Solicitors for the mis en cause the Administrative Tribunal of Québec: Lemieux Chrétien Lahaye Corriveau, Québec.

Solicitor for the mis en cause the City of Lévis: City of Lévis, Lévis.

Solicitor for the intervener the Attorney General of Ontario: The Ministry of the Attorney General of Ontario, Toronto.

Solicitor of the intervener Friends of the Earth: Sierra Legal Defence Fund, Toronto.

de la décision du Tribunal administratif du Québec, rejetant l'appel de la décision du ministre. Toute la contestation de l'appelante reposait sur une conception erronée des fonctions du ministre et de la nature des normes d'équité procédurale pertinentes.

VII. Conclusion

Pour ces motifs, le pourvoi doit être rejeté. J'accorderais les dépens au procureur général du Québec. 40

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Desjardins Ducharme Stein Monast, Montréal.

Procureur de l'intimé : Ministère de la Justice, Québec.

Procureurs du mis en cause le Tribunal administratif du Québec : Lemieux Chrétien Lahaye Corriveau, Québec.

Procureur de la mise en cause Ville de Lévis : Ville de Lévis, Lévis.

Procureur de l'intervenant le procureur général de l'Ontario : Ministère du Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant les Ami(e)s de la Terre : Sierra Legal Defence Fund, Toronto.

TAB 19

[Indexed as: **Jameson House Properties Ltd., Re**]

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended And In the Matter of the Business Corporations Act, S.B.C., 2002, c. 57 And In the Matter of Jameson House Properties Ltd. and Jameson House Ventures Ltd.

Peyman Ashkenani, Diana Becker, Behzad Ershad (aka Kevin Ershad), Nausser Fathollahi, Mark Khademi (aka Mohsen Khademi), Robert Ledingham, David Polinski, Ali Sodagar, Tasleem Suleman, Zuyl Suleman, Ali Sarrafzadeh, Mehdi Sarrafzadeh, Taymour Yeganeh, Arash Alavi, Marjan Javaherian, Robert Lemon, Roshanak Mozafar, Ravin Agah, Burton Goldstein, Nora Goldstein, Roni Strul, Eddie Mok, Mansoor Tashakor and Kaveh Sefiddashti (Appellants / Respondents) and Jameson House Properties Ltd., Jameson House Ventures Ltd., and Ernst & Young Inc., in its capacity as Court Appointed Monitor (Respondents / Petitioners)

British Columbia Court of Appeal

Saunders, Levine, Groberman JJ.A.

Heard: July 13, 2009

Judgment: July 17, 2009

Docket: Vancouver CA037221, 2009 BCCA 339

M.A. Clemens, Q.C. for Appellants
D.A. Goult, J.R. Sandrelli, J. Schultz for Respondents
W.E.J. Skelly for Court Appointed Monitor
R. Butler for Attorney General of British Columbia

Bankruptcy and insolvency — Proving claim — Provable debts — Miscellaneous — Pre-sale units in development was subject to provisions of Real Estate Marketing and Development Act ("REDMA") under which respondent developers had certain disclosure obligations and purchasers certain remedial rights — Financing for development fell away and developer sought and obtained initial order providing for protection from creditors and restructuring under Companies' Creditors Arrangement Act ("CCAA") — Purchasers made application to be declared creditors in CCAA proceedings with right to make claims and vote on plan of compromise and arrangement proposed by developer — Court dismissed application — Purchasers appealed — Appeal dismissed — Identity of developer would not change on implementation of corporate restructuring of developer, and purchasers therefore had no right to rescind pre-sale agreements under s. 21 of REDMA — Failure of financing was not "material fact" that required developer to file and provide amendment to disclosure statement — Purchasers therefore had no right to take position that pre-sale agreements were not enforceable under s. 23 of REDMA — Because purchasers had no rights of rescission or to claim their agreements were unenforceable, they were not creditors for purposes of CCAA proceedings — Judge made no error in extending completion date of construction of units under pre-sale agreements — Declaratory terms of final order did not exceed scope of s. 11(4) of CCAA.

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Creditor approval — Pre-sale units in development was subject to provisions of Real Estate Marketing and Development Act ("REDMA") under which respondent developers had certain disclosure obligations and purchasers certain remedial rights — Financing for development fell away and developer sought and obtained initial order providing for protection from creditors and restructuring under Companies' Creditors Arrangement Act ("CCAA") — Purchasers made application to be declared creditors in CCAA proceedings with right to make claims and vote on plan of compromise and arrangement proposed by developer — Court dismissed application — Purchasers appealed — Appeal dismissed — Identity of developer would not change on implementation of corporate restructuring of developer, and purchasers therefore had no right to rescind pre-sale agreements under s. 21 of REDMA — Failure of financing was not "material fact" that required developer to file and provide amendment to disclosure statement — Purchasers therefore had no right to take position that pre-sale agreements were not enforceable under s. 23 of REDMA — Because purchasers had no rights of rescission or to claim their agreements were unenforceable, they were not creditors for purposes of CCAA proceedings — Judge made no error in extending completion date of construction of units under pre-sale agreements — Declaratory terms of final order did not exceed scope of s. 11(4) of CCAA.

Cases considered by *Levine J.A.*:

Chambers v. Pennyfarthing Development Corp. (1985), 64 B.C.L.R. 145, 20 D.L.R. (4th) 488, 1985 CarswellBC 182 (B.C. C.A.) — considered

Dwane v. Bastion Coast Homes Ltd. (2009), 2009 CarswellBC 1425, 2009 BCSC 726 (B.C. S.C.) — considered

Kerr v. Danier Leather Inc. (2007), 2007 SCC 44, 2007 CarswellOnt 6445, 2007 CarswellOnt 6446, 87 O.R. (3d) 398 (note), 36 B.L.R. (4th) 95, 231 O.A.C. 348, 286 D.L.R. (4th) 601, [2007] 2 S.C.R. 331, 48 C.P.C. (6th) 205, 368 N.R. 204, [2007] S.C.J. No. 44 (S.C.C.) — considered

Smoky River Coal Ltd., Re (1999), 12 C.B.R. (4th) 94, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, [1999] 11 W.W.R. 734, 1999 CarswellAlta 491, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* [1999] A.J. No. 676 (Alta. C.A.) — considered

Solosky v. Canada (1979), 1979 CarswellNat 4, (sub nom. *Solosky v. R.)* [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495, 1979 CarswellNat 630 (S.C.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
  Generally — referred to
  s. 81(1) — considered
  s. 121(1) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
  Generally — referred to

allow a reasonable time for compliance, or, as occurred in this case, to seek alternative financing.

43 Here, the Developer continued construction on the development for a further two weeks, which was a factor the Chief Justice considered in determining whether the failure of financing was a material fact (i.e. "affects, or could reasonably be expected to affect, the value, price, or use of the development unit") as supporting the Developer's belief that sufficient alternative financing would be obtained. Applying an objective test, that factor could lead a reasonable person to conclude, at that time, that the value, price, or use of the completed unit would not be affected by the failure of financing.

44 Two days following the cessation of construction, the Developer commenced the *CCAA* proceedings. Implementation of the Plan will provide the purchasers with at least what they had contracted for, and, in the opinion of the Chief Justice, perhaps greater assurance that the obligations of the Developer under the pre-sale agreements will be met.

45 In these particular circumstances, and on the evidence before the Court, I am of the view that the failure of the financing on October 28, 2008 did not trigger a requirement that the Developer file an amendment to the disclosure statement, and the appellants have no right to claim that the pre-sale agreements are unenforceable or to return of their deposit.

46 I would not accede to this ground of appeal.

Were the Appellants Creditors?

47 The appellants claimed they were creditors under the Plan on the basis that they were entitled to rights and remedies under *REDMA*. In the creditor judgment, the Chief Justice considered the relevant provisions of *REDMA*, the definitions of "claim" in the "claims process order" made in the *CCAA* proceedings and in s. 12(1) of the *CCAA*, and ss. 81(1) and 121(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3 ("*BIA*"). He concluded that a "claim" within the meaning of these provisions was "a debt or liability...provable in proceedings under [the *BIA*]" within the meaning of s. 121(1) of the *BIA*, that must be owed by the bankrupt to the person seeking to prove the claim, and noted that s. 81(1) of the *BIA* contains a separate regime for return of property (May 26 at paras. 18-20).

48 The only potential claim of the appellants was under s. 23 of *REDMA*, which he described as "a defence to enforcement of the purchase agreements". A right to sue for return of their deposits would not be a claim in debt or damages, but an action against the trustee for the return of specific property. That would not be a "debt provable in bankruptcy". Thus, the appellants were not creditors.

49 The appellants take issue with the findings of the Chief Justice as to their rights under *REDMA*. They say that they had a right to sue the developers for the

return of their deposits, which, according to the reasoning of the Alberta Court of Appeal in *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 175 D.L.R. (4th) 703 (Alta. C.A.), was sufficient to qualify them as creditors.

50 I have concluded that the appellants had no rights of rescission or to return of their deposits because their pre-sale agreements were unenforceable, under *REDMA*. Thus, there is no basis for them to claim that they were creditors.

51 While my further comments are *obiter*, I would add that if the appellants had the right to a declaration that their agreements were unenforceable and they were entitled to the return of their deposits, *Luscar* would not support an argument that they were creditors. Their only monetary (or property) claim would be against the trustee holding the deposits, not the "bankrupt" Developer, and there is no basis for a non-monetary claim for a declaration of unenforceability to be characterized as a "debt or liability...provable in bankruptcy".

52 I would not accede to this ground of appeal.

Construction Delay

53 On the application for the Final Order, the Developer sought an order extending the completion date of the pre-sale agreements because of construction delays. The Plan was contingent on the extension. The Chief Justice determined that there were delays of 85 working days, and extended the completion date of the pre-sale agreements by the same amount of time, from December 31, 2010 to May 4, 2011.

54 Section 2.3 of the pre-sale agreement provides that if the development is not completed by December 31, 2010, the purchasers may cancel their agreements:

> If by December 31, 2010, (or if a later date results from the application of Section 3.1 hereof, then by such later date), the Occupancy Permit has not been issued and the Strata Plan has not been deposited for registration in the Land Title Office, the Purchaser or the Vendor shall have the right to cancel this Agreement....If the Vendor or Purchaser exercise the said right, the Deposit and any interest accrued thereon will be paid to the Purchaser...

55 Section 3.1 of the pre-sale agreement provides for an extension of the completion date if the Developer is delayed from completing the construction of the development by "*force majeure*" events beyond its control, other than lack of money:

> If the vendor is delayed from completing the construction of the strata lots or obtaining an occupancy certificate or from depositing the strata plan for registration in the Land Title Office as a result of fire, explosion or accident or other cause, act or omission of any governmental authority, strike, walkout, inability to obtain or delay in attaining labour, material or equipment, flood, adverse site, or conditions, act of God, delay or failure by carriers or contractors, unavailability of supplies or materials, breakage or other casualty, climactic conditions, interference of the purchaser or any other event beyond

TAB 20

PP. 139, 142-145

[Indexed as: **Lamford Forest Products Ltd., Re**]

Re LAMFORD FOREST PRODUCTS LTD.

British Columbia Supreme Court,
Harvey J. [In Chambers]

Heard – May 15 and November 20, 1991.
Judgment – December 16, 1991.

Trustees – Duties and liability – Trustee not personally liable for costs of environmental clean-up in compliance with pollution abatement order beyond funds realizable from bankrupt's estate.

Secured creditors – Priorities – Cost of remedying environmental damage ranking in priority over rights of creditors for payout in bankruptcy.

Crown – Law applying to Crown – Pollution abatement order made against bankrupt – Order not being provable claim of Crown – Bankruptcy Act, R.S.C. 1985, c. B-3, s. 136(1)(j).

The bankrupt was the owner of a mill site. As a result of activities connected with the treatment of lumber at the sawmill, the site was contaminated by heavy metals, chlorophenols, hydrocarbons and other toxic substances. A pollution abatement order was made against the bankrupt. The official receiver sought directions as to the potential personal liability of the trustee and the ranking of the cost of remedying the environmental damage in the payout of the bankruptcy.

Held – The trustee's personal liability was limited and the remedial costs ranked ahead of the creditor's rights.

The trustee could not be held personally liable for the costs of cleanup beyond the funds realizable from the estate. However, the trustee could fall within the scope of other legislation with regard to the disposal of the P.C.B.s stored on the site.

Since the trustee could not be found liable for the costs of the cleanup beyond the assets of the estate, the trustee could not be found liable for breach for non-compliance with the order beyond that expense. As a result, the remedial cost could not be classified as a cost of administration.

The order also did not fall within the scope of a Crown claim under s. 136(1)(*j*) of the *Bankruptcy Act*. There was no debt-creating provision in the *Waste Management Act* (B.C.), under which the order was issued. A public officer ordering a citizen to obey the general law does not become a creditor for any amount that the citizen may ultimately be required to spend. Accordingly, the order was not sufficient to establish a claim or make the Crown a creditor.

The order was not in conflict with the *Bankruptcy Act*. Since the official receiver had stepped into the shoes of the bankrupt which was named in the order, it was incumbent on him to comply with it to the extent that the estate assets would permit.

The balancing of values fell in favour of protecting the health and safety of society over the rights of creditors. However, in the event that there were insufficient funds to meet the requirements of the order, the payment of funds pursuant to the order was subject to a reduction equal to the amount of the trustee's funds.

Cases considered

British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, 75 C.B.R. (N.S.) 1, 38 B.C.L.R. (2d) 145, [1989] 5 W.W.R. 577, 97 N.R. 61, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, 34 E.T.R. 1 – referred to.

Canada Trust Co. v. Bulora Corp. (1980), 34 C.B.R. (N.S.) 145 (Ont. S.C.), affirmed (1981), 39 C.B.R. (N.S.) 152 (Ont. C.A.) – applied.

Chateaugay Corp., In re, 112 B.R. 513, 58 U.S.L.W. 2580 (N.Y. Dist.Ct., 1990) – applied.

Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board), [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 60 N.R. 81, 19 D.L.R. (4th) 577, 63 A.R. 321 – referred to.

Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd., 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 [additional reasons at (1991), 8 C.B.R. (3d) 31 at 55, 84 Alta. L.R. (2d) 257, 86 D.L.R. (4th) 567, 120 A.R. 309, 8 W.A.C. 309, leave to appeal to S.C.C. refused (1992), 8 C.B.R. (3d) 31n, 83 Alta. L.R. (2d) lxvi (note), 86 D.L.R. (4th) 567n] – applied.

Quebec (Deputy Minister of Revenue) c. Rainville, [1980] 1 S.C.R. 35, 33 C.B.R. (N.S.) 301, (sub nom. *Bourgault v. Quebec (Deputy Minister of Revenue)*) 30 N.R. 241, (sub nom. *Re Bourgault*) 105 D.L.R. (3d) 270 – referred to.

Statutes considered

Bankruptcy Act, R.S.C. 1985, c. B-3 –
- s. 71(2)
- s. 72(1)
- s. 136(1)(*b*)
- s. 136(1)(*j*)
- s. 183(1)
- s. 187(3)

Bankruptcy Code, U.S. Code 1982, Title 11.

Canada Water Act, R.S.C. 1985, c. C-11 –
- s. 9

Canadian Environmental Protection Act, S.C. 1988, c. 22 [now R.S.C. 1985 (4th Supp.), c. 16] –
- s. 36 [now R.S.C. 1985 (4th Supp.), c. 16, s. 36]

Fire Marshals Act, R.S.O. 1970, c. 172 [now R.S.O. 1990, c. F.17].

Fisheries Act, R.S.C. 1985, c. F-14 –
- s. 35

Oil and Gas Conservation Act, R.S.A. 1980, c. O-5 –
- s. 7
- s. 92

Transportation of Dangerous Goods Act, R.S.C. 1985, c. T-19 –
- s. 4
- s. 5

Waste Management Act, S.B.C. 1982, c. 41 –
- s. 3.1
- s. 22(1)(*a*)
- s. 22(2)

s. 22(2.1) [en. S.C. 1990, c. 74, s. 11]
s. 34(8)

Rules considered
Bankruptcy Rules, C.R.C. 1978, c. 368 –
R. 54

Regulations considered
Waste Management Act, S.B.C. 1982, c. 41 –
Special Waste Regulation,
B.C. Reg. 63/88

APPLICATION by official receiver for directions in connection with status of pollution abatement order.

G.E.H. Cadman, Q.C., for official receiver.
D.A. Doyle, for Ministry of the Attorney General.

(Estate Doc. 132253;
Doc. Vancouver 1799/90)

1 December 16, 1991. HARVEY J. [In Chambers]: – This is an application brought by the official receiver by way of a notice of motion for directions as to whether a pollution abatement order issued by the regional waste manager of the provincial Ministry of Environment, pursuant to s. 22(2) of the *Waste Management Act*, S.B.C. 1982, c. 41, is a provable claim in bankruptcy, or an expense of administration of the estate, or a law of general application of the province, which falls outside the priority scheme of the *Bankruptcy Act*, R.S.C. 1985, c. B-3. This application is made pursuant to ss. 183(1) and 187(3) of the *Bankruptcy Act*, Bankruptcy R. 54, and the inherent jurisdiction of this court.

2 This application was first brought before me on May 15, 1991 [[1991] B.C.W.L.D. 1755], but I adjourned the matter when on June 12, 1991 a unanimous decision of the Court of Appeal of Alberta in *Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd.*, 8 C.B.R. (3d) 31, [1991] 5 W.W.R. 577, 81 Alta. L.R. (2d) 45, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, was rendered, which had some bearing on this case, so that counsel could consider that authority and because it was possible that the position of the secured creditors might be affected.

FACTS

3 Lamford Forest Products Ltd. ("Lamford") is the owner of a mill site at Sooke, British Columbia, namely, block 13, plan 2434,

sections 64 and 65. A sawmill was operated on that site by Lamford for a number of years, until October 11, 1990, when Lamford made a voluntary assignment into bankruptcy in accordance with the *Bankruptcy Act*. As a result of activities connected with the treatment of lumber at the sawmill, the site is now contaminated by heavy metals, chlorophenols, hydrocarbons and other toxic substances. Some P.C.B.s and other special wastes are stored on site until arrangements can be made for their proper disposal.

4 On October 18, 1990 the regional waste manager of the provincial Ministry of Environment issued a pollution abatement order ("the order") to Lamford pursuant to the *Waste Management Act*. Lamford is ordered to carry out an assessment study to determine the significance and extent of environmental damage to the site, and to manage the contamination in accordance with the *Special Waste Regulation*, B.C. Reg. 63/88, to the Act. The order further stipulates that contravention of its terms is an offence under the Act and may be subject to legal action. Section 34(8) sets a penalty for contravention of any order under the Act at a maximum of $300,000. However, s. 34(8) further stipulates that an order is not contravened unless it specifies in writing a reasonable period of time for compliance and that period has expired. No period for compliance was specified in the order served on Lamford.

5 A preliminary survey (assessment study) has been conducted by the monitor to attempt to determine the extent of environmental damage to the site and to manage the contamination in accordance with the *Waste Management Act*. The best that can be said at this time is that the cost of remediation is uncertain and that until the work is substantially underway or completed, the cost cannot be ascertained. The cost of the work could absorb all the liquidation proceeds without payment to either preferred or secured creditors or substantially exceed such proceeds.

QUESTIONS

6 1. To what extent, if any, will a trustee in bankruptcy be held personally liable for the expense of remediation of the environmental damage beyond the funds realizable from the estate of the bankrupt?

7 2. Where would the cost of remedying the environmental damage rank in priority for payout in bankruptcy?

DISCUSSION

Question 1. To what extent, if any, will a trustee in bankruptcy be held personally liable for the expense of remediation of the environmental damage beyond the funds realizable from the estate of the bankrupt?

8 The position of the official receiver is that the trustee should have no personal liability for the cleanup of the contaminated site, since s. 22(1)(*a*) of the *Waste Management Act*, pursuant to which the order was granted, says the regional waste manager may order "the person who *had* possession, charge or control of the substance at the time it escaped or was emitted, spilled, dumped, discharged, abandoned or introduced into the environment" to fulfil certain assessment and remedial obligations under the Act (my emphasis). Since the trustee did not have possession, charge or control of the toxic chemicals at the time they were introduced into the environment, he or she cannot be held personally financially responsible for the assessment and cleanup of the damage beyond the assets of the estate.

9 The Ministry of Environment ("the ministry") takes the position that the order is binding on the landowner and all successors in interest including the trustee in bankruptcy. The ministry says that the trustee stands in the shoes of the bankrupt, pursuant to s. 71(2) of the *Bankruptcy Act*. Section 71(2) reads as follows:

> "71 . . .
>
> (2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer."

10 With respect, I do not think that s. 71(2) imposes personal liability on the trustee in bankruptcy for the remediation of the Sooke site. In the same way that a trustee does not become personally responsible for any other debts of the bankrupt, the trustee cannot be held personally liable for the costs of cleanup beyond the funds realizable from the estate.

11 However, with regard to the disposal of the P.C.B.s stored on the site, the trustee could fall within the scope of other legislation, such as s. 36 of the *Canadian Environmental Protection Act*, S.C.

1988, c. 22; ss. 4 and 5 of the *Transportation of Dangerous Goods Act*, R.S.C. 1985, c. T-19; s. 9 of the *Canada Water Act*, R.S.C. 1985, c. C-11; s. 35 of the *Fisheries Act*, R.S.C. 1985, c. F-14; and s. 3.1 of the *Waste Management Act*. Since there has not yet been any question of the violation of these statutes, I will refrain from commenting on a trustee's potential liability under them.

Question 2. Where would the cost of remedying the environmental damage rank in priority for payout in bankruptcy?

12 It has been argued that there are three ways in which the cleanup of the Sooke site could potentially be classified under the *Bankruptcy Act*: a cost of administration (s. 136(1)(*b*)); a claim of the Crown (s. 136(1)(*j*)); or a law of general application of the province which must be obeyed.

COST OF ADMINISTRATION

13 The argument in favour of classifying the remedial cost as a cost of administration is that since a trustee could be held personally liable for his or her breach of the order, the cost of avoiding the commission of such an offence should be an administrative cost of the estate. Since I have already decided that a trustee is not liable for the cost of cleanup beyond the assets of the estate, the trustee could not be found liable for breach for non-compliance with the order beyond such expense, so this argument fails.

CLAIM OF THE CROWN

14 In order for the order of the regional waste manager to fall under s. 136(1)(*j*) of the *Bankruptcy Act* as a claim of the Crown, the Crown must be found to be a "creditor" of Lamford, and the "claim" must be provable in bankruptcy.

15 The recently decided case of *Panamericana De Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, supra, is persuasive on the issue of whether the Crown can be considered a creditor where it has issued an order in an attempt to enforce the existing law. In that case, the Energy Resources Conservation Board issued an order pursuant to s. 7 of the *Oil and Gas Conservation Act*, R.S.A. 1980, c. O-5, requiring the receiver of a bankrupt oil company to abandon seven oil wells. (Abandonment in the context of oil wells means to seal a hole which has been drilled for oil or gas to render it environmentally safe.) The Alberta Court of Appeal held that an authority which seeks to enforce the general law of the province does not be-

come a creditor of the citizen upon whom the duty is imposed. The court went on to point out that the board had the authority under s. 92 of the *Oil and Gas Conservation Act* to enter onto the land of the bankrupt and abandon the wells itself, and that if it had done so, the costs would have become "a debt payable" to the board.

16 The Alberta Court of Appeal distinguished three cases which were cited before it to support the claim that the board in that case was a creditor of the bankrupt: *Quebec (Deputy Minister of Revenue) c. Rainville*, [1980] 1 S.C.R. 35, 33 C.B.R. (N.S.) 301, (sub nom. *Bourgault v. Quebec (Deputy Minister of Revenue)*) 30 N.R. 241, (sub nom. *Re Bourgault*) 105 D.L.R. (3d) 270; *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 55 C.B.R. (N.S.) 241, 60 N.R. 81, 19 D.L.R. (4th) 577, 63 A.R. 321; and *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, 38 B.C.L.R. (2d) 145, [1989] 5 W.W.R. 577, 75 C.B.R. (N.S.) 1, 97 N.R. 61, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, 34 E.T.R. 1. The court noted that in each of those three cases, a specific sum was due to the Crown, or Crown agency, as a debt. "None of the cases is authority for the proposition that a public officer ordering a citizen to obey the general law thereby becomes a creditor for any amount the citizen may ultimately be required to spend in complying." (*Panamericana* at p. 590 [W.W.R.]).

17 By way of contrast, the *Waste Management Act* does not expressly stipulate that the regional waste manager can go onto the land of a polluter and then become the holder of a debt claim for the amount it cost to cleanup the damage. Section 22(2.1) of the *Waste Management Act* says that a pollution abatement order can "authorize any persons designated by the [regional waste] manager to enter land for the purpose of controlling, abating or stopping the pollution or to carry out remediation," but this has not been done in this case. The Alberta legislation in *Panamericana* specifically granted the Crown the power to abandon the wells and thereby become the holder of a debt, but since that was not done, the Alberta Court of Appeal found that the board had not become a creditor of the bankrupt. Since there is no such debt creating provision in the *Waste Management Act*, there is an even stronger case to be made here that the Crown as represented by the regional waste manager cannot be considered a creditor under the *Bankruptcy Act*.

18 Further support for the finding that the regional waste manager's order cannot fall within the scope of a Crown claim under s. 136(1)(*j*) can be found in the New York District Court's decision in *In re Chateaugay Corp.*, 112 B.R. 513, 58 U.S.L.W. 2580 (1990). That case involved a factual situation similar to the one at bar.

19 In the United States' *Bankruptcy Code*, "claim" is defined much

more broadly than in the Canadian *Bankruptcy Act*. Yet even under the American legislation, the New York District Court said that the government had no claim against the bankrupt unless the statute provided that the government could enter onto the bankrupt's land and perform the removal or remedial action, and then seek to recover those costs from the responsible parties. Where there is no right to payment for cleanup, the government has no claim provable in bankruptcy. The New York District Court went further to add that monetary penalties available under a statute for non-compliance with an injunctive order do not constitute an alternative right to compensatory payment for the cost of cleanup.

20 I find the decisions in *Panamericana* and *In re Chateaugay* persuasive in making my finding that the order served upon Lamford is not a provable claim of the Crown under s. 136(1)(*j*) of the *Bankruptcy Act*. I find that the order under the *Waste Management Act* is not sufficient to establish a claim, nor to make the Crown a creditor.

Law of General Application of the Province

21 The legislature of British Columbia has not chosen to create a debt in its own favour which it could have done via provisions in the *Waste Management Act*, and the order cannot be classified as an expense of administration. The cost of remediation of the Sooke site can either be classified as a law which must be obeyed by the official receiver or a future trustee, or as an order which may be ignored.

22 The court in *Panamericana* held that the order made in that case was intra vires the power of the province, and did not subvert the scheme of Parliament set up in the *Bankruptcy Act*. Any legislation in conflict with the *Bankruptcy Act* is made inoperable by virtue of s. 72(1). The Alberta Court of Appeal pointed out that the legislation under which the board ordered the abandonment of oil wells was not in direct conflict with the scheme under the *Bankruptcy Act*. Rather, obeyance of the order simply meant that there would be less money available for distribution. The order in the case at bar operates the same way, with only an incidental effect on the distribution of insolvent estates, thus it is not in conflict with the federal statute.

23 There is only one other case in Canada which is analogous to the factual situation of the case at bar, a decision of the Ontario Supreme Court by Cory J. (as he then was) in *Canada Trust Co. v. Bulora Corp.* (1980), 34 C.B.R. (N.S.) 145, which was affirmed by the Ontario Court of Appeal at (1981), 39 C.B.R. (N.S.) 152. In that case the fire marshal issued an order pursuant to the Ontario *Fire Marshals Act*, R.S.O. 1970, c. 172, requiring the demolition of some housing units which were hazardous to the safety of others living near

them. The owner of the housing units was bankrupt, so the question arose as to who had the responsibility of paying for the demolitions. The court found that the safety of the individuals living near the housing units was of paramount importance, over and above even the need to pay off secured creditors. The receiver was found to have a legal duty to obey the order.

24 It is of interest to note that in both the *Panamericana* and the *Bulora* case, the orders took precedence over the rights of secured creditors. It is my understanding that the official receiver and the Ministry of the Environment have agreed that the two secured creditors of Lamford be paid off first, which has already been done prior to the hearing of this application.

25 In both *Panamericana* and the *Bulora* case, it was the receiver who was the subject of the order. In the case at bar Lamford, the bankrupt itself, was the entity named in the order. In my view, this was appropriate in this situation, given the provisions of s. 22(1)(*a*) which stipulate that it is the person who had control of the offending substance at the time it was introduced into the environment who must be the subject of an order under the Act. Now that the official receiver (or a future trustee) has stepped into the shoes of the bankrupt, it is incumbent on him to comply with the order to the extent the assets of the estate will permit.

26 The balancing of values in this case falls in favour of protecting the health and safety of society over the rights of creditors, as it did in the *Bulora* and the *Panamericana* case, but there is also a need in modern society for trustees to take on the duty of winding up insolvent estates. The evidence before me indicates that no trustee can be found who will take on the bankruptcy of Lamford without a guarantee that he or she will be entitled to trustee's fees to be deducted from the amount paid out under the order, and will have no personal liability for the costs of clean-up of the contaminated site as discussed supra. In keeping with the findings I have made when answering the questions, I direct that in the event that there are insufficient funds to meet the requirements of the order, the payment of funds pursuant to the order must be subject to a reduction equal to the amount of the trustee's fees.

Order accordingly.

TAB 21

PP. 506-512

Duncan Cross MacDonald *Appellant*;

and

City of Montreal *Respondent*;

and

The Attorney General of Canada, the Attorney General of Quebec, the Société franco-manitobaine and Alliance Quebec, Alliance for Language Communities in Quebec *Interveners.*

File No.: 17528.

1984: December 18, 19: 1986: May 1.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Appeal — Jurisdiction of Supreme Court of Canada — Leave to appeal refused by Court of Appeal — Whether leave to appeal to Supreme Court of Canada may be granted by the Supreme Court — Supreme Court Act, R.S.C. 1970, c. S-19, s. 41(1).

Constitutional law — Language rights — Court proceedings — English-speaking person in Quebec given summons for traffic violation in French only — Whether summonses emanating from Quebec courts constitutionally valid if issued in one or other of the official languages — Constitution Act, 1867, s. 133.

Appearing before the Municipal Court of the City of Montréal to answer a charge of violating a municipal by-law, appellant, an English-speaking person, unsuccessfully challenged the jurisdiction of the court to proceed against him on the ground that the unilingual French summons issued by the court violated his fundamental rights as an English speaker under s. 133 of the *Constitution Act, 1867*. In a trial *de novo* in the Superior Court, appellant was again convicted. The court concluded that documents such as summonses emanating from the province's courts must be considered constitutionally valid so long as they are issued in one or other of the French or English languages. The Court of Appeal refused to grant leave to appeal from the judgment of the Superior Court. This appeal raises two issues: (1) whether the Supreme Court has jurisdiction to hear a case for which leave to appeal to a provincial

Duncan Cross MacDonald *Appelant*;

et

Ville de Montréal *Intimée*;

et

Le procureur général du Canada, le procureur général du Québec, la Société franco-manitobaine et Alliance Québec, Alliance pour les communautés linguistiques au Québec *Intervenants.*

N° du greffe: 17528.

1984: 18, 19 décembre; 1986: 1er mai.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Lamer, Wilson et Le Dain.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Appel — Compétence de la Cour suprême du Canada — Autorisation d'appel refusée par la Cour d'appel — Une autorisation de pourvoi à la Cour suprême du Canada peut-elle être accordée par la Cour suprême? — Loi sur la Cour suprême, S.R.C. 1970, chap. S-19, art. 41(1).

Droit constitutionnel — Droits linguistiques — Procédures judiciaires — Sommation adressée en français seulement à un anglophone au Québec relativement à une infraction à la circulation routière — Les sommations émanant des tribunaux québécois sont-elles constitutionnellement valides lorsqu'elles sont délivrées dans l'une ou l'autre des langues officielles? — Loi constitutionnelle de 1867, art. 133.

Comparaissant en Cour municipale de la ville de Montréal pour répondre à une accusation d'infraction à un règlement municipal, l'appelant, un anglophone, a en vain contesté la compétence de la cour d'être saisie de son affaire, parce que la sommation unilingue française qu'elle avait délivrée violait ses droits fondamentaux d'anglophone en vertu de l'art. 133 de la *Loi constitutionnelle de 1867*. Au cours d'un procès *de novo* en Cour supérieure, l'appelant a été de nouveau reconnu coupable. La cour a conclu que les documents comme les sommations émanant des tribunaux de la province doivent être tenus constitutionnellement valides dans la mesure où ils sont délivrés dans l'une ou l'autre des langues française ou anglaise. La Cour d'appel a refusé d'accorder l'autorisation d'appeler du jugement de la Cour supérieure. Le pourvoi soulève deux questions: (1) la Cour suprême peut-elle connaître d'une affaire pour court of appeal was denied by the provincial court of appeal and (2) if so, whether the summons, being expressed in the French language only, and not in the language of the English-speaking accused, offends the provisions of s. 133 of the *Constitution Act, 1867*, resulting in a total absence of jurisdiction of the court to proceed against him.

Held (Wilson J. dissenting): The appeal should be dismissed.

(1) *The Jurisdictional Issue*

Per Beetz, Estey, McIntyre, Lamer and Le Dain JJ.: This Court has jurisdiction to hear this case. It is a jurisdiction which, for obvious reasons of policy and comity, should be exercised most sparingly, in very rare cases such as this one, where there is a risk that a question of major constitutional importance might otherwise be put beyond the possibility of review by this Court.

Per Dickson C.J. and Wilson J.: This Court has jurisdiction pursuant to s. 41(1) of the *Supreme Court Act* to review the Quebec Court of Appeal's decision not to grant leave to appeal from a judgment at trial. While the Court should in general maintain an attitude of deference to the exercise of judicial discretion by intermediate appellate courts, it should not hesitate, in light of the broad language of s. 41(1) and the role of the Court as the ultimate appellate tribunal, to interfere with discretionary decisions on those rare occasions when it perceives legal principles of national, and more particularly, constitutional significance to be at stake. To the extent that the *Ernewein* and *Nicholson* cases are inconsistent with this view, they should not be followed.

Cases Cited

By Beetz J.

