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COURT OF APPEAL OF ALBERTA

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

AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD. and 1919209 ALBERTA LTD.

DOCUMENT: **APPLICATION FOR LEAVE TO APPEAL - JOINT BOOK OF AUTHORITIES ON BEHALF OF THE RESPONDENTS**

VOLUME 2 OF 2

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

In the matter of a Plan of Compromise or Arrangement of Lightstream Resources Ltd., 1863359 Alberta Ltd., LTS Resources Partnership, 1863360 Alberta Ltd. and Balken Resources

Mudrick Capital Management LP, FrontFour Capital Corp and FrontFour Capital Group LLC (Applicants) and Lightstream Resources Ltd., Apollo Management L.P. and GSO Capital Partners (Respondents)

Thomas W. Wakeling J.A.

Heard: December 7, 2016
Judgment: December 16, 2016
Docket: Calgary Appeal 1601-0320-AC

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Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Debtor company was granted protection available under Companies' Creditors Arrangement Act (CCAA) — Debtor company was defendant in oppression actions under s. 242 of Business Corporations Act brought by applicants — Applicants alleged that debtor company's failure to include them in debt exchange transaction that respondent company entered into with other respondent companies constituted oppression — Supervising judge found that remedy sought by applicants, exchange of unsecured bonds for secured bonds, was not viable option under CCAA — Applicants sought permission to appeal — Application dismissed — Applicants' position was without merit and bound to fail and this deficiency alone overwhelmed fact that issues it raised were of importance to parties and to insolvency community — Fact that granting applicants permission to appeal would unduly hinder progress of proceedings under CCAA buttressed conclusion that permission to appeal should not be granted — Debt-exchange remedial option was inconsistent with debt-restructuring scheme created by CCAA and it would be contrary to law — CCAA did not contemplate ordering substantial public company to negotiate debt exchange agreement with sophisticated investors that fundamentally altered their creditor status and adversely affects security interests of others who had not wrongfully abridged legitimate interests of party seeking status change — Damages award would make applicants whole — Application was form of jockeying inconsistent with fundamental objective of CCAA — Problems that triggered invocation of CCAA presented significant challenges to debtor company, creditors and supervising judge and altering status of creditors in this critical time frame unnecessarily magnified degree of difficulty initial set of problems represented — Remedy applicants sought was indisputably extraordinary in nature.

APPLICATION by companies for permission to appeal decision that remedy sought by them was not viable option under *Companies' Creditors Arrangement Act*.

Thomas W. Wakeling J.A.:

I. Introduction

1 On September 26, 2016 the Court of Queen's Bench of Alberta granted Lightstream Resources Ltd., one of the respondents, the protection available to a debtor company under the *Companies' Creditors Arrangement Act*. [1]

2 Lightstream is involved in other proceedings before the Court of Queen's Bench commenced in 2015. It is a defendant in oppression actions under s. 242 of the *Business Corporations Act*. [2] Mudrick Capital Management LP, FrontFour Capital Corp and FrontFour Capital Group LLC, the applicants in this Court, [3] are the plaintiffs in the oppression actions. Each alleges that Lightstream's failure to include it in a debt exchange transaction that Lightstream entered into with Apollo Management L.P. and GSO Capital Partners on July 2, 2015 constitutes oppression.

3 The debt exchange agreement to which the applicants take exception allowed Apollo and GSO Capital to exchange their US $465 million in unsecured Lightstream bonds for US $395 million of secured second lien Lightstream bonds. In addition these two creditors acquired an additional US $200 million of secured second lien Lightstream bonds. As a result, Apollo and GSO Capital held US $595 million in secured Lightstream bonds.

4 Mudrick and FrontFour Capital seek in their oppression actions against Lightstream an order directing Lightstream to enter into a security exchange agreement with them that contains the same essential components as the July 2, 2015 agreement between Lightstream, Apollo and GSO Capital. Section 242(3)(e) of the *Business Corporations Act* allows the court, if "it thinks fit", [4] to direct an oppressor and the oppressed party to exchange securities. [5]

5 If the Court granted the applicants this remedy, they would become the holders of secured bonds. This status would increase the likelihood that they would be able to recoup some part of their US $99,950,000 interest in Lightstream.

6 Justice Macleod, the supervising judge, decided to resolve the oppression actions within the context of the *Companies' Creditors Arrangement Act* proceeding. Because time was a commodity in short supply, the supervising judge opted for an expedited process that would reveal whether the debt exchange remedy Mudrick and FrontFour Capital requested — exchange unsecured bonds for secured bonds — was a viable option under the *Companies' Creditors Arrangement Act*. He concluded that it was not. He expressed his opinion unequivocally: [6] "[T]he Plaintiffs are bound to fail and there is no issue to be tried. To grant the remedy sought would be contrary to law."

7 Mudrick and FrontFour Capital seek permission to present to a panel of this Court [7] two questions for consideration. First, did Justice Macleod fail "to apply the correct test for the appropriate remedy for oppressive conduct?" Second, did Justice Macleod err in "[u]sing the context of the CCAA proceeding to restrict the availability of the oppression remedy in a manner contrary to law and public policy?" [8]

8 On December 7, 2016 I denied this application at the conclusion of the parties' oral submissions, stating that reasons would follow. These are my reasons.

II. Questions Presented

9 Section 14(2) of the *Companies' Creditors Arrangement Act* [9] states that "[a]ll appeals ... shall be regulated as far as possible according to the practice in other cases of the court appealed to."

10 There was no contest as to the applicable appellate practice.

11 If no statute stipulates the standard that a court must apply to grant permission to appeal [10] , this Court asks if there are "serious and arguable grounds that are of real and significant interest to the parties." [11] This is the principal question. It incorporates four relatively abstract concepts — serious grounds, arguable grounds, real interest to the parties and significant interest to the parties. To narrow the focus of the inquiry courts pose four more precise and helpful questions to determine if the proposed appeal warrants the attention of a panel of judges and bringing into question the ultimate disposition. [12] First, is the question a party wishes the Court to answer of sufficient importance to persons who are interested in the proper and efficient administration of the *Companies' Creditors Arrangement Act* [13] or the *Business Corporations Act*, [14] or any other identifiable segment of the public? [15] There is a direct correlation between the likelihood permission to appeal will be granted and the size of the group affected by the resolution of the case and the gravity of the impact on the persons affected. [16] Second, will the answer to the question posed by the potential appellant determine a significant issue within the proceeding or the outcome of the proceeding under the *Companies' Creditors Arrangement Act*? [17] Is it important to the resolution of the proceeding in which the applicant is a party? [18] If the answer to the first two questions is "yes", the appeal raises a sufficiently important issue. [19] Third, is the likelihood that the question presented by the potential appellant will be answered in the manner favourable to the potential appellant high enough [20] to justify a second hearing putting the ultimate disposition into doubt [21] and requiring the attention of a panel of judges and counsel for the disputants? Appeals are expensive and introduce delay. Is the answer to the question that the potential appellant presents for consideration so obvious that it can be said the appeal is frivolous? [22] In answering this question, one must bear in mind that an appeal court will only set aside a decision of the supervising judge, if he or she committed an error of law, clearly misapprehended an important fact or made a decision that is obviously wrong. [23] Parliament intended that "most decisions be made by the supervising judge". [24] It follows that permission to appeal will be "only sparingly granted". [25] Fourth, assuming that permission to appeal is granted and that the appellant prosecutes the appeal with reasonable diligence, will the time absorbed by the appeal unduly hinder the progress of the proceedings under the *Companies' Creditors Arrangement Act*? [26]

12 An applicant may be granted permission to appeal even if it fails to clear all four hurdles. [27] A court may exercise its discretion in favor of the applicant who has satisfied the court that the contested decision is clearly wrong despite the fact that the issue is of no interest to the insolvency community. [28] But an applicant with a hopeless case cannot recover from such a predicament.

13 Justice Macleod concluded that the likelihood a court acting judicially would grant the applicants the debt exchange remedy they sought was so low that it could be said they were "bound to fail." [29]

14 Is the applicants' position that this conclusion constitutes reversible error arguable? Or is the likelihood that a court would grant the applicants the remedy they pursue so low that this is a frivolous point?

15 Should permission to appeal be granted?

III. Brief Answers

16 While I am satisfied that the questions Mudrick and FrontFour Capital present are of sufficient importance to the parties and the segment of the community interested in the proper and efficient administration of the *Companies' Creditors Arrangement Act* [30] and the *Business Corporations Act* [31] , the applicants have not persuaded me that the likelihood they would prevail on an appeal if granted permission to appeal is anything but extremely low. I have concluded that their appeal is not arguable. Like Justice Macleod, I agree that the prospects of success are close to zero and that the appeal is bound to fail. In this sense, the appeal is frivolous. It makes no sense to grant permission to appeal if the applicants' position is hopeless.

17 Justice Macleod had compelling reasons to declare that the applicants' assertion that a debt exchange was the appropriate remedy was "bound to fail." Ordering Lightstream to enter into an agreement with Mudrick and FrontFour Capital on the same terms as those negotiated by Apollo and GSO Capital would be manifestly unfair to Apollo and GSO Capital. They had the lion's share of Lightstream's unsecured notes and were in a position to provide Lightstream with much needed capital in return for an upgrade in their security status. That Apollo and GSO Capital were able to extract a provision in the July 2, 2015 securities exchange agreement that prohibited Lightstream from entering into identical agreements with its other smaller creditors, such as Mudrick and FrontFour Capital, is evidence of their strong bargaining position. Mudrick and FrontFour Capital have not alleged in any proceeding that Apollo and GSO Capital, by entering into the securities exchange agreement with Lightstream, breached any obligation they had to Mudrick and FrontFour Capital or Lightstream. [32] An order compelling Lightstream to enter into a debt exchange agreement on the terms the applicants seek would unjustifiably diminish the benefits that Apollo and GSO Capital would derive from their status as secured note holders. Their position would be diluted. In addition, the remedy the applicants seek would harm the interests of the other unsecured note holders. They have not acted in a blameworthy manner that justifies an abridgment of their interests.

18 Justice Macleod also was opposed to a remedy that would "impose debt upon Lightstream unilaterally". [33] Counsel informed me that in the current fact pattern this would not be the consequence if the applicants were ultimately successful and they became secured creditors and participated in the credit-bid process. [34] But I agree with Justice Macleod that, as a rule, a corporation should not be forced to assume debt against its wishes. This is a decision that corporate leaders and not judges should be making. Corporate leaders have access to the relevant data and the skill set needed to make a decision that promotes the corporation's best interests. [35]

19 This determination is reason enough to deny the applicants permission to appeal.

20 But there is another reason that leads me to this conclusion.

21 An appeal would undermine the arrangements that were to be presented on December 8, 2016 to the supervising judge for approval. The transaction contemplated by the arrangement must close by December 31, 2016 or a secured creditor whose support is critical to the transaction will take other steps to protect its position. It is extremely unlikely that any appeal prosecuted by Mudrick and FrontFour Capital, if permission to appeal was granted, would be disposed of before December 31, 2016. And if Mudrick or FrontFour Capital prevailed on appeal, the supervising judge would have to revisit the issue. If the applicants' arguments convinced the supervising judge and they received their preferred remedy, the respondents would appeal. Introducing this level of uncertainty at this stage of the restructuring process would not be a positive development considering the underlying purpose of the *Companies' Creditors Arrangement Act* — the successful restructuring of the debtor company's debt obligations in as short a time as reasonably possible. [36] I am satisfied that an order granting the applicants permission to appeal would unduly hinder the progress of proceedings under the *Companies' Creditors Arrangement Act*.

IV. Relevant Statutory Provisions

22 Sections 2(1), 11, 13, 14 and 42 of the *Companies' Creditors Arrangement Act* [37] read, some in part, as follows:

2(1) in this Act,

. . . . .

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts ....

. . .

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

. . . . .

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

. . .

14(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to ....

. . .

42 The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

23 Section 242 of the *Business Corporations Act*[38] is as follows:

242(1) A complainant may apply to the Court for an order under this section.

(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

. . . . .

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder [or] creditor ... the Court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

. . . . .

(e) an order directing an issue or exchange of securities;

. . . . .

(l) an order compensating an aggrieved person ....

24 Rule 14.5 (1) of the *Alberta Rules of Court*[39] reads, in part, as follows:

14.5(1) Except as provided in this rule, no appeal is allowed to the Court of Appeal from the following types of decisions unless permission to appeal has been obtained:

.....

(f) any decision where permission to appeal is required by an enactment....

V. Statement of Facts[40]

A. The Debt Instruments

25 Lightstream is a light oil exploration and production business.[41] The decline of oil and gas prices has created challenges for it.[42]

26 Mudrick is a Securities Exchange Commission registered investment adviser. FrontFour Capital Corp is the investment fund and portfolio manager of the FrontFour Opportunity Fund. FrontFour Capital Group LLC is the investment advisor to the FrontFour Master Fund Ltd. and other accounts. It manages capital for institutions and individuals. Together they hold US $99,950,000 in unsecured Lightstream notes.[43] Before they acquired a significant portion of this position, in the first half of 2015, each of them carefully assessed the risk that Lightstream would, in the future, issue secured debt.[44] Mudrick knew that Lightstream, as of January 21, 2015, had the capacity to carry US $1.5 billion in total secured debt.[45] Lightstream was the source of this information.[46] Mudrick and FrontFour Capital made the inquiries that they thought were reasonable and concluded that the risk Lightstream would take on secured debt was minimal.[47] They must have assumed that the likelihood Lightstream would encounter liquidity issues in the time frame of interest was low enough to justify their decision to acquire unsecured notes. In a January 21, 2015 conference call in which Mudrick participated, Lightstream stated that liquidity was not a current problem and that it had no present intention to restructure its debt.[48]

27 Lightstream assured the applicants on several other occasions in the first half of 2015 that Lightstream did not intend to restructure its debt and that, if it did decide to exchange unsecured debt for secured debt, it would invite the applicants to participate.[49]

28 Had Lightstream not assured the applicants that they would be able to participate in a debt exchange transaction if Lightstream decided to follow this strategy, Mudrick and FrontFour Capital would have sold their unsecured notes at a profit around the end of May 2015.[50]

29 As of July 1, 2015, Apollo and GSO Capital held US $465 million in unsecured Lightstream notes.[51] This was more than half of Lightstream's outstanding unsecured notes - US $800 million.[52]

30 On July 2, 2015, Lightstream, without notice to the applicants, entered into a note purchase and exchange agreement with Apollo and GSO Capital.[53] The creditors exchanged US $465 million unsecured Lightstream notes for US $395 million secured second lien Lightstream notes and acquired an additional US $200 million in secured second lien Lightstream notes. Lightstream agreed not to enter into a debt exchange agreement with other unsecured note holders on terms as favourable as those Apollo and GSO Capital negotiated.

31 Shortly after Lightstream concluded its debt exchange agreement with Apollo and GSO Capital, it informed the applicants that it would be willing to enter into a debt exchange agreement with them, although on less favourable terms than contained in the debt exchange agreement with Apollo and GSO Capital. [54] Mudrick and FrontFour Capital declined to pursue this opportunity. [55] They insisted that they were entitled to the same terms as Apollo and GSO Capital had negotiated. [56]

32 In the last half of 2015 Mudrick acquired an additional US $36 million of unsecured Lightstream notes. [57]

B. The Oppression Actions Under the Business Corporations Act

33 Within weeks of July 2, 2015, Mudrick and FrontFour Capital commenced oppression actions against Lightstream under s. 242 of the *Business Corporations Act*. [58]

34 The applicants' oppression actions have two bases. They allege that Lightstream's failure to include the applicants in the debt exchange transaction to which Apollo and GSO Capital were signatories breached the assurances Lightstream gave the applicants. [59] They also allege that the debt exchange agreement between Lightstream, Apollo and GSO Capital Partners breached the indenture agreement that governed the terms of the unsecured Lightstream notes. [60] Mudrick and FrontFour Capital seek as a remedy an order compelling Lightstream to enter into a debt exchange agreement with them on the same terms as that set out in the debt exchange agreement between Lightstream, Apollo and GSO Capital Partners. [61]

C. Companies' Creditors Arrangement Act Proceedings

35 On September 26, 2016 [62] Lightstream applied for and was granted protection under the *Companies' Creditors Arrangement Act* [63]. The initial order stayed all proceedings against Lightstream, except, at the request of the applicants, the claims by Mudrick and FrontFour Capital against Lightstream in their oppression actions under the *Business Corporations Act*. [64]

36 A subsequent order directed that the applicants' actions under the *Business Corporations Act* would be resolved under the aegis of the *Companies' Creditors Arrangement Act* proceeding. [65]

37 Lightstream asked the Court to determine whether there was any merit to the applicants' claim that they were entitled to a remedy ordering it to enter into a debt exchange agreement with Mudrick and FrontFour Capital comparable to the July 2, 2015 debt exchange agreement it had with Apollo and GSO Capital. [66] Lightstream asserted that the applicants had no chance of succeeding. If the supervising judge adopted Lightstream's argument, the need for the parties and the court to devote more time to the oppression actions would disappear. Given the looming year-end deadline, time had to be used wisely.

38 In a November 25, 2016 decision Justice Macleod dealt with two issues raised by the applicants' claim that they should be accorded the status of secured creditors, like Apollo and GSO Capital. The supervising judge accepted the argument of Mudrick and FrontFour Capital that a court exercising jurisdiction under the *Companies' Creditors Arrangement Act* could invoke the power bestowed on a court hearing an oppression action under s. 242(3)(e) of the *Business Corporations Act*, provided that "the remedy serves the purpose and scheme of the Court's function under the *CCAA*". [67]

39 Justice Macleod then considered whether there was sufficient evidence to allow an adjudicator to find that Lightstream had oppressed the applicants, and if there was, to assess the likelihood that an adjudicator would hold that the securities exchange remedy was appropriate. He undertook this assignment on the assumption that the facts on which

Mudrick and FrontFour Capital based their claim for relief were true. [68] He also took into account facts that were not in dispute. The supervising judge adopted the same analytical framework used to resolve summary judgment applications under r. 7.3 of the *Alberta Rules of Court*. [69]

40 I will list some of the facts that fall into one or both of these categories to give some indication of the fact pattern that Justice Macleod had before him.

41 First, Mudrick and FrontFour Capital "were aware that a selective exchange transaction was a possibility" and "[i]f ... [they] were nervous about a potential debt exchange, they could have sold their position." [70]

42 Second, there was no evidence that general commercial practice precluded Lightstream from entering into a selective debt exchange with Apollo and GSO Partners. [71]

43 Third, the size of the applicants' position in Lightstream's unsecured debt gave them direct access to members of Lightstream's executive team. This access supports the proposition that Mudrick and FrontFour Capital could reasonably expect that Lightstream would not mislead them on matters that directly relate to the welfare of their investment. [72] Lightstream repeatedly assured the applicants that it would not exchange debt on a selective basis. [73]

44 Fourth, Lightstream believed that the terms of the indenture agreement did not preclude it from entering into selective debt exchange transactions. [74] While the applicants claim in their oppression actions that the indenture agreement precludes selective debt exchanges, they never communicated this opinion to Lightstream before July 2, 2015. [75]

45 Fifth, sometime after July 2, 2015, Lightstream offered Mudrick and FrontFour Capital the opportunity to exchange their unsecured debt for secured debt, on terms less favourable than those granted to Apollo and GSO Capital Partners. [76] The applicants rejected this offer, insisting that they were entitled to the same terms granted to Apollo. [77]

46 Justice Macleod concluded that a trial was necessary to determine whether the applicants' expectation that Lightstream would include them in any debt exchange was reasonable [78] and whether Lightstream had oppressed the applicants. [79] He must have concluded that the position of the parties on these issues was not sufficiently disparate to justify a determination one way or the other.

47 Nonetheless the supervising judge undertook the second inquiry — what is the appropriate remedy — on the assumption that Lightstream had oppressed Mudrick and FrontFour Capital. Justice Macleod asked whether a court acting judicially to achieve the purpose of the *Companies' Creditors Arrangement Act* could select the debt exchange remedy the applicants sought. Justice Macleod concluded that this remedy was not a viable option. He stated that "[t]he Plaintiffs are bound to fail". [80]

VI. Analysis

A. The Court of Appeal's Gatekeeper Plays an Important Role

48 An applicant for permission to appeal must convince the appeal court's gatekeeper that an appeal is appropriate. The rationale for the gatekeeper's role is set out below: [81]

> Not every litigant who wants to appear before an appeal court has a right to such a hearing. ... This screening function is bestowed on appeal courts for several good reasons. First, an appeal may be inconsistent with the purpose of the statute. Expeditious resolution may be more important than other values. Second, legislation may, in effect, declare that other decision makers are in a better position or a good enough position to make decisions so that the risk an unfair or unjust result will be embodied in their work product is sufficiently low to justify denying appellate

review. Third, the amount or the subject matter under dispute may not justify the dedication of more state and private resources to the dispute.

49 The second factor justifying the gatekeeper function is engaged when an applicant seeks leave to appeal a decision made under the *Companies' Creditors Arrangements Act*. Justice Blair highlights this when he stated in *Stelco Inc., Re* [82] that "[l]eave is only sparingly granted in ... [*Companies' Creditors Arrangements Act*] matters because of their 'real time' dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings".

B. The Permission-To-Appeal Standard Contains a Merit-Based Component

50 An effective screening mechanism reduces the likelihood that appeals with very low prospects of success enter the appeal stream. Only appeals that display the merit-based component pass through the screen. [83] This process escalates the reversal rate [84] and validates the devotion of the extra judicial and legal resources to this class of appeals and the attenuation of the principle of finality associated with any court decision. [85]

51 The jurisprudence governing permission-to-appeal applications in civil matters, including those under s.13 of the *Companies' Creditors Arrangement Act*, requires the applicant to convince the gatekeeper that the likelihood the question presented for resolution by the applicant would be answered in the applicant's favor is high enough to justify delaying the ultimate disposition of the issue under review. The prospects of success are high enough if the applicant's position is not frivolous. [86] A position is frivolous if it is not arguable. [87] An appeal is frivolous if the likelihood it will succeed is extremely low. [88] It makes no sense to ask an appeal court to hear appeals that are frivolous. [89]

52 This is not an onerous standard. [90] But it is, nonetheless, a standard that an applicant must meet. [91]

C. The Applicants' Prospect of Success on Appeal Are Too Low To Warrant Granting Them Permission to Appeal

53 To say that Justice Macleod thought the applicants' arguments in support of its debt exchange remedy were not compelling is an understatement. He, in effect, held that Mudrick and FrontFour Capital had a hopeless case. His precise words follow: "[T]he Plaintiffs are bound to fail." [92]

54 Justice Macleod clearly explained why he held such a pessimistic view of the applicant's prospects of success. [93] I agree with his assessment and his reasons.

55 First, he held that the debt-exchange remedial option was inconsistent with the debt-restructuring scheme created by the *Companies' Creditors Arrangement Act* [94] and that it "would be contrary to law". [95] The *Act* does not contemplate ordering a substantial public company to negotiate a debt exchange agreement with sophisticated investors that fundamentally alters their creditor status and adversely affects the security interests of others who have not wrongfully abridged the legitimate interests of the party seeking a status change. It would undermine a central tenet of the security protocol in force in Canada.

56 The debt exchange remedy would adversely affect Apollo and GSO Partners and other holders of unsecured Lightstream notes. [96] It would dilute the secured position of Apollo and GSO Partners. And it would reduce even more the likelihood that the other unsecured creditors would be in the money. None of these cocreditors engaged in any blameworthy conduct that harmed the applicants. There is no valid reason to impair their positions.

57 Second, a damages award would make Mudrick and FrontFour Capital whole [97]. They claimed that they never would have acquired Lightstream's unsecured notes or would have sold their unsecured notes in May 2015 had Lightstream not assured them that it did not intend to enter into a selective debt exchange transaction. A damage award

will place them in the position they would have been in had they held no Lightstream bonds as of July 2, 2015, the date of the debt exchange transaction between Lightstream, Apollo and GSO Capital, an event which devalued Mudrick and FrontFour Capital's Lightstream holdings. It should not be difficult to measure an appropriate damage award. Equally noteworthy, a damage award does not harm the interests of Apollo, GSO Capital or any unsecured note holder. The fact that the applicants may be unable to collect a damage award is not a relevant factor. It is extremely regrettable, but not relevant.

58 Third, Justice Macleod considered the application by Mudrick and FrontFour capital as a form of jockeying inconsistent with a fundamental objective of the *Companies' Creditors Arrangement Act*. The problems that triggered the invocation of the *Companies' Creditors Arrangement Act* present significant challenges to the debtor company, creditors and the supervising judge. Altering the status of creditors in this critical time frame unnecessarily magnifies the degree of difficulty the initial set of problems represents. The supervising judge cited with approval Justice Farley's statement in *Lehndorff General Partner Ltd., Re* [98] that "the intention of the CCAA is to prevent any manoeuvers for positioning among the creditors during the period required to develop a plan and obtain approval of creditors." Justice Macleod's opinion is consistent with Professor Wood's admonition noting that "it is necessary to maintain the status quo and prevent parties from engaging in manoeuvers that seek to undermine the legal position of other parties". [99] I acknowledge that Mudrick and FrontFour Capital first put Lightstream on notice that they claimed this form of relief in the oppression actions they commenced in July 2015. But these are not proceedings that named Apollo and GSO Partners as defendants. [100] They are the ones who stand to suffer the most as events have unfolded if this remedy is granted. In addition, when the applicants commenced their oppression actions against Lightstream is not more important than the fact that they pursued their remedy claim after September 26, 2016, the date of the initial order and the start date of a new regime under which the creditors and the debtor company have a brief opportunity to reach an accommodation of conflicting interests. Again, I agree with Justice Macleod.

59 The applicants have not convinced me that the supervising judge has committed any error of law or made a palpable and overriding error with respect to a factual determination.

60 The remedy the applicants seek is indisputably extraordinary in nature. [101] I am not aware of any case in which a court exercising its jurisdiction under the *Companies' Creditors Arrangement Act* has ordered a public company to enter into a debt exchange agreement with sophisticated investors who have positions in the debtor company measured in the hundreds of millions. [102]

61 There have been instances of courts discharging their obligations under the *Business Corporations Act* ordering defendants to enter into agreements that formalize fundamental undertakings that had served as the foundation of their relationship. [103] But these cases are not remotely comparable to the facts in this proceeding.

62 I am completely satisfied that the applicants' position is without merit and is bound to fail. This deficiency alone overwhelms the fact that the issues it raises are of importance to the parties and to the insolvency community.

63 My determination that granting the applicants permission to appeal would unduly hinder the progress of the proceedings under the *Companies' Creditors Arrangement Act* buttresses my conclusion that permission to appeal should not be granted.

VII. Conclusion

64 The application for permission to appeal is denied.

65 When a court is asked to make an important decision in a timeframe that is measured in hours it, of necessity, relies heavily on counsel. [104] Counsel provided much needed assistance. While it is always desirable, it is especially so in real-time litigation, that counsel precisely state the question presented for the court's determination, formulate the analytical

framework that applies, marshall the relevant facts, and explain, in summary fashion, what his or her client wants and why his or her client's interests should prevail. I acknowledge the high quality of counsel's written and oral arguments.

Application dismissed.

Footnotes

1 A company that is insolvent is a "debtor company". R.S.C. 1985, c. C-36, s. 2(1)(a).

2 R.S.A. 2000, c. B-9.

3 I refer to Mudrick Capital Management LP, FrontFour Capital Corp and FrontFour Capitol LLP collectively as Mudrick and FrontFour Capital.