Paul v. The Queen, [1960] S.C.R. 452; *Walsh v. City of Montreal* (1980), 55 C.C.C. (2d) 299 (Que. S.C.), application for leave to appeal refused, Mtl. C.A., November 10, 1980; *Ernewein v. Minister of Employment and Immigration*, [1980] 1 S.C.R. 639; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1981] 1 S.C.R. 92, referred to.

By Wilson J.

Ernewein v. Minister of Employment and Immigration, [1980] 1 S.C.R. 639; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1981] 1 S.C.R. 92, not followed; *R. v. Gardiner*, [1982]

laquelle une cour d'appel provinciale a refusé l'autorisation d'en appeler devant elle, et (2) si c'est le cas, la sommation, rédigée en français uniquement, et non dans la langue du prévenu anglophone, porte-t-elle atteinte aux dispositions de l'art. 133 de la *Loi constitutionnelle de 1867*, privant ainsi totalement la cour de compétence pour le juger?

Arrêt (le juge Wilson est dissidente): Le pourvoi est rejeté.

(1) *La question de compétence*

Les juges Beetz, Estey, McIntyre, Lamer et Le Dain: La Cour suprême a compétence pour connaître de l'affaire. Elle exerce ainsi une compétence qui, pour des raisons évidentes de principe et de courtoisie, ne devrait l'être qu'avec la plus grande modération, dans les cas très rares où, comme en l'espèce, il y a un risque qu'une question d'une importance constitutionnelle majeure puisse échapper autrement à la possibilité d'être examinée par cette Cour.

Le juge en chef Dickson et le juge Wilson: La Cour suprême a la compétence, en vertu du par. 41(1) de la *Loi sur la Cour suprême*, pour réviser la décision de la Cour d'appel du Québec de ne pas accorder l'autorisation d'en appeler d'une décision de première instance. Bien que la Cour doive en général avoir une attitude de déférence envers le pouvoir discrétionnaire judiciaire exercé par les cours d'appel intermédiaires, elle ne devrait pas hésiter, vu le caractère général du texte du par. 41(1) et de son rôle de tribunal d'appel de dernier ressort, à intervenir dans les décisions discrétionnaires dans les rares cas où elle juge que des principes de droit d'importance nationale, et particulièrement en matière constitutionnelle, sont en jeu. Dans la mesure où les arrêts *Ernewein* et *Nicholson* sont incompatibles avec ce point de vue, ils ne devraient pas être suivis.

Jurisprudence

Citée par le juge Beetz

Arrêts mentionnés: *Paul v. The Queen*, [1960] R.C.S. 452; *Walsh v. City of Montreal* (1980), 55 C.C.C. (2d) 299 (C.S. Qué.), autorisation d'appel refusée, C.A. Mtl., 10 novembre 1980; *Ernewein c. Ministre de l'Emploi et de l'Immigration*, [1980] 1 R.C.S. 639; *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1981] 1 R.C.S. 92.

Citée par le juge Wilson

Arrêts non suivis: *Ernewein c. Ministre de l'Emploi et de l'Immigration*, [1980] 1 R.C.S. 639; *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1981] 1 R.C.S. 92; arrêts mentionnés: *R. c.*

2 S.C.R. 368; *R. v. Joseph* (1900), 6 C.C.C. 144; *Walsh v. City of Montreal* (1980), 55 C.C.C. (2d) 299 (Que. S.C.), application for leave to appeal refused, Mtl. C.A., November 10, 1980, referred to.

(2) *The Constitutional Issue*

Per Beetz, Estey, McIntyre, Lamer and Le Dain JJ.: The summons in French given to the English-speaking appellant did not offend the provisions of s. 133 of the *Constitution Act, 1867*. On the plain meaning of s. 133, as construed by this Court in the two *Blaikie* cases, appellant has no right to be summoned before a court of Quebec by a process issued in his own language. The section provides that a process issued from a Quebec court may be in either of the official languages. If there is a right to use either language, there can be no obligation nor a duty to use the other. In judicial proceedings in the courts covered by s. 133, the language rights protected are those of litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; and they are those of the writers or issuers of written pleadings and processes, not those of the recipients or readers thereof. In the case at bar, there is therefore no doubt that the summons was valid. The Municipal Court of Montreal is a court of Quebec within the meaning of s. 133 and the summons—clearly a document covered by the first *Blaikie* decision—, considered as a command or as a charge, was a process issuing from such a court or under its authority. It may then be unilingual in either the French or the English language.

It may well be desirable or fair that summonses be bilingual to ensure comprehension by the recipient, but such a requirement is not imposed by the explicit provision of s. 133. The section has not introduced a comprehensive scheme of official bilingualism but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism in Parliamentary debates and in judicial proceedings. This incomplete but precise scheme is a constitutional minimum which resulted from an historical compromise arrived at by the founding people who agreed upon the terms of the federal union. The scheme is couched in a language which is capable of containing necessary implications, which can be complemented by federal and provincial legislation, and it is a scheme which can be modified by way of constitutional amendment. But it is not open to the courts under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise.

Gardiner, [1982] 2 R.C.S. 368; *R. v. Joseph* (1900), 6 C.C.C. 144; *Walsh v. City of Montreal* (1980), 55 C.C.C. (2d) 299 (C.S. Qué.), autorisation d'appel refusée, C.A. Mtl., 10 novembre 1980.

(2) *La question constitutionnelle*

Les juges Beetz, Estey, McIntyre, Lamer et Le Dain: La sommation en français remise à l'appelant anglophone ne porte pas atteinte aux dispositions de l'art. 133 de la *Loi constitutionnelle de 1867*. D'après le texte même de l'art. 133, tel que notre Cour l'a interprété dans les deux affaires *Blaikie*, l'appelant ne jouit pas du droit d'être cité à comparaître devant un tribunal du Québec par des pièces de procédure rédigées dans sa propre langue. Cet article porte qu'une pièce de procédure émanant d'un tribunal québécois peut être en l'une ou l'autre des langues officielles. S'il existe un droit de recourir à l'une ou l'autre langue, il ne peut y avoir d'obligation d'utiliser l'une d'elles. Dans les affaires devant les tribunaux visés par l'art. 133, les droits linguistiques garantis sont ceux des justiciables, des avocats, des témoins, des juges et autres officiers de justice qui prennent effectivement la parole, non ceux des parties ou autres personnes à qui l'on s'adresse; ce sont aussi ceux des rédacteurs et des auteurs des actes et pièces de procédure, non ceux de leur destinataire ou de leur lecteur. En l'espèce, il ne fait donc aucun doute que la sommation est valide. La Cour municipale de Montréal est un tribunal du Québec au sens de l'art. 133 et la sommation—manifestement un acte visé par le premier arrêt *Blaikie*—qu'on la considère comme un ordre ou une inculpation, est une pièce de procédure émanant de ce tribunal ou délivrée sous son autorité. Elle peut donc être unilingue, en langue française ou anglaise.

Il peut bien être souhaitable ou juste que les sommations soient bilingues pour assurer que leur destinataire les comprenne, mais ce n'est pas une obligation imposée par la disposition expresse de l'art. 133. Cet article n'a pas introduit un système de bilinguisme officiel global, mais plutôt une forme limitée de bilinguisme obligatoire au niveau législatif, combinée à une forme encore plus limitée d'unilinguisme optionnel dans les débats parlementaires et dans les procédures judiciaires. Ce système incomplet, mais précis, constitue un minimum constitutionnel résultant d'un compromis historique intervenu entre les fondateurs quand ils ont convenu des modalités de l'union fédérale. Le système est formulé en des termes susceptibles de comporter des implications nécessaires et qui peuvent être complétés par la législation fédérale et provinciale; c'est aussi un système qui peut être changé par voie de modification constitutionnelle. Mais il n'appartient pas aux tribunaux, sous couvert d'interprétation, d'améliorer ce compromis constitutionnel historique, d'y ajouter ou de le modifier.

The requirements of natural justice and procedural fairness should not be invoked to construe s. 133. These requirements protect not language rights but other rights which the section was never intended to safeguard and with which it is entirely unrelated. It is axiomatic that everyone has a common law right to a fair hearing, including the right to be informed of the case one has to meet and the right to make full answer and defence. Where the defendant cannot understand the proceedings because he is unable to understand the language in which they are being conducted, the effective exercise of these rights may well impose a consequential duty upon the court to provide adequate translation. But the right of the defendant to understand what is going on in court is not a language right but simply an aspect of the right to a fair hearing.

Per Dickson C.J.: The unilingual summons received by the appellant did not offend s. 133 of the *Constitution Act, 1867*. The words of the section, as construed by this Court in the first *Blaikie* decision, empower the courts of Quebec to issue unilingual documents. Any implied affirmative obligation which may be cast upon the "State" to give effect to a litigant's right to use either French or English is necessarily subordinated to the express authority of courts to issue process in one language only. It is therefore unnecessary in the present case to consider the precise extent of the litigant's right to use either language in the judicial setting.

Per Wilson J., *dissenting*: The Municipal Court of the City of Montréal had no jurisdiction to proceed against the appellant on the basis of a summons which violated his linguistic rights under s. 133 of the *Constitution Act, 1867*. The right conferred on a litigant by that section to use his own language in judicial proceedings imposes a correlative duty on the state to respect and accommodate that right. The words may/either in s. 133 in relation to the language of court proceedings were not employed in order to confer an option on the state to choose the official language in which it wishes to deal with a litigant but to confer an option on the citizen.

The legislative history of the pre-1867 Acts from which s. 133 devolved demonstrates clearly that the focus of concern was meaningful access to the judicial system by users of both official languages. Section 133 reflects a similar concern. It recognizes the linguistic duality in the Province of Quebec and assures both French and English-speaking citizens that their linguis-

Les exigences de la justice naturelle et de l'équité dans la procédure ne devraient pas être invoquées dans l'interprétation de l'art. 133. Ces exigences ne protègent pas des droits linguistiques, mais d'autres droits que cet article n'a jamais eu pour but de sauvegarder et avec lesquels il n'a aucun rapport. Il va de soi que chacun jouit, en *common law*, du droit à un procès équitable, y compris le droit d'être informé de la preuve qui pèse contre lui, ainsi que le droit à une défense pleine et entière. Lorsque le défendeur ne comprend pas la procédure engagée contre lui, parce qu'il est incapable de comprendre la langue dans laquelle elle se déroule, l'exercice effectif de ces droits peut fort bien imposer au tribunal une obligation corrélative de fournir une traduction appropriée. Mais le droit du défendeur de comprendre ce qui se passe dans le prétoire n'est pas un droit linguistique, mais un aspect du droit à un procès équitable.

Le juge en chef Dickson: La sommation unilingue reçue par l'appelant ne porte pas atteinte à l'art. 133 de la *Loi constitutionnelle de 1867*. Les termes de cet article, tels que notre Cour les a interprétés dans le premier arrêt *Blaikie*, habilitent les tribunaux du Québec à délivrer des actes unilingues. Toute obligation de faire implicite qui peut être imposée à «l'État» de donner suite au droit du justiciable d'employer le français ou l'anglais est nécessairement subordonnée au pouvoir exprès conféré aux tribunaux de délivrer une pièce de procédure en une seule langue. Il est donc inutile en l'espèce d'examiner l'étendue précise du droit du justiciable d'utiliser l'une ou l'autre langue dans le domaine judiciaire.

Le juge Wilson, *dissidente*: La Cour municipale de la ville de Montréal n'avait pas compétence pour procéder contre l'appelant en vertu d'une sommation qui violait les droits linguistiques que lui accorde l'art. 133 de la *Loi constitutionnelle de 1867*. Le droit conféré à un justiciable par cet article d'utiliser sa propre langue au cours de procédures judiciaires impose une obligation correspondante à l'État de respecter ce droit et d'y donner suite. Le terme «pourra» à l'art. 133 à l'égard de la langue des procédures judiciaires n'a pas été employé pour donner à l'État le choix de la langue officielle dans laquelle il entend traiter avec le justiciable, mais il visait à donner le choix au particulier.

L'histoire législative des lois antérieures à 1867 dont l'art. 133 découle, indique clairement que la préoccupation principale était d'accorder aux utilisateurs des deux langues officielles un accès réel au système judiciaire. L'article 133 exprime une préoccupation analogue. Il reconnaît la dualité linguistique qui existe dans la province de Québec et garantit aux citoyens de langue tic rights will be protected by the state in a meaningful fashion. The purpose of the section is to put the two official languages on an equal footing. It follows from this that the state's obligation is not satisfied if its courts and their documents speak in either French or English without regard to the language of the litigant. To fulfil its obligation, the state must deal with a litigant in the language he understands. Therefore, to comply with s. 133, the initiating documents emanating from the court must, at a minimum, contain a directive to the recipient in the official language he understands alerting him to the importance of the document and advising him where to apply for a translation.

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française et de langue anglaise que l'État protègera leurs droits linguistiques de façon efficace. Le but de l'article est de mettre les deux langues sur un pied d'égalité. Il s'ensuit que l'État ne satisfait pas à son obligation si les tribunaux s'expriment et rédigent leurs documents en anglais ou en français sans tenir compte de la langue du justiciable. Pour remplir son obligation, l'État doit traiter avec un justiciable dans la langue qu'il comprend. Donc, pour respecter l'art. 133, les documents introductifs d'instance émanant d'un tribunal doivent, à tout le moins, comprendre une indication expliquant au destinataire dans la langue officielle qu'il comprend, l'importance du document et l'informant où il peut en demander une traduction.

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Code Municipal de la Province de Québec, 1870 (Qué.),

ally valid so long as they are issued in one or other of the French or English languages.

comme les sommations émanant des tribunaux de la province doivent être considérés comme constitutionnellement valides pour autant qu'ils sont délivrés dans l'une ou l'autre des langues française ou anglaise.

The Quebec Court of Appeal on December 13, 1982 refused to grant leave to appeal from the judgment of the Superior Court. This refusal formed the basis of the appellant's application for leave to appeal to this Court. Leave was granted on May 17, 1983. A constitutional question was stated for the Court by Ritchie J. on June 21, 1983. It reads as follows:

> Does a summons which is printed and published in the French language only and commands an English speaking person to appear before the Courts of Quebec offend the provisions of s. 133 of the *Constitution Act, 1867*, resulting in a total absence of jurisdiction of the Court to proceed against him?

Le 13 décembre 1982, la Cour d'appel du Québec a refusé d'accorder l'autorisation d'en appeler de la décision de la Cour supérieure. Ce refus constitue le fondement de la demande de l'appelant visant à obtenir l'autorisation de se pourvoir devant cette Cour. Le pourvoi a été autorisé le 17 mai 1983. Le 21 juin 1983, le juge Ritchie a formulé, au nom de la Cour, la question constitutionnelle suivante:

> La sommation qui est imprimée et publiée en français seulement et qui ordonne à une personne anglophone de comparaître devant les cours du Québec est-elle contraire aux dispositions de l'art. 133 de la *Loi constitutionnelle de 1867*, privant ainsi totalement la cour de compétence à son égard?

2. The *Ernewein* Principle

The threshold issue the Court must confront on this appeal is the Court's capacity to review the decision of a provincial appellate court not to grant leave to appeal from a judgment at trial. In *Ernewein v. Minister of Employment and Immigration*, [1980] 1 S.C.R. 639, the majority of this Court held that the Supreme Court of Canada has no power under s. 31(3) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, to review a decision of the Federal Court of Appeal denying leave to appeal from a decision of the Immigration Appeal Board. Laskin C.J.C. interpreted the stipulation in s. 31(3) that "[a]n appeal lies to the Supreme Court from a final or other judgment or determination of the Federal Court of Appeal" as restricting the Supreme Court of Canada's jurisdiction to entertain appeals to cases in which the Federal Court of Appeal either pronounced on the merits of the appeal or, at a minimum, rendered judgment in an interlocutory matter. Such a restriction would, in Chief Justice Laskin's view, imbue the words "final or other judgment or determination" in s. 31(3) with a meaningful subject-matter "without including cases in which the intermediate appellate court has refused to entertain an appeal altogether by refusing required leave"

2. Le principe de l'arrêt *Ernewein*

La question préliminaire que la Cour doit trancher à l'occasion du présent pourvoi est celle de sa capacité de réviser la décision d'une cour d'appel provinciale de ne pas accorder l'autorisation d'en appeler d'une décision de première instance. Dans l'arrêt *Ernewein c. Ministre de l'Emploi et de l'Immigration*, [1980] 1 R.C.S. 639, cette Cour a statué à la majorité qu'elle n'a pas compétence, en vertu du par. 31(3) de la *Loi sur la Cour fédérale*, S.R.C. 1970 (2^e Supp.), chap. 10, pour réviser une décision de la Cour d'appel fédérale qui a refusé l'autorisation d'en appeler d'une décision de la Commission d'appel de l'immigration. Suivant l'interprétation qu'en donne le juge en chef Laskin, la disposition du par. 31(3) selon laquelle «Les jugements finals et toute autre décision de la Cour d'appel fédérale sont ... susceptibles d'appel devant la Cour suprême» restreint la compétence qu'a la Cour suprême du Canada pour entendre des appels aux affaires où la Cour d'appel fédérale s'est prononcée sur le fond de l'appel ou, à tout le moins, rendu une décision interlocutoire. Une telle restriction aurait pour effet, selon le juge en chef Laskin, de donner aux mots «jugements finals et toute autre décision», que l'on trouve au par. 31(3), une portée substantielle «sans inclure les cas

(p. 646). Having so concluded, he then went on to add that this reasoning was equally applicable under s. 41(1) of the *Supreme Court Act*, R.S.C. 1970, c. S-19, to cases in which a provincial court of appeal had refused to grant required leave. And, indeed, the reasoning in *Ernewein* was in fact applied under s. 41(1) in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1981] 1 S.C.R. 92.

If taken literally, the interpretation put upon s. 41(1) of the *Supreme Court Act* in *Ernewein* and *Nicholson* provides a complete answer to the present appeal; that is to say, the appeal would have to be dismissed as this Court would have no jurisdiction either to entertain the merits of the case or to review the Quebec Court of Appeal's exercise of discretion in refusing to grant leave. I cannot accept that interpretation of s. 41(1). This is not to say that Chief Justice Laskin's reasoning in *Ernewein* was not based upon sound principles of deference to judicial decisions rendered in exercise of a discretionary power. It clearly was. Where an appellate court is provided with the statutory authority to control its own docket through the leave granting process and its discretion is exercised in a judicial manner, an attitude of deference towards its decisions is entirely appropriate. As Laskin C.J.C. stated at pp. 646-47:

> There are so many considerations that enter into a refusal to give leave as to make the matter one peculiarly for the experienced judgment of the Court from which leave is sought.
>
> . . .
>
> It is my view that considerations of judicial comity should operate in this respect, and I do not think they should depend on whether or not reasons are given for refusing to hear an appeal.

It is, however, a quantum leap to go from a posture of deference and "judicial comity" to an absolute abrogation of this Court's jurisdiction to exercise its general supervisory power over the

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où la cour d'appel intermédiaire a tout simplement refusé d'entendre un appel en refusant l'autorisation nécessaire» (p. 646). Après être arrivé à cette conclusion, il ajoute que le même raisonnement est également applicable en vertu du par. 41(1) de la *Loi sur la Cour suprême*, S.R.C. 1970, chap. S-19, aux affaires où une cour d'appel provinciale a refusé d'accorder l'autorisation demandée. Et en fait, le raisonnement de l'arrêt *Ernewein* a été appliqué en vertu du par. 41(1) dans l'arrêt *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1981] 1 R.C.S. 92.

Prise au pied de la lettre, l'interprétation donnée au par. 41(1) de la *Loi sur la Cour suprême* dans les arrêts *Ernewein* et *Nicholson* règle entièrement le sort du présent pourvoi; autrement dit, il faudrait rejeter le pourvoi puisque cette Cour n'aurait compétence ni pour entendre le pourvoi au fond ni pour réviser l'exercice de pouvoir discrétionnaire que la Cour d'appel du Québec a fait en refusant l'autorisation. Je ne puis accepter cette interprétation du par. 41(1). Cela ne revient pas à dire que le raisonnement du juge en chef Laskin dans l'arrêt *Ernewein* ne se fondait pas sur des principes valables de respect pour les décisions judiciaires rendues dans l'exercice d'un pouvoir discrétionnaire. Il était nettement fondé sur de tels principes. Lorsqu'une cour d'appel jouit du pouvoir légal de contrôler son propre rôle grâce au processus d'autorisation et qu'elle exerce ce pouvoir discrétionnaire de manière judiciaire, il est tout à fait de mise d'avoir une attitude de respect pour ses décisions. Comme l'affirme le juge en chef Laskin, à la p. 647:

> Tant d'éléments entrent en ligne de compte dans un refus d'autorisation d'appel qu'il s'agit d'une question qui relève particulièrement du jugement expérimenté de la cour à laquelle l'autorisation est demandée.
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> . . .
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> Je suis d'avis qu'il y a lieu de faire jouer des considérations de courtoisie judiciaire à cet égard, et je ne crois pas qu'elles doivent dépendre du fait que la cour d'appel a donné ou non les motifs de son refus d'entendre l'appel.

Il y a toutefois toute une marge entre une attitude de respect et de «courtoisie judiciaire» et l'abrogation absolue de la compétence de cette Cour d'exercer son pouvoir général de surveillance sur courts below. Such an interpretation takes a sound legislative policy and well-founded principles of judicial review and stretches them to an extreme which is, in my view, impossible to support in view of the statutory language in issue.

Under s. 41(1) of the *Supreme Court Act* this Court retains the discretionary power to interfere with any final or other judgment of the intermediate appellate courts which raises an issue of national importance. This discretion is itself broadly phrased so as to include any case with respect to which " ... 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 such 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 ...." While a certain amount of deference to the undoubted competence of intermediate appellate courts to control their own leave granting process is called for, it is equally evident that this Court's jurisdiction to exercise its own discretion in intervening in such decisions is not statutorily confined.

The proposition that under s. 41(1) the Court has jurisdiction to intervene even in the case of discretionary decisions of intermediate appellate courts is supported by other provisions of the *Supreme Court Act*. Section 44, for example, provides that the Court has no power to hear an appeal from a judgment or order made in the exercise of judicial discretion *except where leave to appeal is granted by this Court pursuant to s. 41 of the Act*. The section 44 restriction on the Court's power would clearly apply to appeals arising under s. 38 of the Act, *i.e.*, where a provincial court of appeal had granted leave to appeal to the Supreme Court of Canada. It would also apply to appeals arising under s. 39 of the Act, *i.e.*, where the parties have agreed to appeal a judgment of a lower court directly to the Supreme Court of Canada instead of to the provincial Court of Appeal. Accordingly, in the less usual situations in which leave to appeal to this Court is not granted by a panel of this Court, the statutory

les cours d'instance inférieure. Une telle interprétation part d'une intention valable du législateur et de principes bien établis de révision judiciaire, et les porte à une extrême qui est, à mon avis, impossible à justifier compte tenu du texte de la loi en cause.

En vertu du par. 41(1) de la *Loi sur la Cour suprême*, cette Cour conserve le pouvoir discrétionnaire d'intervenir à l'égard de tout jugement définitif ou de toute autre décision d'une cour d'appel intermédiaire qui soulève une question d'importance nationale. Ce pouvoir discrétionnaire est lui-même formulé en termes généraux de manière à inclure toute affaire à l'égard de laquelle « ... la Cour suprême estime, étant donné l'importance de l'affaire pour le public, l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou sa nature ou son importance à tout autre égard, qu'elle devrait en être saisie ... » Bien que cela commande un certain respect pour le pouvoir qu'ont indubitablement les cours d'appel intermédiaires de contrôler leur propre processus d'autorisation, il est également évident que le pouvoir discrétionnaire qu'a cette Cour pour intervenir dans ces décisions n'est pas limité par la loi.

D'autres dispositions de la *Loi sur la Cour suprême* étayent la proposition selon laquelle la Cour a, en vertu du par. 41(1), compétence pour intervenir même dans le cas de décisions discrétionnaires de cours d'appel intermédiaires. Par exemple, l'art. 44 dispose que la Cour n'a pas compétence pour entendre l'appel d'un jugement ou d'une ordonnance rendue dans l'exercice d'un pouvoir discrétionnaire judiciaire *sauf si la Cour accorde une autorisation de pourvoi conformément à l'art. 41 de la Loi*. La restriction apportée par l'art. 44 à la compétence de la Cour s'appliquerait manifestement aux pourvois interjetés en vertu de l'art. 38 de la Loi, c.-à-d. lorsqu'une cour d'appel provinciale a accordé l'autorisation de se pourvoir devant la Cour suprême du Canada. Elle s'appliquerait aussi aux pourvois interjetés en vertu de l'art. 39 de la Loi, c.-à-d. lorsque les parties ont convenu d'en appeler du jugement d'un tribunal d'instance inférieure directement à la Cour suprême du Canada plutôt qu'à la cour jurisdiction excludes appeals from the exercise of judicial discretion. On the other hand, the explicit exception of s. 41 from the s. 44 restriction serves to indicate that where the route to this Court is the more usual one, *i.e.*, where leave to appeal is granted by this Court itself, its jurisdiction is not restricted to non-discretionary decisions. Rather, under s. 41 of the Act the Court's jurisdiction is confined only by its own exercise of discretion in determining which decisions of an intermediate appellate court are of sufficient national importance to warrant a grant of leave.

It was stated in *R. v. Gardiner*, [1982] 2 S.C.R. 368, that while there are many instances in which this Court is justifiably reluctant to intervene in decisions of the courts below, it is incorrect to confuse this attitude of reluctance with lack of jurisdiction. Dickson J. (as he then was) came to his conclusion as to the broad ambit of the Court's jurisdiction after a thorough survey of its history and a consequent appreciation of its expanded role and increased significance since the days when most appeals were as of right and the Supreme Court of Canada was itself an intermediate appellate court. Given this expansion, the broadly phrased statutory language in which the Court's jurisdiction was framed, and the role of the Court as the ultimate appellate tribunal, he concluded that in the absence of any irrefutable indication to the contrary, the Court's jurisdiction should not be restrictively construed. He said at p. 397:

> The function of this Court is ... to settle questions of law of national importance in the interests of promoting uniformity in the application of the law across the country, especially with respect to matters of federal competence. To decline jurisdiction is to renounce the paramount responsibility of an ultimate appellate court with national authority.

d'appel provinciale. En conséquence, dans les situations moins courantes où l'autorisation de pourvoi devant cette Cour n'est pas accordée par une formation de juges de cette Cour, la compétence conférée par la loi exclut les appels visant l'exercice du pouvoir discrétionnaire judiciaire. D'autre part, l'exception explicite de l'art. 41 à la restriction apportée à l'art. 44 sert à indiquer que lorsque la voie suivie pour arriver à cette Cour est la plus usuelle, c.-à-d. lorsque l'autorisation de pourvoi est accordée par cette Cour elle-même, sa compétence n'est pas limitée aux décisions qui ne sont pas de nature discrétionnaire. Plutôt, en vertu de l'art. 41 de la Loi, la compétence de la Cour n'est limitée que par son propre exercice du pouvoir discrétionnaire de déterminer quels arrêts d'une cour d'appel intermédiaire ont suffisamment d'importance nationale pour justifier une autorisation.

Dans l'arrêt *R. c. Gardiner*, [1982] 2 R.C.S. 368, on a dit que même s'il y a de nombreux cas où cette Cour hésite avec raison à intervenir dans les décisions des cours d'instance inférieure, il est erroné d'assimiler cette attitude d'hésitation à une absence de compétence. Le juge Dickson (maintenant Juge en chef) en est venu à cette conclusion quant à l'étendue considérable de la compétence de la Cour après en avoir tracé minutieusement l'historique et avoir noté l'accroissement de son rôle et l'augmentation de son importance depuis l'époque où presque tous les pourvois étaient de plein droit et où la Cour suprême du Canada était elle-même une cour d'appel intermédiaire. Compte tenu de cet accroissement de son rôle, du caractère général de la formulation des dispositions législatives relatives à la compétence de la Cour et de son rôle comme tribunal d'appel de dernier ressort, il a conclu qu'en l'absence de toute indication irréfutable en sens contraire, il n'y avait pas lieu d'interpréter la compétence de la Cour de façon restrictive. Il dit à la p. 397:

> Le rôle de cette Cour est ... de trancher des questions de droit d'importance nationale dans le but de favoriser l'application uniforme du droit dans tout le pays, spécialement pour ce qui est des sujets de compétence fédérale. Décliner sa compétence équivaut à refuser de remplir la fonction prépondérante d'une cour d'appel de dernier ressort et d'envergure nationale.

This line of reasoning is, of course, all the more pertinent where the issue at stake is one of constitutional law. To quote from the reasons of Pigeon J. in dissent in *Ernewein* at p. 668:

> In my view it is important for this Court in the discharge of its general duty of ultimate supervision over the application of the law throughout Canada, to avoid putting any important question of law beyond any possibility of review.

Section 133 of the *Constitution Act, 1867* is a provision of the utmost significance to members of the minority language group in Quebec and elsewhere in Canada. It has an impact not only on the rights of individuals when they confront the judicial branch of the state but also on the status generally of Canada's two official languages. The national importance of such an issue would be hard to gainsay as would also the appropriateness of this issue's being considered in the nation's highest court. Indeed, given the recently expanded role of the Court in constitutional review under the *Constitution Act, 1982*, a broad view of the Court's jurisdiction would seem to be essential. Accordingly, s. 41(1) of the *Supreme Court Act* (and its cognate in s. 31(3) of the *Federal Court Act*), in its conferring of jurisdiction on the Court to review "any final or other judgment" of a court below, must be given a large and liberal interpretation. While the Court should maintain an attitude of deference to the exercise of judicial discretion by intermediate appellate courts, it undoubtedly has the jurisdiction and should not hesitate to interfere with discretionary decisions on those rare occasions when it perceives legal principles of national, and more particularly constitutional, significance to be at stake. To the extent that the Court's earlier decisions in *Ernewein* and *Nicholson* are inconsistent with this view, I would respectfully suggest that they should not be followed.

It is important to note that the right of appeal from the decision of any court on a summary conviction offence, such as the one with which we are concerned on this appeal, is statutory. Like-

Ce genre de raisonnement est bien sûr d'autant plus pertinent lorsque la question en litige est une question de droit constitutionnel. Le juge Pigeon affirme dans les motifs de dissidence qu'il a rédigés dans l'arrêt *Ernewein*, à la p. 668:

> À mon avis, il importe que cette Cour dans l'exécution de son devoir général de surveillance en dernier ressort de l'application du droit à travers le Canada, évite de mettre aucune question de droit importante hors de portée de toute révision.

L'article 133 de la *Loi constitutionnelle de 1867* est une disposition de la plus haute importance pour ceux qui appartiennent à la minorité linguistique au Québec et ailleurs au Canada. Il a un effet non seulement sur les droits des personnes qui ont affaire au pouvoir judiciaire de l'État, mais aussi sur le statut global des deux langues officielles du Canada. Il serait difficile de nier l'importance nationale de cette question de même que l'à-propos de la soumettre à l'examen de la plus haute cour du pays. De plus, vu l'expansion récente du rôle de la Cour en matière de révision constitutionnelle en vertu de la *Loi constitutionnelle de 1982*, il semblerait essentiel d'interpréter largement la compétence de la Cour. En conséquence, il faut donner une interprétation large et libérale au par. 41(1) de la *Loi sur la Cour suprême* (et à son pendant, le par. 31(3) de la *Loi sur la Cour fédérale*), en ce qu'il confère à la Cour compétence pour réviser «tout jugement définitif ou autre» d'une cour d'instance inférieure. Bien que la Cour doive conserver une attitude de respect envers le pouvoir discrétionnaire judiciaire exercé par les cours d'appel intermédiaires, elle a indubitablement compétence pour intervenir dans des décisions discrétionnaires et ne devrait pas hésiter à le faire dans les rares cas où elle juge que des principes de droit d'importance nationale, et plus particulièrement d'importance sur le plan constitutionnel, sont en jeu. Dans la mesure où les arrêts antérieurs *Ernewein* et *Nicholson* de cette Cour sont incompatibles avec ce point de vue, j'estime avec égards qu'ils ne doivent pas être suivis.

Il est important de souligner que le droit d'en appeler de la décision de toute cour relativement à une infraction punissable sur déclaration sommaire de culpabilité, comme celle en l'espèce, est conféré wise, the corollary power of the appellate court to grant or deny leave as it sees fit: see *R. v. Joseph* (1900), 6 C.C.C. 144 (Que. Q.B.) In the present case the appellant's application for leave to appeal to the Quebec Court of Appeal was brought under s. 108 of the *Summary Convictions Act*, R.S.Q. 1977, c. P-15, which provides:

108. An appeal lies to the Court of Appeal, with leave of that court or of a judge of that court, from any judgment of the Superior Court rendered under the authority of this act, if the party making the application shows a sufficient interest to warrant decision on a question of law only.

It is this statutory provision which establishes and delineates the scope of the Quebec Court of Appeal's power to grant or deny leave to appeal. Once the applicant establishes that he has a sufficient interest in the case and is raising a question of law alone, the court's discretion is triggered and it is unfettered by any statutory restrictions. It is quite evident that the appellant, as an accused person in a summary conviction offence, can meet the first requirement. Moreover, he admits all the facts alleged against him. Accordingly, his constitutional challenge to Quebec's unilingual court summons arises as a question of law alone. While no reasons were given for rejecting the application (it not being the practice to give reasons) it may be safely assumed that the Court was of the view that it had already taken a position on the issue raised by the proposed appeal in rejecting an application for leave to appeal in *Walsh v. Ville de Montréal*, Mtl. C.A., November 10, 1980 (unreported). Montgomery J.A. endorsed the record on the *Walsh* application as follows:

[TRANSLATION] Application dismissed with costs fixed at $50.00, the whole for the reasons given by Hugessen C.J.

Little would have been achieved therefore by the Quebec Court of Appeal's granting leave in the instant case. It had already adopted the reasons of Hugessen A.C.J. in *Walsh*, *supra*.

par la loi. Il en va de même du pouvoir accessoire de la cour d'appel d'accorder ou de refuser l'autorisation selon qu'elle le juge à-propos: voir *R. v. Joseph* (1900), 6 C.C.C. 144 (B.R. Qué.) En l'espèce, la demande de l'appelant visant à obtenir l'autorisation d'en appeler à la Cour d'appel du Québec a été présentée en vertu de l'art. 108 de la *Loi sur les poursuites sommaires*, L.R.Q. 1977, chap. P-15, qui est ainsi rédigé:

108. Il peut être interjeté appel à la Cour d'appel, avec la permission de cette cour ou de l'un de ses juges, de tout jugement de la Cour supérieure rendu sous l'autorité de la présente loi, si la partie qui présente la demande démontre un intérêt suffisant à faire décider d'une question de droit seulement.