4 A discretion must be exercised in a principled manner. *Alberta Treasury Branches v. 1401057 Alberta Ltd.*, 2013 ABQB 748 (Alta. Q.B.), ¶ 29; (2013), [2014] 3 W.W.R. 180 (Alta. Q.B.), 196. See also *Mason v. Intercity Properties Ltd.* (1987), 38 D.L.R. (4th) 681 (Ont. C.A.), 685 ("such a discretion must be exercised judicially"); *Campbell & Co. v. Pollak*, [1927] A.C. 732 (U.K. H.L.), 776 ("the discretion ... is a judicial discretion"); *Scherer v. Counting Instruments Ltd.* (1977), [1986] 1 W.L.R. 615 (Eng. & Wales C.A. (Civil)), 621 ("This discretion is not one to be exercised arbitrarily; it must be exercised judicially, that is to say, in accordance with established principles, and in relation to the facts of the case") & *Oshlack v. Richmond River Council*, [1998] H.C.A. 11 (New South Wales S.C.), ¶ 65; (1998), 193 C.L.R. 72 (New South Wales S.C.), 96 ("Although the statutory discretion is broadly stated, it is not unqualified. It clearly cannot be exercised capriciously. Importantly, the discretion must be exercised judicially in accordance with established principle and factors directly connected with the litigation") per McHugh J.

5 Security is defined in s. 1(ee) of the *Business Corporations Act* as follows: "'security' means a share of any class or series of shares or a debt obligation of a corporation and includes a certificate evidencing such a share or debt obligation".

6 2016 ABQB 665 (Alta. Q.B.), ¶ 92.

7 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 13.

8 Application for Permission to Appeal of Mudrick and FrontFour Capital.

9 R.S.C. 1985, c. C-36.

10 *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 14.5.

11 *Canadian Imperial Bank of Commerce v. Endurance Energy Ltd.*, 2016 ABCA 217 (Alta. C.A.), & para. 9, (chambers) & *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.), & para. 15; (2003), 44 C.B.R. (4th) 96 (Alta. C.A.), 103 (chambers).

12 See *R. v. Letiec*, 2015 ABCA 123 (Alta. C.A.), & para. 31-32 (chambers) (the finality principle recognizes that there is inherent value in an original judicial determination).

13 *Canadian Imperial Bank of Commerce v. Endurance Energy Ltd.*, 2016 ABCA 217 (Alta. C.A.), 9 ("Whether the appeal is *prima facie* meritorious not frivolous) & *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.), ¶¶ 15-17, (2003), 44 C.B.R. (4th) 96 (Alta. C.A.), 103 (chambers) ("Whether the appeal is *prima facie* meritorious, or... whether it is frivolous).

14 R.S.A. 2000, c. B-9, s. 242.

15 *Canadian Natural Resources Ltd. v. Laricina Energy Ltd.*, 2016 ABCA 198 (Alta. C.A.), ¶ 21 (chambers) ("it may be that CNRL's dispute with Laricina over road use fees does raise issues which are unsettled and which may be of significance to the parties and to the industries which utilize these so-called "private roads" on Crown land in Northern Alberta") & *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.), ¶ 17; (2003), 44 C.B.R. (4th) 96 (Alta. C.A.), 103 (chambers) ("It is also interpreted broadly to include not only the insolvency practice but the industry involving the claimant").

16 *Edmonton (City) v. Edmonton (Subdivision and Development Appeal Board)*, 2016 ABCA 129 (Alta. C.A.), ¶ 46; (2016), 49 M.P.L.R. (5th) 211 (Alta. C.A.), 223 (chambers).

17 *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.), ¶¶ 15 & 16; (2003), 44 C.B.R. (4th) 96 (Alta. C.A.), 103 (chambers) ("Whether the point raised is of significance to the action itself").

18 *Canadian Imperial Bank of Commerce v. Endurance Energy Ltd.*, 2016 ABCA 217 (Alta. C.A.), ¶ 9 (chambers) & *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.), ¶ 16; (2003), 44 C.B.R. (4th) 96 (Alta. C.A.), 103 (chambers) ("Whether the point ... is of significance to the action") & *Boychuk v. Edmonton Police Service*, 2014 ABCA 163 (Alta. C.A.), ¶ 39; [2014] 8 W.W.R. 250 (Alta. C.A.), 271 (chambers) ("Does the resolution of the question ... assist in the determination of the merits of the ... [proceeding]? If not, there is no reason to resolve the ... question").

19 *Concrete Equities Inc., Re*, 2012 ABCA 91 (Alta. C.A.), ¶ 19 (chambers) ("there must be serious and arguable grounds for the appeal").

20 The question is usually put this way: "Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous". *Canadian Imperial Bank of Commerce v. Endurance Energy Ltd.*, 2016 ABCA 217 (Alta. C.A.), ¶ 9 (chambers).

21 *Taylor v. Lawrence*, [2002] EWCA Civ 90 (Eng. C.A.), ¶ 6; (2002), [2003] Q.B. 528 (Eng. C.A.), 535 ("The rule in *Ladd v. Marshall* [admission of fresh evidence on appeal] is an example of a fundamental principle of our common law — that the outcome of litigation should be final") & *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319 (Alta. C.A.), ¶ 111 ("It is in the public interest for disputes to come to an end").

22 *Canadian Imperial Bank of Commerce v. Endurance Energy Ltd.*, 2016 ABCA 217 (Alta. C.A.), ¶ 9 (chambers) ("Whether the appeal is *prima facie* meritorious, or... whether it is frivolous) ("Whether the appeal is *prima facie* meritorious not frivolous") & *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.), ¶¶ 15 & 16; (2003), 44 C.B.R. (4th) 96 (Alta. C.A.), 103 (chambers).

23 *Concrete Equities Inc., Re*, 2012 ABCA 91 (Alta. C.A.), ¶ 20 ("In reviewing a *CCAA* decision of a supervising judge, the standard of review of correctness applies to errors of law .... [P]alpable and overriding error applies to a supervising judge's exercise of discretion or findings of fact") & *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.), ¶ 20; (2003), 44 C.B.R. (4th) 96 (Alta. C.A.), 104 (chambers) ("a supervising chambers judge under the CCAA should be afforded considerable deference. Their decisions will be interfered with only in the event of unreasonable acts, errors in principle or manifest errors").

24 *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326 (Alta. C.A.), 341. See generally *Boychuk v. Edmonton Police Service*, 2014 ABCA 163 (Alta. C.A.), ¶ 16; [2014] 8 W.W.R. 250 (Alta. C.A.), 260-61 (chambers) (the architecture of an enactment that assigns decision making responsibility to different fora reveals the limited role of some decision makers).

25 *Stelco Inc., Re* (2005), 261 D.L.R. (4th) 368 (Ont. C.A.), 374 & *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]), ¶ 272.

26 *Canadian Imperial Bank of Commerce v. Endurance Energy Ltd.*, 2016 ABCA 217 (Alta. C.A.), ¶ 9 (chambers) & *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.), ¶ 16; (2003), 44 C.B.R. (4th) 96 (Alta. C.A.), 103 (chambers) ("Whether the appeal will unduly hinder the progress of the action"). It is not obvious to me how this last question is in any way related to the principal question. It introduces a very separate consideration. In making this observation, I am not suggesting that the answer to the question is unimportant. The answer, in some scenarios, may be dispositive of the issue.

27 *Monarch Land Ltd. v. Sanderson of Fish Creek (Calgary) Developments Ltd.*, 2014 ABCA 143 (Alta. C.A.), ¶ 16 (chambers) & *Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of)*, 2005 ABCA 357 (Alta. C.A. [In Chambers]), ¶ 14; (2005), 376 A.R. 95 (Alta. C.A. [In Chambers]), 98-99. *Contra*, *Homburg Invest Inc., Re*, 2012 QCCA 665 (C.A. Que.), ¶ 4 (chambers) (the Court held that "an applicant's failure to establish any one of them will result in dismissal of the application"). See generally *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319 (Alta. C.A.), ¶¶ 57-70 (chambers).

28 *Carleo Investments Ltd. v. Strathcona (County)*, 2014 ABCA 302 (Alta. C.A.), ¶ 10; (2014), 28 M.P.L.R. (5th) 173 (Alta. C.A.), 178 (chambers) ("Doing justice between the parties is always 'of importance'").

29 2016 ABQB 665 (Alta. Q.B.), ¶ 92.

30 R.S.C. 1985, c. C-36.

31 R.S.A. 2000, c. B-9, s. 242.

32 The oppression actions are against Lightstream. Mr. Pinos, counsel for Mudrick and FrontFour Capital, stated in his oral submissions, that a cocreditor cannot be sued in an oppression action. But, as Mr. Wadden, counsel for Apollo and GSO Capital, noted, the applicants have not commenced an action against his clients alleging that they conspired with Lightstream to harm the applicants. Lightstream's position before Justice Macleod was that it entered into the debt exchange agreement with Apollo and GSO Capital because it was in Lightstream's best interests to do so.

33 2016 ABQB 665 (Alta. Q.B.), ¶ 88. Apollo and GSO Capital, as a result of their obligations under the July 2, 2015 securities exchange agreement with Lightstream, had purchased an additional US $200 million of secured Lightstream bonds. This was a welcome development from Lightstream's perspective. It needed the cash. If the supervising judge ordered Lightstream to enter into a debt exchange agreement with the applicants having the same key features as the July 2, 2015 agreement, Lightstream would be forced to assume more debt. This, I believe, was Justice McLeod's concern.

34 The credit-bid process has these features. First, because efforts to locate a purchaser for the assets of Lightstream willing to pay an amount that would equal Lightstream's obligations to the first lien lenders failed, other protocols were in place. Second, the first lien lenders have agreed with Lightstream to forebear from exercising their rights and remedies arising from Lightstream's defaults under a credit agreement until 2:00 p.m. Calgary time on December 31, 2016. Third, some lenders have agreed to provide a new revolving credit facility with an aggregate commitment of Cdn $400 million. These proceeds are to be used to pay out Lightstream's obligations to the first lien lenders no later than December 31, 2016. Fourth, the secured second lien note holders will incorporate "Credit Bid Co." Credit Bid Co. will acquire Lightstream's assets and, in exchange, the secured second lien notes will be automatically canceled. Credit Bid Co. will issue to secured second lien note holders a pro rata number of common shares in Credit Bid Co. As a result, Credit Bid Co. will own and operate Lightstream's assets and business and Lightstream will have no assets or active business. See Affidavit of Peter D. Scott sworn September 21, 2016.

35 *Brant Investments Ltd. v. KeepRite Inc.* (1991), 80 D.L.R. (4th) 161 (Ont. C.A.), 190-91 ("the trial judge should [not] substitute his own business judgment for that of managers, directors, or a committee.... Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. ...In short, he does not know enough to make the business decision required").

36 See R. Wood, Bankruptcy and Insolvency Law 311 (2009) ("Courts have consistently maintained that the purpose of restructuring law is to provide an insolvent debtor with a limited but reasonable period of time within which to develop a plan or proposal and to put it before the creditors who must then decide to accept or reject it").

37 R.S.C. 1985, c. C-36.

38 R.S.A. 2000, c. B-9.

39 Alta. Reg. 124/ 2010.

40 This statement draws on the facts the supervising judge took into account for the purpose of deciding the issues before him. Lightstream contests many of these facts. 2016 ABQB 665 (Alta. Q.B.), ¶ 8.

41 2016 ABQB 665 (Alta. Q.B.), ¶1

42 Id.

43 Id. ¶¶ 12, 13 & 38.

44 Id. ¶¶ 10 & 11.

45 Id. ¶ 11.

46 Id.

47 Id. ¶¶ 10 & 11.

48 Id. ¶ 11.

49 Id. ¶¶ 15, 16, 20, 26, 29 & 73.

50 Id. ¶ 28.

51 Id. ¶ 22.

52 Id. ¶ 9.

53 Id. ¶ 34.

54 Id. ¶ 72.

55 Id.

56 Id.

57 Id. ¶ 38.

58 Id. ¶ 36.

59 Id.

60 Id.

61 Id. ¶ 37.

62 Id. ¶¶ 1 & 39.

63 R.S.C. 1985, c. C-36.

64 2016 ABQB 665 (Alta. Q.B.), ¶ 39.

65 Id.

66 Id. ¶ 41.

67 Id. ¶ 54.

68 Id. ¶ 8.

69 Summary judgment is available if the moving party's position is unassailable. A position is unassailable if the moving party's prospects of success are very high and those of the nonmoving party very low, resulting in a marked disparity in the strength of their positions. *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280 (Alta. C.A.), ¶ 45; (2014), 584 A.R. 68 (Alta. C.A.), 78 & *Ghost Riders Farm Inc. v. Boyd Distributors Inc.*, 2016 ABCA 331 (Alta. C.A.), ¶ 11. This Court held in *P. (W.) v. Alberta*, 2014 ABCA 404 (Alta. C.A.), ¶ 26; (2014), 378 D.L.R. (4th) 629 (Alta. C.A.), 642 that "[s]ummary judgment is ... no longer to be denied solely on the basis that the evidence discloses a triable issue. The question is... whether the claim or defence is so compelling that the likelihood it will succeed is very high ...." See also *Stout v. Track*, 2015 ABCA 10 (Alta. C.A.), ¶ 48; (2015), 62 C.P.C. (7th) 260 (Alta. C.A.), 278 per Wakeling, J.A. ("The likelihood the moving party's position

will prevail is very high if the comparative strengths of the moving and nonmoving party's positions are so disparate that the likelihood the moving party's position will prevail is many times greater than the likelihood that the nonmoving party's position will carry the day.") To my mind, sufficient disparity exists if the moving party's position is at least four times more likely to prevail than the nonmoving party's.

70 2016 ABQB 665 (Alta. Q.B.), ¶¶ 62 & 64.

71 Id. ¶¶ 61 & 62.

72 Id. ¶ 65.

73 Id. ¶¶ 20, 29 & 73.

74 Id. ¶¶ 17 & 70.

75 Id. ¶ 73.

76 Id. ¶ 72.

77 Id.

78 Id. ¶ 73.

79 Id. ¶ 82.

80 Id. ¶ 92.

81 *R. v. Evans*. 2014 ABCA 339 (Alta. C.A.), ¶ 24; (2014), 316 C.C.C. (3d) 437 (Alta. C.A.), 449-50 (chambers).