C'est cette disposition législative qui établit et délimite la portée du pouvoir de la Cour d'appel du Québec d'accorder ou de refuser l'autorisation d'appel. Dès que le demandeur démontre qu'il a un intérêt suffisant dans l'affaire et qu'il soulève une question de droit seulement, le pouvoir discrétionnaire de la cour entre en jeu et il n'est limité par aucune restriction légale. Il est tout à fait évident que l'appelant, comme personne accusée d'avoir commis une infraction punissable sur déclaration sommaire de culpabilité, satisfait à la première condition. De plus, il reconnaît tous les faits invoqués contre lui. En conséquence, sa contestation constitutionnelle de la sommation unilingue de la cour du Québec soulève une question de droit seulement. Bien qu'aucune raison de rejeter la demande n'ait été donnée (les raisons n'étant pas habituellement données), on peut supposer, sans crainte d'erreur, que la cour a estimé qu'elle s'était déjà prononcée sur la question soulevée par l'appel proposé, en rejetant une demande d'autorisation d'appel dans l'arrêt inédit *Walsh c. Ville de Montréal* (C.A. Mtl., 10 novembre 1980). Le juge Montgomery a inscrit au dossier de l'affaire *Walsh* ce qui suit:

Requête rejetée avec dépens fixés à la somme de $50.00, le tout pour les raisons données par l'Hon. juge en chef Hugessen.

En conséquence, il n'aurait pas été utile que la Cour d'appel du Québec accorde l'autorisation d'appel en l'espèce. Elle avait déjà adopté les motifs exprimés par le juge en chef adjoint Hugessen dans l'affaire *Walsh*, précitée.

It is of some interest to note that the Quebec Court of Appeal, in disposing of the application in *Walsh*, elected to dismiss the application for leave for the reasons given by Hugessen A.C.J. rather than granting the application and dismissing the appeal for the reasons given by the Associate Chief Justice. The latter method of procedure avoids the *Ernewein* problem entirely and is, in my view, to be preferred where in denying leave the Court has in fact considered the substantive issue and it is its decision on the substantive issue which has caused it to dismiss the application.

Il est intéressant de souligner qu'en statuant sur la demande dans l'affaire *Walsh*, la Cour d'appel du Québec a choisi de rejeter la demande d'autorisation d'appel pour les motifs donnés par le juge en chef adjoint Hugessen plutôt que d'accueillir la demande d'autorisation et de rejeter l'appel pour les mêmes motifs. Cette dernière façon de procéder permet d'éviter complètement le problème de l'arrêt *Ernewein* et est, à mon avis, préférable lorsqu'en refusant la demande d'autorisation la cour a en réalité examiné la question de fond et que c'est sa décision sur la question de fond qui l'a amenée à rejeter la demande en question.

Given then that McCarthy J.A. acted within the bounds of his discretion in denying leave in this case, the Court is squarely confronted with the tension which unquestionably exists between the *Ernewein* principle and the Court's very broad jurisdiction under the *Supreme Court Act*. Section 41(1) requires the Court to function in an ultimate supervisory capacity with respect to questions of national public importance while *Ernewein* contemplates an attitude of deference toward judicial decisions validly taken by the court below in exercise of a statutory discretion. The broad terms in which the Court's role is expressed in s. 41(1), however, serve to indicate that the principle of deference underlying *Ernewein* should not be seen as requiring the Court to abdicate its supervisory role by denying itself jurisdiction in a case of major constitutional importance such as the one before us. The national significance of the issue must surely displace the deferential posture which would otherwise be appropriate. I would conclude that the tremendous importance of the constitutional issue raised in this case makes the restraint with which such a decision of an intermediate appellate court would normally be approached inappropriate and that the Court is therefore free to consider whether on its merits the Superior Court decision of Meyer J. requires further scrutiny at the appellate level.

Alors, puisque le juge McCarthy a agi dans les limites de son pouvoir discrétionnaire en refusant l'autorisation en l'espèce, la Cour est nettement aux prises avec le conflit qui existe indéniablement entre le principe de l'arrêt *Ernewein* et la compétence très large que lui confère la *Loi sur la Cour suprême*. Le paragraphe 41(1) exige que la Cour exerce la fonction ultime de surveillance à l'égard de questions d'importance nationale, alors que l'arrêt *Ernewein* envisage une attitude de respect pour les décisions judiciaires validement rendues par les cours d'instance inférieure dans l'exercice d'un pouvoir discrétionnaire conféré par la loi. Toutefois, les termes généraux dans lesquels le par. 41(1) décrit le rôle de la Cour servent à indiquer qu'il ne faut pas considérer que le principe du respect sous-jacent à l'arrêt *Ernewein* exige que la Cour renonce à son rôle de surveillance en déclinant compétence dans un cas d'une importance majeure sur le plan constitutionnel, comme celui qui nous est soumis. L'importance nationale de la question en litige doit sûrement écarter l'attitude de respect qu'il conviendrait, par ailleurs, d'adopter. Je suis d'avis de conclure que l'importance énorme de la question constitutionnelle soulevée en l'espèce rend inappropriée la réserve avec laquelle on aborderait normalement une telle décision d'une cour d'appel intermédiaire et que la Cour est en conséquence libre d'examiner si, sur le plan du fond, la décision rendue par le juge Meyer de la Cour supérieure doit être plus amplement examinée en appel.

3. Language Rights Under s. 133

In *Blaikie No. 1*, *supra*, this Court found that s. 133 of the *Constitution Act, 1867* gave persons involved in proceedings in the courts of Quebec the option to use either French or English in any pleading or process, including oral argument, and that this guarantee could not be modified by unilateral act of either the federal or Quebec Legislature. This line of reasoning was taken one step further in *Blaikie No. 2*, *supra*, in which the Court held that matters of an essentially judicial character such as rules of court were subject to the s. 133 right "by necessary intendment" and that persons would be deprived of the right if rules and prescribed forms for court proceedings and processes were couched in one language only. Quoting from the judgment of the Court at p. 332:

> Rules of practice are not expressly referred to in s. 133 of the *B.N.A. Act*. Given the circumstances described above, they are unlikely to have been overlooked but in our view the draftsmen must have thought that they were subject to the section by necessary intendment.
>
> The point is not so much that rules of practice partake of the legislative nature of the Code of which they are the complement. A more compelling reason is the judicial character of their subject-matter for which s. 133 makes special provision. Rules of practice may regulate not only the proper manner to address the court orally and in writing, but all proceedings, processes, certificates, styles of cause and the form of court records, books, indexes, rolls, registers, each of which may under s. 133, be written in either language. Rules of practice may also prescribe and do prescribe specific forms for proceedings and processes, such for instance as the motion for authorization to institute a class action or a judgment in a class action (*Rules of Practice of the Superior Court of the Province of Quebec in civil matters*, November 10, 1978, ss. 49 to 56), a proceeding in the Superior Court, a process of the Superior Court. All litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only.

(Emphasis added.)

3. Les droits linguistiques en vertu de l'art. 133

Dans l'arrêt *Blaikie nº 1*, précité, cette Cour a conclu que l'art. 133 de la *Loi constitutionnelle de 1867* accorde aux personnes engagées dans des procédures devant les tribunaux du Québec le droit d'utiliser l'un ou l'autre du français ou de l'anglais dans tout acte de procédure ou bref, y compris les plaidoiries, et que cette garantie n'est pas susceptible d'être modifiée unilatéralement par l'un ou l'autre du Parlement fédéral ou de la législature du Québec. Ce raisonnement a été poussé plus loin dans l'arrêt *Blaikie nº 2*, précité, où la Cour a statué que les choses de nature essentiellement judiciaire comme les règles de pratique des tribunaux sont, «en toute logique, nécessairement visées» par le droit énoncé à l'art. 133 et que les personnes seraient privées de ce droit si les règles et les formules prescrites d'actes de procédure et de brefs étaient rédigées en une seule langue. La Cour dit, à la p. 332:

> L'article 133 de l'*A.A.N.B.* ne mentionne pas expressément les règles de pratique. Vu les circonstances que nous venons de décrire, il est improbable qu'on les ait oubliées; à notre avis, les rédacteurs ont dû penser qu'en toute logique, elles étaient nécessairement visées par l'article.
>
> La question n'est pas tellement que les règles de pratique participent de la nature législative du Code dont elles sont le complément. Une raison plus impérieuse est le caractère judiciaire de leur objet que l'art. 133 vise expressément. Les règles de pratique peuvent réglementer non seulement la bonne façon de s'adresser à la cour oralement et par écrit, mais toutes les procédures, tous les brefs, certificats et intitulés, ainsi que la forme des archives, livres, index, rôles et registres de la cour, qui peuvent tous, en vertu de l'art. 133, être tenus dans l'une ou l'autre langue. Les règles de pratique peuvent également prescrire, et prescrivent effectivement, des formules précises d'actes de procédure et de brefs, par exemple la requête pour autorisation d'exercer le recours collectif ou un jugement dans un recours collectif (*Règles de pratique de la Cour supérieure de la province de Québec en matière civile*, le 10 novembre 1978, art. 49 à 56), une procédure en Cour supérieure, un bref de la Cour supérieure. Tous les plaideurs ont le droit fondamental de choisir le français ou l'anglais et seraient privés de cette liberté de choix si ces règles et formules obligatoires étaient rédigées en une seule langue.

(C'est moi qui souligne.)

TAB 22

PP. 282, 289-293, 298-300

grievances) refers to art. 6.15 and following, not art. 6.14. Therefore there is no reason to read art. 6.14 in the light of art. 8. The words of art. 6.14 are still clear and unambiguous in the light of s. 7 and 8 and the whole agreement. An unsettled grievance can be referred to an arbitrator at the request of either party. The interpretation which the arbitrator would urge on us cannot be rationally supported by the words themselves. To conclude that art. 6.14 is ambiguous, one must be able to extract two plausible meanings from the words. Instead it appears that the arbitrator has ignored art. 6.14 and cannot find support for his conclusion in the agreement at all. Because of the very plain and unambiguous wording in art. 6, I am of the opinion that it is not necessary to look outside of this article in order to interpret the words therein.

I am therefore of the opinion that the arbitrator committed an error in law when he refused to assume jurisdiction to hear the grievance. I would dismiss the appeal and order costs payable to the respondent from the appellant in the amount of $1,250 throughout.

Appeal allowed.

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. et al.; Attorney-General of Alberta, Intervenor

[Indexed as: Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.]

Alberta Court of Appeal, Laycraft C.J.A., Foisy and Irving JJ.A. June 12, 1991.

Bankruptcy — Creditors — Energy Resources Conservation Board making order requiring receiver to abandon oil and gas wells — Board not creditor with provable claim but entitled to have order enforced under general law — No subversion of bankruptcy legislation — Bankruptcy Act, R.S.C. 1985, c. B-3, ss. 2, 121(1) — Oil and Gas Conservation Act, R.S.A. 1980, c. 0-5 — Energy Resources Conservation Act, R.S.A. 1980, c. E-11.

The defendant was the licensed operator of certain oil and gas wells. The respondent was appointed its receiver by the court pursuant to a debenture made in favour of the plaintiff. Subsequently, the defendant became bankrupt. The applicant, the Energy Resources Conservation Board, made an order requiring the receiver to abandon certain wells not sold, so as to make them environmentally safe, pursuant to the *Oil and Gas Conservation Act*, R.S.A. 1980, c. O-5, and the *Energy Resources Conservations Act*, R.S.A. 1980, c. E-11. It made an application for an order requiring the receiver to comply with its order. The judge of first instance dismissed the application on the ground that the board's order was at the expense of the plaintiff, a secured creditor, and its entitlement under the

Bankruptcy Act, R.S.C. 1985, c. B-3, and was thus, beyond the constitutional powers of the province.

On appeal, **held**, the appeal should be allowed.

The regulatory scheme for oil and gas operations, contained in the *Oil and Gas Conservation Act* and the *Energy Resources Conservation Act*, confer on the board wide powers to ensure environmentally safe operations, including abandonment of wells. The power of the board to make orders in respect of the proper abandonment of wells to enforce the obligations of operators under those statutes did not make it a creditor as defined by s. 2 of the *Bankruptcy Act*, nor give it a provable claim in bankruptcy pursuant to s. 121(1). Rather, the obligations imposed by the provincial statutes formed part of the general law of the province which bound every citizen who became a licensee of wells. Hence, the receiver, as successor-operator of the wells, and as an officer of the court, had a duty to abandon the wells in accordance with the law. This did not amount to a subversion of the scheme devised by Parliament for the distribution of assets in a bankruptcy.

Canada Trust Co. v. Bulora Corp. (1980), 34 C.B.R. (N.S.) 145; affd 39 C.B.R. (N.S.) 152, **apld**

Re Bourgault (1979), 105 D.L.R. (3d) 270, [1980] 1 S.C.R. 35 *sub nom. Deputy Minister of Revenue v. Rainville*, 33 C.B.R. (N.S.) 301, 20 N.R. 24 *sub nom. Bourgault's Estate v. Deputy Minister of Revenue*; *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 59 D.L.R. (4th) 726, [1989] 2 S.C.R. 24, 75 C.B.R. (N.S.) 1, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 97 N.R. 61; *Deloitte Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)* (1985), 19 D.L.R. (4th) 577, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 63 A.R. 321, 38 Alta. L.R. (2d) 168, 60 N.R. 81, 31 A.C.W.S. (2d) 297, **distd**

Canadian Commercial Bank v. Simmons Drilling Ltd. (1989), 62 D.L.R. (4th) 243, 76 C.B.R. (N.S.) 241, 35 C.L.R. 126, 78 Sask. R. 87, 17 A.C.W.S. (3d) 493; *Kovacs v. B & W Enterprises*, 469 U.S. 649 (1984); *Penn Terra Ltd. v. Dept. of Environmental Resources*, 733 F. 2d 267 (1984); *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1985); *United States v. Whizco Inc.*, 841 F. 2d 147 (1988); *Bank of Montreal v. Hall* (1990), 65 D.L.R. (4th) 361, [1990] 1 S.C.R. 121, 46 B.L.R. 161, 9 P.P.S.A.C. 177, [1990] 2 W.W.R. 193, 82 Sask. R. 120, 104 N.R. 111, 19 A.C.W.S. (3d) 356; *Royal Bank v. Workmen's Compensation Bd. of N.S.*, [1936] 4 D.L.R. 9, [1936] S.C.R. 560; *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail)* (1988), 50 D.L.R. (4th) 577, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 84 N.R. 308, 9 A.C.W.S. (3d) 397; *Alta. Treasury Branches v. Invictus Fin. Corp.* (1986), 42 Alta. L.R. (2d) 181, 68 A.R. 207 [affd 61 C.B.R. (N.S.) 254, 47 Alta. L. R. (2d) 94]; *Fotti v. 777 Management Inc.* (1981), 2 P.P.S.A.C. 32, [1981] 5 W.W.R. 48, 9 Man.R. (2d) 142; *C.P.R. Co. v. Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, **consd**

Other cases referred to

Plisson v. Duncan (1905), 36 S.C.R. 647; *Parsons v. Sovereign Bank of Canada* (1912), 9 D.L.R. 476, [1913] A.C. 160; *Multiple Access Ltd. v. McCutcheon* (1982), 138 D.L.R. (3d) 1, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 44 N.R. 181

Statutes referred to

Bankruptcy Act, R.S.C. 1985, c. B-3, ss. 2, definition "creditor", 121
Business Corporation Act, S.A. 1981, c. B-15, ss. 92, 93, 94, 95 [am. 1987,

c. 15, s. 9]
Energy Resources Conservation Act, R.S.A. 1980, c. E-11, s. 2
Oil and Gas Conservation Act, R.S.A. 1980, c. O-5, ss. 4(*b*), (*f*) [both am. 1983, c. O-5.5, s. 30(6)(*c*)], 7, 9, 11-20, 92 [am. 1988, c. 37, s. 12], 95 [am. 1984, c. 55, s. 35; 1988, c. 37, s. 15]

Rules and regulations referred to

Alta. Reg. 149/71 (*Energy Resources Conservation Act*)
Alta. Reg. 151/71 (*Oil and Gas Conservation Act*), s. 3.030(3)

APPEAL from a judgment of MacPherson J., 80 C.B.R. (N.S.) 84, 75 Alta. L.R. (2d) 185, dismissing an application for an order requiring a receiver to comply with an order to abandon certain oil wells.

Stanley H. Rutwind, for appellant (intervenor), Attorney-General of Alberta.
W.J. Major, Q.C., and *M.J. Major*, for appellant, Energy Resources Conservation Board.
R.C. Wigham, for respondent, Panamericana de Bienes y Servicios, S.A.
T.L. Czechowskyj, for respondent, Vennard Johannesen Insolvency Inc.
J.D. McDonald, for Collins Barrow Limited, trustee in bankruptcy.

The judgment of the court was delivered by

LAYCRAFT C.J.A.:—The issue on this appeal is whether the *Bankruptcy Act*, R.S.C. 1985, B-3, prevents the court-appointed receiver-manager of an insolvent and bankrupt oil company from complying with an order of the Energy Resources Conservation Board of the Province of Alberta. The order required the receiver-manager, in the interests of environmental safety, to carry out proper abandonment procedures on seven suspended oil wells. In the Court of Queen's Bench, Mr. Justice MacPherson held that the order requiring "the abandonment and securing of potentially dangerous well sites is at the expense of the secured creditors' entitlement" under the *Bankruptcy Act* and is "beyond the province's constitutional powers" [80 C.B.R. (N.S.) 84 at pp. 90-91, 75 Alta. L.R. (2d) 185]. He directed the receiver-manager not to comply with the order. For the reasons which follow, I respectfully disagree with that conclusion and would allow the appeal by the board.

"Abandonment" and "abandon" are terms with different meanings in the oil industry than when used in their usual legal sense. In the oil industry they refer to the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe. In general terms, the process requires that the well bore be sealed at various points along its length to prevent cross-flows of liquids or gases between formations, or into aquifers or from the surface. The cost may vary from a few hundred dollars to tens of thousands of dollars depending on the circumstances.

I FACTS

Prior to May, 1987, Northern Badger Oil & Gas Limited carried on business in the exploration for, and the production of, oil and gas in Alberta and Saskatchewan. It was licensed to operate 31 oil and gas wells in Alberta of which 11 were producing wells. The remainder were suspended or standing in a non-producing condition. Northern Badger owned varying interests approximating 10% in each well and was the operator of them on behalf of itself and other working interest owners.

On November 1, 1985, Northern Badger granted floating charge debenture security over certain oil and gas assets, including its interest in the 31 Alberta wells, to the respondent Panamericana. It defaulted under the debenture and in May, 1987, Panamericana applied for and obtained a court order appointing Vennard Johannesen Insolvency Inc. ("the Receiver")

> . . . Receiver and Manager of all of the undertaking, property, and assets of the Defendant, Northern Badger Oil and Gas Limited with authority to manage, operate, and carry on the business and undertaking of the Defendant . . .

On August 7, 1987, a receiving order, effective retroactively to July 7, 1987, placed Northern Badger in bankruptcy. Collins Barrow Limited was appointed trustee in bankruptcy.

On July 20, 1987, the Energy Resources Conservation Board wrote to Northern Badger referring to the insolvency and

> requiring an undertaking that the wells will continue to be operated in adherence with the regulations and conditions of the well licenses. Also it is essential that the licensee be capable of responding to any problems which may occur and properly abandoning the well once production is complete.

The board further suggested that "the solution to the problem" would be to transfer the wells to a party "who is prepared to take on the responsibilities of the licensee". The Receiver responded to this letter on August 14, 1987. It reported that 21 of the wells had been transferred to other parties, but that 12 wells had not. It then said:

> The Receivership Manager is presently involved in negotiations to sell *all of the assets and liabilities* to a number of interested parties. Vennard Johannesen is therefore striving to pass on the obligations to the prospective purchaser.

(Emphasis added.)

The board wrote again to the Receiver on December 11, 1987 pointing out that their records still showed Northern Badger to be the licensee of the wells. The letter asked the Receiver to confirm that no permits, licences or approvals would be remaining before they applied for discharge "or alternatively that you give the Board notice of any application to be discharged".

During the interval between these two letters, the Receiver had attempted to sell the Northern Badger properties to various prospective purchasers including Senex Corporation. On November 13th, Senex made an offer to purchase the remaining Northern Badger assets held by the Receiver for $1,850,000 plus a carried interest of 17.5% on certain undeveloped properties held by Northern Badger. Under this offer Senex would become the licensee of the remaining wells. However, the agreement had a clause which provided:

> The purchaser may elect to exclude any interest of the Vendor in any lands which has a value less than the costs of abandonment as agreed by the parties, or, failing agreement by Sproule Associates Limited, on or before the closing date.

The Receiver applied to the court for approval of the sale; the affidavit material filed in support of the application made no express reference to the "back out" clause. The Receiver did not give notice to the board of the application. The court approved the transaction on December 18, 1987 and the closing date of the sale was set for January 15, 1988.

Prior to the closing, by an agreement dated on the same day, Senex exercised its rights under the "back out" clause and passed seven wells back to the Receiver. This amending agreement did not vary the purchase price of the remaining assets. All the wells passed back must now be abandoned; two of them require minor expenditures, but the other five will require expenditures in the range of $40,000 each.

The court order of December 18, 1987, set aside five different funds to meet the claims of named claimants against Northern Badger for sums held in trust for them, or where claimants had rights of set-off, or to meet lien claims against the properties themselves. None of these funds made allowance for the abandonment of the wells. The remainder of the moneys were held by the Receiver awaiting the outcome of litigation to determine whether Panamericana was entitled to priority over other creditors.

On January 27, 1988, the Receiver advised the board that

> effective January 15, 1988 Vennard Johannesen Insolvency Inc. in its capacity as Receiver and Manager of Northern Badger Oil and Gas Limited *has sold all of the assets of the company* to Senex corporation.
>
> Please cancel our account with you effective January 15, 1988. We will not be responsible for any charges or fees incurred after January 15, 1988.

(Emphasis added.)

After a six-day trial in May, 1988, Panamericana obtained judgment against Northern Badger for $1,304,112, and also obtained a declaration that it had priority over all other creditors of Northern Badger for the payment of sums due under the debenture. Thereupon, on May 29, 1988, the Receiver applied to Court of Queen's Bench for an order approving its administration of the receiving order and for a discharge from its responsibilities. The affidavit filed in support detailed the payment or settlement of all claims for which provision had been made by the five funds established in December, 1987. It disclosed that, after all assets were distributed to Panamericana, there would still be a substantial deficiency in the payment of the debenture debt.

At the time of this application, the Receiver had approximately $226,000 on hand which it sought to pay to Panamericana after deducting its fees and disbursements. It wished to deliver to Collins Barrow, as trustee in bankruptcy, what were termed "minor, unrealized receivables" including the interest of Northern Badger in the seven wells and the well licences relating to them. The affidavit did not refer specifically to the liability arising from the obligation to abandon the seven wells. An apparent indirect reference to these seven wells is contained in para. 18 of the supporting affidavit:

> The Receiver has determined that certain assets of Northern Badger were not marketable and were excluded by Senex Corporation in its purchase of the assets of Northern Badger, which assets shall remain with the estate of Northern Badger, subject to any further direction of this Honourable Court.

The record before this court makes only brief reference to events during the next year. However, the application by the Receiver to be discharged remained in abeyance. In December, 1988, the board wrote to the Receiver pointing out that a number of wells were still licensed to Northern Badger. The Receiver did not respond until May 3, 1989. It advised the board that five of the seven wells which now require abandonment, had been deleted from the Senex sale.

The board's reaction to this information was, apparently, immediate. On June 1, 1989, an Order in Council of the Lieutenant-Governor in Council purporting to be issued under s. 7 of the *Oil and Gas Conservation Act*, R.S.A. 1980, c. O-5, approved the issuance by the board of an order respecting the abandonment of those five wells and the two others.

The board order authorized by the Order in Council was issued on June 6, 1989. It required the Receiver to submit abandonment programs for the seven wells by June 15, 1989 and to abandon them in accordance with an approved program on or before February 28, 1990. On June 13, 1989, the board moved in the Court of Queen's Bench for an order requiring the Receiver to comply with the board's order and this litigation resulted.

While the board's motion was pending, an effort was made to obtain contribution toward the cost of abandonment from other working-interest owners. Upon the application of the board, on November 23, 1989, Mr. Justice MacPherson directed the Receiver to take steps to collect from other working-interest owners of the seven wells their proportionate share of abandonment costs totalling $202,500. The proportion of these costs attributable to the percentage interest of Northern Badger in the wells was estimated at $17,330. Nothing in the record before the court discloses whether, or the extent to which, this effort succeeded.

On this appeal, the respondents objected that a portion of the evidence presented on behalf of the board was inadmissible. They strongly urged that there was, in the result, no evidence that failure to abandon the wells presented any danger. The evidence in question was the affidavit of Mr. G.J. DeSorcy, chairman of the Energy Resources Conservation Board. In that affidavit Mr. DeSorcy stated that he is a professional engineer and chairman of the board. He testified, on information and belief, as to a considerable amount of technical information about the five wells, the formations encountered, and the present condition of them. He expressed opinions as to the danger of cross-flows of liquids and gases, and as to hazards to the environment and to "public health and safety". The information was, apparently, derived from the records of the wells filed with the board; the expressions of opinion were his own.

In my opinion, it is not necessary to determine whether this information was admissible in this form or to consider the need for a new trial if it was not. Even if the information and expressions of opinion in this affidavit are ignored, there is ample evidence on the record in other affidavits, including those filed on behalf of the Receiver, to establish the probable cost of abandonment of the wells and the need for that process. As will be discussed later in these reasons, the process of abandonment of oil and gas wells is part of the general law of Alberta enacted to protect the environment and for the health and safety of all citizens.

II THE REASONS FOR JUDGMENT

The learned chambers judge delivered extensive reasons for judgment. He held that the board order sanctioned by the Order in Council was within the board's jurisdiction under the general powers contained in ss. 4(*b*), (*f*) and 7 of the *Oil and Gas Conservation Act.* He held, however [at p. 89], that the board "is a creditor seeking to have its claim to have the seven wells abandoned, preferred to the claim of the secured creditor, and to the scheme of distribution set forth in s. 136 of the Bankruptcy Act". He cited *Re Bourgault* (1979), 105 D.L.R. (3d) 270, [1980] 1 S.C.R. 35 *sub nom. Deputy Minister of Revenue v. Rainville*, 33 C.B.R. (N.S.) 301, and *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 59 D.L.R. (4th) 726, [1989] 2 S.C.R. 24, 75 C.B.R. (N.S.) 1, and said [at pp. 89-91]:

> The E.R.C.B. orders in council in form relate to a constitutionally valid objective, that is, abandonment of gas wells. The genuine purpose is to do something beyond the province's constitutional powers. It is to take money directed, by the Bankruptcy Act, to be paid to a secured creditor, and apply it to another purpose.
>
> . . . . .
>
> Subject to the rights of secured creditors, everything in the nature of property of the bankrupt vests in the trustee in bankruptcy. The E.R.C.B. has the powers under the Oil and Gas Conservation Act to abandon the wells and collect the costs from the appropriate parties.
>
> This claim, whether done directly or ordered to be done, is a claim provable in bankruptcy.
>
> Section 121 of the Bankruptcy Act: "All debts and liabilities, present or future, to which the bankrupt is subject", is surely wide enough to cover this liability.
>
> The proper approach to solving problems such as are raised in the case at bar is prescribed by the Supreme Court of Canada in the *F.B.D.B. v. Que. (Comm. de la santé & de la sécurité du travail)* [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209 at 217 and following, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308, a similar case of contest between preserving the secured creditors' rights as opposed to saving the public purse.
>
> The Bankruptcy Act has not been amended to deal with modern social problems of abandonment of contaminated property. Here the abandonment and the securing of potentially dangerous well sites is at the expense of the secured creditors' entitlement if the E.R.C.B. were to succeed.
>
> While I am aware that the Supreme Court of the United States of America split five to four in deciding a similar issue in the matter of *Midlantic Nat. Bank v. New Jersey Dept. of Env. Protection; Quanta Resources Corp. v. New York (City)*, 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986), I am of the view that the law of Canada accords with the dissenting view of the Chief Justice of the United States when he said that it was for the legislature to change the law, not the courts, when it came to impairing otherwise valid security for societal purposes. One should see also *Lloyd's Bank of Can. v. Int.*

Warranty Co., a decision of the Alberta Court of Appeal (1989) [now reported 68 Alta. L.R. (2d) 356, [1990] 1 W.W.R. 749, 76 C.B.R. (N.S.) 54, 60 D.L.R. (4th) 272, 97 A.R. 113, leave to appeal to S.C.C. refused 70 Alta. L.R. (2d) liii, 102 A.R. 240, 104 N.R. 320] as to the need for clear legislative statements a
before destroying property rights.

Accordingly, I must instruct the receiver-manager that he must not proceed to abandon the several wells directed to be abandoned by the order of the E.R.C.B. out of the moneys held for the secured creditors.

III REGULATORY REGIME FOR ALBERTA OIL AND GAS WELLS b

The regulatory scheme for oil and gas operations in Alberta is contained in the *Oil and Gas Conservation Act*, in the *Energy Resources Conservation Act*, R.S.A. 1980, c. E-11, and in the regulations under those Acts. Each statute contains a statement of its purposes. Section 4 of the *Oil and Gas Conservation Act* c
provides:

> 4. The purposes of this Act are
>
> . . . . .
>
> (*b*) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, completing, reworking, testing d
> operating and abandonment of wells and in operations for oil and gas.
>
> . . . . .
>
> (*f*) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Board has jurisdiction. e

The board is given wide specific powers under the act in the regulation of operations in the exploration for, and production of oil and gas. Where a specific power is not given to the board to be exercised on its own volition, it has a wide general power to be exercised with the authorization of the Lieutenant-Governor in f
Council. Section 7 provides:

> 7. The Board, with the approval of the Lieutenant Governor in Council, may make any just and reasonable orders and directions the Board considers necessary to effect the purposes of this Act and that are not otherwise specifically authorized by this Act. g

Section 9 provides that a board order shall override the terms of any contract. Sections 11 to 20 provide for the licensing of oil and gas drilling and producing operations. Section 11(1)(*b*) provides that no person shall continue any producing operations unless

> (*b*) he is the licensee or is acting under the instructions of the licensee. h

Section 13 provides that if it is established that a licensee does not have the right to produce oil or gas from land, the licence becomes "void for all purposes except as to the liability of the holder of the licence to complete or abandon the well". Section

3.030 (3) of the regulations also provides, in some circumstances, for the board to direct a licensee to abandon a well. Section 18 provides that a well licence shall not be transferred without the consent of the board. Section 19 outlines circumstances in which the board may cancel a licence.

By s. 92(1) and (2), the board is empowered to enter a well site and to perform itself, work needed for "control, completion, suspension or abandonment of the well". The cost of this work then becomes a "debt payable by the licensee of a well to the Board". Section 95 empowers the board to enforce any order by taking over the production, management and control of the well.

The *Energy Resources Conservation Act* which establishes the board, has a similar statement of its purposes in s. 2. Among these purposes are:

> (*c*) to effect the conservation of, and to prevent the waste of, the energy resources of Alberta;
>
> (d) to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy;
>
> (e) to secure the observance of safe and efficient practices in the exploration for, processing, development and transportation of the energy resources of Alberta;

It is evident that the regulatory regime contained in these statutes and regulations contemplates that all wells drilled for oil or gas will one day be abandoned. That is so whether the well is unsuccessful or whether it produces large quantities of oil or gas. At some point, when further production is not possible or the cost of production of remaining quantities exceeds the revenue which could be obtained from it, the process of abandonment is required of the well licensee. In those situations where there is no solvent entity able to carry out the abandonment duties the wells become, in the descriptive vernacular of the oil industry, "orphan wells". Thus the direct issue in this litigation, in my opinion, is whether the *Bankruptcy Act* requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety, which are liabilities, as a charge to the public.

IV DID THE BOARD HAVE A PROVABLE CLAIM IN THE BANKRUPTCY?

A basic premise of the respondents' position in the Court of Queen's Bench, and in this court, is that the board has a provable claim as a creditor in the bankruptcy of Northern Badger. From this it is contended that, in enforcing the requirement for the proper abandonment of oil and gas wells, the board simply ranks as a creditor. Then, it is said the scheme of distribution of the *Bankruptcy Act* gives priority to the secured creditors so that the a trustee is unable to obey the law requiring abandonment of oil and gas wells. That is so, it is urged, because the requirement of the provincial legislation cannot subvert the scheme of distribution specified by the *Bankruptcy Act*. The respondents point to the definition of "creditor" in s. 2 of the *Bankruptcy Act* and to the b elements of a "provable claim" set forth in s. 121.

Mr. Justice MacPherson agreed with these contentions saying that the words in ss. 2 and 121 of the *Bankruptcy Act* were "surely wide enough to cover" Northern Badger's liability to abandon the wells. These sections provide:

> 2. In this Act, c
>
> "creditor" means a person having a claim preferred, secured or unsecured, provable as a claim under this Act;
>
> . . . . .
>
> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject d before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

There are two aspects to the question whether the board had a "provable claim" in the bankruptcy. The first is whether Northern e Badger had a liability; the second is whether that liability is to the board so that it is the board which is the creditor. I respectfully agree that Northern Badger had a liability, inchoate from the day the wells were drilled, for their ultimate abandonment. It was one of the expenses, inherent in the nature of the properties them- f selves, taken over for management by the Receiver. With respect, I do not agree, however, that the public officer or public authority given the duty of enforcing a public law thereby becomes a "creditor" of the person bound to obey it.

The statutory provisions requiring the abandonment of oil and g gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to h mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

It is true that this board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under s. 92(1) and (2) of the *Oil and Gas Conservation Act* (discussed above) do the work of abandonment itself and become a creditor for the sums expended. But the board has not done so in this case. Rather, it is simply in the course of enforcing observance of a part of the general law of Alberta.

Counsel for Panamericana cited three authorities in support of its argument that the board is a creditor of Northern Badger: *Re Bourgault, supra*; *Deloitte Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)* (1985), 19 D.L.R. (4th) 577, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, and *British Columbia v. Henfrey Samson Belair Ltd., supra*. But in all these cases some actual impost had been levied against the citizen and a sum of money was due and owing to the specific public authority involved. In *Bourgault*, Quebec had registered a "privilege" for $5,474.08 for sales tax which the company had failed to remit; in *Deloitte Haskins & Sells*, the sum in dispute was a levy of $3,646.68 made under the *Workers' Compensation Act*; in *Henfrey Samson Belair Ltd.*, the company had collected, and failed to remit sales tax of $58,763.23. Thus in each case a specific sum was due to the Crown, or a Crown agency, as a debt. None of the cases is an authority for the proposition that a public officer ordering a citizen to obey the general law thereby becomes a creditor for any amount the citizen may ultimately be required to spend in complying.

In my view, the board is not, at this point, a "creditor" of Northern Badger with a claim provable in its bankruptcy. The problem presented by this case is not to be solved, therefore, by determining whether the board ranks as a creditor of Northern Badger before or after the secured creditors. Rather, it must be determined whether the Receiver, which was the operator of the oil wells in question, had a duty to abandon them in accordance with the law.

V THE DUTIES OF THE RECEIVER

Vennard Johannesen Insolvency Inc. assumed its duties as Receiver in this case as an officer of the court. The nature of its duties has been determined by a long line of cases, now reinforced by the provisions of the *Business Corporations Act*, S.A. 1981,

c. B-15. Sections 92 and 93 require the Receiver to act in accordance with the directions of the court and of the instrument under which the appointment was made. Sections 94 and 95 provide:

> 94. A receiver or receiver-manager of a corporation appointed under an instrument shall
>
> (*a*) act honestly and in good faith and,
>
> (*b*) deal with any property of the corporation in his possession or control in a commercially reasonable manner.
>
> 95. On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:
>
> (*a*) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;
>
> (*b*) an order determining the notice to be given to any person or dispensing with notice to any person;
>
> (*c*) an order fixing the remuneration of the receiver or receiver-manager;
>
> (*d*) an order
>
> (i) requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;
>
> (ii) relieving any of those persons from any default on any terms the Court thinks fit;
>
> (iii) confirming any act of the receiver or receiver-manager;
>
> (*d.1*) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of his administration that the Court specifies;
>
> (*e*) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

A receiver appointed by the court must act fairly and honestly as a fiduciary on behalf of all parties with an interest in the debtor's property and undertaking. The receiver is not the agent of the debtor or the creditor or of any other party, but has the duty of care, supervision and control which a reasonable person would exercise in the circumstances. The receiver may be liable for failure to exercise an appropriate standard of care. These points have been made in many cases starting in 1905 with *Plisson v. Duncan* (1905), 36 S.C.R. 647. The decision of Viscount Haldane in *Parsons v. Sovereign Bank of Canada* (1912), 9 D.L.R. 476, [1913] A.C. 160 (P.C.), which has been frequently quoted, emphasizes the independence of the receiver from those who procured the appointment.

It is also clear that the receiver takes full responsibility for the management, operation and care of the debtor's assets, but does not take legal title to them. That point has been made in a number of decisions including that of Lamer J. (as he then was) speaking for the court in *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail)* (1988), 50 D.L.R. (4th) 577, [1988] 1 S.C.R. 1061, 84 N.R. 308. At p. 582, he said:

> . . . the immovable in the case at bar is property of the bankrupt within the meaning of the *Bankrupt Act*. Even if the trustee takes possession of the immovable before the bankruptcy, the bankrupt remains owner of his property. The trustee who has seized an encumbered immovable cannot claim to have a right of ownership over that property: he has only the rights of a creditor under a pledge or hypothec. This court has ruled this way twice in *Lafontaine Apts. v. Larue*, [1931] 2 D.L.R. 12, [1931] S.C.R. 7 *sub nom. Laliberté v. Larue*, 12 C.B.R. 436, and *General Trust of Canada v. Roland Chalifoux Ltée*, [1962] S.C.R. 456.

A further factor affecting the obligation of a court-appointed receiver is the receiver's status as an officer of the court; the standard required because of that status is one of meticulous correctness. In *Alta. Treasury Branches v. Invictus Fin. Corp.* (1986), 42 Alta L.R. (2d) 181, 68 A.R. 207 (Q.B.), Stratton J. (as he then was) said that the Receiver's obligations "reach further than merely acting honestly". He quoted with approval the statement of Wilson J. in *Fotti v. 777 Management Inc.* (1981), 2 P.P.S.A.C. 32 at p. 37, [1981] 5 W.W.R. 48, 9 Man. R. (2d) 142 (Q.B.):

> . . . the receiver is an officer of the Court and in his discharge of that office he may not, in the name of the Court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this Court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed.

The same concern for proper conduct by the court's appointed officer may be seen in the judgment of the Saskatchewan Court of Appeal in *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 62 D.L.R. (4th) 243, 76 C.B.R. (N.S.) 241, 35 C.L.R. 126. In that case the receiver undertook a lengthy review of the debtor's records, and discovered that some subcontractors, who had not registered liens in time, were unpaid. In some cases, the time for filing liens had expired after the receiver had been appointed. The court affirmed the duty of a receiver to ascertain his obligations within a reasonable time and noted that the receiver's actions in the discharge of those obligations are the actions of the court which appointed him. It held that, whether by intention or by default, an officer of the court, cannot be permitted to change the relative rights of those for whom he is acting. Sherstobitoff J.A. said at pp. 250-51:

> The receiver, and through it the bank, must bear responsibility for the consequences of the failure to act with sufficient diligence to discover the claims within a reasonable time, thereby permitting lapse of the limitation period.
>
> What is clear is that, when the receiver was appointed, the subcontractors were entitled to payment from the trust fund. The failure to make payment to the subcontractors within a reasonable time thereafter, an obligation imposed by s. 89 of the *Business Corporations Act* and s. 7 of the *Builders' Lien Act* taken together, was in default of those statutory obligations. If the receiver had applied to the court for directions for payment out of the moneys on that date or within a reasonable time thereafter, the money would have been ordered paid to the subcontractors. The result is that the default of the receiver in failing to act with sufficient promptness and diligence to discover and pay the claims against the trust before expiration of the limitation period has deprived the subcontractors of the right to realize their claims from the trust fund.
>
> The bank now seeks to benefit from that default and the receiver supports its position. That position is untenable. While it may not be improper for a private debtor to withhold payment of a debt due and owing, whether deliberately or by neglect or oversight, and thereby benefit from an intervening limitation period, the same is not true of a receiver, *for he is an officer of the court*. The receiver's action is the action of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default.

(Emphasis added.)

In the present case it is clear that almost from the commencement of the receivership, the Receiver was aware of the obligation, in law, of Northern Badger to see the oil and gas wells properly abandoned. The correspondence from the board detailed the obligation for the proper operation of the wells and the ultimate abandonment of them.

As one reviews the sequence of events leading to the sale of the assets to Senex, it is difficult to escape the conclusion that the "back out" clause was deliberately negotiated to achieve the very result for which the respondents now contend. The "back out" clause contemplates the situation that the costs of abandonment of some wells may exceed the revenue to be gained from them. Of course, no matter what wealth a well has produced in the past, there comes a time, in the last days of its life, when little oil remains and the well must be abandoned. At that point it is a liability with the cost of abandonment exceeding the revenue that could be obtained. In this case, the parties even provided for an arbitrator to determine, if need be, whether that moment had arrived. All wells with some value were to be sold; the remainder were to be left in the bankrupt estate when the Receiver obtained a discharge from its duties.

Moreover, whether by accident or design, the board was not made aware of the developing situation. Despite the correspondence, the board was not aware that Senex was able to exercise a "back out" clause in the sale agreement. The board was first told of the effort "to sell *all the assets and liabilities*". It was then told that "*all the assets* have been sold". Only the most alert reader would detect the subtle difference in the two quoted portions of the Receiver's letters. On the material filed, it is also difficult to escape the conclusion that the court approved the sale to Senex without being aware of the prospect that some wells were to be left as "orphans".

VI CONCLUSION

In my opinion, the board had the power, when authorized by the Lieutenant-Governor in Council, to order the abandonment of the wells by some person. The order was clearly within the general regulatory scheme, and within the expressed purposes, of both of the statutes regulating the oil and gas industry. Indeed, the contrary was not argued. What was contended is that the board should have directed its order to Northern Badger or to the trustee in bankruptcy rather than to the Receiver. What was further contended is that the receiver or trustee in bankruptcy is unable to obey the general law enacted by the provincial legislature to govern oil wells because to do so would subvert the scheme Parliament has devised for distribution of assets in a bankruptcy.

The parties referred the court to some cases in the United States and to one in Canada where a debtor's legal duties on environmental matters conflicted with the potential distribution of the estate on insolvency. In each case, however, the response of the court was to some degree determined by statutory provisions. The cases are not easy to reconcile.

In *Kovacs v. B & W Enterprises*, 469 U.S. 649 (1984), a state obtained an injunction ordering an individual to clean up a hazardous site, and later a receiver was appointed to seize property of the debtor and perform the duty. The individual filed for bankruptcy and the issue was whether his subsequent discharge from bankruptcy cleared the obligation. It was held in the Sixth Circuit Court of Appeals that the claim was essentially a monetary "liability on a claim" under the bankruptcy statute, and that the debtor was discharged. The United States Supreme Court affirmed.

In *Penn Terra Ltd. v. Dept. of Environmental Resources*, 733 F. 2d 267 (1984), the Third Circuit Court of Appeals was required to decide whether an exemption clause in the bankruptcy legislation a
should be construed to exempt from discharge an order requiring the debtor to complete restoration of the sites after coal operations. The court observed that the judgment obtained was not in the form of a traditional money judgment as for a tort or other claim. It then held that the debtor was not discharged and was required to b
perform the restoration.

In *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1985), a corporation filed for bankruptcy after it was discovered to have stored oil contaminated with a carcinogen at a site in New Jersey and c
another in New York. The trustee proposed to abandon the sites on the ground that they were of "inconsequential value" to the estate. In New Jersey, state environmental officials ordered the site cleaned up. A majority of the United States Supreme Court held that a bankruptcy trustee may not abandon property in contravention of state law. The minority would have held that the abandon- d
ment might be barred in emergency conditions, which did not yet exist in the case.

A similar problem arose again after both the above cases had been decided in *United States v. Whizco Inc.*, 841 F. 2d 147 (1988). The United States sought an injunction to force obedience to a e
statutory obligation to abandon a worked-out coal mine. The Sixth Circuit Court of Appeals held, following the *Kovacs* case, that the operator's discharge under the *Bankruptcy Act* discharged the operator's liability to the extent that it would require the expenditure of money. f

One similar case has arisen in Canada. In *Canada Trust Co. v. Bulora Corp.* (1980), 34 C.B.R. (N.S.) 145 (Ont. S.C.), the Receiver, as in the present case, had been appointed to receive *and manage* the company. The fire marshal ordered the Receiver to demolish certain housing units which were in a "serious and g
hazardous" condition. It was urged that, despite the appointment of the Receiver, the company continued to exist and to hold title to its assets. Thus, it was said, the proper recipient of the demolition order was the company, itself, and not the Receiver. Cory J., then a judge of the High Court of Justice of Ontario, summarized the h
argument in these terms at p. 151:

> It was contended that the nature of the position of the receiver, although it might paralyze the power of the company for which it was appointed, did not extinguish the legal existence of that company. Thus Bulora continued to exist and continued as the entity responsible for the required demolition. It was said

> that, as the Fire Marshal had every right to recover from the municipality, the receiver should not and could not be required to undertake the demolition, which would have the effect of reducing the amount recovered by Canada Trust, the secured creditor.

Cory J. then summarized the powers of the Receiver under the order appointing it, which gave it very wide powers of management and control similar to those given the Receiver in this case. He then said at p. 152:

> There remains the major problem of determining who should bear the costs of the demolition. The order of the Fire Marshal is of vital concern for the safety of residents of the units adjacent to and close by the abandoned units. The safety of those persons occupying such units should be of paramount importance. If the receiver is given wide and sweeping powers in the management of the company, surely in the course of such management it has a duty to comply with a demolition order where the safety of individuals is so vitally concerned. It is indeed unfortunate that a creditor must suffer the loss resulting from the demolition. Nevertheless, the asset to be managed by the receiver must, in my opinion, be managed with a view to the safety of those residing in and beside that asset. Receivership cannot and should not be guided solely by the recovery of assets. In my view, there is a social duty to comply with an order such as this which deals with the safety of individuals affected by an asset the receiver is managing.
>
> The direction then will be that the receiver is to comply with the order of the Fire Marshal and proceed with the demolition of the specified units.

The Court of Appeal affirmed the judgment of Cory J.: 39 C.B.R. (N.S.) 152. The endorsement on the record was as follows:

> There was an order made by the fire marshall the legality and appropriateness of which is not challenged by the appellant. We are of the view that under the circumstances it was not only within the jurisdiction of the learned judge to direct that the court-appointed receiver-manager carry out that order but those circumstances necessitated that the receiver-manager be so directed. Although Cory J. referred to a "social duty" to comply with the order that language, with deference, was inappropriate. The duty involved was a statutory one and it was unnecessary for him to consider the social implications of the order. The appeal is dismissed with costs.

As in *Bulora Corp.*, it is urged in this case that Northern Badger is the licensee of the wells; the Receiver has never had legal title to them and is not the licensee. Therefore, it is said, the abandonment order should be directed to Northern Badger and not to the Receiver. In my opinion, that contention is not valid.

The Receiver has had complete control of the wells and has operated them since May, 1987, when it was appointed Receiver and Manager of them. It has carried out for more than three years, activities with respect to the wells which only a licensee is authorized to do under the provisions of the *Oil and Gas Conservation Act*. In that position, it cannot pick and choose as to whether an operation is profitable or not in deciding whether to carry it out. If one of the wells of which a receiver has chosen to take control should blow out of control or catch fire, for example, it would be a remarkable rule of law which would permit him to walk away from the disaster saying simply that remedial action would diminish distribution to secured creditors.

While the Receiver was in control of the wells, there was no other entity with whom the board could deal. An order addressed to Northern Badger would have been fruitless. That is so because, by order of the court, upon the application of the debenture holder, neither Northern Badger nor its trustee in bankruptcy had any right even to enter the well sites or to undertake any operation with respect to them. Moreover, under the regulatory scheme for Alberta oil wells, only a licensee is entitled to produce oil and gas. The Receiver cannot be heard to say that, while functioning as a licensee to produce the wells and to profit from them, it assumed none of a licensee's obligations.

I must also consider the contention, which found favour in the Court of Queen's Bench, that the receiver or bankruptcy trustee managing and operating oil and gas wells need not and, indeed, is forbidden to obey the general provincial law governing property of that description. Put another way, this argument states that the general provincial law regulating the operation of oil and gas wells in Alberta is invalid to the extent that it purports to govern a receiver or bankruptcy trustee in possession of such wells.

Conflict between federal and provincial legislation is, of course, a classic Canadian problem. A number of cases have considered the situation where either a federal or provincial law, validly enacted within the constitutional power reserved to the enacting body, also touches upon or affects a heading of power reserved to the other level of government. These cases have been extensively reviewed and commented upon in the recent decision of the Supreme Court of Canada in *Bank of Montreal v. Hall* (1990), 65 D.L.R. (4th) 361, [1990] 1 S.C.R. 121, 46 B.L.R. 161.

Provincial legislation has often been upheld despite incidental effects on a subject under the federal power. Where there is direct confrontation (as where one statute says "yes" and the other says "no" — as Dickson J. (as he then was) expressed it in *Multiple Access Ltd. v McCutcheon* (1982), 138 D.L.R. (3d) 1, [1982] 2 S.C.R. 161, 18 B.L.R. 138, the doctrine of paramountcy may force a conclusion of invalidity of the provincial legislation.

That the two statutes affect the same subject-matter does not necessarily mean that one or the other of them is invalid. An early case of this type was *C.P.R. Co. v. Parish of Notre Dame de Bonsecours*, [1899] A.C. 367. In that case the Privy Council held that since Parliament has the exclusive right to prescribe regulations for the construction, repair and alteration of a railway, a provincial legislature could not regulate the structure of a ditch-forming part of the works. But it held *intra vires* a municipal code which prescribed the cleaning of the ditch and the removal of obstructions to prevent flooding.

Similarly, in *Royal Bank v. Workmen's Compensation Bd. of N.S.*, [1936] 4 D.L.R. 9, [1936] S.C.R. 560, the Supreme Court of Canada held valid a levy for workers' compensation which adversely affected security granted under the *Bank Act.* La Forest J., giving the judgment of the court in *Bank of Montreal v. Hall, supra*, quoted the judgment of Davis J. in the Nova Scotia case (at pp. 16-7) as follows at pp. 380-1:

> . . . I have reached the conclusion that the goods in question, though owned by the bank subject to all the statutory rights and duties attached to the security were property in the Province of Nova Scotia 'used in or in connection with or produced in or by the industry with respect to which the employer (was) assessed though not owned by an employer' and became subject to the lien of the provincial statute the same as the goods of other owners . . . *It is a provincial measure of general application for the benefit of workmen employed in industry in the Province and is not aimed at the impairment of bank securities though its operations may incidentally in certain cases have that effect.*"

(Emphasis added by La Forest J.)

In *Bank of Montreal v. Hall*, the provincial legislation in conflict with valid federal legislation was forced to give way. The bank sought to enforce security granted to it under the *Bank Act* and the issue was whether it was required to follow the procedures and experience delays prescribed by the Saskatchewan *Limitation of Civil Rights Act.* After a review of the case law and of the two enactments, La Forest J. was "led inescapably to the conclusion" that there was an "actual conflict in operation" between them. The provincial legislation was held inoperative in respect of security taken by the bank.

In my view, there is no such direct conflict in this case. The Alberta legislation regulating oil and gas wells in this province is a statute of general application within a valid provincial power. It is general law regulating the operation of oil and gas wells, and safe practices relating to them, for the protection of the public. It is not aimed at subversion of the scheme of distribution under the *Bankruptcy Act* though it may incidentally affect that distribution in some cases. It does so, not by a direct conflict in operation, but because compliance by the Receiver with the general law means that less money will be available for distribution.

This view accords with the opinion stated in Holden and Morawetz: *Bankruptcy Law of Canada*, at pp. 1-3 and 1-4, where it is said: a

> There is no indication that the bankruptcy provisions were ever intended to apply to laws (and thus orders) governing environmental protection or energy conservation in the public interest. It cannot be said that the provincial laws "displace the legislative purpose of Parliament".

I respectfully agree with the decision in *Bulora Corp.*, *supra*. In b my opinion, the Receiver, the manager of the wells with operating control of them, was bound to obey the provincial law which governed them.

I would not attempt to define the limits of provincial regulatory authority in relation to the federal powers respecting insolvency and bankruptcy. The various levels of government regulate busi- c ness in a myriad of ways. The extent to which these levels of government may, in the exercise of their powers, affect in an incidental way, the distribution of insolvent estates must depend, to a considerable extent, on the facts of the particular case.

I would allow the appeal and direct the Receiver to comply with d the board order. The parties may speak to costs.

Appeal allowed.

Re Hill and University College of Cape Breton et al. e

[Indexed as: Hill v. University College of Cape Breton]

Nova Scotia Supreme Court, Trial Division, Davison J. June 3, 1991.

Education — Colleges and universities — Powers of governing council — f Respondent university appointing applicant president — Deciding to review applicant's performance — Interviewing persons about applicant's performance — Giving summary of interviews to applicant — Notice of board meeting omitting that presidency would be considered — Applicant not permitted to attend board meeting — Board created by statute — President's position created by statute — Certiorari available — Breaches of natural justice — g Board failing to act fairly.

Administrative law — Remedies — Certiorari — Availability — Respondent university appointing applicant as president — Deciding to review applicant's performance — Interviewing persons about applicant's performance — Giving summary of interviews to applicant — Notice of board meeting neglecting to state presidency would be considered — Applicant not h permitted to attend board meeting — Board created by statute — President's position created by statute — Certiorari available.

Administrative law — Natural justice — Respondent university appointing applicant as president — Deciding to review applicant's performance as president — Interviewing persons about applicant's performance — Giving

TAB 23

pp. 392-393

Richard Dorion *Appellant*

v.

Jacques Roberge and Johanne Beaupré *Respondents*

and

Jean-Pierre Bolduc *Mis en cause*

INDEXED AS: ROBERGE *v.* BOLDUC

File No.: 20943.

1990: October 4; 1991: February 28.

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Appeal — Jurisdiction of Supreme Court of Canada — Court of Appeal refusing leave to appeal Superior Court judgment — Whether leave to appeal to Supreme Court of Canada may be granted — Supreme Court Act, R.S.C., 1985, c. S-26, s. 40(1).

Civil responsibility — Professional liability — Notaries — Title searches — Incidence of res judicata in the context of title searches — Buyers not purchasing property following notary's opinion that defect in title not cured by subsequent judgment — Notary acting in accordance with common notarial practice — Whether notary failed to properly assess effect of judgment on vendor's title — If so, whether error of law constitutes a fault entailing notary's liability — Distinction between common professional practice and fault — Civil Code of Lower Canada, art. 1241.

Judgments and orders — Res judicata — Conditions — Incidence of res judicata in the context of title searches — Judgment rendered by default on action in giving in payment — Civil Code of Lower Canada, art. 1241.

Evidence — Expert evidence — Professional liability — Role of expert testimony.

Costs — Costs on solicitor and client basis — Leave to appeal to Supreme Court of Canada granted on con-

Richard Dorion *Appelant*

c.

Jacques Roberge et Johanne Beaupré *Intimés*

et

Jean-Pierre Bolduc *Mis en cause*

RÉPERTORIÉ: ROBERGE *c.* BOLDUC

N° du greffe: 20943.

1990: 4 octobre; 1991: 28 février.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Sopinka, Gonthier et Cory.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Appel — Compétence de la Cour suprême du Canada — Cour d'appel refusant l'autorisation d'en appeler d'un jugement de la Cour supérieure — L'autorisation de pourvoi devant la Cour suprême du Canada peut-elle être accordée? — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 40(1).

Responsabilité civile — Responsabilité professionnelle — Notaires — Examen des titres — Incidence de la chose jugée dans le cadre de l'examen des titres — Refus des acquéreurs d'acheter un immeuble vu l'opinion du notaire qu'un vice de titre n'a pas été corrigé par un jugement subséquent — Conduite du notaire conforme à la pratique notariale courante — Le notaire a-t-il mal évalué l'effet du jugement sur le titre du vendeur? — Si oui, l'erreur de droit constitue-t-elle une faute qui entraîne la responsabilité du notaire? — Distinction entre la pratique professionnelle courante et la faute — Code civil du Bas-Canada, art. 1241.

Jugements et ordonnances — Chose jugée — Conditions — Incidence de la chose jugée dans le cadre de l'examen des titres — Jugement rendu par défaut sur une action en dation en paiement — Code civil du Bas-Canada, art. 1241.

Preuve — Preuve d'expert — Responsabilité professionnelle — Rôle du témoignage d'expert.

Dépens — Dépens calculés sur la base avocat-client — Autorisation de pourvoi devant la Cour suprême du *dition that appellant notary assume costs of appeal — Respondents requesting costs on solicitor and client basis in factum and at hearing — Decision important to notarial profession only — Costs awarded on solicitor and client basis — Supreme Court Act, R.S.C., 1985, c. S-26, s. 47.*

In 1987, upon acceptance of their offer to purchase the immoveable property of the mis en cause, the respondents instructed the appellant notary to examine the vendor's title to assure them that he held good and valid title to the property and, if so, to prepare the deed of sale. In examining the chain of title, the appellant discovered that in 1977 one P.L. had obtained a loan from a caisse populaire (the "Caisse") guaranteed by a hypothec and by a giving in payment clause. The deed of loan was registered against the property in issue even though P.L. was not the owner, the property being registered at the time in the name of P.L. Inc. Both P.L. and P.L. Inc. later made assignments in bankruptcy and the same trustee was appointed for both bankrupt estates. The trustee registered a notice of the bankruptcy of P.L. against the property but did not register a notice on behalf of P.L. Inc. The Caisse, upon the default of P.L. on his loan and pursuant to the giving in payment clause in the deed of loan, took proceedings against the trustee of the bankrupt estate of P.L. and against P.L. Inc. The proceedings were served on the trustee of the bankrupt estate of P.L., on P.L. personally and on P.L. Inc. As none of the defendants appeared to defend the action, the Caisse obtained a default judgment granting it title to the property. This judgment was duly registered against the property. In 1981, the Caisse sold the property to the wife of the prospective vendor who, in 1984, purchased the property from his wife.

Following the title search, the appellant informed the respondents that, in his opinion, the judgment obtained by the Caisse did not cure the defect in the vendor's title. The hypothec, granted by a person other than the registered owner, was null and void and the judgment could not give more than the hypothec was worth. The vendor's attorney replied that the judgment registered had perfected the title, and had acquired the authority of *res judicata*. Faced with these opposite views, the respondents consulted a second notary who confirmed the appellant's opinion. The respondents then notified the vendor that, in the circumstances, they would not purchase the property and instructed their attorney to take action against him. The vendor counterclaimed for damage allegedly suffered on account of the respondents' refusal to purchase the property. In answer to the counterclaim, the respondents exercised a recourse in

Canada accordée à la condition que le notaire appelant assume les dépens du pourvoi — Demande de dépens comme entre avocat et client présentée par les intimés dans leur mémoire et à l'audition — Décision importante pour la profession notariale seulement — Dépens accordés comme entre avocat et client — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 47.

En 1987, après acceptation de leur offre d'achat d'un immeuble du mis en cause, les intimés ont donné au notaire appelant mandat d'examiner le titre du vendeur pour les assurer que le vendeur détenait un titre bon et valable sur l'immeuble et, dans l'affirmative, de préparer l'acte de vente. En examinant la chaîne des titres, l'appelant a découvert qu'en 1977 un certain P.L. avait obtenu d'une caisse populaire (la «Caisse») un prêt garanti par hypothèque assortie d'une clause de dation en paiement. L'acte de prêt a été enregistré contre l'immeuble en cause même si P.L. n'en était pas le propriétaire, l'immeuble étant enregistré à l'époque au nom de P.L. Inc. Plus tard, P.L. et P.L. Inc. ont fait cession de leurs biens et la même personne a été nommée syndic aux biens des deux faillis. Le syndic a fait enregistrer un avis de la faillite de P.L. contre la propriété, mais il ne l'a pas fait au nom de P.L. Inc. Suite au défaut de P.L. d'honorer son prêt et conformément à la clause de dation en paiement prévue à l'acte de prêt, la Caisse a engagé des procédures contre le syndic à la faillite de P.L. et contre P.L. Inc. Les procédures ont été signifiées au syndic à la faillite de P.L., à P.L. personnellement et à P.L. Inc. Aucun des défendeurs n'ayant comparu à l'action, la Caisse a obtenu un jugement par défaut lui accordant la propriété de l'immeuble. Ce jugement a été dûment enregistré contre l'immeuble. En 1981, la Caisse a vendu l'immeuble à l'épouse du vendeur éventuel qui, en 1984, l'a acheté de celle-ci.

Après avoir procédé à l'examen des titres, l'appelant a informé les intimés qu'à son avis le jugement obtenu par la Caisse n'avait pas corrigé le vice du titre du vendeur. L'hypothèque consentie par une personne autre que le propriétaire enregistré était nulle et le jugement ne pouvait donner plus que ce que valait cette hypothèque. L'avocat du vendeur a répondu que le jugement enregistré avait rendu le titre parfait et qu'il avait acquis l'autorité de la chose jugée. Devant ces avis contradictoires, les intimés ont consulté un second notaire qui a confirmé l'avis de l'appelant. Les intimés ont alors avisé le vendeur que, dans ces circonstances, ils n'achèteraient pas l'immeuble et ils ont donné à leur avocat instruction de prendre action contre lui. Le vendeur s'est porté demandeur reconventionnel pour les dommages qu'il aurait subis en raison du refus des intimés d'acheter l'immeuble. En réponse à la demande reconventionwarranty against the appellant on the basis that it was on his advice that they refused to purchase the property.

The Superior Court dismissed the respondents' action and allowed both the vendor's counterclaim and the respondents' recourse in warranty against the appellant. The trial judge held that the judgment in favor of the Caisse had the authority of *res judicata* and conferred good and valid title on the Caisse despite the fact that the hypothec was granted by a person other than the registered owner. The trial judge found that the appellant committed an error of law and that the respondents were not justified in refusing to sign the deed of sale. He concluded that the appellant's error constituted a fault and was the *causa causans* of the damage suffered by the respondents. The Court of Appeal refused to grant leave to appeal from the judgment of the Superior Court. This appeal is to determine whether the appellant erred in law in ignoring the authority of *res judicata* as regards the Caisse's judgment and its effect on the vendor's title; and, if so, whether such an error constitutes a fault entailing appellant's liability. However, before answering the main issues, this Court must determine if it has jurisdiction to entertain the present appeal.

Held: The appeal should be dismissed.

(1) *Supreme Court's Jurisdiction*

This Court has jurisdiction pursuant to s. 40(1) of the *Supreme Court Act* to review the Court of Appeal's decision not to grant leave to appeal from a judgment at trial. Under s. 40(1), this Court retains the discretionary power to hear an appeal from any final or other judgment of the intermediate appellate courts which raises an issue of public importance. While a certain amount of deference to the undoubted competence of intermediate appellate courts to control their own leave-granting process is called for, it is equally evident that this Court's jurisdiction to exercise its own discretion in intervening in such decisions is not statutorily confined. Moreover, in the present case, leave to appeal was granted from both the Superior Court and the Court of Appeal judgment.

(2) *Res Judicata*

Appellant's contention that the vendor's title could be challenged by an action contesting the validity of the

nelle, les intimés ont exercé un recours en garantie contre l'appelant, alléguant que c'était sur son conseil qu'ils avaient refusé de se porter acquéreurs de l'immeuble.

La Cour supérieure a rejeté l'action des intimés et a accueilli tant la demande reconventionnelle du vendeur que le recours en garantie des intimés contre l'appelant. Le juge de première instance a conclu que le jugement en faveur de la Caisse avait l'autorité de la chose jugée et qu'il conférait un titre bon et valable à la Caisse en dépit du fait que l'hypothèque avait été consentie par une personne autre que le propriétaire enregistré. Le juge de première instance a conclu que l'appelant avait commis une erreur de droit et que le refus des intimés de signer l'acte de vente n'était pas justifié. Il a conclu que l'erreur de l'appelant constituait une faute et qu'elle était la *causa causans* du préjudice subi par les intimés. La Cour d'appel a refusé l'autorisation d'interjeter appel contre le jugement de la Cour supérieure. Le présent pourvoi vise à déterminer si l'appelant a commis une erreur de droit en ne tenant pas compte de l'autorité de la chose jugée relativement au jugement obtenu par la Caisse et des effets de ce jugement sur le titre du vendeur, et dans l'affirmative, si une telle erreur constitue une faute qui entraîne la responsabilité du notaire. Cependant, avant de répondre aux questions principales, notre Cour doit décider si elle a compétence pour instruire le présent pourvoi.

Arrêt: Le pourvoi est rejeté.

(1) *La compétence de la Cour suprême*

Notre Cour a, en vertu du par. 40(1) de la *Loi sur la Cour suprême*, compétence pour examiner la décision de la Cour d'appel de refuser l'autorisation d'interjeter appel contre un jugement de première instance. En vertu du par. 40(1), notre Cour conserve le pouvoir discrétionnaire d'entendre un appel interjeté à l'encontre de tout jugement définitif ou de toute autre décision d'une cour d'appel intermédiaire qui soulève une question d'importance pour le public. Bien que cela commande un certain respect pour le pouvoir qu'ont indubitablement les cours d'appel intermédiaires de contrôler leur propre processus d'autorisation, il est également évident que le pouvoir discrétionnaire qu'a notre Cour d'intervenir dans ces décisions n'est pas limité par la loi. De plus, en l'espèce, l'autorisation de pourvoi a été accordée tant à l'égard de la décision de la Cour supérieure qu'à l'égard de l'arrêt de la Cour d'appel.

(2) *La chose jugée*

Il faut rejeter l'argument de l'appelant selon lequel le titre du vendeur peut être attaqué au moyen d'une action hypothec must be rejected. The judgment granting ownership of the immoveable property to the Caisse acquired the authority of *res judicata* since it met all the conditions set out in art. 1241 *C.C.L.C.* The judgment was rendered by a civil court in Quebec which had jurisdiction in the matter; the Caisse's action on the giving in payment clause was contentious in nature and the judgment "definitive", even though rendered by default, since the proceedings were served on the parties. Further, there was identity of parties, object and cause. In the context of *res judicata*, juridical identity of the parties is all that is required. The prospective vendor was a successor by particular title to the property and thus a "party" to any judgments rendered in regard thereto. The trustee was a party to the action on the giving in payment clause and represented the creditors of P.L. Inc. When someone is represented by a party to an action, he cannot later challenge the judgment. The object of the judgment obtained by the Caisse was the ownership of the immoveable property, precisely the same object which an attack on the validity of the hypothec would pursue. Finally, the essence of the legal characterization of the facts alleged is identical and relates to the contract of loan. The inexecution of the obligation undertaken in that contract is the "concrete" cause of action.

Even if the creditors of P.L. Inc. were not "represented" by the trustee, they would still be bound by the judgment granting ownership of the property to the Caisse. The chirographic creditors cannot claim more rights than those of their debtor. If that debtor loses some of his patrimony, then these creditors simply have a decreased patrimony to share. They cannot challenge the validity of the judgment unless they prove that such judgment constituted an attempt to defraud the creditors. An oblique action, however, is taken by a creditor, not in a personal capacity, but as a representative of the debtor, and thus would raise the same issues of representation and *res judicata*. A Paulian action, on the other hand, must allege fraud and is taken in the name of the individual creditor exercising personal rights. Such action, although a possibility even after a judgment in giving in payment, is prescribed after one year of knowledge of the alleged fraud.