82 (2005), 261 D.L.R. (4th) 368 (Ont. C.A.), 374.

83 *Boychuk v. Edmonton Police Service*, 2014 ABCA 163 (Alta. C.A.), ¶ 33; [2014] 8 W.W.R. 250 (Alta. C.A.), 268-69 (chambers) ("The Court of Appeal decides which questions are important enough to justify its participation in the process").

84 See "To Hear or Not to Hear: A Question for the California Supreme Court", 3 Stan. L. Rev. 243, 250-51 (1951) (California Supreme Court appeals that cleared the leave-to-appeal hurdle were successful over fifty percent of the time) & Note, "Courting Reversal: The Supervisory Role of the State Supreme Courts", 87 Yale L.J. 1191, 1200 (1978). ("When the supreme court must hear cases by right, the rate of reversal should be lower than when the court may choose the cases it will hear").

85 *R. v. Letiec*, 2015 ABCA 123 (Alta. C.A.), ¶ 31 (chambers).

86 *Canadian Imperial Bank of Commerce v. Endurance Energy Ltd.*, 2016 ABCA 217 (Alta. C.A.), ¶ 9 (chambers); *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.), & para. 15 & 16; (2003), 44 C.B.R. (4th) 96 (Alta. C.A.), 103 (chambers) & *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319 (Alta. C.A.), ¶ 136 (chambers).

87 *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319 (Alta. C.A.), ¶ 136 (chambers); *Edmonton (City) v. Edmonton (Subdivision and Development Appeal Board)*, 2016 ABCA 129 (Alta. C.A.), ¶¶ 9 & 57; (2016), 49 M.P.L.R. (5th) 211 (Alta. C.A.), 213 & 224 (chambers) & *Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of)*, 2005 ABCA 357 (Alta. C.A. [In Chambers]), ¶ 14; (2005), 376 A.R. 95 (Alta. C.A. [In Chambers]), 98-99.

88 *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319 (Alta. C.A.), ¶ 136 (chambers); *R. v. Jensen*, 2014 ABCA 435 (Alta. C.A.), ¶ 23; [2015] 5 W.W.R. 655 (Alta. C.A.), 663 (chambers) ("An appeal is frivolous if the likelihood it will succeed is extremely low") & *R. v. Govenlock*, 2015 ABCA 122 (Alta. C.A.), ¶ 30 (chambers) ("if an appeal is based on a point that is not arguable, the likelihood the appeal will succeed is extremely low"). Some judges have adopted a more demanding test. See

Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of), 2005 ABCA 357 (Alta. C.A. [In Chambers]), ¶ 13; (2005), 376 A.R. 95 (Alta. C.A. [In Chambers]), 98 (O'Brien, J.A. asked if the appeal is more likely than not to succeed).

89 *Boychuk v. Edmonton Police Service*, 2014 ABCA 163 (Alta. C.A.), ¶ 52; [2014] 8 W.W.R. 250 (Alta. C.A.), 276 (chambers) ("leave should not be granted if the applicant cannot possibly succeed. ... The legislature did not create a structure which devotes resources to hopeless cases") & *R. v. McNaughton*, 2010 ABCA 97 (Alta. C.A.), ¶ 6; (2010), 487 A.R. 130 (Alta. C.A.), 132-33 (chambers) ("An applicant... will not be able to meet this precondition [an appeal is not frivolous] if... the grounds of appeal are so weak that the prospects of success are remote"). The ultimate disposition of some cases is beyond doubt. E.g., *R. v. Evans*, 2014 ABCA 339 (Alta. C.A.), ¶ 37; (2014), 316 C.C.C. (3d) 437 (Alta. C.A.), 456 (chambers) (the chambers judge denied leave to appeal because "[t]he Supreme Court of Canada answered ... [the question for which the applicant sought leave] twenty-five years ago and there is no need to cover the same ground again. The proper path is well-trodden and unmistakable") & *Launer v. Sommerfeld* (1964), 48 W.W.R. 224 (B.C. S.C.), 225 (the fact that the defendant drove at a high rate of speed, overtook the plaintiff, a Californian and hit her vehicle from behind, prompted the chambers judge to opine that "it is extremely difficult to imagine any further material facts which would disentitle the plaintiff to anything less than the finding of a substantial degree of fault on the part of the defendant").

90 *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319 (Alta. C.A.), ¶ 137 (chambers) ("This is not a high standard"); *R. v. Jensen*, 2014 ABCA 435 (Alta. C.A.), ¶ 24; [2015] 5 W.W.R. 655 (Alta. C.A.), 664 (chambers) ("This is not an onerous standard") & *Boychuk v. Edmonton Police Service*. 2014 ABCA 163 (Alta. C.A.), ¶ 53; [2014] 8 W.W.R. 250 (Alta. C.A.), 278 (chambers) ("This is a very low standard").

91 Many applicants have failed to clear this hurdle. E.g., *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319 (Alta. C.A.), ¶ 149 (chambers) ("This service argument is devoid of merit. I am satisfied that its prospect of success is extremely low and must be characterized as frivolous"); *Canadian Natural Resources Ltd. v. Laricina Energy Ltd.*, 2016 ABCA 198 (Alta. C.A.), ¶ 25 (chambers) ("Given the evidence which was adduced and the arguments which were advanced before the Bankruptcy and Insolvency Court, I simply do not see how an arguable case can be made to suggest that the *CCAA* judge erred. On the evidence before her, unsatisfactory though it may have been, her finding that the road use fees were reasonable was a reasonable one and one which an appeal court would accord deference"); *Shire International Real Estate Investments Ltd., Re*, 2013 ABCA 198 (Alta. C.A.), ¶ 14 (chambers) ("The standard of review ... militates strongly against a successful appeal, as the judge's remaining findings are subject to deference and should not be lightly interfered with. There was evidence before her which supported her findings") & *SemCanada Crude Co., Re*, 2012 ABCA 312 (Alta. C.A.), ¶ 30 ("Especially given the standard of review on this issue, I doubt that Orleans' argument has *prima facie* merit").

92 *Lightstream Resources Ltd., Re*, 2016 ABQB 665 (Alta. Q.B.), ¶ 92.

93 Id. ¶¶ 87 & 88.

94 Id. ¶ 89.

95 Id. ¶ 92.

96 Id. ¶¶ 87 & 88. See generally *Barnabe v. Touhey* (1995), 37 C.B.R. (3d) 73 (Ont. C.A.), 75 (the Court held that the introduction of a constructive trust "would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt").

97 2016 ABQB 665 (Alta. Q.B.), ¶ 86. See generally *864789 Alberta Ltd. v. Haas Enterprises Inc.*, 2008 ABQB 555 (Alta. Q.B.), ¶¶ 62 & 63 & *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), 493 ("This remedy would be just because it will put Alex, in so far as money can, in the position which he would have been in had he not been ejected. It would not give him an opportunity to which he had no reasonable expectation").

98 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), 32.

99 R. Wood, Bankruptcy and Insolvency Law 319 (2009).

100 I understand why the applicants did not name Apollo and GSO Capital as defendants in their oppression actions. Mr. Pinos stated in his oral submissions that a creditor cannot sue a cocreditor in an oppression action.

101 See *Ferguson v. Imax Systems Corp.* (1980), 12 B.L.R. 209 (Ont. H.C.), ¶ 222-23 (the Court, responded to a request from the applicant, claiming to be oppressed, that she be granted common shares in exchange for her preference shares, this way: "[Respondent's counsel] was horrified and says even if I have the powers in which she demurs, I should not, as I would be taking over the directing of the corporate functions. Semble, I can do that. There is, of course, no case on point. And I would think for good reason. First, it should only be done in drastic circumstance (I can conceive of none)").

102 The fact that something has never been done before is not a sufficient reason to refrain from doing it for a first time if first principles support the new course. *Valard Construction Ltd. v. Bird Construction Co.*, 2016 ABCA 249 (Alta. C.A.), ¶¶ 156-58 per Wakeling, J.A. in dissent not on this point & *Foothills Provincial General Hospital v. Alberta Union of Provincial Employees*, 2 Public Service E ee Relations Bd. R. 1046, ¶ 3 (1990) ("That something has never been done before is not a reason for refusing to do that which can be supported by rational argument"). First principles do not assist the applicants. *Ferguson v. Imax Systems Corp.* (1980), 12 B.L.R. 209 (Ont. H.C.), 222-23.

103 *McGovern-Burke v. Martineau*, 2016 ABQB 514 (Alta. Q.B.) (the Court ordered a very small company to issue or transfer shares sufficient to make the plaintiff a fifty percent shareholder); *Badr v. 2305136 Ontario Inc.*, 2015 ONSC 4260, 46 B.L.R. (5th) 188 (Ont. S.C.J.), aff'd, 2016 ONSC 5039 (Ont. Div. Ct.) (the Court, exercising its jurisdiction under s. 248 of the *Ontario Business Corporations Act*, declared that the plaintiff and the defendant had agreed that the plaintiff would be allotted fifty percent of the shares for services rendered to the defendant and ordered the defendant to issues the shares) & *Working Ventures Canadian Fund Inc. v. Angoss Software Corp.*, [2000] O.J. No. 4537 (Ont. S.C.J. [Commercial List]), ¶ 71 (the Court, exercising its jurisdiction under s. 248 of the *Ontario Business Corporations Act* — the oppression provision — ordered the respondent to discharge its contractual obligations and issues shares to the applicant holder of a warrant to purchase common shares).

104 See generally Wakeling "The Oral Component of Appellate Work", 5 Dalhousie L.J. 584, 588 (1979)("Judges and lawyers alike, as a unit, struggle for the best solution. Those on both sides of the bench make their contribution and without this cooperation the legal system will not attain its full problem solving potential").

TAB 13

2003 SCC 71, 2003 CSC 71
Supreme Court of Canada

British Columbia (Minister of Forests) v. Okanagan Indian Band

2003 CarswellBC 3040, 2003 CarswellBC 3041, 2003 SCC 71, 2003 CSC 71, [2003] 3 S.C.R. 371, [2003] S.C.J. No. 76, [2004] 1 C.N.L.R. 7, [2004] 2 W.W.R. 252, 114 C.R.R. (2d) 108, 127 A.C.W.S. (3d) 214, 189 B.C.A.C. 161, 21 B.C.L.R. (4th) 209, 233 D.L.R. (4th) 577, 309 W.A.C. 161, 313 N.R. 84, 43 C.P.C. (5th) 1, J.E. 2004-59

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests, Appellant v. Chief Dan Wilson, in his personal capacity and as representative of the Okanagan Indian Band and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A57614, Respondents and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation, Interveners

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests, Appellant v. Chief Ronnie Jules, in his personal capacity and as representative of the Adams Lake Indian Band, Chief Stuart Lee, in his personal capacity and as representative of the Spallumcheen Indian Band, Chief Arthur Manuel, in his personal capacity and as representative of the Neskonlith Indian Band and David Anthony Nordquist, in his personal capacity and as representative of the Adams Lake Indian Band, the Spallumcheen Indian Band and the Neskonlith Indian Band and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A38029, Block 2, Respondents and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation, Interveners

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

Heard: June 9, 2003
Judgment: December 12, 2003
Docket: 28988, 28981

Proceedings: affirming (2001), [2001] B.C.J. No. 2279, [2002] B.C.W.L.D. 21, 95 B.C.L.R. (3d) 273, [2002] 1 C.N.L.R. 57, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, (sub nom. British Columbia (Ministry of Forests) v. Jules) 92 C.R.R. (2d) 319 (B.C. C.A.); reversing in part (2000), 2000 BCSC 1135, 2000 CarswellBC 1559, [2000] B.C.J. No. 1536 (B.C. S.C.)

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Subject: Public; Civil Practice and Procedure; Constitutional; Family

Headnote

Aboriginal law --- Practice and procedure — Miscellaneous issues

Courts have inherent jurisdiction to grant costs to litigant, in rare and exceptional circumstances, prior to final disposition of case and in any event of cause, where party seeking interim costs genuinely cannot afford to pay for litigation, claim to be adjudicated is prima facie meritorious, and issues raised are of public importance and have not been resolved in previous cases — Granting of interim costs to respondent Indian Bands claiming logging rights on Crown land by Court of Appeal upheld — Circumstances of this case were exceptional.

Crown --- Practice and procedure involving Crown in right of province — Costs — Costs against Crown

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Civil practice and procedure --- Costs — Particular orders as to costs — "Costs in any event"

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Civil practice and procedure --- Costs — Appeals as to costs — Interference with discretion of lower court

Court of Appeal had sufficient grounds to review exercise of discretion by trial court and to grant interim costs to respondent Indian Bands claiming logging rights on Crown land — Appellate court may and should intervene with trial judge's exercise of discretion where trial judge has misdirected himself as to applicable law or made palpable error in his assessment of facts — Trial judge erred in overemphasizing importance of avoiding any order that involved prejudging issues.

Droit autochtone --- Procédure — Questions diverses

Tribunaux ont le pouvoir inhérent d'accorder des dépens à une partie au litige, dans des circonstances rares et exceptionnelles, avant le règlement définitif de l'affaire et quelle qu'en soit l'issue, lorsque: la partie qui réclame une provision pour frais n'est réellement pas en mesure d'assumer les coûts du litige; la question à trancher est à première vue méritoire; et les questions soulevées sont d'importance pour le public et n'ont pas été tranchées dans le cadre d'affaires précédentes — Maintien de la décision de la Cour d'appel d'octroyer une provision pour frais aux bandes indiennes intimées, qui alléguaient détenir des droits de couper du bois sur les terres de la Couronne — Circonstances de l'espèce étaient exceptionnelles.

Couronne --- Procédure mettant en cause la Couronne du chef de la province — Frais — Condamnation de la Couronne aux dépens

Tribunaux ont le pouvoir inhérent d'accorder des dépens à une partie au litige, dans des circonstances rares et exceptionnelles, avant le règlement définitif de l'affaire et quelle qu'en soit l'issue, lorsque: la partie qui réclame une provision pour frais n'est réellement pas en mesure d'assumer les coûts du litige; la question à trancher est à première vue méritoire; et les questions soulevées sont d'importance pour le public et n'ont pas été tranchées dans le cadre d'affaires précédentes — Maintien de la décision de la Cour d'appel d'octroyer une provision pour frais aux bandes indiennes intimées, qui alléguaient détenir des droits de couper du bois sur les terres de la Couronne — Circonstances de l'espèce étaient exceptionnelles.