The trustee himself could not contest the judgment even if he was not properly served in his capacity as trustee in bankruptcy of P.L. Inc. P.L. Inc. was properly served, given the absence of notice of bankruptcy in the index of immoveables, and the trustee, who failed to

contestant la validité de l'hypothèque. Le jugement conférant la propriété de l'immeuble à la Caisse a acquis l'autorité de la chose jugée puisqu'il satisfait à toutes les conditions énoncées à l'art. 1241 *C.c.B.-C.* Le jugement a été rendu par un tribunal civil québécois qui avait compétence en la matière; l'action de la Caisse en dation en paiement était de nature contentieuse et, quoiqu'il ait été rendu par défaut, le jugement était «définitif» puisque les procédures avaient été signifiées aux parties. De plus, il y avait identité de parties, d'objet et de cause. Dans le contexte de la chose jugée, l'identité juridique des parties est tout ce qui est requis. Le vendeur éventuel était un successeur à titre particulier de l'immeuble et était ainsi «partie» à tout jugement touchant ledit immeuble. Le syndic était partie à l'action en dation en paiement et représentait les créanciers de P.L. Inc. La personne qui est représentée par une partie à une instance ne peut par la suite contester le jugement. L'objet du jugement obtenu par la Caisse était la propriété de l'immeuble, soit précisément le même objet que viserait une contestation de la validité de l'hypothèque. Enfin, la qualification juridique des faits allégués est essentiellement identique et se rapporte au contrat de prêt. C'est l'inexécution de l'obligation assumée dans ce contrat qui constitue la cause d'action «concrète».

Même dans l'hypothèse où les créanciers de P.L. Inc. n'auraient pas été «représentés» par le syndic, ils seraient toujours liés par le jugement accordant la propriété de l'immeuble à la Caisse. Les créanciers chirographaires ne peuvent revendiquer plus de droits que ceux que possède leur débiteur. Si ce débiteur perd une partie de son patrimoine, les créanciers n'ont plus alors qu'un patrimoine réduit à partager. Ils ne peuvent contester la validité du jugement, à moins de prouver que ce jugement constitue une tentative de fraude à leur endroit. Toutefois, l'action oblique est intentée par un créancier, non en sa capacité personnelle, mais en sa qualité de représentant du débiteur, ce qui fait intervenir les mêmes notions de représentation et de chose jugée. Dans l'action paulienne, par contre, il doit y avoir allégation de fraude et le recours est formé au nom du créancier individuel dans l'exercice de ses droits personnels. Bien que cette action puisse être intentée même après un jugement en matière de dation en paiement, elle est prescrite à l'expiration d'un an à compter du jour où on a pris connaissance de la fraude alléguée.

Le syndic lui-même ne pouvait pas contester le jugement même s'il n'avait pas dûment reçu signification de l'instance en sa qualité de syndic à la faillite de P.L. Inc. P.L. Inc. a dûment reçu signification, compte tenu de l'absence d'avis de faillite dans l'index des immeubles, register such notice on the debtor's property at the time of the bankruptcy, could not benefit from his own omission. In any event, the trustee had actual knowledge of the proceedings, and if he sought to attack the judgment, he would have had to act within a reasonable time.

As for third parties, if they were aware of the judgment rendered in favour of the Caisse they should have acted with diligence to retract the judgment. Since the judgment was registered against the property years earlier, it would be difficult, if not impossible, for the creditors to claim absence of notice. The time elapsed since the registered judgment obtained by the Caisse would also serve as a bar to third-party opposition. The remote possibility that third parties, unaware of the judgment, could later contest the validity of the hypothec and, as a consequence, the validity of the vendor's title is pure speculation. There is no indication that any other party might have had an interest in the validity of the hypothec and/or the ownership of the property.

The appellant, therefore, made an error of law in ignoring the authority of *res judicata* as regards the judgment obtained by the Caisse and its effect on the vendor's title to the property. The judgment conferred good and valid title on the Caisse, despite the fact that there was a defect in the hypothec, since it was not appealed from and, on the facts of this case, could not have been the object of further proceedings. The appellant failed to distinguish between the hypothec's defect, which existed, and the defect in the title, which did not exist, having been cured by the judgment granting ownership to the Caisse.

(3) *Expert Evidence*

Expert witnesses testified at trial that the appellant's opinion was in conformity with the norms of practice of a prudent and cautious notary in the same circumstances. The expert evidence, although not relevant in the determination of whether the judgment rendered on the giving in payment action had the authority of *res judicata*, was relevant in the assessment of notarial practice and was properly admitted by the trial judge. The trial judge, however, is the final arbiter and is not bound by expert testimony. This is particularly so in matters of professional liability, where an expert's evidence is not binding regarding the precise question of law which the judge is called upon to decide. This is the domain of the judge.

et le syndic, qui a négligé de faire enregistrer cet avis contre les biens du débiteur au moment de la faillite, ne saurait tirer profit de sa propre omission. En tout état de cause, le syndic avait une connaissance de fait de la
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poursuite et s'il avait voulu attaquer le jugement, il aurait dû le faire dans un délai raisonnable.

Quant aux tierces parties, si elles étaient au courant du jugement rendu en faveur de la Caisse, c'est avec
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diligence qu'elles auraient dû agir pour en demander la rétractation. Le jugement ayant été enregistré contre l'immeuble plusieurs années auparavant, il serait difficile, voire impossible, aux créanciers d'invoquer l'absence d'avis. Le délai écoulé depuis l'enregistrement du jugement obtenu par la Caisse constituerait également
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une fin de non-recevoir à une tierce-opposition. La possibilité lointaine que des tiers, non au fait du jugement, puissent ultérieurement contester la validité de l'hypothèque et, partant, la validité du titre du vendeur n'est que pure spéculation. Rien n'indique qu'une autre partie
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aurait pu avoir un intérêt dans la validité de l'hypothèque ou dans la propriété de l'immeuble, ou dans les deux à la fois.

L'appelant a donc commis une erreur de droit en ne
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tenant pas compte de l'autorité de la chose jugée relativement au jugement obtenu par la Caisse et de l'effet de ce jugement sur le titre de propriété du vendeur. Le jugement a conféré à la Caisse un bon et valable titre malgré qu'il y ait eu un vice dans l'hypothèque, étant
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donné qu'il n'a pas été porté en appel et qu'il n'aurait pu, d'après les faits de l'espèce, faire l'objet d'autres procédures. L'appelant n'a pas fait la distinction entre le vice de l'hypothèque, qui existait, et le vice du titre, qui n'existait pas puisqu'il y avait été remédié par le jugement conférant la propriété de l'immeuble à la Caisse.
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(3) *La preuve d'expert*

Des témoins experts ont affirmé en première instance que l'opinion de l'appelant était conforme aux normes
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de pratique d'un notaire prudent et vigilant, placé dans les mêmes circonstances. Bien qu'elle n'ait pas été utile pour déterminer si le jugement rendu sur l'action en dation en paiement avait l'autorité de la chose jugée, la preuve d'expert était pertinente pour évaluer la pratique
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notariale et le juge de première instance a eu raison de l'admettre. Cependant, le juge de première instance reste l'arbitre final et n'est pas lié par le témoignage des experts. Il en va particulièrement ainsi en matière de responsabilité professionnelle où le témoignage d'un expert
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ne lie pas quant à la question de droit précise que le juge est appelé à trancher. Cette question relève du domaine du juge.

(4) *Professional Liability*

The trial judge was correct in concluding that the appellant's error constituted a fault entailing his liability. The fact that a professional followed the common professional practice at the relevant time is not sufficient to avoid liability. Such practice must be demonstrably reasonable. Accordingly, when a professional adheres to a common professional practice which does not accord with the general standards of liability, i.e., that one must act in a reasonable and diligent manner, he can be found liable, depending on the facts of each case. The common notarial practice followed by the appellant led to the conclusion that there was a defect in the vendor's title and that such defect was not cured by the judgment granting ownership to the Caisse. Given the clear state of the law at the time, the notarial practice as regards title searches cannot be characterized as reasonable and diligent, nor can the casual way in which the issue of *res judicata* was dealt with be condoned. The issue of *res judicata* is not a controversial one in the legal field and its application to this case did not present particular difficulties. The appellant's main contractual obligation toward the respondents was to give a legal opinion as to the vendor's title. This obligation was one of means only but one that he had a duty to fulfill in a prudent and diligent manner. Appellant's error of law was unreasonable and constituted a fault in the circumstances of this case. Further, the necessity to advise clients of the legal consequences of their actions is clearly an aspect of the notarial duty to counsel. Appellant's failure to inform the respondents of the likelihood of legal action by the vendor constituted a breach of his obligations toward the respondents.

The appellant is liable for the damage suffered by the respondents. The appellant's opinion was the direct, immediate, and logical cause of the respondents' decision not to purchase the property. The fact that the respondents sought the opinion of a second notary, which confirmed that of the appellant, did not affect the causal link between the appellant's fault and the damage suffered by the respondents. Had the appellant given proper legal advice, they would never have needed to seek a second opinion. Further, the opinion of the second notary did not constitute a *novus actus interveniens*. The respondents' decision to seek a second opinion was

(4) *La responsabilité professionnelle*

Le juge de première instance a eu raison de conclure que l'erreur de l'appelant constituait une faute engageant sa responsabilité. Le fait qu'un professionnel ait suivi la pratique professionnelle courante à l'époque en cause ne suffit pas pour échapper à la responsabilité. Il faut que le caractère raisonnable de cette pratique puisse être démontré. En conséquence, le professionnel qui adhère à une pratique professionnelle courante qui n'est pas conforme aux normes générales de la responsabilité, c'est-à-dire qu'on doit agir de façon raisonnable et diligente, peut engager sa responsabilité suivant les faits de l'espèce. La pratique notariale courante que l'appelant a suivie l'a amené à conclure que le titre du vendeur était entaché d'un vice et que ce vice n'avait pas été corrigé par le jugement qui conférait la propriété de l'immeuble à la Caisse. Compte tenu de la clarté du droit à l'époque, la pratique notariale en matière d'examen des titres ne saurait être qualifiée de raisonnable et diligente, pas plus qu'on ne saurait excuser le traitement superficiel accordé à la question de la chose jugée. La question de la chose jugée n'est pas une question controversée dans le domaine juridique et son application aux faits de l'espèce ne présentait pas de difficultés particulières. La principale obligation contractuelle de l'appelant envers les intimés consistait à donner une opinion juridique sur le titre du vendeur. Cette obligation en était une de moyens seulement, mais il avait le devoir de la remplir d'une manière prudente et diligente. L'erreur de droit commise par l'appelant était déraisonnable et constituait une faute dans les circonstances de l'espèce. De plus, la nécessité d'informer ses clients des conséquences juridiques de leurs actions est manifestement un aspect du devoir de conseil qui incombe au notaire. L'omission de l'appelant d'informer les intimés de la probabilité que le vendeur intente une action en justice constitue un manquement aux obligations qu'il avait envers les intimés.

L'appelant est responsable du dommage subi par les intimés. L'opinion de l'appelant a été la cause directe, immédiate et logique de la décision des intimés de ne pas acheter l'immeuble. Le fait que les intimés aient demandé l'avis d'un second notaire, qui a confirmé l'opinion de l'appelant, ne modifie en rien le lien de causalité existant entre la faute de l'appelant et le dommage subi par les intimés. L'appelant aurait-il donné le conseil juridique approprié aux intimés que ceux-ci n'auraient jamais eu besoin de solliciter un second avis. De plus, l'opinion du second notaire ne constituait pas un *novus actus interveniens*. La décision des intimés de completely dependent upon the appellant's erroneous conclusion that the title was defective.

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solliciter un deuxième avis dépendait complètement de la conclusion erronée de l'appelant que le titre était vicié.

Jurisprudence

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ous, declaring the Caisse sole owner of the property and radiating all charges against the immoveable property retroactively to the date of the deed of loan. The failure of the parties to the proceedings to raise the matter of ownership of the property at that time precluded them from subsequently raising the same issue. The judgment is consequently *res judicata* between the parties.

According to the respondents, the appellant's error of law in ignoring the effect of *res judicata* was so fundamental that it constituted a fault. No matter the common notarial practice at the time, the appellant, in the circumstances, did not act as a reasonable and diligent notary. In any event, the evidence of the expert notary, as well as that of notary Giroux, should not have been admitted. Under the guise of discussing common notarial practice, these witnesses' actual purpose was to accredit the legal opinion of the appellant. It is the function of the judge, not experts, to decide questions of law.

The respondents' refusal to pass title and the damages suffered as a result of this refusal were a logical, direct and immediate consequence of the fault of the appellant. Since, in the respondents' opinion, there was no error on the part of the trial judge, the appeal should be dismissed.

Analysis

At the outset, a preliminary question arose as to the jurisdiction of this Court to hear the appeal from both the Superior Court judgment and the Court of Appeal judgment refusing leave to appeal of the lower court decision. The parties urged us to decide the merits of the case, particularly since leave was granted by this Court not only from the Court of Appeal's judgment, but also [TRANSLATION] "if this Court sees fit, from the Superior Court's decision rendered on February 9, 1988".

Any doubt on the issue of jurisdiction is, in my view, resolved by *MacDonald v. City of Montreal*,

ment étaient claires et nettes: la Caisse était déclarée seule propriétaire de l'immeuble et toutes les charges grevant l'immeuble étaient radiées rétroactivement à la date de l'acte de prêt. Le défaut des parties à l'instance de soulever, à ce moment-là, la question de la propriété de l'immeuble les privaient du droit de soulever ultérieurement la même question. Le jugement a donc acquis l'autorité de la chose jugée entre les parties.

D'après les intimés, l'erreur de droit que l'appelant a commise en ne tenant pas compte de l'effet de la chose jugée est si fondamentale qu'elle équivaut à une faute. Quelle qu'ait été la pratique notariale courante à cette époque, l'appelant n'a pas, dans les circonstances, agi comme un notaire raisonnable et diligent. En tout état de cause, le témoignage du notaire expert, de même que celui du notaire Giroux, n'auraient pas dû être admis en preuve. Sous le couvert d'une analyse de la pratique notariale courante, ces témoignages servaient en réalité à accréditer l'opinion juridique de l'appelant. Or, c'est au juge, et non aux experts, qu'il appartient de trancher les questions de droit.

Le refus des intimés de passer titre et les dommages résultant de ce refus sont la conséquence logique, directe et immédiate de la faute de l'appelant. Puisque, selon les intimés, le juge de première instance n'a commis aucune erreur, le pourvoi doit être rejeté.

Analyse

Dès le départ, on a soulevé la question préliminaire de la compétence de notre Cour d'entendre le pourvoi interjeté tant à l'encontre du jugement de la Cour supérieure que de l'arrêt de la Cour d'appel refusant l'autorisation d'en appeler de la décision du tribunal d'instance inférieure. Les parties nous ont demandé de nous prononcer sur le fond de l'affaire, étant donné que notre Cour a accordé l'autorisation de se pourvoir non seulement contre l'arrêt de la Cour d'appel, mais également, «si cette Cour le juge à propos, contre la décision de la Cour supérieure rendue le 9 février 1988».

Tout doute quant à la question de compétence est, à mon avis, résolu par l'arrêt *MacDonald c. Ville de*

[1986] 1 S.C.R. 460, where, as here, the Court of Appeal refused to grant leave to appeal. Although dissenting on the constitutional issue involved, Wilson J. spoke on the issue of jurisdiction at p. 508:

> Under s. 41(1) of the *Supreme Court Act* [now s. 40(1)] this Court retains the discretionary power to interfere with any final or other judgment of the intermediate appellate courts which raises an issue of national importance. This discretion is itself broadly phrased so as to include any case with respect to which "... 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 such 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. . . ." While a certain amount of deference to the undoubted competence of intermediate appellate courts to control their own leave granting process is called for, it is equally evident that this Court's jurisdiction to exercise its own discretion in intervening in such decisions is not statutorily confined.

This being said, before delving into the particular question of whether the appellant notary did err in law, it may be appropriate to situate the debate within the general context in which it arises, i.e., professional liability.

Professional Liability

Professional liability is governed by the principles of ordinary civil liability, i.e., the theory of fault. Mazeaud and Tunc, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle* (6th ed. 1965), t. I, at No. 507, p. 574, express this clearly:

> [TRANSLATION] The same rules are always applied by the Court of Cassation in the particular area of *professional fault* ...

> This is fault committed by an individual in practising his profession, such as carelessness by a physician or surgeon or negligence by a government officer. [Emphasis in original.]

Montréal, [1986] 1 R.C.S. 460, où, comme en l'espèce, la Cour d'appel avait refusé la permission d'en appeler. Bien que dissidente sur la question constitutionnelle, le juge Wilson s'est exprimée ainsi, à la p. 508, sur l'aspect juridictionnel:

> En vertu du par. 41(1) de la *Loi sur la Cour suprême* [maintenant le par. 40(1)], cette Cour conserve le pouvoir discrétionnaire d'intervenir à l'égard de tout jugement définitif ou de toute autre décision d'une cour d'appel intermédiaire qui soulève une question d'importance nationale. Ce pouvoir discrétionnaire est lui-même formulé en termes généraux de manière à inclure toute affaire à l'égard de laquelle «... la Cour suprême estime, étant donné l'importance de l'affaire pour le public, l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou sa nature ou son importance à tout autre égard, qu'elle devrait en être saisie ...» Bien que cela commande un certain respect pour le pouvoir qu'ont indubitablement les cours d'appel intermédiaires de contrôler leur propre processus d'autorisation, il est également évident que le pouvoir discrétionnaire qu'a cette Cour pour intervenir dans ces décisions n'est pas limité par la loi.

Cela dit, il m'apparaît approprié, avant d'aborder la question spécifique de l'erreur de droit qu'aurait commise le notaire appelant, de situer le débat dans son contexte général, soit celui de la responsabilité professionnelle.

Responsabilité professionnelle

La responsabilité professionnelle est régie par les principes de la responsabilité civile ordinaire, c'est-à-dire la théorie de la faute. Dans leur *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle* (6e éd. 1965), t. I, au no 507, p. 574, Mazeaud et Tunc s'expriment clairement à ce sujet:

> Ce sont toujours les mêmes règles qui sont appliquées par la Cour de cassation dans le domaine particulier de la *faute professionnelle* ...

> Il s'agit de la faute commise par un individu dans l'exercice de sa profession: telle l'imprudence d'un médecin ou d'un chirurgien, telle encore la négligence d'un officier ministériel. [En italique dans l'original.]

TAB 24

PP. 992-993

Azco Mining Inc. *Appellant*

v.

Sam Lévy & Associés Inc. *Respondent*

Indexed as: Sam Lévy & Associés Inc. v. Azco Mining Inc.

Neutral citation: 2001 SCC 92.

File No.: 27876.

2001: May 15; 2001: December 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Courts — Jurisdiction — Trustee presenting petitigon to Quebec Superior Court sitting in bankruptcy seeking to "recuperate" assets held by company with office in British Columbia — Company bringing motion to transfer petition to British Columbia — Whether Superior Court lacked subject matter jurisdiction over petition — Whether Superior Court erred in exercising discretion against making transfer order — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-1, s. 187(7).

The appellant is a company incorporated under the laws of Delaware, offering venture capital services from its office in British Columbia. In 1996, a deal involving the financing of an African gold mine was struck between the appellant and Eagle, a company with offices in Quebec. The parties reduced their agreement to a series of documents, each of which contained a clause stating that the agreement was to be governed by the laws of British Columbia. In September 1997, Eagle was adjudged bankrupt by the Quebec Superior Court sitting in bankruptcy and the respondent firm was appointed trustee in bankruptcy. In January 1999, the respondent trustee presented a petition seeking to "recuperate" the assets of Eagle, including the monetary value of numerous shares held or controlled by the appellant. The appellant then brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy

Azco Mining Inc. *Appelante*

c.

Sam Lévy & Associés Inc. *Intimée*

Répertorié : Sam Lévy & Associés Inc. c. Azco Mining Inc.

Référence neutre : 2001 CSC 92.

N° du greffe : 27876.

2001 : 15 mai; 2001 : 20 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Tribunaux — Compétence — Présentation à la Cour supérieure du Québec siégeant en matière de faillite d'une requête du syndic visant à « recouvrer » des biens retenus par une société ayant un bureau en Colombie-Britannique — Présentation par la société d'une requête sollicitant le renvoi en Colombie-Britannique de la requête en recouvrement de biens — La Cour supérieure était-elle incompétente ratione materiae pour entendre la requête en recouvrement de biens? — La Cour supérieure a-t-elle commis une erreur en exerçant son pouvoir discrétionnaire pour refuser de renvoyer l'affaire? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-1, art. 187(7).

L'appelante est une société constituée sous le régime des lois du Delaware, offrant du capital de risque à partir de son bureau en Colombie-Britannique. En 1996, l'appelante et Eagle, une société ayant des bureaux au Québec, ont conclu une opération concernant le financement d'une mine d'or africaine. Les parties ont consigné leur entente dans une série de documents, dont chacun contenait une clause portant que le contrat était régi par les lois de la Colombie-Britannique. En septembre 1997, Eagle a été déclarée en faillite par la Cour supérieure du Québec siégeant en matière de faillite et la société intimée a été nommée syndic de la faillite. En janvier 1999, le syndic intimé a présenté une requête visant à « recouvrer » des biens de Eagle, y compris la valeur pécuniaire de nombreuses actions détenues ou contrôlées par l'appelante. L'appelante a alors présenté une requête sollicitant le renvoi de la requête en recouvrement de biens « à la Division des faillites de la Cour suprême de

Division of Vancouver". The appellant's motion was dismissed. The Court of Appeal unanimously upheld that decision.

Held: The appeal should be dismissed.

The bankruptcy petition was properly filed in the Quebec Superior Court sitting in bankruptcy. A creditor is required to file a bankruptcy petition in the court having jurisdiction in the judicial district of the locality of the debtor. Eagle carried on business in Quebec and its only connection to British Columbia was that the agreements between itself and the appellant referred to the law of that province. Nothing in the evidence suggested that the bankruptcy court in Quebec lacked subject matter jurisdiction over the petition or personal jurisdiction over Eagle when it made the receiving order. The bankruptcy court thereby acquired jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia. The *Bankruptcy and Insolvency Act* establishes a nationwide scheme for the adjudication of bankruptcy claims. Section 188(1) ensures that orders made by the bankruptcy court sitting in one province can and will be enforced across the country.

The bankruptcy court does not lack subject matter jurisdiction over the dispute because it is a contract case. While a trustee's claim in relation to a "stranger to the bankruptcy" or lacking the "complexion of a matter in bankruptcy" should be brought in the ordinary civil courts, if the contractual dispute properly relates to the subject matter of the bankruptcy proceedings, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction. Here, far from being a "stranger" to the bankruptcy, the appellant is potentially the most significant player in the role of either creditor or debtor, as the case may be. Further, while the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases, the trustee's claim is not properly characterized as a claim in damages but as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant.

The *Bankruptcy and Insolvency Act prima facie* establishes one command centre or "single control" for all proceedings related to the bankruptcy. "Single control" is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" under s. 187(7) to send the trustee scurrying to multiple jurisdictions. The

la Colombie-Britannique à Vancouver ». La requête de l'appelante a été rejetée. La Cour d'appel a confirmé cette décision à l'unanimité.

Arrêt : Le pourvoi est rejeté.

La requête en faillite a été déposée à bon droit devant la Cour supérieure du Québec siégeant en matière de faillite. Le créancier doit déposer une requête de mise en faillite auprès du tribunal compétent dans le district judiciaire de la localité du débiteur. Eagle faisait affaire au Québec et son seul lien avec la Colombie-Britannique tenait au fait que les contrats entre elle et l'appelante renvoyaient aux lois de cette province. Aucun élément de preuve ne laissait croire que le tribunal de faillite du Québec n'avait pas compétence *ratione materiae* sur la requête de mise en faillite et compétence *ratione personae* sur Eagle lorsqu'il a rendu l'ordonnance de séquestre. Le tribunal de faillite a ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique. La *Loi sur la faillite et l'insolvabilité* établit un régime national de règlement des demandes en matière de faillite. Le paragraphe 188(1) prévoit que les ordonnances du tribunal de faillite siégeant dans une province sont exécutoires et exécutées partout au pays.

Le tribunal de faillite ne perd pas compétence sur l'objet du litige parce qu'il s'agit d'une affaire contractuelle. Bien qu'une demande du syndic qui est dirigée contre un « étranger à la faillite » ou qui n'est pas de la « nature d'une affaire de faillite » doive être présentée aux tribunaux civils ordinaires, si le litige contractuel se rapporte bel et bien à la faillite, le fait que ce litige comporte également un aspect touchant la propriété et les droits civils n'écarte aucunement la compétence du tribunal de faillite. En l'espèce, loin d'être une « étrangère » à la faillite, l'appelante en est potentiellement le joueur le plus important, que ce soit en qualité de créancière ou de débitrice, selon le cas. De plus, même si le tribunal de faillite ne possède pas la compétence générale d'un tribunal civil pour accorder des dommages-intérêts à la suite de la rupture d'un contrat, on ne peut qualifier la demande du syndic de simple demande en dommages-intérêts, car il s'agit plutôt d'une demande de recouvrement de biens précis du failli que l'appelante retient sans droit.

La *Loi sur la faillite et l'insolvabilité* établit à première vue un centre de commandement ou un « contrôle unique » pour la totalité des procédures liées à la faillite. Le « contrôle unique » n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant » au sens du par.

motions judge was entitled to conclude that the facts of this case do not show "sufficient cause" to require the transfer to British Columbia.

The relevant agreements to which the appellant and Eagle were parties contained choice of law, not choice of forum provisions, and the Quebec courts are perfectly able to apply the law of British Columbia. Furthermore, arts. 3148 and 3135 of the *Civil Code of Québec* would only apply in bankruptcy court "[i]n cases not provided for in the Act or . . . Rules". Since s. 187(7) of the Act specifically provides that a transfer will not be ordered unless there is satisfactory proof that a proceeding will be "more economically administered" in another division or district or "for other sufficient cause", these particular provisions of the Code can have no application. Where, unlike in this case, a defendant has the benefit of a choice of forum clause, such a clause ought to be taken into careful consideration by a motions judge under s. 187(7) but it is not binding.

Cases Cited

Followed: *Stewart v. LePage* (1916), 53 S.C.R. 337; *In re Ireland* (1962), 5 C.B.R. (N.S.) 91; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90; **distinguished:** *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; **referred to:** *Attorney-General for Alberta v. Atlas Lumber Co.*, [1941] S.C.R. 87; *Boily v. McNulty*, [1928] S.C.R. 182; *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240; *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311; *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380; *In re Morris Lofsky* (1947), 28 C.B.R. 164; *Sigurdson v. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75; *Re Holley* (1986), 54 O.R. (2d) 225; *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336; *In re The Moratorium Act (Sask.)*, [1956] S.C.R. 31; *Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31; *Ellis v. Silber* (1872), L.R. 8 Ch. App. 83; *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) v. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19; *In re Martin* (1953), 33 C.B.R. 163; *In re Reynolds* (1928), 10 C.B.R. 127; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143; *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. 246; *Geoffrion v. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; *Excavations Sanoduc inc. v. Morency*, [1991]

187(7), justifiant que le syndic doive accourir dans plusieurs ressorts. Le juge des requêtes pouvait conclure que les faits ne faisaient pas ressortir un « motif suffisant » pour renvoyer l'instance en Colombie-Britannique.

Les contrats pertinents auxquels l'appelante et Eagle étaient parties contenaient une clause exprimant le choix des lois applicables, et non une clause d'élection de for, et les tribunaux québécois sont parfaitement capables d'appliquer les lois de la Colombie-Britannique. Par ailleurs, les art. 3148 et 3135 du *Code civil du Québec* ne s'appliqueraient dans une instance devant le tribunal de faillite que « [d]ans les cas non prévus par la Loi ou les [. . .] règles ». Étant donné que le par. 187(7) de la Loi prévoit explicitement que le renvoi n'est ordonné que lorsqu'il est prouvé de façon satisfaisante qu'une instance sera « administré[e] d'une manière plus économique » dans une autre division ou dans un autre district ou « pour un autre motif suffisant », ces dispositions particulières du Code ne s'appliquent pas. Lorsqu'un défendeur, contrairement au défendeur en l'espèce, bénéficie d'une clause d'élection de for, le juge des requêtes doit examiner cette clause avec soin en application du par. 187(7), mais il n'est pas lié par elle.

Jurisprudence

Arrêts suivis : *Stewart c. LePage* (1916), 53 R.C.S. 337; *In re Ireland* (1962), 5 C.B.R. (N.S.) 91; *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90; **distinction d'avec l'arrêt :** *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; **arrêts mentionnés :** *Attorney-General for Alberta c. Atlas Lumber Co.*, [1941] R.C.S. 87; *Boily c. McNulty*, [1928] R.C.S. 182; *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240; *Associated Freezers of Canada Inc. (Trustee of) c. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311; *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380; *In re Morris Lofsky* (1947), 28 C.B.R. 164; *Sigurdson c. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75; *Re Holley* (1986), 54 O.R. (2d) 225; *Falvo Enterprises Ltd. c. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336; *In re The Moratorium Act (Sask.)*, [1956] R.C.S. 31; *Union St. Jacques de Montreal c. Bélisle* (1874), L.R. 6 P.C. 31; *Ellis c. Silber* (1872), L.R. 8 Ch. App. 83; *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) c. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19; *In re Martin* (1953), 33 C.B.R. 163; *In re Reynolds* (1928), 10 C.B.R. 127; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143; *Mancini (Trustee of) c. Falconi* (1987), 65 C.B.R. 246; *Geoffrion c. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, R.D.J. 423; *In re Atlas Lumber Co. v. Grier and Sons Ltd.* (1922), 3 C.B.R. 226; *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23; *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171; *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256; *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040; *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143, leave to appeal refused [1997] 2 S.C.R. xiv; *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380; *Ash v. Lloyd's Corp.* (1991), 6 O.R. (3d) 235, aff'd (1992), 9 O.R. (3d) 755, leave to appeal refused [1992] 3 S.C.R. v; *Maritime Telegraph and Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471; *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (1960); *In re Treco*, 239 B.R. 36 (1999), aff'd 240 F.3d 148 (2001); *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109; *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (1987); *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (1989).

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Bankruptcy and Insolvency General Rules, C.R.C., c. 368 [am. SOR/98-240], s. 3.
Civil Code of Québec, S.Q. 1991, c. 64, arts. 3135, 3148.
Code of Civil Procedure, R.S.Q., c. C-25.
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APPEAL from a judgment of the Quebec Court of Appeal, [2000] R.J.Q. 392, [2000] Q.J. No. 417 (QL), dismissing the appellant's appeal from a

[1990] R.J.Q. 6; *Excavations Sanoduc inc. c. Morency*, [1991] R.D.J. 423; *In re Atlas Lumber Co. c. Grier and Sons Ltd.* (1922), 3 C.B.R. 226; *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23; *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171; *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256; *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040; *Sarabia c. « Oceanic Mindoro » (The)* (1996), 26 B.C.L.R. (3d) 143, autorisation de pourvoi refusée [1997] 2 R.C.S. xiv; *Volkswagen Canada Inc. c. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380; *Ash c. Lloyd's Corp.* (1991), 6 O.R. (3d) 235, conf. par (1992), 9 O.R. (3d) 755, autorisation de pourvoi refusée [1992] 3 R.C.S. v; *Maritime Telegraph and Telephone Co. c. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471; *Industrial Packaging Products Co. c. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (1960); *In re Treco*, 239 B.R. 36 (1999), conf. par 240 F.3d 148 (2001); *Industrial Acceptance Corp. c. Lalonde*, [1952] 2 R.C.S. 109; *Coastal Steel Corp. c. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (1987); *Hays and Co c. Merrill Lynch*, 885 F.2d 1149 (1989).

Lois et règlements cités

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Code de procédure civile, L.R.Q., ch. C-25.
Loi constitutionnelle de 1867, art. 91(21), 92(13).
Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 2(1) [mod. 1997, ch. 12, art. 1], 17(1), 30(1)*d*), 43(5) [abr. & rempl. 1992, ch. 27, art. 15], 72(1), 183(1)*b*), *c*), 187(7), 188(1), (2).
Règles générales sur la faillite et l'insolvabilité, C.R.C., ch. 368 [mod. DORS/98-240], art. 3.

Doctrine citée

Bohémier, Albert. *Faillite et insolvabilité*, vol. 1. Montréal : Thémis, 1992.
Castel, J.-G. *Canadian Conflict of Laws*, 4th ed. Toronto : Butterworths, 1997.
Fletcher, I. F. *Insolvency in Private International Law*. Oxford : Clarendon Press, 1999.
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POURVOI contre un arrêt de la Cour d'appel du Québec, [2000] R.J.Q. 392, [2000] Q.J. No. 417 (QL), rejetant l'appel interjeté par l'appelant (*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

b) le débiteur a résidé au cours de l'année précédant sa faillite;

c) se trouve la plus grande partie des biens de ce débiteur, dans les cas non visés aux alinéas *a*) ou *b*).

23 Section 43(5) expresses a rule of jurisdiction that apportions among the courts named in s. 183(1) judicial power over the adjudication of bankruptcy petitions. The evidence was that Eagle carried on business in Quebec even though it had not obtained a licence to do so. The agreements between Azco and Eagle (and the promissory notes on which Azco's counterclaim is based) recite that Eagle has an office at 212 Labrosse Boulevard, Gatineau, Quebec. The same address appears on its corporate letterhead. Azco's Vice-President of Finance testified that his meetings with respect to the financing were held at that office. There is no suggestion that Eagle vacated the premises prior to its bankruptcy, or that it had any other offices in Canada.

Le paragraphe 43(5) exprime une règle de compétence qui attribue à l'un ou l'autre des tribunaux nommés au par. 183(1) le pouvoir judiciaire de statuer sur les requêtes de mise en faillite. La preuve a permis de constater que Eagle faisait affaire au Québec, même si elle n'avait pas obtenu de permis le lui permettant. Les contrats entre Azco et Eagle (ainsi que les billets à ordre fondant la demande reconventionnelle de Azco) précisent que Eagle a un bureau au 212, boulevard Labrosse, à Gatineau (Québec). Cette adresse figure dans l'en-tête de son papier à lettres. Le vice-président aux Finances de Azco a témoigné que les rencontres relatives au financement ont été tenues à ce bureau. Rien ne laisse entendre que Eagle ait quitté les lieux avant sa faillite, ni qu'elle ait eu d'autres bureaux au Canada.

24 It appears that Eagle's only connection to British Columbia is that the agreements mentioned above refer to the law of that province. It is clear that s. 43(5) would not have permitted the filing of the bankruptcy petition in British Columbia on such a ground. Nothing in the evidence, in my view, suggests that the bankruptcy court in Hull lacked subject matter jurisdiction over the petition and personal jurisdiction over Eagle when it made the receiving order on September 12, 1997.

Le seul lien apparent entre Eagle et la Colombie-Britannique tient au fait que les contrats susmentionnés renvoient aux lois de cette province. Il est clair que le par. 43(5) n'aurait pas permis le dépôt de la requête de mise en faillite en Colombie-Britannique pour un tel motif. J'estime qu'aucun élément de la preuve ne laisse croire que le tribunal de faillite à Hull n'avait pas compétence *ratione materiae* sur la requête de mise en faillite et compétence *ratione personae* sur Eagle lorsqu'il a rendu l'ordonnance de séquestre le 12 septembre 1997.

2. *Did the Bankruptcy Court Thereby Acquire Jurisdiction to Deal With Matters Affecting the Bankrupt Estate Arising in British Columbia?*

2. *Le tribunal de faillite a-t-il ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique?*

25 The Act establishes a nationwide scheme for the adjudication of bankruptcy claims. As Rinfret J. pointed out in *Boily v. McNulty*, [1928] S.C.R. 182, at p. 186: [TRANSLATION] "This is a federal statute that concerns the whole country, and it considers territory from that point of view". The national implementation of bankruptcy decisions rendered by a court within a particular province is achieved

La Loi établit un régime national de règlement des demandes en matière de faillite. Comme le juge Rinfret l'a souligné dans l'arrêt *Boily c. McNulty*, [1928] R.C.S. 182, p. 186 : « Il s'agit d'une loi fédérale qui concerne tout le pays, et elle envisage le territoire à ce point de vue ». C'est par l'intermédiaire du réseau d'entraide des cours supérieures des provinces et des territoires prévu par l'art.

through the cooperative network of superior courts of the provinces and territories under s. 188: *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240 (Que. C.A.), *per* Rivard J.A., at p. 246, [TRANSLATION] "The *Bankruptcy Act* is federal and the orders of the Quebec Superior Court sitting as a bankruptcy court under that Act are enforceable in Ontario". See also: *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311 (N.S.C.A.), at p. 314, and *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380 (C.A.), at p. 1389.

The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation". *Stewart* dealt with the winding up of a federally incorporated trust company in British Columbia. As a result of the winding up, a client in Prince Edward Island instituted a proceeding in the superior court of that province for a declaration that certain moneys held by the bankrupt trust company were held in trust and that the bankrupt trust company should be removed as trustee. This Court held that the dispute, despite its strong connection to Prince Edward Island, could not be brought before the court of that province without leave of the Supreme Court of British Columbia. Anglin J. commented at p. 349:

> No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be

188 que les décisions rendues par un tribunal siégeant dans une province donnée sont exécutées à l'échelle nationale : *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240 (C.A. Qué.), le juge Rivard, p. 246 : « La *Loi de faillite* est fédérale, et les ordonnances de la Cour Supérieure de la province de Québec, siégeant en vertu de cette loi comme Cour de Faillite, sont exécutoires [en] Ontario ». Voir également : *Associated Freezers of Canada Inc. (Trustee of) c. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311 (C.A.N.-É.), p. 314, et *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380 (C.A.), p. 1389.

26 Les syndics auront souvent (et peut-être de plus en plus) à composer avec des débiteurs et des créanciers résidant dans différentes régions du pays. Ils ne pourront pas s'acquitter efficacement de leurs fonctions, pour reprendre les mots du juge Idington dans l'arrêt *Stewart c. LePage* (1916), 53 R.C.S. 337, p. 345, [TRADUCTION] « si tous peuvent s'interposer et invoquer leurs propres perceptions de leurs droits quant à la présentation d'une demande en justice ». L'arrêt *Stewart* portait sur la liquidation d'une société de fiducie constituée sous le régime des lois fédérales en Colombie-Britannique. Par suite de la liquidation, un client de l'Île-du-Prince-Édouard a présenté devant la Cour supérieure de cette province une demande de jugement déclaratoire portant que certains des fonds détenus par la société de fiducie faillie étaient détenus en fiducie et que cette société devait être déchue de sa qualité de fiduciaire. Notre Cour a conclu qu'en dépit de son lien très étroit avec l'Île-du-Prince-Édouard, le litige ne pouvait pas être soumis à la cour de cette province sans l'autorisation de la Cour suprême de la Colombie-Britannique. Le juge Anglin a fait remarquer, à la p. 349 :

> [TRADUCTION] Il ne fait pas de doute que des inconvénients surgiront dans les cas exceptionnels où, comme en l'espèce, la liquidation de la société a lieu dans une province du Dominion très éloignée de la province de résidence des personnes intéressées en qualité de créancières ou de demanderesses. Mais le législateur a probablement jugé nécessaire dans l'intérêt d'une liquidation prudente et économique que la cour chargée de la liquidation ait le contrôle non seulement de l'actif et des biens se trouvant en la possession de la société mise en

involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

liquidation, mais aussi de l'ensemble des litiges dans lesquels cette société pourrait être engagée. De façon générale, la prépondérance des inconvénients milite probablement en faveur de ce genre de contrôle unique, bien qu'il puisse comporter des désavantages dans certains cas.

27 *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Section 188(1) ensures that orders made by a bankruptcy court sitting in one province can and will be enforced across the country.

Comme je l'ai mentionné, l'arrêt *Stewart* portait sur la liquidation d'une société, mais la politique législative favorisant le « contrôle unique » s'applique également en matière de faillite. Il y va du même intérêt public à la gestion expéditive, efficace et économique des retombées d'un effondrement financier. Par application du par. 188(1), les ordonnances du tribunal de faillite siégeant dans une province sont exécutoires et exécutées partout au pays.

28 I have concluded that the jurisdiction of the Quebec Superior Court sitting in Bankruptcy was properly invoked by the petitioning creditors in this case but counsel for the appellant company says that his client, with its office in British Columbia, is not within its reach. The argument, in part, is that whatever the power of Parliament to confer national jurisdiction on a provincial superior court, that court is nevertheless provincially constituted, and for service of process its long arm statute must be complied with. The factual record does not show precisely how service of the trustee's petition was effected on the appellant, but if the appellant had any concerns regarding the proprieties of service of the petition to initiate proceedings against it, such concerns were waived when Azco did not raise them in its motion brought in Hull. A good deal of time was occupied on the appeal with arguments about how a Quebec court could acquire *in personam* jurisdiction over a corporation resident in British Columbia, and whether the Quebec rules for service *ex juris* applied. The argument that the Quebec Superior Court sitting in Bankruptcy cannot exercise *in personam* jurisdiction over creditors in another province under the Act is rejected for the reasons of national jurisdiction already mentioned. Any objections regarding service of process are answered by the fact that Azco not only appeared in Quebec but invoked the jurisdiction of the Quebec Superior Court sitting in Bankruptcy to transfer the proceedings pursuant to s. 187(7) of the Act to the bankruptcy court sitting in Vancouver. Any remain-

J'ai conclu que les créanciers qui ont demandé la mise en faillite ont fait appel à bon droit à la compétence de la Cour supérieure du Québec siégeant en matière de faillite, mais l'avocat de l'appelante affirme que sa cliente, qui a un bureau en Colombie-Britannique, échappe à la compétence de cette cour. Il plaide, notamment que, quel que soit le pouvoir du Parlement de conférer une compétence nationale à la cour supérieure d'une province, il demeure que cette cour est constituée par la province et que la loi grâce à laquelle elle a le bras long doit être respectée en ce qui concerne la signification des actes de procédure. Les faits révélés par le dossier n'indiquent pas précisément de quelle manière la requête en recouvrement présentée par le syndic a été signifiée à l'appelante, mais si Azco avait des arguments à faire valoir relativement à la validité de la signification de cette requête introductive d'une instance contre elle, elle y a renoncé en ne les soulevant pas dans la requête qu'elle a présentée à Hull. En appel, une bonne partie de l'audience a été consacrée aux arguments portant sur la question de savoir comment un tribunal québécois pouvait acquérir la compétence *ratione personae* sur une société située en Colombie-Britannique et si les règles québécoises de signification *ex juris* s'appliquaient. Je rejette la prétention selon laquelle la Cour supérieure du Québec siégeant en matière de faillite ne peut exercer la compétence *ratione personae* sur les créanciers d'une autre province en vertu de la Loi, et ce pour les motifs déjà exposés qui tiennent à la compétence nationale de la cour. Aucune objection ing issue with respect to *in personam* jurisdiction was thereby waived.

Azco did not, of course, waive its objection to jurisdiction over the subject matter of this particular dispute. That was a major point in its motion. I turn now to that issue.

3. *Are Contract Claims Nevertheless Excluded From Federal Bankruptcy Jurisdiction?*

The appellant's motion, as stated, argued that the trustee's claims against it are "exclusively contractual in nature" (para. 6) and that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). The theory underlying these contentions seems to be that contract claims relate to "Property and Civil Rights" within the meaning of s. 92(13) of the *Constitution Act, 1867* and on that account lie outside the jurisdiction of the bankruptcy court. At para. 42 of its factum, for example, the appellant argues:

> [TRANSLATION] Contrary to what the Court of Appeal affirms, the trustee's claim is therefore purely contractual in nature, under the civil law. It is not a remedy specifically provided for under the BIA such as the application to have preferential payments declared void (see sections 91 to 100 BIA). The mere fact that the plaintiff is a trustee does not alter the nature of the claim and does not turn it into a bankruptcy dispute.

Most bankruptcy issues, of course, present a property and civil rights aspect. It is true, however, that some of the decided cases which deny jurisdiction to the bankruptcy court do so on grounds that have a constitutional flavour, e.g., *In re Morris Lofsky* (1947), 28 C.B.R. 164 (Ont. C.A.), *per*

liée à la signification des actes de procédure ne saurait subsister, étant donné que Azco a non seulement comparu au Québec, mais aussi invoqué la compétence de la Cour supérieure du Québec siégeant en matière de faillite en lui demandant de renvoyer l'instance au tribunal de faillite siégeant à Vancouver par application du par. 187(7). Elle a ainsi renoncé à soulever toute question irrésolue concernant la compétence *ratione personae*.

Bien entendu, Azco n'a pas renoncé à contester la 29
compétence *ratione materiae* sur l'objet du présent litige. Il s'agissait d'un élément prépondérant de sa requête. J'aborderai maintenant cette question.

3. *Les demandes de nature contractuelle échappent-elles néanmoins à la compétence fédérale en matière de faillite?*

Dans sa requête, l'appelante a prétendu 30
que les demandes du syndic contre elle étaient [TRADUCTION] « de nature exclusivement contractuelle » (par. 6) et que la [TRADUCTION] « Division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande de nature contractuelle contre Azco » (par. 20). La théorie qui sous-tend ces arguments est apparemment la suivante : comme les demandes contractuelles ont trait à « [l]a propriété et [aux] droits civils » au sens du par. 92(13) de la *Loi constitutionnelle de 1867*, ces actions en justice ne relèvent pas de la compétence du tribunal de faillite. Au paragraphe 42 de son mémoire, par exemple, l'appelante soutient que :

> Contrairement à ce qu'affirme la Cour d'appel, le recours du syndic est donc une affaire purement contractuelle, de droit civil. Il ne s'agit pas d'un recours spécifiquement prévu par la LFI tel le recours en annulation de paiement préférentiel (voir articles 91 à 100 LFI). Le simple fait que le demandeur soit un syndic ne change pas la nature du recours et n'en fait pas un litige en matière de faillite.

Bien entendu, la plupart des questions liées à la 31
faillite concernent de près ou de loin la propriété et les droits civils. Il est cependant vrai que certains des arrêts qui nient la compétence du tribunal de faillite s'appuient sur des motifs à connotation constitutionnelle, p. ex., *In re Morris Lofsky* (1947), 28 C.B.R.

TAB 25

PP. 16-17, 19, 22-23

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 Stelco Inc., and other Applicants listed in Schedule "A" Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

[Indexed as: Stelco Inc. (Re)]

Court of Appeal for Ontario, Goudge, Feldman and Blair JJ.A.
March 31, 2005

Corporations — Directors — Removal of directors — Jurisdiction of court to remove directors — Restructuring supervised by court under Companies' Creditors Arrangement Act — Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation — In context of restructuring, court not having inherent jurisdiction to remove directors — Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Debtor and creditor — Arrangements — Removal of directors — Jurisdiction of court to remove directors — Restructuring supervised by court under the Companies' Creditors Arrangement Act — Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation — In context of restructuring, court not having inherent jurisdiction to remove directors — Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

On January 29, 2004, Stelco Inc. ("Stelco") obtained protection from creditors under the *Companies' Creditors Arrangement Act* ("*CCAA*"). Subsequently, while a restructuring under the *CCAA* was under way, Clearwater Capital Management Inc. ("Clearwater") and Equilibrium Capital Management Inc. ("Equilibrium") acquired a 20 per cent holding in the outstanding publicly traded common shares of Stelco. Michael Woollcombe and Roland Keiper, who were associated with Clearwater and Equilibrium, asked to be appointed to the Stelco board of directors, which had been depleted as a result of resignations. Their request was supported by other shareholders who, together with Clearwater and Equilibrium, represented about 40 per cent of the common shareholders. On February 18, 2005, the Board acceded to the request and Woollcombe and Keiper were appointed to the Board. On the same day as their appointments, the board of directors began consideration of competing bids that had been received as a result of a court-approved capital raising process that had become the focus of the *CCAA* restructuring.

The appointment of Woollcombe and Keiper to the Board incensed the employees of Stelco. They applied to the court to have the appointments set aside. The employees argued that there was a reasonable apprehension that Woollcombe and Keiper would not be able to act in the best interests of Stelco as opposed to their own best interests as shareholders. Purporting to rely on the court's inherent jurisdiction and the discretion provided by the *CCAA*, on February 25, 2005, Farley J. ordered Woollcombe and Keiper removed from the Board.

Woollcombe and Keiper applied for leave to appeal the order of Farley J. and if leave be granted, that the order be set aside on the grounds that (a) Farley J. did not have the jurisdiction to make the order under the provisions of the *CCAA*, (b) even if he did have jurisdiction, the reasonable apprehension of bias test had no application to the removal of directors, (c) he had erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) in any event, the facts did not meet any test that would justify the removal of directors by a court.

Held, leave to appeal should be granted, and the appeal should be allowed.

The appeal involved the scope of a judge's discretion under s. 11 of the *CCAA*, in the context of corporate governance decisions made during the course of the plan negotiating and approval process of the *CCAA*. In particular, it involved the court's power, if any, to make an order removing directors under s. 11 of the *CCAA*. The order to remove directors could not be founded on inherent jurisdiction. Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, and it permits the court to maintain its authority and to prevent its process from being obstructed and abused. However, inherent jurisdiction does not operate where Parliament or the legislature has acted and, in the *CCAA* context, the discretion given by s. 11 to stay proceedings against the debtor corporation and the discretion given by s. 6 to approve a plan which appears to be reasonable and fair supplanted the need to resort to inherent jurisdiction. A judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a *CCAA* proceeding. The order in this case could not be founded on inherent jurisdiction because it was designed to supervise the company's process, not the court's process.

The issue then was the nature of the court's power under s. 11 of the *CCAA*. The s. 11 discretion is not open-ended and unfettered. Its exercise was guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. What the court does under s. 11 is establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. In the course of acting as referee, the court has authority to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. The court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. The court is not catapulted into the shoes of the board of directors or into the seat of the chair of the board when acting in its supervisory role in the restructuring.

The matters relating to the removal of directors did not fall within the court's discretion under s. 11. The fact that s. 11 did not itself provide the authority for a *CCAA* judge to order the removal of directors, however, did not mean that the supervising judge was powerless to make such an order. Section 20 of the *CCAA* offered a gateway to the oppression remedy and other provisions of the *Canada*

Business Corporations Act, R.S.C. 1985, c. C-44 ("*CBCA*") and similar provincial statutes. The powers of a judge under s. 11 of the *CCAA* may be applied together with the provisions of the *CBCA*, including the oppression remedy provisions of that statute.

Court removal of directors is an exceptional remedy and one that is rarely exercised in corporate law. In determining whether directors have fallen foul of their obligations, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. The evidence in this case was far from reaching the standard for removal, and the record would not support a finding of oppression, even if one had been sought. The record did not support a finding that there was a sufficient risk of misconduct to warrant a conclusion of oppression. Further, Farley J.'s borrowing the administrative law notion of apprehension of bias was foreign to the principles that govern the election, appointment and removal of directors and to corporate governance considerations in general. There was nothing in the *CBCA* or other corporate legislation that envisaged the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment. The issue to be determined was not whether there was a connection between a director and other shareholders or stakeholders, but rather whether there was some conduct on the part of the director that would justify the imposition of a corrective sanction. An apprehension of bias approach did not fit this sort of analysis.

For these reasons, Farley J. erred in declaring the appointment of Woollcombe and Keiper as directors of Stelco of no force and effect, and the appeal should be allowed.

Cases referred to

Alberta Pacific Terminals Ltd. (Re), [1991] B.C.J. No. 1065, 8 C.B.R. (3d) 99 (S.C.); *Algoma Steel Inc. (Re)*, [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194 (C.A.); *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71, 39 C.B.R. (4th) 5 (C.A.), revg in part [2001] O.J. No. 5046, 30 C.B.R. (4th) 163 (S.C.J.); *Babcock & Wilcox Canada Ltd. (Re)* [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75 (S.C.J.); *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, 5 N.R. 515, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240; *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, 25 O.R. (3d) 480*n*, 128 D.L.R. (4th) 73, 187 N.R. 241, 24 B.L.R. (2d) 161; *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1 B.L.R. (2d) 225 (C.A.); *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.); *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, 4 C.B.R. (3d) 311 (C.A.); *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.* [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (C.A.); *Country Style Foods Services Inc. (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.); *Dylex Ltd. (Re)*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.); *Ivaco Inc. (Re)*, [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.); *Lehndorff General Partner Ltd. (Re)*, [1993] O.J. No. 14, 9 B.L.R. (2d) 275, 17 C.B.R. (3d) 24 (Gen. Div.); *London Finance Corp. Ltd. v. Banking Service Corp. Ltd.*, [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); *Olympia & York Developments Ltd. (Re)* (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1 (Gen. Div.) (*sub nom. Olympia & York Dev. v. Royal Trust Co.*); *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, 244 D.L.R. (4th) 564, 2004 SCC 68, 49 B.L.R. (3d) 165, 4 C.B.R. (5th) 215; *R. v. Sharpe*, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, 88 B.C.L.R. (3d) 1, 194 D.L.R. (4th) 1, [2001] 6 W.W.R. 1, 86 C.R.R. (2d) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, [2001] SCC 2; *Richtree Inc. (Re)* (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251, 7 C.B.R. (5th) 294 (S.C.J.); *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 36 O.R. (3d) 418*n*, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC 210-006 (*sub nom. Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd., Adrien v. Ontario Ministry of Labour*); *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293, 96 O.T.C. 279 (Gen. Div.); *Sammi Atlas Inc. (Re)*, [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); *Stephenson v. Vokes* (1896), 27 O.R. 691, [1896] O.J. No. 191 (H.C.J.); *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1360, 14 C.B.R. (3d) 88, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331 (S.C.)

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 2 [as am.], 102 [as am.], 106(3) [as am], 109(1) [as am.], 111 [as am.], 122(1) [as am.], 145 [as am.], 241 [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [as am.], 20 [as am.]

Authorities referred to

Driedger, E.A., *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983)

Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973–)

Jacob, I.H., "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28

Peterson, D.H., *Shareholder Remedies in Canada*, looseleaf (Markham: LexisNexis—Butterworths, 1989)

Sullivan, R., *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002)

APPLICATION for leave to appeal and, if leave is granted, an appeal from the order of Farley J., reported at [2005] O.J. No. 729, 7 C.B.R. (5th) 307 (S.C.J.), removing two directors from the board of directors of Stelco Inc.

Jeffrey S. Leon and *Richard B. Swan*, for appellants Michael Woollcombe and Roland Keiper.

Kenneth T. Rosenberg and *Robert A. Centa*, for respondent United Steelworkers of America.

Murray Gold and *Andrew J. Hatnay*, for respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. And Welland Pipe Ltd.

Michael C.P. McCreary and *Carrie L. Clynick*, for USWA Locals 5328 and 8782.

John R. Varley, for Active Salaried Employee Representative.

Michael Barrack, for Stelco Inc.

Peter Griffin, for Board of Directors of Stelco Inc.

K. Mahar, for Monitor.

David R. Byers, for CIT Business Credit, Agent for DIP Lender.

which there is little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision-making process continues to be of importance to the *CCAA* proceedings. From the reasons that follow it will be evident that in my view the appeal has merit.

[26] Leave to appeal is therefore granted.

Part IV — The Appeal

The Positions of the Parties

[27] The appellants submit that,

(a) in exercising its discretion under the *CCAA*, the court is not exercising its "inherent jurisdiction" as a superior court;

(b) there is no jurisdiction under the *CCAA* to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,

(c) even if there is jurisdiction, the motion judge erred:

   (i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;

   (ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,

   (iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

[28] The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the *CCAA* proceedings and, second, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the

ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the *CCAA* process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a *CCAA* proceeding is owed considerable deference: *Re Algoma Steel Inc.*, [2001] O.J. No. 1943, 25 C.B.R. (4th) 194 (C.A.), at para. 8.

[29] The crux of the respondents' concern is well-articulated in the following excerpt from para. 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group — particular investment funds that have acquired Stelco shares during the *CCAA* itself — have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

[30] The respondents submit that fairness, and the perception of fairness, underpin the *CCAA* process, and depend upon effective judicial supervision: see *Re Olympia & York Development Ltd.* (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.); *Re Ivaco Inc.*, [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.), at paras. 15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the *CCAA*". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the *CCAA*.

[32] The *CCAA* is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; *Re Lehndorff General Partners Ltd.*, [1993] O.J. No. 14,

17 C.B.R. (3d) 24 (Gen. Div.). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the *CCAA*, as the source of judicial power in a *CCAA* proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List)); and *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the *CCAA*, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the *CCAA* and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the *CCAA*.

Inherent jurisdiction

[34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In *Halsbury's Laws of England*, 4th ed. (London: LexisNexis UK, 1973–), vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[35] In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in *Royal Oak Mines, supra*, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should

not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; *Richtree Inc. (Re)* (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the *CCAA* context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

> . . . the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the *CCAA*. . . . This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above,[2] rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", *supra*, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a *CCAA* context. The court retains the ability to control its own process, should the need arise. There is a distinction, however — difficult as it may be to draw — between the *court's* process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the *company's* process, on the other hand. The court simply supervises the latter

2 The reference is to the decisions in *Dyle*, *Royal Oak Mines* and *Westar*, cited above.

process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose".[3] Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a *CCAA* proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The section 11 discretion

[39] This appeal involves the scope of a supervisory judge's discretion under s. 11 of the *CCAA*, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion — in spite of its considerable breadth and flexibility — does not permit the exercise of such a power in and of itself. There may be situations where a judge in a *CCAA* proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the *Canada Business Corporation Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), and imported into the exercise of the s. 11 discretion through s. 20 of the *CCAA*. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy grounds.

[40] The pertinent portions of s. 11 of the *CCAA* provide as follows:

> *Powers of court*
>
> 11(1) 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.
>
> . . . . .
>
> *Initial application court orders*
>
> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.
>
> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

3 See para. 43, *infra*, where I elaborate on this distinction.

(*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 or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

(*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 or proceeding with any other action, suit or proceeding against the company.

. . . . .

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

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

(*b*) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

[41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as *R. v. Sharpe*, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, at para. 33, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, is articulated in E.A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) as follows:

> Today, 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.

See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), at p. 262.

[42] The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the *CCAA*, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions

made by directors and officers in the course of managing the business and affairs of the corporation.

[43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under sub-paras. 11(3)(*a*)–(*c*) and 11(4)(*a*)–(*c*) of the *CCAA* to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

[44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff*, *supra*, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts.

[45] With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

[46] I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: *London Finance Corp. Ltd. v. Banking Service Corp. Ltd.*, [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); *Stephenson v. Vokes*, [1896] O.J. No. 191, 27 O.R. 691 (H.C.J.). The authority to remove must therefore be found in statute law.

[47] In Canada, the *CBCA* and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting:

CBCA, ss. 106(3) and 111.[4] The specific power *to remove* directors is vested in the shareholders by s. 109(1) of the *CBCA*. However, s. 241 empowers the court — where it finds that oppression as therein defined exists — to "make any interim or final order it thinks fit", including (s. 241(3)(*e*)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.).

[48] There is therefore a statutory scheme under the *CBCA* (and similar provincial corporate legislation) providing for the election, appointment *and removal* of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., supra*, at p. 480 S.C.R.; *Royal Oak Mines Inc. (Re), supra*; and *Richtree Inc. (Re), supra*.

[49] At para. 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [*sic*] or supervising the management, of the business and affairs of the corporation": s. 102(1) *CBCA*. *Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem.* The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.

(Emphasis added)

[50] Respectfully, I see no authority in s. 11 of the *CCAA* for the court to interfere with the composition of a board of directors on such a basis.

[51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in

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4 It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the *CCAA* is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power — which the courts are disinclined to exercise in any event — except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The oppression remedy gateway

[52] The fact that s. 11 does not itself provide the authority for a *CCAA* judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the *CCAA* offers a gateway to the oppression remedy and other provisions of the *CBCA* and similar provincial statutes. Section 20 states:

> 20. 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.

[53] The *CBCA* is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the *CCAA* may be applied together with the provisions of the *CBCA*, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

[54] I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(*b*) of the *CBCA* to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority.

The level of conduct required

[55] Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc., supra.* The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

> Director removal is *an extraordinary remedy* and certainly should be *imposed most sparingly.* As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada".[5]
>
> > SS. 18.172 *Removing and appointing directors to the board is an extreme form of judicial intervention.* The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. *By tampering with a board, a court directly affects the management of the corporation.* If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be *a measure of last resort.* The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.

(Emphasis added)

[56] C. Campbell J. found that the continued involvement of the Ravelston directors in the *Hollinger* situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark, however, and the record would not support a finding of oppression, even if one had been sought.

[57] Everyone accepts that there is no evidence the appellants have conducted themselves, as directors — in which capacity they participated over two days in the bid consideration exercise — in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk — a reasonable apprehension — that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future.

5 Dennis H. Peterson, *Shareholder Remedies in Canada*, looseleaf (Markham: LexisNexis — Butterworths, 1989), at 18-47.

TAB 26

Strathcona County v. PriceWaterhouseCoopers Inc., Trustee of the Estates of Fantasy Construction Ltd. et al.

[Indexed as: Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)]

Court File Nos. BK03 109703; BK03 109704; BK03 109685; BK03 109686

PP. 538, 542-548, 551

Alberta Court of Queen's Bench
Burrows J.

Heard: June 10, 2005
Judgment rendered: July 21, 2005

Bankruptcy and insolvency — Trustee — Duties — Developers failing to perform drainage work required by permits and filing for bankruptcy — Obligation to do work survived bankruptcy and was obligation of trustee — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

Planning — Development permit — Conditions — Developers failing to perform drainage work required by permits and filing for bankruptcy — Obligation to do work survived bankruptcy and was obligation of trustee — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

A municipality issued development permits to a corporation (the "developer") for the development of a condominium project. The permits required the developer to submit grading plans to the municipality for approval and to grade the property accordingly. The title to some of the units was held by a related corporation and the owner of both corporations and his wife. The drainage work did not comply with municipal requirements, so the municipality issued stop work orders. It brought an action against all the parties for declarations that they were in breach, *inter alia*, of the development permits and stop work orders and for a mandatory injunction requiring them to complete the required grading. The defendants failed to comply. The municipality then obtained an order granting a permanent injunction preventing the defendants from completing the drainage work, declaring that the municipality could complete the work, and requiring the two corporations to pay security into court to ensure completion. They failed to pay the security and all the defendants made assignments into bankruptcy. The municipality brought an application for a declaration that the obligation to do the drainage work survived the bankruptcy and should be paid for by the trustee.

Held, the application should be granted.

The obligation of a bankrupt to comply with public safety or environmental standards, imposed pursuant to statutory authority, survives the bankruptcy. The obligation to provide an approved drainage system was imposed pursuant to statutory authority. The order granting an injunction preventing the developers from completing the drainage work did not relieve them of their obligation but was intended to ensure that their obligation was carried out at their expense. Consequently, the trustee must use estate assets to carry out the obligation, even though it prejudices the bankrupt's creditors. However, since the development permits and stop work orders were issued only to the first corporation the declaration sought by the municipality should be made only in respect of that corporation, subject to further submissions.

Cases referred to

Big Sky Living Inc. (Re) (2002), 37 C.B.R. (4th) 42, 318 A.R. 165, 115 A.C.W.S. (3d) 13, 2002 ABQB 659 — **refd to**

Canada Trust Co. v. Bulora Corp. (1981), 39 C.B.R. (N.S.) 152 — **refd to**

Fantasy Construction Ltd. (Re) (2005), 8 C.B.R. (5th) 216, 137 A.C.W.S. (3d) 243 *sub nom. Condominium Corp. 922 2235 v. Fantasy Construction Ltd.*, 2005 ABQB 63 — **refd to**

Lamford Forest Products Ltd. (Re) (1991), 86 D.L.R. (4th) 534, 10 C.B.R. (3d) 137, 8 C.E.L.R. (N.S.) 186, 63 B.C.L.R. (2d) 388, 30 A.C.W.S. (3d) 1111 — **refd to**

Midlantic National Bank v. New Jersey Department of Environmental Protection; Quanta Resources Corp. v. New York (City), 474 U.S. 494 (1986) — **refd to**

Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd. (1991), 81 D.L.R. (4th) 280, 8 C.B.R. (3d) 31, 7 C.E.L.R. (N.S.) 66, [1991] 5 W.W.R. 577, 2 W.A.C. 44, 81 Alta. L.R. (2d) 45, 117 A.R. 44, 27 A.C.W.S. (3d) 563 [supp. reasons 86 D.L.R. (4th) 567, 8 C.B.R. (3d) 31 at p. 55, 3 C.P.C. (3d) 100, 8 W.A.C. 309, 84 Alta. L.R. (2d) 257, 120 A.R. 309, 30 A.C.W.S. (3d) 953] leave to appeal to S.C.C. refused 86 D.L.R. (4th) viii, 20 W.A.C. 396*n*, 127 A.R. 396*n*, 137 N.R. 394*n* — **folld**

Roadstar Aggregates Inc. (Receiver of) v. Kovacs (2003), 2 C.B.R. (5th) 320, 126 A.C.W.S. (3d) 559, 2003 ABQB 861 *sub nom. KPMG v. Kovacs* — **refd to**

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
- s. 14.06(2), (4), (8) [as am. by S.C. 1992, c. 27, s. 9]
- s. 30(1)(g)
- s. 121

Municipal Government Act, R.S.A. 2000, c. M-26
- s. 554
- s. 624(1)
- s. 639
- s. 640(2)(c)(iv)

Authorities referred to

Saxe, Dianne, "Trustees' and Receivers' Environmental Liability Update" (1997), 49 C.B.R. (3d) 138

APPLICATION for a declaration that a municipally-imposed obligation to perform drainage work survived the developers' bankruptcies and was the obligation of the trustee.

Jeneane S. Grundberg and *Daniel R. Peskett*, for applicant, Strathcona County.

Michael J. McCabe, Q.C., and *Rebecca Ratti*, for respondent, PriceWaterhouseCoopers Inc., Trustee of the Estates of Fantasy Construction Ltd., Madison Development Corp. 1984 Ltd., John Van Leenen and Irene Jean Van Leenen.

Jeremy H. Hockin, for Sunrise Park Condominium Corp.

[1] BURROWS J.:—Strathcona County seeks a declaration that PriceWaterhouseCoopers, as Trustee in Bankruptcy of the bankrupts, is bound by the terms of Development Permits issued by the County in respect of a condominium project in the County. In particular the County seeks declarations which would have the effect of requiring the Trustee to use the assets of the bankrupt estates to pay the cost of drainage work the Development Permits required be done, but which was not done. The Trustee takes the position that it cannot be required to use estate assets to do the work and that, at best, the Trustee may have a provable claim as a creditor in the bankruptcy.

The Development Permits and Stop Orders

[2] In 1999 and 2000 the County issued three Development Permits to Fantasy Construction Ltd., all relating to a proposed multi-family residential development in the County known as Sunrise Park. The first permit, dated May 31, 1999, was for Phase I of the project which covered 12 dwelling units. The second, dated October 4, 1999, was for Phase II covering 14 units. The third was issued on August 30, 2000 for Phases III and IV and covered 25 units.

[3] Each of the permits was issued subject to express conditions requiring the installation of appropriate stormwater management. The permits required Fantasy to submit grading plans to County officials for review and approval and then to do site grading in accordance with those plans.

[4] At least as of February 2004 titles to various units of the condominium project were in the names of Madison Development Corporation 1984 Ltd. and the individual bankrupts. The bankrupt John Van Leenen is the sole shareholder and director of both corporate bankrupts.

[5] On November 13, 2003 the County issued Stop Orders to Fantasy in respect of all three Development Permits. Grading on the project lands did not comply with the design grades that had been submitted. There had been unauthorized alterations to a berm

structure on the property. The Stop Orders required Fantasy to submit a new surface drainage plan for approval by November 30, 2003 and to complete the drainage work by May 31, 2004. Fantasy submitted a new drainage plan in response to the Stop Orders but there were a number of deficiencies and it was not approved.

The Drainage Action

[6] On February 6, 2004 the County commenced an action by Originating Notice against Fantasy, Madison and the Van Leenens (the "developers") seeking declarations that they were in breach of the *Municipal Government Act*, R.S.A. 2000, c. M-26, the Strathcona County Land Use Bylaw, the Development Permits, and the Stop Orders. The County also sought a mandatory injunction pursuant to the *Municipal Government Act*, s. 554 requiring the developers to complete the necessary grading and drainage work to the satisfaction of the County. This proceeding is referred to as "the drainage action".

[7] The developers did not contest the drainage action. They acknowledged that the County was entitled to the relief claimed. However, they asked for more time to comply with the Stop Orders.