Procédure civile — Frais — Ordonnances particulières en matière de frais — Frais accordés quelle que soit l'issue de la cause

Tribunaux ont le pouvoir inhérent d'accorder des dépens à une partie au litige, dans des circonstances rares et exceptionnelles, avant le règlement définitif de l'affaire et quelle qu'en soit l'issue, lorsque: la partie qui réclame une provision pour frais n'est réellement pas en mesure d'assumer les coûts du litige; la question à trancher est à première vue méritoire; et les questions soulevées sont d'importance pour le public et n'ont pas été tranchées dans le cadre d'affaires précédentes — Maintien de la décision de la Cour d'appel d'octroyer une provision pour frais aux bandes indiennes intimées, qui alléguaient détenir des droits de couper du bois sur les terres de la Couronne — Circonstances de l'espèce étaient exceptionnelles.

Procédure civile — Frais — Appels relativement aux frais — Intervention dans l'exercice du pouvoir discrétionnaire du tribunal inférieur

Cour d'appel avait des motifs suffisants pour réviser l'exercice du pouvoir discrétionnaire du tribunal de première instance et pour accorder une provision pour frais aux bandes indiennes intimées qui alléguaient détenir un droit de couper du bois sur les terres de la Couronne — Tribunal d'appel peut et doit intervenir dans l'exercice du pouvoir discrétionnnaire d'un juge de première instance lorsque ce dernier a mal compris le droit applicable ou a commis une erreur manifeste dans son appréciation des faits — Juge de première instance a commis une erreur en insistant trop sur l'importance d'éviter toute ordonnance nécessitant de préjuger les questions en cause.

Members of respondent Indian Bands began logging on Crown land in British Columbia without authorization under the Forest Practices Code of British Columbia Act, but with authorization from their respective tribal councils. The Minister of Forests served the Bands with stop-work orders and commenced proceedings to enforce them. The Bands, claiming they had aboriginal title to the lands in question and were entitled to log them, filed a notice of constitutional question. The Minister applied to have the proceedings remitted to the trial list, while the Bands urged that the matter be dealt with summarily because they lacked the financial resources for a protracted and expensive trial. Alternatively, they submitted that the matter should go to trial only if the Crown were ordered to pay their legal fees and disbursements in advance and in any event of the cause.

The chambers judge held that the case could not be decided based on the documentary and affidavit evidence alone but should be remitted to trial. He found that the court had a general discretion to award interim costs in exceptional circumstances, but that constitutional norms did not require such an order to be made in the Bands' favour. The chambers judge found that his jurisdiction to order the Minister to pay the Bands' costs in advance of the trial was very narrow, and that he was precluded from making such an order because that would involve prejudging the case on the merits. He also suggested that the litigation might be able to proceed if the Bands could work out a contingent fee arrangement with counsel.

The Court of Appeal upheld the chambers judge's decision that the just determination of the issues required a trial. It agreed that the principle of access to justice did not oblige the government to fund litigants who could not afford to pay for legal representation in a civil suit, and that s. 35 of the Constitution Act, 1982 did not obligate the government to provide funding for legal fees of an aboriginal band attempting to prove asserted aboriginal rights.

However, the Court of Appeal held that the chambers judge placed too much emphasis on concerns about pre-judging the outcome, which were diminished in light of the special circumstances of the case and the public interest in a proper resolution of the issues. It held that the chambers judge had a discretionary power to order interim costs in favour of the Bands, and that such an order should have been made in the "exceptional" circumstances of this case. The Minister appealed.

Held: The appeal was dismissed.

LeBel J. (McLachlin C.J.C., Arbour, Binnie, Deschamps, Gonthier JJ. concurring): Courts have an inherent discretionary jurisdiction to award costs. The traditional purpose of an award of costs is to indemnify the successful party in respect of the expenses incurred either defending a claim that proved unfounded or in pursuing a valid legal right. However, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. While the principle of indemnity remains a paramount consideration, a costs award may also serve to encourage settlement, deter frivolous actions and defences, and discourage unnecessary steps in litigation.

The traditional approach to costs can also be seen as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Another relevant consideration, which has increased in importance as litigation over matters of public interest has become more common, is access to justice. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded. An award of interim costs forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed. The discretionary power to award interim costs is limited to very exceptional cases and ought to be narrowly applied. It is most typically exercised in, but is not limited to, matrimonial or family cases. Interim costs may also be available in certain trust, bankruptcy and corporate cases, where they are awarded to avoid unfairness by enabling impecunious litigants to pursue meritorious claims.

The power to order interim costs is inherent in the nature of the court's equitable jurisdiction. Three criteria are relevant to the exercise of this power. First, the party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. Second, the claimant must establish a prima facie case of sufficient merit. Finally, there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. If the court decides to award interim costs in circumstances where key issues remain live and contested between the parties, it will in a sense be predetermining triable issues. While this may raise concerns about fettering the discretion of the trial judge who will eventually adjudicate the merits of the case, it should not in itself preclude the granting of interim costs if the relevant criteria are met.

In cases of public importance, the usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens have access to the courts to determine their constitutional rights and other issues of broad social significance. Moreover, it is often inherent in the nature of such cases that the issues to be determined are of significance not only to the parties but also to the broader community. As a result, the public interest is served by a proper resolution of those issues. It is for the trial court to determine in each instance whether a particular case, which might be considered "special" by its very nature as a public interest case, is special enough that the unusual measure of ordering costs would be appropriate.

The criteria for an award of interim costs to be available to an individual Charter claimant of limited means are therefore as follows: (i) the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; (ii) the claim to be adjudicated is of sufficient merit that it would be contrary to the interests of justice to forfeit the opportunity to pursue the case merely because the litigant lacks financial means; and (iii) the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases. If these three conditions are established, then courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation.

It was apparent from his reasons that had the chambers judge applied these criteria, he would have ordered interim costs in this case. He found as a fact that the Bands were in extremely difficult financial circumstances and could not afford legal representation; that their claims of aboriginal title and rights were prima facie plausible and supported by extensive documentary evidence; and that the case was one of great public importance, raising novel and significant issues of profound importance to the people of British Columbia, the resolution of which would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in the province. The circumstances of this case were indeed special, even extreme. Accordingly, the criteria for an award of interim costs were met. The conditions attached to the costs order by the Court of Appeal would encourage the parties to resolve the matter through negotiation and ensure that there would be no temptation for the Bands to drag out the process unnecessarily.

The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to the applicable rules of court and the need to act judicially on the facts of the case. The chambers judge's decision was based on his judicial experience, his view of what justice required, and his assessment of the evidence; it was not to be interfered with lightly. However, an appellate court may and should intervene in discretionary decisions where it finds that the trial judge misdirected himself as to the applicable law or made a palpable error in his assessment of the facts.

Two errors vitiated the chambers judge's decision in this case and called for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues and erred in concluding that his discretion did not extend so far as to empower him to make the requested order. Second, his finding that a contingent fee arrangement might be a viable alternative for funding the litigation was not supported by any evidence, and the prospect of the Bands' hiring counsel on a contingency basis seemed unrealistic.

Major J. (dissenting) (Iacobucci, Bastarache JJ. concurring): Traditionally, costs are awarded at the conclusion of the trial or appellate decision, and almost always to the successful party. In certain cases, interim costs may be awarded to a spouse suing for the division of property as a consequence of separation or divorce, but the ratio of the matrimonial cases makes it clear that such awards preserve the traditional indemnification purpose of costs. To award interim costs when liability remains undecided would be a dramatic extension of the precedent. Awarding costs in advance could be seen as prejudging the merits, as in the absence of compelling reasons, the objectivity of the court making such an order will almost automatically be questioned. Moreover, to do so in a case with serious constitutional considerations where the Crown is the defending party would be an unusual extension of highly exceptional private law precedent into an area fraught with other implications. While there may be public law questions where access to justice can be provided through the discretionary award of interim costs, such cases must lie closer to the heart of the interim costs case law. The development of the common law of costs should be initiated by trial courts properly exercising their discretionary power, not by appellate reversal of that discretion. In the circumstances of this appeal, the awarding of interim costs was a form of judicially-imposed legal aid. Interim costs should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. That remedy lies with the legislature and law societies, not the judiciary.

While a case must be exceptional in order to attract interim costs, the proposition that "special circumstances" almost always exist where the public interest is invoked was too broad to meet the exceptional requirement. To say simply that the issues transcend the individual interests in the case and have not yet been resolved does not assist the trial judge in deciding what is "special enough" and provides no ascertainable standard or direction. Even if it were contrary to the interests of justice for an opportunity to pursue a case to be forfeited because the litigant lacks financial means, there was nothing to distinguish the present aboriginal land claims from any other. There was no evidence that these land claims should be considered "exceptional" nor was there anything to establish how the new criteria would apply differently between one impecunious aboriginal party and another.

The interim costs case law suggests narrow guidelines. Interim costs have been awarded in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled and in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. The legal characteristics which explain why marital cases are an exception to the rule that costs "follow the event" are guidelines for the exercise of judicial discretion. At common law, husbands usually had control and legal ownership of the marital purse and property, ensuring in most cases that wives did not have the financial resources to pursue litigation. It was acknowledged in this appeal that each of the Bands was without funds. Generalizing beyond the marital context, there must be a special relationship between the parties such that the cost award would be particularly appropriate. Where no right under s. 35 of the Constitution Act, 1982 was implicated and the matter involved the provincial rather than the federal Crown, this special relationship could not automatically be presumed. Finally, and dispositive of this appeal, there is a presumption in marital cases that the property that is the subject of the dispute is to be shared in some way. In a sense, some liability is assumed; all that is to be litigated is the extent of the liability. The chambers judge's reluctance to prejudge the present case on the merits was appropriate, since it could not be presumed that the Bands would establish even partial aboriginal title.

The ratio of the common law dictates the following guidelines for the discretionary, extraordinary award of interim costs: (i) the party seeking the interim costs cannot afford to fund the litigation and has no other realistic manner of proceeding with the case; (ii) there is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate; and (iii) it is presumed that the party seeking interim costs will win some award from the other party. A court should be particularly careful in the exercise of its inherent powers on costs in cases involving the resolution of controversial public questions. Not only was such precedent not required at common law, but also by incorporating such an amorphous concept without clearly defining what constitutes "special circumstances," the distinction between the traditional purpose of awarding costs and concerns over access to justice was blurred. The common law is to advance by increments while generally staying true to the purposes behind its rules. The new criteria endorsed by the majority broadened the scope of interim costs to an undesirable extent and were not supported in the case law. The common law rules on interim costs should not be advanced through an appellate court ignoring and overturning the trial judge's correctly guided discretion. This is more appropriately a question for the legislature.

A trial judge's discretionary decision on interim costs is owed great deference and should be disturbed only if the judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. If the Supreme Court of Canada were to enlarge the scope for interim costs, it should be seen as a new rule and not an adaption of existing law. On the basis of the law on costs at the time of this application, the chambers judge properly exercised his discretion. He was correct in his assessment that liability remained an open question and that ordering interim costs would inappropriately require prejudging the case. Accordingly, he was justified in concluding that although he had a limited discretion in appropriate circumstances to award interim costs, this case fell far outside that area.

Since the chambers judge committed no error of law and did not commit a "palpable error" in his assessment of the facts, deference should be given to his decision not to exercise his discretion to make the extraordinary grant of interim costs. Each side should bear its own costs.

Autorisés par leurs conseils tribaux respectifs, des membres des bandes indiennes intimées ont commencé à couper du bois sur les terres de la Couronne de la Colombie-Britannique, sans avoir cependant obtenu une autorisation en vertu de la Forest Practices Code of British Columbia Act. Le ministre des Forêts a fait signifier aux bandes indiennes des ordonnances de cessation des travaux et a intenté des procédures afin de les faire respecter. Les bandes indiennes ont déposé un avis de question constitutionnelle, alléguant qu'elles détenaient un titre aborigène sur les terres en question et qu'elles avaient le droit d'y mener des activités d'exploitation forestière. Le ministre a demandé à ce que l'instance soit inscrite pour instruction, tandis que les bandes indiennes insistaient pour que la question soit décidée par procédure sommaire, étant donné qu'elles n'avaient pas de ressources financières suffisantes pour mener un procès long et coûteux. Par ailleurs, elles ont soumis que l'affaire ne devrait se rendre à procès que s'il était ordonné à la Couronne de payer leurs frais juridiques et débours à l'avance, quelle que soit l'issue du procès.

Le juge en chambre a statué que l'affaire ne pouvait être décidée sur la base de la preuve documentaire et de la preuve par affidavit et qu'elle devait être renvoyée à procès. Il a conclu que le tribunal avait compétence pour accorder une provision pour frais, dans des circonstances exceptionnelles, mais que les normes constitutionnelles n'exigeaient pas qu'une telle ordonnance soit faite en faveur des bandes indiennes. Le juge était d'avis que sa compétence pour ordonner au ministre de payer à l'avance les frais des bandes indiennes était très restreinte; il a aussi estimé qu'il ne pouvait rendre une telle ordonnance parce que cela nécessiterait d'examiner le fond de l'affaire. Selon lui, l'instance pourrait probablement procéder si les bandes indiennes arrivaient à conclure une entente d'honoraires conditionnels avec leurs avocats.

La Cour d'appel a confirmé la décision du juge en chambre qu'un règlement équitable de ces questions nécessitait la tenue d'un procès. La Cour était d'accord que le principe de l'accès à la justice n'oblige aucunement le gouvernement à financer les parties qui n'ont pas les moyens de se payer les services d'un avocat dans le cadre d'une poursuite civile, et que l'art. 35 de la Loi constitutionnelle de 1982 n'obligeait pas non plus le gouvernement à fournir du financement à une bande autochtone qui tente de prouver l'existence de droits ancestraux. La Cour a cependant statué que le juge en chambre avait trop insisté sur les préoccupations concernant le danger de préjuger de l'issue de la cause, lesquelles préoccupations étaient atténuées en raison des circonstances spéciales de l'espèce et de l'intérêt du public à ce que les questions en litige soient réglées comme il se doit. Elle a conclu que le juge en chambre avait un pouvoir discrétionnaire d'ordonner une provision pour frais en faveur des bandes indiennes, et qu'une telle ordonnance aurait dû être faite, vu les circonstances exceptionnelles de l'espèce. Le ministre a interjeté appel.

Arrêt: Le pourvoi a été rejeté.

LeBel, J. (McLachlin, J.C.C., Gonthier, Binnie, Arbour, Deschamps, JJ., souscrivant à l'opinion de LeBel, J.): Les tribunaux ont un pouvoir discrétionnaire inhérent leur permettant d'accorder des dépens. L'octroi des dépens vise traditionnellement à indemniser la partie gagnante pour les dépenses qu'elle a encourues en se défendant à l'égard d'une action s'étant révélée sans fondement ou en faisant reconnaître un droit valide. Par ailleurs, les règles modernes en matière de frais tendent aussi à réaliser différents objectifs en plus de l'objectif traditionnel d'indemnisation. Même si le principe de l'indemnisation demeure la considération primordiale, l'octroi des dépens peut également servir à encourager un règlement, à dissuader les actions et les défenses frivoles ainsi qu'à décourager les démarches inutiles.

La règle traditionnelle d'adjudication des dépens est aussi dictée par le souci général d'assurer le fonctionnement équitable et efficace du système judiciaire. L'accès à la justice constitue une autre considération pertinente pour l'application des règles d'attribution des dépens. Dans des cas spéciaux où des parties aux ressources limitées cherchent à faire respecter leurs droits constitutionnels, les tribunaux exercent souvent leur pouvoir discrétionnaire d'adjudication des dépens de façon à ne pas les mettre dans une situation difficile que pourrait causer l'application des règles traditionnelles. Ils contribuent ainsi à aider les citoyens ordinaires à avoir accès au système juridique lorsqu'ils cherchent à régler des questions qui revêtent de l'importance pour l'ensemble de la collectivité.

Les préoccupations concernant l'accès à la justice et l'opportunité d'atténuer les grandes inégalités entre les parties au litige occupent également le premier plan dans les rares cas où des provisions pour frais sont accordées. L'octroi d'une telle provision permet d'éviter qu'une argumentation juridique fondée ne soit pas entendue parce qu'une des parties ne dispose pas des ressources financières nécessaires. Le pouvoir discrétionnaire d'accorder une provision pour frais se limite à des cas vraiment exceptionnels et doit être utilisé de façon restreinte. Bien que généralement exercé dans le cadre d'affaires matrimoniales ou familiales, il ne se limite cependant pas à ces seuls domaines. Une provision pour frais peut également être accordée dans certaines affaires en matière de fiducie, de faillite ou de sociétés, afin d'éviter une situation d'iniquité en permettant aux parties sans ressources de faire entendre des demandes fondées.

Le pouvoir d'accorder une provision pour frais est inhérent à la nature de la compétence en equity de statuer sur les dépens. Trois critères sont pertinents à l'exercice de ce pouvoir. Premièrement, la partie qui sollicite l'ordonnance doit être si dépourvue de ressources qu'elle serait incapable, sans l'ordonnance, de faire entendre sa cause. Deuxièmement, elle doit prouver de façon prima facie que sa cause possède un fondement suffisant. Finalement, il doit exister des circonstances suffisamment spéciales pour que le tribunal soit convaincu que la cause appartient à cette catégorie restreinte de causes justifiant l'exercice exceptionnel de ses pouvoirs. Si le tribunal décide d'accorder une provision pour frais dans de telles circonstances, il se trouvera en un sens à préjuger des questions qui peuvent faire l'objet d'un procès. Même si l'on se demande si cette situation pourrait affecter le pouvoir discrétionnaire du juge qui devra éventuellement se prononcer sur le bien-fondé de la cause, cela ne devrait toutefois pas empêcher l'octroi de provisions pour frais si les conditions pertinentes sont respectées.

Dans les causes d'intérêt public, les objectifs traditionnels de l'attribution des dépens sont généralement supplantés par d'autres objectifs de politique, dont, notamment celui de garantir que les citoyens ordinaires auront accès aux tribunaux afin de faire préciser leurs droits constitutionnels et de faire trancher d'autres questions sociales de portée générale. De plus, de par leur nature, les causes de ce genre soulèvent fréquemment des questions importantes non seulement pour les parties au litige mais aussi pour la collectivité en général. L'intérêt public est donc servi par le règlement adéquat de ces questions. Il incombe au tribunal de première instance de décider dans chaque cas si une affaire, qui peut être considérée comme étant « particulière » de par son caractère d'intérêt public, est suffisamment particulière pour s'élever au niveau des causes où l'allocation inhabituelle de dépens constituerait une mesure appropriée.

Par conséquent, le test à appliquer pour déterminer si une personne sans ressource invoquant un droit protégé par la Charte canadienne peut se voir accorder une provision pour frais est le suivant: i) la partie qui demande une provision pour frais n'a véritablement pas les moyens de payer les frais occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions au tribunal; ii) la demande paraît au moins suffisamment valable et, de ce fait, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers; iii) les questions soulevées dépassent le cadre des intérêts du plaideur, elles revêtent une importance pour le public et elles n'ont pas encore été tranchées. Si ces trois conditions sont remplies, les tribunaux disposent alors d'une compétence limitée pour ordonner que les dépenses de la partie sans ressources suffisantes soient payés préalablement. De telles ordonnances doivent être formulées avec soin et révisées en cours d'instance de façon à assurer l'équilibre entre les préoccupations concernant l'accès à la justice et la nécessité de favoriser le déroulement raisonnable et efficace de la poursuite.

Il ressortait clairement des motifs du juge en chambre que, s'il avait appliqué ces conditions, il aurait ordonné le paiement d'une provision pour frais en l'espèce. De fait, il a conclu que les bandes indiennes éprouvaient d'importantes difficultés financières et n'avaient pas les moyens d'être représentées par avocat. Leurs revendications concernant leur titre aborigène et d'autres droits ancestraux étaient à première vue plausibles et étaient étayées par une preuve documentaire abondante. L'affaire revêtait une très grande importance pour le public et elle soulevait des questions nouvelles et importantes ayant une importance cruciale pour la population de la Colombie-Britannique; une décision à leur égard constituerait un pas majeur vers le règlement des nombreux problèmes en suspens entre la Couronne et les Autochtones dans cette province. Les circonstances de l'espèce étaient effectivement particulières, voire même exceptionnelles. Les conditions d'attribution d'une provision de frais étaient donc remplies. Les conditions dont la Cour d'appel a assorti l'ordonnance garantissaient que les parties seraient encouragées à régler le litige par la négociation et que les bandes ne seraient pas tentées d'étirer le processus inutilement.

On a qualifié d'absolu et d'illimité le pouvoir discrétionnaire du tribunal de première instance de décider s'il y a lieu d'adjuger des dépens, sous la seule réserve des règles de pratique applicables et de la nécessité d'agir de façon judiciaire selon les faits de l'espèce. La décision du juge en chambre était fondée sur son expérience judiciaire, sa perception des exigences de la justice et son appréciation de la preuve; cette décision ne devait pas être modifiée à la légère. Une cour d'appel peut et doit cependant intervenir dans l'exercice d'un pouvoir discrétionnaire lorsqu'elle estime que le juge de première instance s'est fondé sur des considérations erronées en ce qui concerne le droit applicable ou a commis une erreur manifeste dans son appréciation des faits.

En l'espèce, deux erreurs viciaient la décision du juge en chambre et nécessitaient une intervention en appel. Premièrement, le juge a trop insisté sur l'importance d'éviter de rendre une ordonnance par laquelle on se trouverait à préjuger des questions en litige et il a commis une erreur lorsqu'il a conclu que son pouvoir discrétionnaire n'allait pas jusqu'à lui permettre de rendre l'ordonnance demandée. Deuxièmement, sa conclusion qu'une entente d'honoraires conditionnels serait peut-être une solution de rechange viable quant au financement du litige n'était étayée par aucun élément de preuve; la perspective que les bandes puissent retenir les services d'un avocat sur une base d'honoraires conditionnels semblait irréaliste.

Major, J., dissident (Iacobucci, Bastarache, JJ., souscrivant à l'opinion de Major, J.): Les dépens sont traditionnellement attribués après que la décision finale a été rendue en première instance ou en appel et ils le sont presque toujours en faveur de la partie gagnante. Dans certains cas, une provision pour frais peut être accordée à un conjoint qui intente un procès au sujet du partage des biens, par suite d'une séparation ou d'un divorce; en droit matrimonial, la justification de telles provisions pour frais est par ailleurs claire, soit préserver le but traditionnel de l'adjudication des dépens que constitue l'indemnisation. Accorder une provision pour frais alors que la question de la responsabilité n'a pas encore été tranchée aurait pour effet d'étendre considérablement la portée de la jurisprudence. Octroyer des dépens avant l'instruction pourrait être perçu comme laissant préjuger de l'issue de la cause, étant donné que, en l'absence de motifs sérieux, l'objectivité du tribunal qui rend une telle ordonnance sera presque automatiquement remise en question. De plus, agir de la sorte dans une affaire qui présente des considérations constitutionnelles importantes et dans laquelle la Couronne est la partie défenderesse constituerait une transposition inhabituelle d'une jurisprudence de droit privé très exceptionnelle dans un domaine comportant de nombreuses autres facettes. Même s'il se peut que des questions de droit public justifient l'octroi discrétionnaire de provisions pour frais afin de permettre l'accès à la justice, de tels cas doivent être largement comparables à ceux que reconnaît la jurisprudence en matière d'attribution de provisions pour frais. L'évolution de la common law en matière de provision pour frais devrait être amorcée par les tribunaux de première instance dans l'exercice judicieux de leur pouvoir discrétionnaire et non par l'annulation en appel de leurs décisions à cet égard. En l'espèce, l'adjudication par la Cour d'appel d'une provision pour frais apparaissait comme une forme d'aide juridique imposée par le tribunal. La provision pour frais ne devrait pas être utilisée aux fins d'amener, essentiellement, le tribunal à financer le litige pour les parties sans ressources suffisantes et à garantir leur accès aux tribunaux. La solution du problème relève du législateur et des ordres professionnels des avocats et non de la magistrature.

S'il est vrai que l'affaire doit être exceptionnelle pour ouvrir droit à une provision pour frais, la proposition que les causes où l'on invoque l'intérêt public font presque toujours intervenir des circonstances extraordinaires était forcément trop large pour satisfaire à l'exigence du caractère exceptionnel. Dire simplement que les questions soulevées dépassent le cadre des intérêts individuels en cause et qu'elles n'ont pas encore été tranchées n'aide pas le juge de première instance à décider de ce qui est « suffisamment spécial » et ne constitue pas une norme ou une directive identifiable. Même s'il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers, rien ne distinguait les présentes revendications territoriales autochtones de toute autre revendication. Rien dans la preuve ne démontrait le caractère exceptionnel des présentes revendications territoriales ni ne permettait d'établir comment l'application des nouveaux critères varierait selon la partie autochtone sans ressources suffisantes dont il est question.

La jurisprudence relative à l'octroi des provisions pour frais propose des lignes directrices étroites. Des provisions pour frais ont été accordées dans des affaires de droit matrimonial où l'on a présumé une certaine responsabilité et où l'octroi des dépens répondait à l'objectif d'indemnisation; d'autres ont été accordées dans des affaires en matière de sociétés ou de fiducie où le tribunal a ordonné à la société ou à la fiducie pour laquelle l'action était intentée de payer la provision pour frais. Les caractéristiques juridiques qui expliquent pourquoi les affaires de droit matrimonial constituent une exception à la règle habituelle voulant que les dépens « suivent l'issue de la cause », constituent des lignes directrices pour l'exercice du pouvoir discrétionnaire. En common law, du fait que l'argent et les autres biens de la famille étaient légalement la propriété du mari, qui en assurait également la maîtrise, l'épouse n'avait souvent pas les ressources financières nécessaires pour faire valoir ses droits devant les tribunaux. Dans le présent appel, on reconnaissait que les bandes indiennes n'avaient aucun moyen financier. Si on généralise au-delà du contexte matrimonial, la relation entre les parties doit être telle que l'adjudication de dépens serait particulièrement appropriée. Dans les cas où aucun droit fondé sur l'art. 35 de la Loi constitutionnelle de 1982 n'est en cause et où l'affaire concerne la Couronne provinciale plutôt que la Couronne fédérale, cette relation spéciale ne peut être automatiquement présumée. Finalement, mais élément déterminant en l'espèce, il existe une présomption que le bien faisant l'objet du litige sera partagé d'une façon ou d'une autre. En un sens, le tribunal présume une certaine responsabilité; la seule chose à débattre, c'est l'étendue de cette responsabilité. La réticence du juge en chambre à préjuger de l'affaire quant au fond était justifiée, puisque l'on ne pouvait présumer que les bandes indiennes arriveraient à prouver l'existence, même partielle, d'un titre aborigène.