[8] On February 18, 2004 Sanderman J. issued an Order, founded on the developers' concessions, declaring the developers in breach of the Act, Bylaw, Development Permits, and Stop Orders, and granting the mandatory injunction which the County had sought. The developers were required to submit drainage plans prepared by an engineer to the satisfaction of the County by March 31, 2004.

[9] The plans were not submitted as required by the injunction. The developers sought and were granted time extensions. They submitted plans to the County but they were unacceptable.

[10] On June 15, 2004 County personnel inspected the construction site and discovered a contractor doing drainage work though no plan had been approved. When informed that there was no approved plan, the contractor stopped work.

July 22, 2004 Order

[11] On July 22, 2004 the County applied before Sanderman J. for further relief in the drainage action. Efforts to get Fantasy to provide an acceptable drainage plan had been in vain. Unapproved drainage work had been done. Counsel who had appeared for Mr. Van Leenen in February had ceased to act. Mr. Van Leenen had fired the successor counsel just before the July 22 application. Purchasers of

condominium units had advised the County that they had lost all confidence in Fantasy and would not allow Fantasy on their property to do drainage work. The transcript of the proceedings on July 22 demonstrates that Sanderman J. concluded that Mr. Van Leenen was solely at fault for the drainage issue not having been resolved by that date.

[12] The main thrust of the July 22 application was to put in place a procedure by which the drainage work would get done without further involvement of the developers, but at their expense.

[13] The County had sought a temporary injunction preventing the developers from engaging in unapproved drainage work. However, it was plain that approved work would not get done if any reliance was placed on the developers. So Sanderman J. issued a permanent injunction requiring them "to cease drainage related work including trenching, excavation and pouring of concrete". The Order also declared that the County would be at liberty to engage an engineer to complete a satisfactory drainage plan and to complete the required work at the expense of the developers. The Order further required:

- Fantasy and Madison to pay $240,000 into Court by July 30, 2004 as security for the completion of the work,
- Fantasy, Madison and the Van Leenens not to sell any of the lands, and
- any funds received on existing sales to be paid into Court pending further directions.

[14] On August 12, 2004 the developers, having retained new counsel, applied to Sanderman J. for a variation of the July 22 Order on the ground that they had not had notice of the application and because the obligations imposed by the Order were "unnecessarily onerous and difficult to comply with". In an affidavit filed in support of this application Mr. Van Leenen swore that Fantasy, Madison and he, himself, did not have the funds required to be paid into Court and attempts to borrow them had been unsuccessful.

[15] On that application Sanderman J. suspended the requirement that Fantasy and Madison pay $240,000 into Court as security until August 26, 2004.

Safety Code Proceedings

[16] At the same time as the drainage action was proceeding, the County was also taking steps against Fantasy and Madison in relation to violations of the Safety Code. Those proceedings were also

under Sanderman J.'s case management. Mr. Van Leenen's actions in that context were similarly uncooperative and frustrating to the County, purchasers of condominium units and the Court.

August 26, 2004 Order

[17] On August 26, 2004 Mr. Van Leenen, who had again changed counsel, submitted, based on his construction experience, that the required drainage work would not cost more than $45,000 so that security of $240,000 was excessive. He made various proposals for dealing with the safety code and drainage concerns and other issues. Both the County and the Court found the proposals unacceptable. Sanderman J. ordered Fantasy and Madison to pay $625,000 and the Van Leenens to pay $125,000 into Court by October 1, 2004 as security in respect of the safety code deficiencies, and ordered that all assets owned by the developers be frozen. The obligation created by the July 22 Order to pay $240,000 into Court as security in respect of the drainage work continued to be outstanding.

The Bankruptcies

[18] The developers assigned themselves into bankruptcy on September 9 and 10, 2004. PriceWaterhouseCoopers Inc. was appointed Trustee of all four bankrupt estates.

Drainage Work Not Done

[19] Though, at the time of the July 22 Order, the intention clearly was that the County would do the drainage work that the developers had not done, that did not occur by the time of the bankruptcies. The intention had been that the County would do the work at the expense of the developers who would pay $240,000 into Court to secure payment. The funds were not paid into Court. The County did not therefore do the work.

[20] After the assignments into bankruptcy, the County took the position that the Trustee was obliged to carry out the drainage work. In October 2004 the Trustee attempted to find a practical solution and applied for an order appointing the Trustee as a receiver and authorizing it to charge the bankrupt estate in priority to other secured creditors in order to obtain funds to do the required work. Creditors who would have realized no benefit from the proposed work and who feared deterioration of their security position opposed that application. I declined to grant the receivership order because, in my view, the question of whether the proposed course of action was in the interests of the bankrupt estates, and should therefore be

undertaken, was for the Inspectors and Trustee, not the Court, to determine. (*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*), s. 30(1)(g))

[21] It was essential that some of the required work not be further delayed. It was done. At least some of it was done pursuant to an order preserving the County's right to claim that the Trustee ought to have done it and without prejudice to the County's claim to have the cost paid out of the bankrupt estates. (Order of November 25, 2004)

[22] In January 2005 the Sunrise Park Condominium Corporation, supported by the County, applied in early 2005 to have the bankruptcies of Fantasy and Madison annulled. I dismissed the application. (*Fantasy Construction Ltd. (Re)* (2005), 8 C.B.R. (5th) 216)

County's Position

[23] The County, supported by the Sunrise Park Condominium Corporation, now takes the position that the obligation to do drainage work according to a County approved plan, survived the bankruptcy and is now an obligation of the Trustee. They seek a declaration to that effect and an order requiring that the drainage work, for which an engineering firm retained by the County has prepared a plan, be completed at the expense of the bankrupt estates.

Panamericana Case

[24] The County cites *Panamericana De Bienes Y Servicio (Receiver of) v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280 (Alta. C.A.) (leave to appeal to the Supreme Court of Canada refused, 86 D.L.R. (4th) viii), in support of its application. Northern Badger was the operator of several oil wells. The Energy Resources Conservation Board regulated oil well operations. The Board had ordered Northern Badger to properly abandon several non-producing wells to make them environmentally safe. The process was expected to cost in excess of $200,000. Northern Badger defaulted on security held by Panamericana and a Court-appointed receiver was put in place. Shortly thereafter a bankruptcy receiving order was issued. Northern Badger's assets were insufficient to cover both Panamericana's secured claim and the abandonment costs. The Alberta Court of Appeal held that the receiver was obliged to use the bankrupt's funds to pay for the well abandonment — to comply with the ERCB's order — even though doing so would prejudice the secured creditor, Panamericana.

[25] Laycraft C.J.A., writing for the Court, articulated the issue as follows: (page 289)

> Thus the direct issue in this litigation, in my opinion, is whether the *Bankruptcy Act* requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety, which are liabilities, as a charge to the public.

[26] The main argument in support of the secured creditor's position was that the obligation to the Board was a "provable claim" under the *Bankruptcy Act*. It was therefore subject to the scheme of distribution under that Act which gave priority to secured creditors. The Trustee would therefore not be able to obey the Board's abandonment order. The requirements of provincial legislation could not subvert the scheme of distribution specified by the *Bankruptcy Act*.

[27] Laycraft C.J.A. observed that a "provable claim" in bankruptcy has two features. First the bankrupt must have been subject to a liability. This feature was present. From the day the wells were drilled, Northern Badger was liable for their ultimate abandonment.

[28] The second feature was that the liability must be owed to the party said to have the provable claim, the creditor. Laycraft C.J.A. held that this feature was not present. Northern Badger's abandonment obligation was not owed to the ERCB. It was owed to the public at large. Laycraft C.J.A. said: (page 290)

> With respect, I do not agree, however, that the public officer or public authority given the duty of enforcing a public law thereby becomes a "creditor" of the person bound to obey it.
>
> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

[29] Laycraft C.J.A. held that the Board was not a creditor even though the statute which empowered it gave it the authority to do the

required abandonment work itself and to create a statutory debt in its own favour. He observed that though such powers existed, the Board had not chosen to use them. It had not taken the steps which the statute permitted it to take to make itself a creditor. It was seeking to enforce the bankrupt's obligation by steps which did not involve making itself a creditor.

[30] Having concluded that the Board was not a creditor, Laycraft C.J.A. went on to consider whether a receiver appointed under a security instrument had a duty to comply with the provincial law which the Board was charged to enforce. After considering several points relevant to that issue, including the constitutionally validity of provincial legislation which has an incidental effect on a subject within federal jurisdiction, Laycraft C.J.A. concluded that the Receiver was bound to obey the Board's order and to use estate assets to pay for the abandonment despite the resulting prejudice to the secured creditor.

[31] Strathcona County submits that the situation in this case is governed by *Panamericana*. The obligation imposed on Fantasy in the Development Permits relating to drainage grading was an obligation owed to the public in general — not to the County. The County's position is analagous to that of the ERCB in *Panamericana*. It is the public agency charged by the Legislature to ensure that standards required for the safety of citizens and their property are imposed on those who undertake land development. On the day it began to develop the Sunrise Park Condominium project pursuant to the first Development Permit, Fantasy acquired an obligation to ensure that the required drainage work was done. That obligation did not cease to exist when Fantasy assigned itself into bankruptcy and the Trustee became responsible for the administration of its assets. Just as the receiver in *Panamericana* was obliged to use the assets of Northern Badger to cover the cost of abandonment of the oil wells even though the secured creditor would not, as a result, realize as much of its secured debt, so here, the Trustee is obliged to use the bankrupts' assets to cover the cost of the drainage work, even though secured creditors may not, as a result, recover as much on their claims.

BIA Amendments

[32] The Trustee submits that amendments to the BIA made after *Panamericana* and in response to that case have "overruled the state of the common law created by *Panamericana*".

[33] It appears accurate that implications of the decision in *Panamericana* and other similar decisions that preceded it (*Canada Trust Co. v. Bulora Corp.* (1981), 39 C.B.R. (N.S.) 152 (Ont. C.A.), and *Quanta Resources Corp. v. New York (City)*, 474 U.S. 494 (1986) (U.S.S.C.)), resulted in both judicial and legislative response. Developments are traced by Dr. Dianne Saxe in her article *Trustees' and Receivers' Environmental Liability Update* (1997), 49 C.B.R. (3d) 138.

[34] Dr. Saxe observes that these cases created uncertainty which produced a reluctance on the part of Trustees and receivers to accept assignments in cases involving environmental issues. Some of this reluctance was overcome judicially. In *Re Lamford Forest Products Ltd.* (1991), 10 C.B.R. (3d) 137, 86 D.L.R. (4th) 534 (B.C.S.C.), Harvey J. held that though the cost of compliance with an environmental protection order would have priority to the claim of a secured creditor, it would not have priority to the fees of the Trustee. He also held that the Trustee would not be personally liable for the compliance cost.

[35] In November 1992, the *BIA* was amended to confirm the protection of Trustees from personal liability. A Trustee could not be personally liable for any environmental damage that occurred before the Trustee's appointment. If there was environmental damage after the Trustee's appointment, the Trustee could only be liable if the damage resulted from the Trustee's negligence. (S.C. 1992, c. 27, s. 9(1) enacting *BIA* s. 14.06(2))

[36] In April 1997 the *BIA* was further amended to extend to receivers the protection from personal liability that had been granted to Trustees in 1992. The standard of care required of Trustees and receivers in respect of after appointment environmental damage was reduced from negligence to "gross negligence or willful misconduct". In limited circumstances, a Trustee could avoid personal liability for failure to comply with an order requiring the Trustee to remedy an environmental condition by abandoning any interest in the property affected by the condition. The Crown was given a charge, prior to any other claim, against real property on which an environmental cleanup was required for the cost of the cleanup. Though normally a liability must exist at the time of the bankruptcy in order to be a provable claim, claims against a bankrupt estate for environmental cleanup costs would be provable claims regardless of when the claim arose.

[37] The principle established in *Panamericana* is that an obligation of a bankrupt to comply with public safety or environmental standards, imposed pursuant to statutory authority, must be honoured by the Trustee using estate assets notwithstanding resulting prejudice to creditors of the bankrupt. The *BIA* amendments deal with Trustee's personal liability, Trustee's standard of care in relation to environmental issues, Trustee's abandonment of property to avoid liability for environmental conditions, crown priority, and timing of provable claims. It may be that *Panamericana* inspired the concerns that lead to the amendments. Parliament responded to those concerns as it considered necessary. But in doing so it did not overrule *Panamericana*. In my view the principle articulated and applied in *Panamericana* is still part of the law.

[38] The Trustee referred to an extensive collection of materials generated by the parliamentary committee which reviewed both *BIA* amendments. Those materials do not support the conclusion that Parliament's intention in enacting the amendments was to overrule *Panamericana*.

[39] I note that the vitality of the *Panamericana* principle was not doubted by either Slatter J. in *Re Big Sky Living Inc.* (2002), 318 A.R. 165 (Q.B.) (para. 46), or Master Wacowich in *KPMG v. Kovacs* (2003), 2 C.B.R. (5th) 320 *sub nom. Roadstar Aggregates Inc. (Receiver of) v. Kovacs* (Alta. Q.B.).

BIA s. 14.06(8)

[40] I wish to comment more specifically on *BIA* s. 14.06(8) because it could appear to be directed to the reasoning in *Panamericana*. The subsection reads:

> 14.06(8) Notwithstanding subjection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

[41] In *Panamericana* Laycraft C.J.A. held that the obligation to pay the abandonment costs was not a provable claim. It was a liability of the bankrupt. But it was a liability owed to the public at large which the ERCB was charged to enforce. So it was not a liability owed to a creditor. It therefore lacked the features of a provable claim. It might be argued that s. 14.06(8) provides, despite that reasoning, that an environmental costs claim is a provable claim.

[42] That, in my view, would be a misinterpretation of s. 14.06(8). I interpret the section as intending only to overcome what would otherwise be the effect of s. 121(1). That section provides that liabilities to which the bankrupt is subject on the day on which he becomes bankrupt, or to which he may become subject before discharge by reason of an obligation existing at the time of bankruptcy, are provable claims. If that section applied, an environmental claim arising after the date of bankruptcy but before discharge might not be a provable claim. Section 14.06(8) deals only with that timing issue. It does not convert a statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it.

Application of Panamericana

[43] The *Panamericana* principle continues to be part of the law. I am obliged to apply it where a bankrupt has an obligation of the type contemplated by the principle at the time of bankruptcy. In my view that is the situation in the case before me.

[44] The obligation to provide an approved drainage system for the land on which the condominium development was built was imposed pursuant to statutory authority. The *Municipal Government Act*, R.S.A. 2000, c. M-26, requires the County to enact a land use bylaw (s. 639), and to have a designated development authority to exercise development powers on its behalf (s. 624(1)). The Act requires that the land use bylaw prescribe the conditions that are to be attached to a Development Permit (s. 640(2)(c)(iv)). The County's land use bylaw requires applicants for Development Permits to address site drainage issues. It requires the development authority to ensure that site drainage issues are properly addressed in a development plan: *Strathcona County Land Use Bylaw*, Bylaw 8-2001, s. 6.13. As previously noted, the Development Permits issued in this case required drainage grading plans to be approved and followed in construction.

[45] In *Panamericana* Laycraft C.J.A. held that the obligation to abandon the oil wells was an obligation owed by Northern Badger to the citizens of Alberta. He said that the obligation was [p. 290]:

> . . . part of the general law of Alberta, binding every citizen of the province. All who became licensees or oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing or ice and snow, or the demolition of unsafe structures are examples which come to mind.

[46] Is the *Panamericana* principle limited to a certain subclass of statutory obligations? Is the obligation to provide appropriate stormwater drainage grading in a land development in that class? In my view whether the type of statutory obligation to which *Panamericana* applies is limited to obligations imposed to protect the safety of citizens or their property or is as broad as any obligation imposed pursuant to the general law of Alberta, the obligation here in question is included. The obligation imposed on the land developer in this case was for the benefit of citizens who would eventually buy units in the project. It was also for the benefit of the taxpayers of the County upon whom fall some part of the expense of responding to floods which damage property with inadequate drainage. It is an obligation to which the *Panamericana* principle applies.

Effect of July 22, 2004 Order

[47] Was the obligation affected by the July 22, 2004 Order of Sanderman J.? As previously noted, that Order provided, in part, as follows:

> 1. A permanent injunction is hereby granted requiring the Respondents to cease drainage related work, including trenching, excavation and pouring of concrete.
>
> 2. It is hereby declared that the County is at liberty to engage the services of an engineer or engineering firm of the County's choice to have a Drainage Plan completed to the County's satisfaction at the expense of the Respondents.
>
> 3. It is hereby declared that the County, its designated officers or employees, agents or contractors, without further notice or further leave of this Court, are at liberty to enter the Lands and proceed with completion of the work contemplated under an approved Drainage Plan, at the Respondents' expense.
>
> 4. The Respondents Fantasy and Madison are hereby ordered to pay $240,000 into Court by July 30, 2004 as security for completion of the aforementioned orders.
>
> . . .

[48] This Order was in force at the time of the bankruptcy. The Trustee observes that paragraph 1 of the Order enjoined the developers from doing any further drainage work. How then can it be that the Trustee acquired an obligation to do drainage work?

[49] As noted above, at the time of this Order the County had been attempting for many months to secure the developer's compliance with the drainage obligations of the Development Permits. The

developers had never disputed their obligation. They had repeatedly acknowledged it and sought time extensions to permit them to comply with it. In the weeks immediately preceding the July 22 Order it had become plain that efforts to secure compliance were unlikely to succeed. In that context, it appeared that the only way the work would get done was if the County stepped in to do it. Given that the County had recently discovered the developer doing drainage grading without an approved plan, it was necessary to have that activity stopped. The July 22 Order stopped it and contemplated the County doing the required work at the developer's expense.

[50] The injunction therefore was part of a plan to secure compliance with the developers' obligation. Its purpose was similar to the purpose of the Stop Orders which had, it appeared, been ignored. The other parts of the plan were that the County would retain an engineer to do the drainage design, would get the work done, and that the developers would pay funds sufficient to pay for drainage work into Court. The plan failed because the developer did not pay the funds into Court. Without that security, the County did not do the work.

[51] It is clear that the Order, read as a whole, did not intend to relieve the developers of their obligation. Quite the contrary. The intention clearly was to ensure the obligation was met at the expense of the developers. In my view, the Order had no effect on the obligation the County now seeks to enforce against the Trustee. That obligation was extant at the time of the bankruptcy. The *Panamericana* principle applies in this case.

Are all bankrupt estates liable?

[52] The County seeks a declaration that all four of the bankrupt estates, those of Fantasy, Madison and both Mr. and Mrs. Van Leenen, are subject to the obligation to complete the drainage work. However, the Development Permits were issued only to Fantasy. Likewise, the Stop Orders were issued only to Fantasy, albeit to the attention of Mr. Van Leenen.

[53] The Originating Notice of Motion by which the drainage action was commenced on February 9, 2004 named Madison and the Van Leenens as Respondents in addition to Fantasy and sought declarations that all four respondents were in breach of the *Municipal Government Act*, the Development Permits and the Stop Orders. The pleading alleged that Fantasy was the developer of the

land, that Madison was the owner of 16 units and that the Van Leenens were the owners of two units.

[54] The Affidavit filed in support of the application contained evidence supporting those allegations and also indicating that Mr. Van Leenen was the sole director and shareholder of both Fantasy and Madison. It also recited that the Stop Orders were provided to the registered owners of the lands including Madison and the Van Leenens.

[55] The Order granted on February 18, 2004 in the drainage action granted the declarations the County sought. It was declared that all four Respondents were in breach of the *Municipal Government Act*, the Development Permits and the Stop Orders. As previously noted this Order was founded on concessions by the Respondents which are recited in the Order as follows:

> . . . AND UPON hearing that the Respondents do not contest the validity of the Stop Orders, nor do they intend to cross examine Mr. Lanuk on his evidence, nor do they intend to submit evidence, but they do wish additional time to comply with the requirements of the Stop Orders . . .

[56] I have reviewed an excerpt from the transcript of the proceedings before Sanderman J. on February 18, 2004 and there appears to have been no discussion of the basis for concluding that Madison and the Van Leenens owed, and should be declared to be in breach of, the obligations imposed by the Development Permits. It does not appear that that specific point was either raised or conceded in the hearing. It is not specifically mentioned in the recital quoted above. A concession that the Stop Orders were valid does not equate to an admission that parties not named in them have an obligation under them.

[57] The materials before me do not address the basis upon which Madison and the Van Leenens were held in breach. The point was not addressed on this application. I am not certain as to the effect of the February 18, 2004 Order. Is it now, by reason of the Order, beyond dispute that Madison and the Van Leenens are in breach of the drainage work obligation imposed by the Development Permits? In considering whether to make the declaration sought in this application am I obliged to accept the conclusion recorded in the February 18, 2004 Order?

[58] It may be that these questions do not have practical significance. It may be that the assets of Fantasy are sufficient to cover the cost of the required work. Or it may be that creditors with claims

only against Fantasy would wish to submit that the cost of the drainage work must be shared by all four bankrupt estates.

[59] Since this aspect of the matter was not addressed in the application I will at this point only grant the declaration sought by the County in respect of Fantasy. If counsel wish to address the issue of whether the same declaration should also be made in respect of Madison and the Van Leenens, they may arrange to make submissions in that regard.

[60] I therefore grant the declarations sought in paragraphs 1 and 2 of the Notice of Motion in respect only of the estate of Fantasy Construction Ltd. It may be that the formal order will require other provisions to give practical effect to these declarations. If counsel are unable to agree in that regard they may make arrangements for an application to address the matter.

[61] Finally, I wish to observe that during the hearing of this application there was some discussion of *BIA* s. 14.06(4) which gives the Trustee the right in certain circumstances to avoid personal liability for failure to comply with an order requiring a Trustee to remedy an environmental condition by abandoning the property. It appears from their submissions that counsel differ on the applicability of this section to this case. If it becomes necessary to determine whether the section could be invoked in this situation, counsel may wish to make application in that regard. Though there was argument addressed to the point, I do not consider it necessary to make any ruling on it now.

Application granted.

TAB 27

Strathcona County v. PriceWaterhouseCoopers Inc., Trustee of the Estates of Fantasy Construction Ltd. et al.

[Indexed as: Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)]

Court File Nos. BK03 109703; BK03 109704; BK03 109685; BK03 109686 Edmonton

pp. 228-231, 235-236

Alberta Court of Queen's Bench
Burrows J.

Heard: September 14, 15 and 27, 2005
Judgment rendered: October 26, 2005

Bankruptcy and insolvency — Priorities — Municipality seeking to enforce public obligations under development permits against developer and others after bankruptcy — Not acting as creditor but as enforcer — Cost to be paid out of developer's estate — Municipality ranks as unsecured creditor of costs already incurred for work not done by developer — Not entitled to gain secured status by adding cost to tax roll — Entitled to moneys paid into court by developer before bankruptcy — Entitled as unsecured creditor to costs awarded in proceedings — Not entitled to rank as unsecured creditor for costs not yet set by court — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

A municipality issued development permits for a condominium development to a corporate developer. The developer failed to comply with the permits when it failed to ensure proper grading and drainage for the property. The developer also breached safety code provisions. The municipality obtained an order requiring the developer, a related corporation, and the owners of both corporations to comply. The other corporation and the owners owned certain units in the project. When the developer and the other parties failed to comply, the municipality obtained a further order declaring that it would complete the required work and requiring the two corporations to pay security into court to permit completion of the work. Except in one case, they failed to comply and they and the owners all made assignments into bankruptcy. The municipality did some of the work before the bankruptcies, but much remained to be done. It claimed priority in all the estates.

In earlier proceedings, the court held that the obligation to perform the drainage work survived the bankruptcy and should be paid for out of the assets of the developer's estate. However, various matters were left unresolved and came back before the court. The trustee appealed that decision. The court now considered the remaining issues, as well as issues arising from the earlier order, which had not yet been settled by the parties or filed.

Held, the municipality had priority in some, but not in other situations.

(1) As regards the anticipated cost of the drainage work, the municipality was a public authority charged with enforcing a publicly owed obligation and was not a

creditor in the bankruptcy, but an enforcer. While its enforcement affected the interests of the creditors, this did not arise because of a provincial interference with the scheme of priorities among creditors established by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). However, only the estate of the developer could be used to complete the drainage work, since the development permits were issued to it and it was the only person that owed a public obligation to do the work. The other bankrupts had no such obligation.

(2) As regards the cost already incurred by the municipality to remediate drainage and safety code violations before the bankruptcies, it sought to recover those costs from the estates of the two corporations. In that respect it was no longer acting as an enforcer, but had become a creditor seeking to recover money. As such it was subject to the scheme of distribution under the BIA. However, in accordance with the court's earlier order, the municipality was entitled to perform urgent drainage work without prejudice to its right to claim recovery of the cost from the trustee. On the other hand, the municipality was not entitled to have the stay of proceedings imposed by the BIA lifted to permit it to add the cost it incurred to the tax roll and become a secured creditor. While it had the statutory right to add such costs to the roll absent bankruptcy, it could not achieve priority once bankruptcy intervened, since it was seeking recovery as a creditor. The municipality was, thus, an unsecured creditor of the estates of the two corporations. Whether it was also an unsecured creditor of the estates of the owners would have to be decided at a later date, pending an application for an order annulling their bankruptcies.

(3) The municipality was entitled to the moneys paid into court by the developer, even though they had not been paid out at the time of the bankruptcies. The contingency for payment out had been resolved before the bankruptcies, so that the moneys then belonged to the municipality.

(4) The municipality was entitled to claim costs ordered in the various proceedings as an unsecured creditor. However, it was not entitled to claim costs for court appearances not yet set by the court, since no debt exists until the costs are taxed or set by the court.

Cases referred to

Husky Oil Operations Ltd. v. M.N.R. (1995), 128 D.L.R. (4th) 1, [1995] 3 S.C.R. 453, 35 C.B.R. (3d) 1, 24 C.L.R. (2d) 131, [1995] 10 W.W.R. 161, 107 W.A.C. 81, 137 Sask. R. 81, 188 N.R. 1, 58 A.C.W.S. (3d) 182 — **distd**

Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd. (1991), 81 D.L.R. (4th) 280, 8 C.B.R. (3d) 31, 7 C.E.L.R. (N.S.) 66, [1991] 5 W.W.R. 577, 2 W.A.C. 44, 81 Alta. L.R. (2d) 45, 117 A.R. 44, 27 A.C.W.S. (3d) 563 [supp. reasons 86 D.L.R. (4th) 567, 8 C.B.R. (3d) 31 at p. 55, 3 C.P.C. (3d) 100, 8 W.A.C. 309, 84 Alta. L.R. (2d) 257, 120 A.R. 309, 30 A.C.W.S. (3d) 953; leave to appeal to S.C.C. refused 86 D.L.R. (4th) viii, 20 W.A.C. 396*n*, 127 A.R. 396*n*, 137 N.R. 394*n*] — **folld**

Strathcona (County) v. Fantasy Construction Ltd. (Trustee of) (2005), 256 D.L.R. (4th) 536, 13 C.B.R. (5th) 145, 12 M.P.L.R. (4th) 167, 47 Alta. L.R. (4th) 138, 141 A.C.W.S. (3d) 524, 2005 ABQB 559 — **refd to** *d) Costs incurred for Safety Code work* .... *$ 79,277.47*

The County's position and the Trustee's response to it parallel those set out in respect of the drainage costs matter. The Trustee allowed this item as an unsecured claim against the estates of Fantasy and Madison but disallowed it as against the estates of John and Irene Van Leenen.

e) Costs ordered in drainage action and Safety Code action .... *$ 59,330.33*

The County's position and the Trustee's response again parallel those set out in respect of the drainage costs matter. The Trustee allowed this item as an unsecured claim against all four estates because the costs were ordered against all four bankrupts.

f) County's share of cost of Court appointed expert .... *$ 4,000.00*

Again the County's position and the Trustee's response parallel those set out in respect of the drainage costs matter. The Trustee allowed this item as an unsecured claim against the estates of Fantasy and Madison but disallowed it as against the estates of John and Irene Van Leenen.

g) Costs for various Court appearances not yet set by the Court

County's position: The County claims to be entitled to costs in respect of applications and case management meetings in the drainage and Safety Code actions in respect of which the Court made no costs orders and no costs have as yet been taxed.

Trustee's position: No debt exists until costs are either taxed or set by the Court. That cannot now occur because of the stay resulting from the bankruptcies. This item was disallowed as against all estates.

h) 2004 municipal taxes on certain units .... *$ 27,253.28*

This item was not in the County's original proof of claim. The County claims the priority

> to which a municipality is normally entitled in respect of property taxes. I understand the Trustee accepts this claim.

[10] In the remainder of these reasons I will deal with each of these matters.

a) The anticipated cost of incomplete drainage work $200,000.00

[11] This item was the subject of my July 21, 2005 decision currently under appeal. I held that this work must be done, and that the assets of the estate of Fantasy must be used to pay for it, even though that will reduce the amount available for creditors in that estate. The item is not properly a claim in the bankruptcy. That, I think, is recognized by all parties. The County however included it in the claim formally submitted to the Trustee pending the determination of the question of whether the *Panamericana* principle applied. As mentioned, I held on July 21, 2005, that *Panamericana* applied and that Fantasy's assets must be used to ensure compliance with the drainage grading obligations imposed in the development permit.

[12] On this application the Trustee and a secured creditor of Fantasy sought to revisit that determination. They indicated that there was Supreme Court of Canada authority affecting the issue which had not been cited previously. Since the parties had not yet settled or filed a formal Order in respect of my July decision I permitted counsel to make further submissions.

[13] Further, in my July decision, I left undecided, pending further argument, the question of whether the estates of Madison and the Van Leenens are also obligated to ensure completion of the drainage work.

[14] In addition, on this application the Trustee also took the position that my July decision did not oblige the Trustee to see that the work was done and argued that such an obligation cannot be imposed on a Trustee. The Trustee also indicated he wished to address whether *BIA* s. 14.06(4) gives him the right to abandon the property and be relieved of the obligation to complete the drainage work.

[15] In the midst of the application counsel requested time to consider whether an alternative route to resolving the issues arising in relation to the incomplete drainage work existed. This aspect of the

application was adjourned to September 27, 2005 pending discussions among counsel. On September 27, 2005 I was advised that the exploration of other routes to resolution had failed. Accordingly counsel completed their submissions.

Has Panamericana been overruled?

[16] The Supreme Court of Canada decision which counsel brought to my attention is *Husky Oil Operations Ltd. v. M.N.R.*, [1995] 3 S.C.R. 453, 128 D.L.R. (4th) 1. In that case a majority of the Court held that provisions of the Saskatchewan *Workers' Compensation Act*, which had the effect of giving the Saskatchewan Workers' Compensation Board a higher priority for its claim against a bankrupt estate than would be the case under the *BIA*, were inapplicable in a bankruptcy context. Gonthier J. set out six principles which apply when provincial legislation appears to conflict with the federal bankruptcy legislation. The application of those principles in that case was not straight forward because the provincial legislation did not directly grant the Board a higher priority. It did so by a circuitous route, aspects of which appeared consistent with and permitted by the *BIA*. The majority of the Supreme Court looked behind the form in order to distill the substance, and found that the effect of the legislation was unconstitutional.

[17] The Trustee and one secured creditor, Carewest, argue that the case before me is governed by *Husky*. They submit that the effect of the application of the *Panamericana* principle is to give the County a priority it would not get under the *BIA*. They argue that *Husky* in 1995 must be taken to have overruled the Alberta Court of Appeal's 1991 decision in *Panamericana*.

[18] I cannot accept this submission.

[19] First I observe that in *Husky* all nine members of the Supreme Court recognized that it does not necessarily render provincial legislation invalid that it has an effect on the scheme of distribution set out in the *BIA*. The minority, whose reasons were written by Iacobucci J., discussed this in assessing the argument that ". . . any time provincial law affects the final result of a bankruptcy, the province is improperly attempting to alter the priorities of distribution" (para. 139). This argument was labelled, "the bottom line approach". If provincial legislation affects the "bottom line", the amount available in the bankruptcy for distribution to a creditor or category of creditors, it is unconstitutional.

[20] Iacobucci J. rejected the bottom line approach. He gave examples of provincial legislation which affects the bottom line in bankruptcy and yet does not conflict with the *BIA*. One of the examples he gave was the *Panamericana* case. He said: (para. 146)

> The Alberta Court of Appeal has, for its part, also demonstrated a reluctance to invalidate provincial legislation which simply touches upon bankruptcy proceedings. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, [1991] 5 W.W.R. 577, the issue before the court was whether the *Bankruptcy Act* prevented a court-appointed receiver-manager of an insolvent and bankrupt oil company from complying with an order requiring that receiver-manager, in the interests of environmental integrity, carry out proper abandonment procedures on seven suspended oil wells. That work would be done at the expense of the secured creditors' entitlement under the *Bankruptcy Act*. At page 599, Laycraft C.J.A. held for the court:
>
> > In my view, there is no...direct conflict in this case. The Alberta legislation regulating oil and gas wells in this province is a statute of general application within a valid provincial power. It is general law regulating the operation of oil and gas wells, and safe practices relating to them, for the protection of the public. It is not aimed at subversion of the scheme of distribution under the *Bankruptcy Act* though it may incidentally affect that distribution in some cases. It does so, not by a direct conflict in operation, but because compliance by the receiver with the general law means less money will be available for distribution.
>
> *Northern Badger* thus echoes the proposition that provincial laws of general application continue to apply in bankruptcy even though they may incidentally alter the amount of proceeds available in the bankrupt's estate for distribution.

[21] For the majority, Gonthier J. also considered the "bottom line approach". He said: (para. 30)

> My colleague Iacobucci J. properly rejects the broader "bottom line" approach since, as he indicates, such an approach "risks nullifying the broad array of provincial legislation underpinning the *Bankruptcy Act*" (para. 142). It is trite to observe that the *Bankruptcy Act* is contingent on the provincial law of property for its operation. The Act is superimposed on those provincial schemes when a debtor declares bankruptcy. As a result, provincial law necessarily affects the "bottom line", but this is contemplated by the *Bankruptcy Act* itself. Indeed, it is no exaggeration to say that there is no "bottom line" without provincial law.