Pour que l'exception en common law soit justifiée quant à l'octroi discrétionnaire et extraordinaire de provisions pour frais, il faut satisfaire aux conditions suivantes: i) la partie qui demande une provision pour frais n'a pas les moyens d'agir en justice et ne dispose en réalité d'aucune autre source de financement; ii) il existe entre les parties une relation spéciale telle que l'octroi d'une provision pour frais ou d'un soutien serait particulièrement approprié; iii) on présume que la partie qui demande une provision pour frais obtiendra une certaine compensation de la part de l'autre partie. Dans le cadre d'affaires où l'on doit résoudre des questions d'intérêt public controversées, un tribunal doit se montrer particulièrement prudent dans l'exercice de son pouvoir inhérent d'adjudication des dépens. Non seulement un tel précédent n'était pas exigé par la common law, mais l'adoption d'une notion aussi nébuleuse, sans définition claire de ce que l'on entend par « circonstances spéciales », estompait la distinction entre l'objectif traditionnel de l'adjudication des dépens et les préoccupations quant à l'accès à la justice. La common law doit évoluer graduellement tout en respectant d'une manière générale les objets sous-jacents à ses règles. Les nouveaux critères approuvés par les juges majoritaires élargissaient le champ d'application des provisions pour frais dans une mesure qui n'était pas souhaitable et ils n'étaient pas étayés par la jurisprudence. Les règles de common law en matière de provisions pour frais ne devraient pas être modifiées par l'intervention d'une cour d'appel infirmant la décision que le juge de première instance a rendue en usant judicieusement de son pouvoir discrétionnaire. Une telle modification relève davantage du législateur.

Il faut faire preuve de grande déférence à l'égard du pouvoir discrétionnaire du juge de première instance d'accorder des provisions pour frais et n'intervenir que si le juge de première instance s'est fondé sur des considérations erronées en ce qui concerne le droit applicable ou a commis une erreur manifeste dans son appréciation des faits. Si la Cour suprême du Canada élargissait le champ d'application des provisions pour frais, il faudrait interpréter cela comme une nouvelle règle et non pas comme une adaptation des règles de droit existantes. Le juge en chambre a correctement exercé son pouvoir discrétionnaire en fonction des règles de droit qui existaient en matière de dépens à l'époque où la demande a été présentée. Il a eu raison de conclure que la question de la responsabilité demeurait entière en l'espèce et que, s'il ordonnait le paiement de provisions pour frais, il se trouverait à préjuger de façon inopportune de l'issue de l'affaire. Il a donc eu raison de conclure que bien qu'il possède un pouvoir discrétionnaire limité dans les circonstances appropriées d'accorder des provisions pour frais, la présente affaire relevait d'un tout autre domaine.

Comme le juge de première instance n'a pas commis d'« erreur manifeste » dans son appréciation des faits, il fallait s'en remettre à sa décision de ne pas exercer son pouvoir discrétionnaire pour accorder exceptionnellement des provisions pour frais. Chaque partie devait assumer ses propres dépens.

APPEALS by provincial Crown from judgment reported at *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2001), 2001 BCCA 647, 2001 CarswellBC 2355, 95 B.C.L.R. (3d) 273, [2002] 1 C.N.L.R. 57, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, (sub nom. *British Columbia (Ministry of Forests) v. Jules*) 92 C.R.R. (2d) 319 (B.C. C.A.), allowing in part appeals by Indian Bands from order refusing to order that Crown pay Bands' costs of trial in advance.

POURVOIS de la Couronne provinciale à l'encontre de l'arrêt publié à *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2001), 2001 BCCA 647, 2001 CarswellBC 2355, 95 B.C.L.R. (3d) 273, [2002] 1 C.N.L.R. 57, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, (sub nom. *British Columbia (Ministry of Forests) v. Jules*) 92 C.R.R. (2d) 319 (B.C. C.A.), qui a accueilli en partie les pourvois des bandes indiennes à l'encontre de l'ordonnance refusant d'ordonner à la Couronne de leur payer une provision pour frais.

LeBel J.:

I. Introduction

1 These two appeals concern the inherent jurisdiction of the courts to grant costs to a litigant, in rare and exceptional circumstances, prior to the final disposition of a case and in any event of the cause (I will refer to a cost award of this nature as "interim costs"). Such a jurisdiction exists in British Columbia. This discretionary power is subject to stringent conditions and to the observance of appropriate procedural controls. In this case, for the reasons which follow, I would uphold the granting of interim costs to the respondents by the British Columbia Court of Appeal, and I would hold that the Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court.

II. Background

2 In the fall of 1999, members of the four respondent Indian bands (the "Bands") began logging on Crown land in British Columbia without authorization under the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (the "*Code*"). The Bands' respective tribal councils had purportedly authorized the harvesting of the timber, which was to be used to construct housing on the Bands' reserves. The appellant Minister of Forests served the Bands with stop-work orders under the *Code*, and commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging ss. 96 and 123 of the *Code* as conflicting with their constitutionally protected aboriginal rights.

3 The Minister then applied under Rule 52(11)(d) of the *Rules of Court* of the Supreme Court of British Columbia, B.C. Reg. 221/90, to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The respondents argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial — which, given the evidentiary challenges of proving a claim of aboriginal title, this would almost undoubtedly be. In the alternative, they argued that the court, in the exercise of its powers to attach conditions

to a discretionary order under Rule 52(11)(d) and to make orders as to costs pursuant to Rule 57(9), should order a trial only if it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. In support of this position, they raised constitutional arguments on three grounds: a general right of access to justice that is implicit in the *Charter* and flows from the primacy of the rule of law; the protection of aboriginal rights, as affirmed by s. 35 of the *Constitution Act, 1982*; and equality rights under s. 15 of the *Charter*.

4 The respondents filed affidavit and documentary evidence in support of their claims of aboriginal title and rights. They also submitted evidence demonstrating that it was impossible for them to fund the litigation themselves. The evidence indicated that the Bands were all in extremely difficult financial situations. The chiefs deposed that their communities face grave social problems, including high unemployment rates, lack of housing, inadequate infrastructure, and lack of access to education. Many members of the respondent Bands who live off-reserve would like to return to their communities, but are unable to do so because there are not enough jobs and homes even for those who live on the reserves now. The Bands have been forced to run deficits to finance their day-to-day operations. The chiefs of the Spallumcheen and Neskonlith Bands deposed that they are close to having outside management of their finances imposed by the Department of Indian and Northern Affairs because their working capital deficits are so high.

5 The Bands' counsel estimated that the cost of a full trial would be $814,010. The Bands say that they had no way to raise this much money; and that even if they did, there are many more pressing needs which would have to take priority over funding litigation. One of the most urgent needs is new housing — the very purpose for which, they say, they want to harvest timber from the land to which they claim title.

III. Relevant Legislative Provisions

6 Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90:

> 1(12) When making an order under these rules the court may impose terms and conditions and give directions as it thinks just.
>
> 52(11) On an application the court may
>
> > (d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.
>
> 57(9) ...costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

IV. Judicial History

A. British Columbia Supreme Court, [2000] B.C.J. No. 1536, 2000 BCSC 1135 (B.C. S.C.)

7 Sigurdson J. held that the case could not be decided on the basis of documentary and affidavit evidence alone, and should therefore be remitted to the trial list. The evidence submitted by the Bands of their historical connection to the land was not sufficient in itself to dispose of the issue. Proving the Bands' aboriginal rights claims, which were contested by the Crown, would require historical, anthropological and archaeological evidence to be given by live witnesses and subjected to the detailed and rigorous testing of the trial process. The just resolution of the dispute required a trial and pleadings.

8 Sigurdson J. went on to consider whether he should impose a condition that the Minister pay the Bands' legal fees and disbursements. He began with the question of whether the court retained a general jurisdiction to award interim costs in a proceeding. He noted that costs usually follow the event and are awarded at the conclusion of the proceedings. Referring to a line of Ontario cases where a narrow jurisdiction to award interim costs has been recognized, Sigurdson J. held that such a discretion also existed in British Columbia in exceptional circumstances. He noted that he was unaware of any cases where substantial amounts had been awarded prior to trial where a liability or right was seriously in issue.

9 Turning to the Bands' argument that constitutional norms applied to the exercise of his discretion over costs, Sigurdson J. held that those norms did not require an order of interim costs to be made in the Bands' favour. He acknowledged that the Bands would need to retain experienced counsel and experts, and that a trial would be complex and expensive. He also recognized that the Bands' poverty would make it difficult for them to put their case forward. In his view, however, these obstacles resulted from the nature of the case and from the Bands' financial circumstances, not from any interference with their constitutional rights. The Bands' s. 35 argument failed, he held, because there were no specific circumstances giving rise to a fiduciary obligation on the part of the Crown to negotiate with the Bands or to fund the litigation of their land claim.

10 Sigurdson J. declined to order the Minister to pay the Bands' costs in advance of the trial. He found that his jurisdiction to make such an order was very narrow and was limited by the principle that he could not prejudge the outcome of the case. In this case, liability was still in issue, and Sigurdson J. held that ordering the payment of costs in advance would involve prejudging the case on the merits. For this reason, he was of the view that he was precluded from making such an order. Sigurdson J. added a recommendation that the federal and provincial Crown consider providing funding to ensure that the cases, which had elements of test cases, would be properly resolved at trial. He also suggested that the litigation might be able to proceed if the Bands could work out a contingent fee arrangement with counsel.

B. British Columbia Court of Appeal (2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647 (B.C. C.A.)

11 Newbury J.A., writing for a unanimous panel, allowed the Bands' appeal of Sigurdson J.'s decision.

12 At the outset, Newbury J.A. noted that the Bands' claims, if they went to trial, would be the first to try aboriginal claims to title and other rights in respect of logging in British Columbia. She also summarized some of the affidavit evidence setting out the dire financial circumstances of the Bands.

13 Newbury J.A. upheld the chambers judge's decision to remit the matter of the Bands' aboriginal rights or title to trial. She agreed with him that the just determination of these issues required a trial. This holding was not raised on appeal to this Court.

14 On the question of funding the litigation, Newbury J.A. distinguished between a constitutional right to full funding of legal fees and disbursements, on the one hand, and on the other, the court's discretion to make orders as to "costs" as that term is used in the rules of court and in general legal parlance — meaning a payment to offset legal expenses, usually in an amount set by statutory guidelines, rather than payment of the actual amount owed by the client to his or her solicitor.

15 As far as a constitutional right to funding of the Bands' legal expenditures was concerned, Newbury J.A. substantially agreed with the reasons of the chambers judge. She held that the principle of access to justice did not extend so far as to oblige the government to fund litigants who could not afford to pay for legal representation in a civil suit. She also agreed with Sigurdson J. that s. 35 of the *Constitution Act* did not place an affirmative obligation on the government to provide funding for legal fees of an aboriginal band attempting to prove asserted aboriginal rights. Nothing in the specific circumstances of this case gave rise to a fiduciary expectation on the Bands' part that their legal fees would be funded. (She did not address the Bands' s. 15 arguments, which were not raised on appeal.) Newbury J.A. concluded that the Bands did not have a constitutional right to legal fees funded by the provincial Crown.

16 Newbury J.A. came to a different conclusion, however, on the matter of the court's discretion to order interim costs in favour of the Bands. She agreed with Sigurdson J. that this discretion existed, and that it was narrow in scope and restricted to narrow and exceptional circumstances. In her view, however, the circumstances of this case were indeed exceptional. Newbury J.A. held that the chambers judge had placed too much emphasis on concerns about prejudging the outcome, which in her view were diminished in light of the special circumstances of the case and the public interest in a proper resolution of the issues. She held that constitutional principles and the unique nature of the relationship between the Crown and aboriginal peoples were background factors that should inform the exercise of the court's discretion to

order costs. Newbury J.A. held that the chambers judge had erred in failing to recognize that the case involved exceptional and unique circumstances which outweighed concerns about prejudging the outcome of the case.

17 Newbury J.A. held that, although the court had no discretion to order full funding of the Bands' case by the Crown, the chambers judge did have a discretionary power to order interim costs. She held that such an order should be made with conditions designed to provide concrete assistance to the Bands without exposing the Minister to unreasonable or excessive costs. She ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that she imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation. These terms, as found in the Court of Appeal Order dated November 5, 2001, are best stated in full:

> AND THIS COURT FURTHER ORDERS that the Crown, in any event of the cause, pay such legal costs of the Bands, as that term is used and as the Chambers judge orders from time to time in accordance with the following:
>
> (a) Costs, as is referenced in paragraph [10] of the *Reasons for Judgment*;
>
> (b) Unless the Chambers judge concludes that special costs are warranted in this case, costs are to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation;
>
> (c) Counsel are to consider whether costs could be saved by trying one of the four cases rather than all four at the same time. If counsel are unable to agree on that issue, they should seek directions from the Chambers judge. Counsel are also to use all other reasonable measures to minimize costs, and the Chambers judge may impose restrictions for this purpose;
>
> (d) The Province and the Bands are to attempt to agree on a procedure whereby the Bands upon incurring taxable costs and disbursements from time to time up to the end of the trial, will so advise the respondent, and provide such other 'backup' material as the Chambers judge may order. Such costs would be paid by the respondent within a given time-frame, unless the Province objects, in which case it shall refer the matter to the Chambers judge, who may order the taxation of the bill in the ordinary way;
>
> (e) If counsel are unable to agree on such procedures, the matter shall be taken back to the Chambers judge, who shall make directions in accordance with the spirit of these *Reasons*.

V. Issues

18 This case raises two issues: first, the nature of the court's jurisdiction in British Columbia to grant costs on an interim basis and the principles that govern its exercise; and second, appellate review of the trial court's discretion as to costs. The issue of a constitutional right to funding does not arise, as it was not relied on by the respondents in this appeal.

VI. Analysis

A. The Court's Discretionary Power to Grant Interim Costs

(1) Traditional Costs Principles — Indemnifying the Successful Party

19 The jurisdiction of courts to order costs of a proceeding is a venerable one. The English common law courts did not have inherent jurisdiction over costs, but beginning in the late 13th century they were given the power by statute to order costs in favour of a successful party. Courts of equity had an entirely discretionary jurisdiction to order costs according to the dictates of conscience (see M.M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at p. 1-1). In the modern Canadian legal system, this equitable and discretionary power survives, and is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion.

20 In the usual case, costs are awarded to the prevailing party after judgment has been given. The standard characteristics of costs awards were summarized by the Divisional Court of the Ontario High Court of Justice in *Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc.* (1985), 51 O.R. (2d) 23 (Ont. Div. Ct.), at p. 32, as follows:

> (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
>
> (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
>
> (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
>
> (4) They are *not* payable for the purpose of assuring participation in the proceedings.