[22] In agreeing with Iacobucci J. on this aspect of the case, Gonthier J. did not mention the *Panamericana* case. He did not express, or even hint at, any disagreement with Iacobucci J.'s characterization of *Panamericana* as an example of a situation where provincial legislation could validly touch upon bankruptcy

proceedings. He expressly agreed with the proposition for which Iacobucci J. had cited *Panamericana* as an example. I find it difficult, in these circumstances, to read *Husky* as overruling *Panamericana*.

[23] Further, in my view, *Husky* does not speak to the fundamental basis of the *Panamericana* decision. Laycraft C.J.A. held, in *Panamericana*, that the public authority charged with enforcing a publicly owed obligation, in that case the ERCB, was not a creditor. It was an enforcer. For that reason the ERCB was not affected by Northern Badger's bankruptcy in its effort to enforce the publicly owed obligation. Its enforcement powers affected the interests of the secured creditor, Panamericana, but not because of a provincial interference with the scheme of priorities among creditors created by the *BIA*.

[24] If Laycraft C.J.A.'s distinction between a creditor and an "enforcer" is valid, then none of the six principles listed by Gonthier J. for application where provincial property legislation appears to conflict with federal bankruptcy legislation, is engaged. They are engaged only where the effect of provincial legislation is to treat a creditor differently than he would be treated under the *BIA*. They have no application in a competition between an "enforcer" and a creditor. *Husky* cannot be read as making any statement about the validity of Laycraft C.J.A.'s distinction. It cannot in my view be read as overruling *Panamericana*.

[25] In my view *Panamericana* remains authoritative. Where it applies it is binding on me. As I held in July, it applies to the situation now before me.

[26] I note in passing that the position taken by the Trustee and the one secured creditor appear to be a challenge to the constitutionality of the authority granted to the County to enforce the provisions of the development permit it issued to Fantasy — at least, to the constitutionality of the scope of that authority when considered in light of the *Panamericana* case. I expect that such a challenge would require notice to the Attorney General. I observe that the Alberta Attorney General was involved in the *Panamericana* case, separately from the ERCB. So far as I am aware no notice of a constitutional question has been given in this case.

Are the estates of Madison, John Van Leenen and Irene Van Leenen to be used, in addition to the estate of Fantasy, to complete the drainage grading work?

[27] As mentioned, in my July 21, 2005 decision I granted the declaration the County sought only in respect of Fantasy. I held that the assets of Fantasy must be applied to the completion of the drainage work. I left undecided the question of whether the assets of Madison, John Van Leenen and Irene Van Leenen must also be so applied. Counsel returned to that question on this application.

[28] Fantasy's assets must be so used because, in my view, it is beyond question that Fantasy owes the public obligation to do the drainage work which the County is charged to enforce. The issue to be addressed is whether the three other bankrupts also owe that public duty.

[29] The development permits which impose the drainage work obligation were issued to Fantasy alone. There is therefore, in my view, nothing in them to impose a public duty on any of the other three bankrupts. Similarly the stop orders issued in November 2003 were issued only to Fantasy. The action they ordered was ordered only of Fantasy. It does not change that fact that Madison and the Van Leenens, as owners of units in the project, were issued copies of the stop orders. Neither does it change that fact that the County under s. 645 of the *Municipal Government Act* could have issued a stop order requiring action on the part of parties other than Fantasy including, probably, Madison and the Van Leenens. It did not do so.

[30] The only doubt on this issue arises from the Order granted by Sanderman J. on February 18, 2004 in the drainage action. Madison, John Van Leenen and Irene Van Leenen were named respondents in that proceeding in addition to Fantasy. The Order declared "the Respondents" to be in breach of the *Municipal Government Act*, the development permits and the stop orders. I described the circumstances in which the Order was granted in some detail in my July 21, 2005 decision (paragraphs 52 to 57).

[31] The question before me now is whether the effect of the February 18, 2004 Order was to impose a public obligation on Madison, John Van Leenen and Irene Van Leenen which the County can now enforce against the assets of those parties in application of the *Panamericana* principle.

of the immediate work required in respect of the Safety Code breaches on the units owned by the Van Leenens.

b) July 22, 2004 Order, paragraph 4. Fantasy and Madison were ordered to pay $240,000 into Court as security for the completion of the drainage work.

c) August 26, 2004 Order, paragraph 1.a) iii. Fantasy and Madison were ordered to pay $750,000 into Court as security for the completion of the Safety Code work on six buildings. This was calculated on the basis of $125,000 per building. The Van Leenens, as owners of one of the buildings, were ordered to pay $125,000 of this amount.

[42] As mentioned previously, the anticipated problem in respect of which the third Order directed $750,000 be paid into Court, has not in fact arisen, at least in respect of five of the six buildings. I understand it has not been possible to obtain access to the sixth building to determine whether or not any concern remains about it. As to the security ordered in respect of the drainage work, the County claims the actual costs of doing drainage work that has been done and seeks to have the work that has not yet been done paid for using the assets of the bankrupt estates. Similarly the County claims for the cost of the Safety Code work that was actually done.

[43] In these circumstances the County no longer seeks to have the ordered security paid. In effect it has abandoned its claim in relation to these items.

c) Costs incurred for drainage work $79,978.91

d) Costs incurred for Safety Code work $79,277.47

Does the Panamericana principle apply to incurred expense?

[44] In respect of these items, the County submitted that the *Panamericana* principle should be applied in respect of the cost of the work that has been done at its expense, not just the work that is yet to be done.

[45] As noted above, it appears to have been pivotal to Laycraft C.J.A.'s reasoning in *Panamericana* that the ERCB was not a creditor seeking to recover a debt but rather was a public agency seeking to enforce the general law of the province. He said: (page 290)

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory

> obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whim [*sic*] the duty is imposed.
>
> It is true that this board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under s. 92(1) and (2) of the *Oil and Gas Conservation Act* (discussed above) do the work of abandonment itself and become a creditor for the sums expended. But the board has not done so in this case. Rather, it is simply in the course of enforcing observances of a part of the general law of Alberta.

[46] Clearly, it is essential to this reasoning that the public agency charged with enforcing the general law of Alberta not have taken steps to make itself a creditor. If it has exercised a statutory authority or authority obtained from some other source, such as a Court Order, to do whatever ought to have been done by the party with the obligation and to recover the cost of doing so, it has become a creditor. From then on, the object of the whole process has changed. The public agency is no longer seeking to require the party with the general law obligation to comply. It is seeking to recover money. If the party with the obligation is in bankruptcy, collection of the money, its debt, by the public authority must be subject to the scheme of distribution created by the *BIA*.

[47] The County does not have any form of super priority over other creditors in respect of the expenditures it has made in relation to the drainage work or the Safety Code work. The principle in *Panamericana* does not apply to the recovery of funds expended by the County in this context.

The drainage work expense incurred after November 25, 2004

[48] In the fall of 2004 the County believed it was necessary to complete a portion of the drainage work as soon as possible. The County's Coordinator of Development Engineering swore that five aspects of the work were of an urgent nature, were "required to prevent flooding and property damage" and, in the case of one unit, were required to eliminate a safety hazard in relation to an excavation.

TAB 28

P. 449

Larry Bell, Robert Chase and Peter Dolezal *Appellants*

and

United Mine Workers of America International Union and United Mine Workers of America, Local 7292 *Appellants*

v.

Greenhills Workers' Association *Respondent*

and

Three Hundred Non-Union Employees *Respondents*

INDEXED AS: WESTAR MINING LTD. (RE)

File No.: 23395.

1993: June 8.

Present: Lamer C.J. and Sopinka, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Appeal — Leave to appeal — Court of Appeal — Companies' Creditors Arrangement Act — Panel of British Columbia Court of Appeal having jurisdiction to hear appeal from order of single justice on application for leave to appeal under Companies' Creditors Arrangement Act.

Appeal — Leave to appeal — Court of Appeal — Companies' Creditors Arrangement Act — Proceedings for obtaining leave to appeal taken within 21 days after rendering of order being appealed — Provisions of Companies' Creditors Arrangement Act complied with.

Corporations — Compromises and arrangements — Order under Companies' Creditors Arrangement Act set aside — No jurisdiction to make order in absence of notice to parties and hearing.

Larry Bell, Robert Chase et Peter Dolezal *Appelants*

et

United Mine Workers of America International Union et United Mine Workers of America, Local 7292 *Appelants*

c.

Greenhills Workers' Association *Intimée*

et

Trois cents employés non syndiqués *Intimés*

RÉPERTORIÉ: WESTAR MINING LTD. (RE)

Nº du greffe: 23395.

1993: 8 juin.

Présents: Le juge en chef Lamer et les juges Sopinka, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Appel — Autorisation d'appel — Cour d'appel — Loi sur les arrangements avec les créanciers des compagnies — Formation de la Cour d'appel de la Colombie-Britannique compétente pour entendre l'appel interjeté contre l'ordonnance rendue par un seul juge concernant une demande d'autorisation d'appel fondée sur la Loi sur les arrangements avec les créanciers des compagnies.

Appel — Autorisation d'appel — Cour d'appel — Loi sur les arrangements avec les créanciers des compagnies — Procédures visant à obtenir l'autorisation d'appel engagées dans les 21 jours suivant la délivrance de l'ordonnance faisant l'objet d'un appel — Respect des dispositions de la Loi sur les arrangements avec les créanciers des compagnies.

Compagnies — Transactions et arrangements — Annulation d'une ordonnance fondée sur la Loi sur les arrangements avec les créanciers des compagnies — Absence de compétence pour rendre l'ordonnance sans avoir préalablement avisé et entendu les parties.

Statutes and Regulations Cited

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

APPEAL from a judgment of the British Columbia Court of Appeal (1993), 75 B.C.L.R. (2d) 16, dismissing an application to set aside an order of Southin J.A. (1992), 75 B.C.L.R. (2d) 14, 16 C.B.R. (3d) 55, refusing leave to appeal from an interlocutory order made by Macdonald J. (1992), 14 C.B.R. (3d) 101, during proceedings brought under the *Companies' Creditors Arrangement Act.* Appeal allowed.

Jack M. Giles, Q.C., for the appellants Bell et al.

Gwen K. Randall, Q.C., and *Cheryl Yingst-Bartel*, for the appellants United Mine Workers of America International Union et al.

Frank G. Potts and *Tim Delaney*, for the respondent Greenhills Workers' Association.

The judgment of the Court was delivered orally by

IACOBUCCI J.—We agree, for the reasons given by McEachern C.J.B.C., that the British Columbia Court of Appeal had jurisdiction to hear an appeal of the decision of Southin J.A. regarding the order of Macdonald J. made on August 26, 1992, and that the appellants properly complied with the applicable provisions of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, in bringing their appeal.

Under the circumstances, we think it appropriate to address the merits. In that respect, we are of the view that the order of August 26, 1992 was improper and should be set aside because there was no jurisdiction for Macdonald J. to make the order, absent notice to and hearing the affected parties.

Lois et règlements cités

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. (1985), ch. C-36.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1993), 75 B.C.L.R. (2d) 16, qui a rejeté une demande d'annulation d'une ordonnance du juge Southin (1992), 75 B.C.L.R. (2d) 14, 16 C.B.R. (3d) 55, qui avait refusé l'autorisation d'en appeler d'une ordonnance interlocutoire rendue par le juge Macdonald (1992), 14 C.B.R. (3d) 101, au cours de procédures engagées en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*. Pourvoi accueilli.

Jack M. Giles, c.r., pour les appelants Bell et autres.

Gwen K. Randall, c.r., et *Cheryl Yingst-Bartel*, pour les appelants United Mine Workers of America International Union et autre.

Frank G. Potts et *Tim Delaney*, pour l'intimée Greenhills Workers' Association.

Version française du jugement rendu oralement par

LE JUGE IACOBUCCI—Pour les motifs exposés par le juge en chef McEachern de la Colombie-Britannique, nous sommes tous d'accord pour dire que la Cour d'appel de la Colombie-Britannique avait compétence pour entendre l'appel interjeté contre la décision du juge Southin concernant l'ordonnance rendue par le juge Macdonald le 26 août 1992, et que les appelants se sont bien conformés aux dispositions applicables de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. (1985), ch. C-36, en interjetant leur appel.

Dans les circonstances, nous croyons qu'il convient d'aborder le fond de l'affaire. À cet égard, nous sommes d'avis que l'ordonnance du 26 août 1992 n'était pas appropriée et qu'elle devrait être annulée pour le motif que le juge Macdonald n'avait pas compétence pour la rendre sans avoir préalablement avisé et entendu les parties concernées.

The appeal from the order of Southin J.A. is quashed without costs.

The appeal from the decision of the British Columbia Court of Appeal is allowed, the judgment of the British Columbia Court of Appeal refusing leave to appeal is set aside, and the order of August 26, 1992 of Macdonald J. is set aside.

The appellants shall have their costs here and in both courts below.

Judgment accordingly.

Solicitors for the appellants Bell et al.: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the appellants United Mine Workers of America International Union et al.: McCarthy Tétrault, Calgary.

Solicitors for the respondent Greenhills Workers' Association: Lindsay Kenney, Vancouver.

L'appel interjeté contre l'ordonnance du juge Southin est annulé sans dépens.

L'appel interjeté contre l'arrêt de la Cour d'appel de la Colombie-Britannique est accueilli, la décision de la Cour d'appel de la Colombie-Britannique de refuser l'autorisation d'appel est annulée, de même que l'ordonnance rendue par le juge Macdonald le 26 août 1992.

Les appelants ont droit à leurs dépens dans toutes les cours.

Jugement en conséquence.

Procureurs des appelants Bell et autres: Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs des appelants United Mine Workers of America International Union et autre: McCarthy Tétrault, Calgary.

Procureurs de l'intimée Greenhills Workers' Association: Lindsay Kenney, Vancouver.

TAB 29

PP. 153-154

Canada's Railway Safety Regulatory Regime: Past, Present & Future

E. Wayne Benedict*

Table of Contents

I.	Introduction	147
II.	Railway Accidents in Canada	148
	A. Railway Employees	148
	B. The Public	151
	C. The Environment	153
III.	Canada's Railway Safety Regulatory Regime	154
	A. The Past	155
	B. The Present	157
	C. The Future	162
IV.	Conclusion	165

I. Introduction

When accidents happen on the railway, catastrophe usually follows for individuals, the public, property, and the environment. The extreme

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weights involved in moving railway equipment give no quarter to anything unfortunate enough to get in its path—whether metal, rock, or flesh. In addition, trains regularly carry dangerous goods through populated urban areas; products whose potential to inflict death and destruction is immense and previously proven.

Canada is no stranger to railway accidents. Part II of this essay explores a few of the more recent accident examples. The country has a complex regulatory regime in place to ensure the safe operation of railways running within its borders, and the safety of those who could suffer damage as a result of railway mishaps—railway employees, the public, the environment. Part III of this essay examines Canada's historical and current railway safety regulatory regime and the "deregulation" of railways, which began in the late 1980s. This part also discusses the present trend toward creeping re-regulation that seems to be occurring in light of a recent spate of headline-grabbing derailments in Canada. Part IV concludes the essay with the suggestion that the government should take back the self-regulation privileges that have been granted to the industry (such as self-inspection and safety management systems) and recognize that deregulation of safety, wherein the railway is responsible for the management of its own safety, is not adequately protecting the interests of the Canadian public, the Canadian environment, or Canadian railway workers.

II. Railway Accidents in Canada

Canada is no stranger to railway accidents both large and small. This section explores a few of the more recent and devastating accidents that have occurred.

A. Railway Employees

Although rarely reported in newspapers, injuries and deaths of railway employees due to accidents on the job are not infrequent. In a contest between flesh and multi-ton moving railway equipment, the latter always prevails. For example, between 1991 and 2004, the Workers' Compensation Board of British Columbia alone accepted lost time claims relating to work accidents from 282 yard locomotive engineers, 667 conductors/brakemen, 319 yard workers, and 331 track maintenance workers.[1] Multiply those statistics across all provinces with operative railways

1. Workers' Comp. Bd. of B.C., Occupational Injuries by Accident Type and Occupation in British Columbia, 1997-2005, Table 7A at 12, http://www.worksafebc.com/publications/reports/statistics_reports/occupational_injuries/1997-2004/assets/pdf/Table%20%207A%2097-04.pdf.

train were injured, some seriously but there was no loss of life.[30] In Red Deer, A.B., on February 2, 2001, the derailment of two cars of toxic chemicals caused one fatality and the evacuation of 1,300 people, thirty-four of whom were treated in hospitals.[31] On December 30, 1999, two CNR trains carrying petroleum products and waste respectively collided causing several explosions and a major fire; 700 people were evacuated from their Mont-St-Hilaire residences near the crash site and passenger and freight rail operations between Montreal and Quebec City were halted or diverted for several days.[32] On February 15, 1986, forty-two people were injured when a Via Rail passenger train from Moncton to Montreal rammed a stationary CNR freight train on a siding at Bernieres, the third accident in a week for Via Rail. It prompted the then Transport Minister Don Mazankowski to order a sweeping crackdown on the safety practices of railways and their employees.[33]

C. The Environment

In addition to the Mississauga and Hinton disasters mentioned above, the following environmentally detrimental railway accidents are notable. On August 2, 2006, twenty loaded cars of a 124-car CPR coal train travelling on CNR track derailed on a railway bridge over the Thompson River; twelve loaded cars of coal spilled into the fish-bearing river.[34] On June 4, 2006, 200,000 liters of petroleum products spilled from four tank cars, half of which spilt into the Riviere-du-Loup, after a CNR derailment 250 kilometers north of Quebec City.[35] The derailment of a forty-four car CNR train on August 3, 2005, spilled 730,000 liters of bunker C oil and wood preservative into Lake Wabamun near Edmonton.[36] Two days later, a CNR derailment in the Cheakamus Canyon near Squamish spilled 40,000 liters of sodium hydroxide into the Cheakamus and other rivers, which wiped out fish stocks.[37]

On August 31, 2005, just west of Hope nine CNR cars that jumped

30. *Five Years Ago Today*, Daily News, April 12, 2006, at A6.

31. McGran, *supra* note 7. *See also* Transp. Safety Bd. of Canada, Railway Investigation Report R01E0009: Derailment, Canadian Pacific Railway, Train No. CP 966-02, Mile 95.6, Red Deer Subdivision, Red Deer, Alberta (February 2, 2001), *available at* http://www.tsb.gc.ca/en/reports/rail/2001/r01e0009/r01e0009.pdf.

32. *Fatal Wreck to Stall Rail Service for Days*, Toronto Star, Jan. 1, 2000, at 1. *See also* Transp. Safety Bd. of Canada, *supra* note 9.

33. *Quebec Train Crash Prompts Crackdown*, The Gazette, Feb. 17, 1986, at A1.

34. *Derailment Dumps Coal in River*, National Post, Aug. 3, 2006, at A6.

35. *CN Cleaning Up After Derailment*, Journal-Pioneer, June 7, 2006, at 6.

36. Bellett, *supra* note 17. *See also* Toxic Spill, Pollution and Urbanization Put Rivers at Risk, The Leader, Mar. 29, 2006 at 25.

37. *Id.*

the track spilled sulphur from open rail cars.[38] A wildfire in May 2001 that started beside CNR rail tracks near Chisholm consumed 1,045 square kilometers of forest and wiped out about a dozen homes and other buildings. Hundreds of firefighters took weeks to quell the blaze at an estimated cost of $31 million. The fire likely started by sparks flying from a faulty wheel on a freight train; CNR, while not admitting guilt or responsibility, paid $10 million in cash and $8.6 million over the next decade toward property damage and a long list of fire-prevention projects in settlement of a law suit initiated by the Alberta Crown.[39]

On February 2, 2001, four rail tankers derailed near Red Deer, one of which began leaking toxic ammonia fertilizer. Seventy-five to eighty tons of pressurized ammonia leaked from the tanker, some of which vaporized into a deadly gas.[40] On January 20, 1995, three locomotives leaking diesel and two freight cars carrying zinc sulphide fell into Kootenay Lake.[41] On October 30, 1987, 16 rail cars of a BC Rail train derailed and an estimated 200 tons of sulphur were dumped into the Cheakamus River. Deadly sulphur-dioxide gas, generated when friction ignited spilled sulphur, settled around the wreck.[42] On March 10, 1980, thirty-one cars of a CNR freight train derailed near Macgregor M.B., twelve of which were carrying vinyl chloride monomer. Two of those cars leaked product into the environment.[43]

The foregoing is but a small slice of the most recent railway accidents in Canada.[44] From these news stories, one can see the need for effective regulation of railway safety to safeguard the interests of the public and society, the environment, and railways and their personnel.

III. Canada's Railway Safety Regulatory Regime

Canada's federal and provincial governments have long recognized the need for effective safety regulation and enforcement of same in the railway industry. While provincial governments regulate railways that

38. Bellet, *supra* note 17, at A2.

39. *CN Payout Largest of Its Kind,* Calgary Herald, Jan. 14, 2006, at C5.

40. Lisa Gregoire, *Jan Haak's 'Great Big Shower': Decontamination Crew Cleans Up at Red Deer,* Edmonton Journal, Feb. 5, 2001, at A7; *see also* Transp. Safety Bd. of Canada, *supra* note 31.

41. Morton, *supra* note 14.

42. *Train Dumps Sulphur Into Cheakamus River,* The Vancouver Sun, Oct. 31, 1987, at A3.

43. Ry. Transp. Comm., W. Div., Saskatoon, Saskatchewan, Canadian Transp. Comm'n, Report On Inquiry Into The Derailment Of CNR Train B806QM09 On March 10, 1980 At Deer, Manitoba, otherwise referred to as "The MacGregor Derailment" (1980).

44. For a brief historical review of some of Canada's more disastrous railway accidents, *see* Hugh A. Halliday, Wreck!: Canada's Worst Railway Accidents (Toronto: Robin Brass 1997).

TAB 30

Lead, Arsenic, and Polycyclic Aromatic Hydrocarbons in Soil and House Dust in the Communities Surrounding the Sydney, Nova Scotia, Tar Ponds

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This study evaluated lead, arsenic, and polycyclic aromatic hydrocarbon (PAH) contamination in the residential communities adjacent to the Sydney, Nova Scotia, tar ponds, the area considered Canada's worst contaminated site. The tar pond remediation policy has been limited to the site and some residential properties. We compared background concentrations in 91 soil samples taken 5–20 km from the coke oven site with those in soil samples from the three communities surrounding the tar ponds: Whitney Pier, Ashby, and North End. These surrounding communities were statistically different from background regarding arsenic, lead, and PAHs. Twenty percent of the background soil samples and 95% of the tar pond soil samples were above the Canadian health-risk–based soil guidelines for arsenic (12 ppm), and 5% of the background samples and 80% of the tar pond soil samples were above the Canadian guidelines for lead (140 ppm). Regarding dust lead and arsenic loading, the results provide no evidence that Whitney Pier is significantly different than Ashby and North End. Children in these communities are predicted to have a 1–15% chance of blood lead > 10 µg/dL. The results suggest that lead and arsenic found in the homes originate outside. The lead content of paint in the homes was not evaluated, but consideration of painted wood at the doorway did not confound the results of the study. The results indicate that the residential environment has been adversely affected by PAHs, lead, and arsenic and should be considered for remediation. *Key words:* arsenic, community, environmental justice, house dust, lead, PAHs, polycyclic aromatic hydrocarbons, soil, Sydney, tar ponds, tracking. *Environ Health Perspect* 112:35–41 (2004). doi:10.1289/ehp.6423 available via *http://dx.doi.org/* [Online 16 October 2003]

A steel plant and coke ovens in Sydney, Nova Scotia, Canada, operated from 1901 through 1988 (Barlow and May 2000) (Figure 1). The coke oven area contained 400 coke ovens, four blast furnaces, and 10 open-hearth furnaces. The coal tar produced in making coke was released into Muggah Creek and created the tar ponds (Furimsky 2002; Tay et al. 2003) The release of the coal tar also resulted in the contamination of the groundwater. The coke ovens and steel plant deposited several million tons of particulate matter on the industrial site and surrounding community (CBCL Ltd. 1999; Furimsky 2002). Based on the analysis of the coal used in the coking operation, the particulate matter would have deposited significant levels of lead, arsenic, polycyclic aromatic hydrocarbons (PAHs), and other contaminants (Furimsky 2002). Air sampling done while the coke ovens were operational showed significant levels of PAHs in the ambient air (Atwell et al. 1982). In September 1998, a memorandum of understanding was signed between the Government of Canada, Government of Nova Scotia, and Cape Breton Regional Municipality stating that the Muggah Creek estuary is recognized as Canada's worst contaminated site and should be considered a national issue (CBCL Ltd. 1999).

Health research in Sydney, Nova Scotia, has found an increase in cancer incidence (Guernsey et al. 2000), cancer mortality (Band et al. 2003; Health Canada 1999), and congenital anomalies (Dodds and Seviour 2001) compared with the rest of Nova Scotia and Canada. Adolescents living near the tar ponds have expressed environmental and health related concerns about themselves and their families (Covell and O'Leary 2002). The health research suggests that the environmental contaminants released during the coke and steel operations may play a significant role.

For several years, the community has expressed the need for the contamination around the site to be evaluated to address their concerns about potential health risks. Sampling for contaminants has focused primarily on an area called "north of the coke ovens" (NOCO) in Whitney Pier, where lead, arsenic, and PAHs have been found (JDAC Environmental Ltd. 2001a) and remediation has been recommended for several residential properties (JDAC Environmental Ltd. 2001b). The reason for focusing on Whitney Pier NOCO is that it is predominantly downwind of the coke oven site. The other neighborhoods in close proximity, Whitney Pier (outside NOCO), Ashby, and North End, have not been considered adversely affected, and the residents have not been considered to face increased health risks. There has been no evaluation of contaminants in house dust in Sydney. House dust is the primary exposure route for children (Manton et al. 2000).

Our study addressed three fundamental questions: *a*) Is there a significant difference in soil contaminant concentrations in background samples collected 5, 10, 15, and 20 km from the coke oven site and samples collected from the communities surrounding the tar ponds? *b*) Are contaminant levels in Whitney Pier significantly different from those in Ashby and North End (Figure 1)? *c*) Are the environmental contaminants found in the soil also moving into the homes in the three communities surrounding the tar ponds?

Materials and Methods

Household dust and soil samples were analyzed for the presence of lead and arsenic in all three locations. The Government of Canada collected and analyzed soil samples for PAHs and metals in residential soil (Government of Canada. Unpublished data), and residents provided us with their results to be used in the analysis. For background data, we used the Government of Canada "Far A Field" study (Fraser and Small 2001), in which soil samples were collected from 5, 10, 15, and 20 km upwind of the coke oven site and analyzed for lead, arsenic, and PAHs.

Recruitment and household survey of residents. We chose 15 homes in each community within a three-block radius of the site to ensure coverage of the study area (Figure 1). We conducted a survey in each household to document the age, construction, and condition of the doorway; smoking status; cleaning of the doorway and floor; and other possible sources of lead and arsenic. Homes that had undergone major renovations in the last 2 years were excluded from the study.

Soil sampling. Discrete soil samples were collected from the top 5 cm of soil, placed in a plastic bag, and sealed. If bare areas were

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We thank the residents of Sydney and volunteers with the People's Health Commission for sharing their perspective and their time. We thank S. Epstein, E. Furimsky, D. Green, L. Guyn, B. Lanphear, B. Marcocchio, E. May, D. Miller, M. Richardson, D. Stefani, and B. Thomas for their comments.

This research was supported by a donation from Sierra Club of Canada, which paid for Environmental Services Laboratory costs.

The authors declare they have no competing financial interests.

Received 29 April 2003; accepted 15 October 2003.

available in the yard, we chose these sites to collect the sample. If grass was present, the top organic layer was removed and the soil sample was taken from the top 5 cm of soil. The soil samples were taken from the middle of the yard to avoid potential contamination from other sources; areas in close proximity to the house or garage were avoided to mitigate confounding from these sources, most notably paint. We collected some composite soil samples. The same sampling procedure was followed, and equal amounts of soil were thoroughly mixed in the sample bag before sending the sample for analysis. Soil samples were sent to the Environmental Services Laboratory (Sydney, Nova Scotia, Canada) for lead and arsenic analysis following U.S. Environmental Protection Agency (EPA) methods (U.S. EPA 1994a, 1994b, 1996).

Our sampling strategy involved using Government of Canada data from the communities surrounding the tar ponds (Government of Canada. Unpublished data); in addition, we collected soil samples to provide coverage of all the geographic areas indicated in Figure 1. Precise locations of samples taken are not provided, to maintain the anonymity of the participants.

In Whitney Pier (NOCO), residents provided data for 13 Government of Canada samples for lead, arsenic, PAHs, and other contaminants. In Whitney Pier (outside NOCO), residents provided data for 17 Government of Canada samples, and 3 residential soil samples were collected; these were analyzed for lead and arsenic ($n = 20$). In Ashby, residents provided data for 3 Government of Canada samples, and 6 residential soil samples were collected and analyzed for lead and arsenic ($n = 9$). In addition, 1 soil sample was taken from beneath a 100-year-old home to provide some indication of background concentrations for lead and arsenic before the deposition of the contaminants. In North End, residents provided data for 6 Government of Canada samples, and 6 residential soil samples were collected and analyzed for lead and arsenic ($n = 12$). One soil sample was taken from beneath a home in North End, directly adjacent to the tar ponds, at water level, and analyzed for lead and arsenic to provide information on contamination from groundwater.

The soil samples collected by the Government of Canada were used in developing Spearman correlation coefficients between lead, arsenic, and PAHs, and were used for predicting the level of PAH loading in dust ($n = 33$). Prediction of the PAH dust loading in the homes was made by presuming that the correlation of lead to PAHs holds for both soil and indoor dust. The prediction of PAH loading in dust was made using the following equation:

$$\text{PAH dust loading} = (\text{GM Pb dust loading} \times \text{GM PAH soil}) \div (\text{GM Pb soil}),$$

where GM is the geometric mean.

We collected 1 soil sample from outside Sydney to provide an indication of background lead and arsenic. In addition, background data consisted of 91 shallow soil samples analyzed for lead, arsenic, and PAHs collected upwind of the tar ponds at distances of 5 km ($n = 6$), 10 km ($n = 25$), 15 km ($n = 11$), and 20 km ($n = 50$) (Fraser and Small 2001). The soil results were also compared with typical background urban concentrations in Canada and the Canadian Council of Ministers of the Environment (CCME 1997) soil quality guidelines for arsenic (12 ppm), lead (140 ppm), and PAHs.

House dust sampling. For indoor dust, we compared 15 homes in Whitney Pier with 30 control homes, 15 in Ashby and 15 in North End (Figure 1). In Whitney Pier, the samples were taken from both NOCO and outside NOCO, north of the steel plant site. Homes were chosen in the sampling areas in order to provide a geographically representative sample. Our sampling was designed to compare lead and arsenic concentrations from the main entrance with those from the kitchen floor to determine if the contaminants were entering the home from outdoors and to show movement of the contaminants into the home.

The dust sampling method generally followed the wipe methods of Lanphear et al. (1995) and Sterling et al. (1999). For the kitchen floor, we used a 50 × 40 cm template to give an area of 0.2 m^2. For the doorway

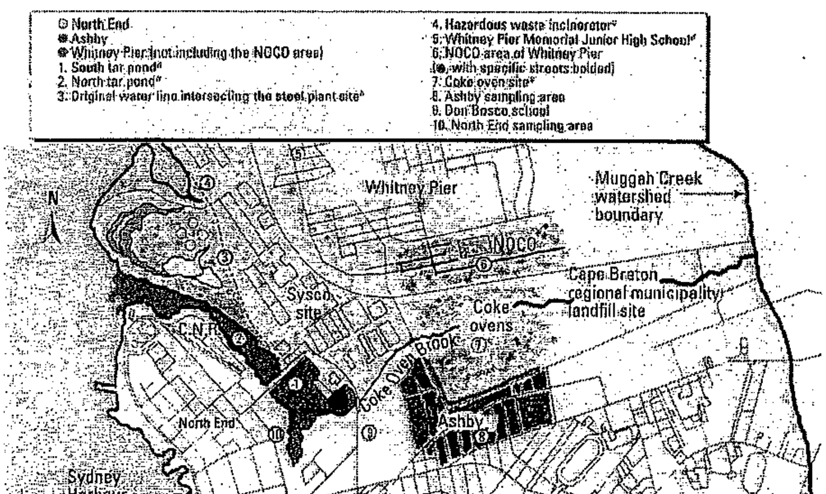

Figure 1. Sydney, Nova Scotia, tar ponds and surrounding area (adapted from Barlow and May 2000). The soil and dust sampling took place in the three communities: North End, Ashby, and Whitney Pier. In Whitney Pier, the NOCO area (red with bolded streets) has been partitioned off from Whitney Pier as a whole by the authorities. In this study we tested the assumption that the NOCO area is different from Ashby and North End with respect to soil and house dust levels of lead and arsenic.

[a]The tar ponds are reported to contain 700,000 tons of coal tar, of which 50,000 tons are contaminated with PCBs; however, the amount of coal tar may greatly exceed this estimate (Furimsky 2002). [b]The infill material is predominantly slag piles. [c]The hazardous waste incinerator was built in 1992 to burn the coal tar waste in the tar ponds. [d]Situated approximately 600 m uphill from the waste incinerator. [e]Four hundred coke ovens processed coke for the steel mill.

Table 1. Comparison of lead and arsenic in soil in the background Far A Field (FAR) study (Fraser and Small 2001) sampled at 5, 10, 15, and 20 km from the coke ovens site and the three communities surrounding the tar ponds (TAR): Whitney Pier, Ashby, and North End.

	FAR As (ppm)	TAR As (ppm)	FAR Pb (ppm)	TAR Pb (ppm)
No.	91	55	91	55
GM	6.5	50[a]	32	297[a]
Median	6.0	52[a]	29	340[a]
Mode	4.0	18[a,b]	18	230[a,b]
SD	9	56	40	309
Percentiles				
1	2	5	2	52
10	3	18[a]	15	92
20	4	25[a]	18	132
30	4	34[a]	21	230[a]
40	6	43[a]	24	275[a]
50	6	52[a]	29	340[a]
60	8	61[a]	35	410[a]
70	9	80[a]	44	448[a]
80	11	92[a]	65	505[a]
90	16[a]	140[a]	110	669[a]
100	65[a]	280[a]	200[a]	1,700[a]

[a]Values exceed the CCME health-risk–based guidelines for lead (140 ppm) and arsenic (12 ppm) (CCME 1997). [b]Multiple modes exist; the smallest value is shown.