21 The characteristics listed by the court reflect the traditional purpose of an award of costs: to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed). Costs awards were described in *Ryan v. McGregor* (1926), 58 O.L.R. 213 (Ont. C.A.), at p. 216, as being "in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought".

(2) Costs as an Instrument of Policy

22 These background principles continue to govern the law of costs in cases where there are no special factors that would warrant a departure from them. The power to order costs is discretionary, but it is a discretion that must be exercised judicially, and accordingly the ordinary rules of costs should be followed unless the circumstances justify a different approach. For some time, however, courts have recognized that indemnity to the successful party is not the sole purpose, and in some cases not even the primary purpose, of a costs award. Orkin, *supra*, at p. 2-24.2, has remarked that:

> The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs; indeed, the principle has been called "outdated" since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or vexations [*sic*] litigation and to discourage unnecessary steps.

23 The indemnification principle was referred to as "outdated" in *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464 (Ont. Gen. Div.), at p. 475. In this case the successful party was a law firm, one of whose partners had acted on its behalf. Traditionally, courts applying the principle of indemnification would allow an unrepresented litigant to tax disbursements only and not counsel fees, because the litigant could not be indemnified for counsel fees it had not paid. Macdonald J. held that the principle of indemnity remained a paramount consideration in costs matters generally, but was "outdated" in its application to a case of this nature. The court should also use costs awards so as to encourage settlement, to deter frivolous actions and defences, and to discourage unnecessary steps in the litigation. These purposes could be served by ordering costs in favour of a litigant who might not be entitled to them on the view that costs should be awarded purely for indemnification of the successful party.

24 Similarly, in *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (B.C. C.A.), the British Columbia Court of Appeal stated at para. 28 that "the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated". The court held that self-represented lay litigants should be allowed to tax legal fees, overruling its earlier decision in *Kendall v. Hunt (No. 2)* (1979), 16 B.C.L.R. 295 (B.C. C.A.). This change in the common law was described by the court as an incremental one "when viewed in the larger context of the trend towards

awarding costs to encourage or deter certain types of conduct, and not merely to indemnify the successful litigant" (para. 44).

25 As the *Fellowes* and *Skidmore* cases illustrate, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer; this policy has been codified in the rules of court of many provinces (see, e.g., Supreme Court of British Columbia *Rules of Court*, Rule 37(23-26); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 49.10; Manitoba *Queen's Bench Rules*, Man. Reg. 553/88, Rule 49.10). Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.

26 Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

(3) Public Interest Litigation and Access to Justice

27 Another consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the *Charter*. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

28 Courts have referred to the importance of this objective on numerous occasions. In *Canadian Newspapers Co. v. Canada (Attorney General)* (1986), 32 D.L.R. (4th) 292 (Ont. H.C.), Osler J. opined that "it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden" (pp. 305-6), while at the same time cautioning that "the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged" (p. 306). In *Lavigne v. O.P.S.E.U.* (1987), 60 O.R. (2d) 486 (Ont. H.C.), White J. held that "it is desirable that *Charter* litigation not be beyond the reach of the citizen of ordinary means" (p. 526). He awarded costs to the successful *Charter* applicant in spite of the fact that his representation had been paid for by a third-party organization (so that he would not, on the traditional approach, have been entitled to any indemnity). This case was overturned on the merits on appeal (*Lavigne v. O.P.S.E.U.* (1989), 67 O.R. (2d) 536 (Ont. C.A.); aff'd [1991] 2 S.C.R. 211 (S.C.C.)), but neither the Ontario Court of Appeal nor this Court expressed any disapproval of White J.'s remarks on costs. Referring to both *Canadian Newspapers Co.* and *Lavigne* in *Rogers v. Greater Sudbury (City) Administrator of Ontario Works* (2001), 57 O.R. (3d) 467 (Ont. S.C.J.), Epstein J. concluded at para. 19 that "costs can be used as an instrument of policy and ... making *Charter* litigation accessible to ordinary citizens is recognized as a legitimate and important policy objective".

29 In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (S.C.C.), the applicants, who were Jehovah's Witnesses, unsuccessfully argued that their *Charter* rights had been violated when a blood transfusion was administered to their baby daughter over their objections. Instead of granting costs in the cause, the District Court judge directed the intervening Attorney General to pay the applicants' costs. Whealy D.C.J. cited Osler J.'s statement in *Canadian Newspapers Co.*, *supra*, that *bona fide* challenges should not be deterred, and observed that the case before him was an unusual one involving a matter of province-wide importance (see (Ont. Dist. Ct.)). His costs order, although

unconventional, was upheld on appeal by the Ontario Court of Appeal, and subsequently by this Court. At the Court of Appeal, Tarnopolsky J.A. noted that this case, in which "the parents rose up against state power because of their religious beliefs," was one of national, even international significance ((1992), 10 O.R. (3d) 321 (Ont. C.A.), at pp. 354-55). La Forest J. stated at para. 122 of this Court's judgment that the costs award against the Attorney General was "highly unusual" and something that should be permitted "only in very rare cases," but that the case "raised special and peculiar problems". He allowed Whealy D.C.J.'s order to stand.

30 The *B. (R.)* case illustrates that in highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequence of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervenor or party. It should be noted that Whealy D.C.J. applied Rule 57.01(2), a provision of Ontario's *Rules of Civil Procedure* that expressly authorized the court to award costs against a successful litigant and specified that the importance of the issues was a factor to be considered (see Rule 57.01(1)(d)). Although these principles are not spelled out in the Supreme Court of British Columbia *Rules of Court*, in my view they are generally relevant in guiding the exercise of a court's discretion as to costs. They form part of the background against which a British Columbia court exercises its inherent equitable jurisdiction, confirmed by Rule 57(9), to depart from the usual rule that costs follow the event.

(4) Interim Costs

31 Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded. An award of costs of this nature forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed. That costs orders can be used in this way in a narrow class of exceptional cases was recognized early on by the English courts. In *Jones v. Coxeter* (1742), 2 Atk. 401, 26 Eng. Rep. 642 (Eng. Ch. Div.), the Lord Chancellor found that "the poverty of the person will not allow her to carry on the cause, unless the court will direct the defendant to pay something to the plaintiff in the mean time." Invoking the "intirely discretionary" equitable jurisdiction to order costs, he ordered costs to be paid to the plaintiff "to empower her to go on with the cause" (p. 642).

32 The discretionary power to award interim costs in appropriate cases has also been recognized in Canada. An extensive discussion of this power is found in *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.). Macdonald J. reviewed the authorities, including *Jones*, *supra*, and concluded that "the court *does* have a general jurisdiction to award interim costs in a proceeding" (p. 215 (emphasis in original)). She also found that that jurisdiction was "limited to very exceptional cases and ought to be narrowly applied, especially when the court is being asked to essentially pre-determine an issue" (p. 215).

33 As Macdonald J. recognized in *Organ*, *supra*, at p. 215, the power to order interim costs is perhaps most typically exercised in, but is not limited to, matrimonial or family cases. In *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 (Alta. C.A. [In Chambers]), Russell J.A. observed that the wife in divorce proceedings could traditionally obtain "anticipatory costs" to enable her to present her position (para. 18). This was because husbands usually controlled all the matrimonial property. Since the wife had "no means to pay lawyers, her side of the litigation would not be advanced, and this position was patently unfair" (para. 20). Interim costs will still be granted in family cases where one party is at a severe financial disadvantage that may prevent his or her case from being put forward. See, e.g., *Woloschuk v. Von Amerongen*, [1999] A.J. No. 463 , 1999 ABQB 306 (Alta. Q.B. [In Chambers]), where the Alberta Court of Queen's Bench ordered a lump sum payment of $10,000 to the mother in a custody action by way of interim costs, finding that the father's financial position was "significantly better than that of the [mother] in terms of funding this protracted lawsuit" (para. 16); and *Roberts v. Aasen*, [1999] O.J. No. 1969 (Ont. S.C.J.), also a custody case, where the court held that the father was unlikely to succeed at trial and that the mother lacked the resources to pay her legal fees and disbursements, and ordered the father to pay $15,000 as interim costs. Orkin observes that in the modern context "the *raison d'tre* [*sic*] of such awards is to assist the financially needy party pending the trial; they are made where the spouse is without resources and would otherwise be unable to obtain relief in court" (*supra*, at p. 2-23 (citations omitted)).

34 Interim costs are also potentially available in certain trust, bankruptcy and corporate cases, where they are awarded for essentially the same reason — to avoid unfairness by enabling impecunious litigants to pursue meritorious claims with which they would not otherwise be able to proceed. *Organ, supra*, was a corporate case involving, among other causes of action, an action under the oppression remedy set out in s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16. The statute also provided in s. 249(4) that interim costs could be awarded in an oppression case. Macdonald J. held that, in addition to this express statutory power, the court also had an inherent jurisdiction to award interim costs. In the particular circumstances of this case, however, she held that the order should not be granted, because by their own admission the plaintiffs were not impecunious and would be able to proceed to trial without it. In *Amcan Industries Corp. v. Toronto Dominion Bank*, [1998] O.J. No. 3014 (Ont. Gen. Div. [Commercial List]), a bankruptcy case, Macdonald J. acknowledged "the inherent unfairness that arises in choking a plaintiff's action if access to funds is not permitted" (para. 39); in this case, again, interim costs were not awarded because impecuniosity was not established. In *Turner v. Andrews* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76 (B.C. C.A.), an action for breach of fiduciary duty in respect of a pension fund, the British Columbia Court of Appeal recognized that the court had the power to award interim costs, but held that the interests of justice did not require it to do so on the facts of the case. Newbury J.A. noted that the financial position or impecuniosity of a party is not in itself reason enough to depart from the usual rules as to costs (para. 18).

35 Based on the foregoing overview of the case law, the following general observations can be made. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. This broad discretion may be expressly referred to in a statute, as in s. 131(1) of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that costs "are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid". Indeed, the power to order interim costs may be specifically stipulated, as in the Ontario *Business Corporations Act* or similar legislation in other jurisdictions. Even absent explicit statutory authorization, however, the power to award interim costs is implicit in courts' jurisdiction over costs as it is set out in statutes such as the Supreme Court of British Columbia *Rules of Court*, which provides that the court may make orders varying from the usual rule that costs follow the event.

36 There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. These requirements might be modified if the legislature were to set out the conditions on which interim costs are to be granted, or where courts develop criteria applicable to a particular situation where interim costs are authorized by statute (as is the case in relation to s. 249(4) of the Ontario *Business Corporations Act*; see *Organ, supra*, at p. 213). But in the usual case, where the court exercises its equitable jurisdiction to make such costs orders as it concludes are in the interests of justice, the three criteria of impecuniosity, a meritorious case and special circumstances must be established on the evidence before the court.

37 Although a litigant who requests interim costs must establish a case that is strong enough to get over the preliminary threshold of being worthy of pursuit, the order will not be refused merely because key issues remain live and contested between the parties. If the court does decide to award interim costs in such circumstances, it will in a sense be predetermining triable issues, since it will have to decide that one side will receive its costs before it is known who will win on the merits (and since the winner is usually entitled to costs). As a result, concerns may arise about fettering the discretion of the trial judge who will eventually be called upon to adjudicate the merits of the case. This in itself should not, however, preclude the granting of interim costs if the relevant criteria are met. As Macdonald J. noted in *Organ, supra*, the court's discretion must be exercised with particular caution where it is being asked to predetermine an issue in this sense, but it does not follow that the court would be going beyond the limits of its discretion if it were to grant the order. I therefore disagree with the conclusion of the New Brunswick Court of Queen's Bench in *New Brunswick (Minister of Health & Community Services) v. G. (J.)* (1995), 131 D.L.R. (4th) 273 (N.B. Q.B.), that costs cannot be

ordered at the commencement of a proceeding in the absence of express statutory authority to award costs regardless of the outcome of the proceeding (p. 283) (this case was eventually overturned by this Court in [1999] 3 S.C.R. 46 (S.C.C.), but the interim costs issue was a secondary one that was not dealt with on appeal). As I stated above, the power to order costs contrary to the cause is always implicit in the court's discretionary jurisdiction as to costs, as is the power to order interim costs.

(5) Interim Costs in Public Interest Litigation

38 The present appeal raises the question of how the principles governing interim costs operate in combination with the special considerations that come into play in cases of public importance. In cases of this nature, as I have indicated above, the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate.

39 One factor to be borne in mind by the court in making this determination is that in a public law case costs will not always be awarded to the successful party if, for example, that party is the government and the opposing party is an individual *Charter* claimant of limited means. Indeed, as the *B. (R.)* case demonstrates, it is possible (although still unusual) for costs to be awarded in favour of the *unsuccessful* party if the court considers that this is necessary to ensure that ordinary citizens will not be deterred from bringing important constitutional arguments before the courts. Concerns about prejudging the issues are therefore attenuated in this context since costs, even if awarded at the end of the proceedings, will not necessarily reflect the outcome on the merits. Another factor to be considered is the extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court.

40 With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

41 These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve

the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order.

B. Appellate Review of Discretionary Decisions

42 The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to any applicable rules of court and to the need to act judicially on the facts of the case (*Earl v. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68 (Sask. C.A.), at para. 7, citing *Benson v. Benson* (1994), 120 Sask. R. 17 (Sask. C.A.)). Sigurdson J.'s decision in the present case was based on his judicial experience, his view of what justice required, and his assessment of the evidence; it is not to be interfered with lightly.

43 As I observed in *R. v. Regan* (2002), 161 C.C.C. (3d) 97, 2002 SCC 12 (S.C.C.), however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801 (S.C.C.), at p. 814-5, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

44 Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues. In a case of this kind, as I have indicated, this consideration is of less weight than in the ordinary case; in fact, the allocation of the costs burden may, in certain cases, be determined independently of the outcome on the merits. Sigurdson J. erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Secondly, Sigurdson J.'s finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and I agree with Newbury J.A. that the prospect of the Bands' hiring counsel on a contingency basis seems unrealistic in the particular circumstances of this case.

C. Application to the Facts of this Case

45 It is unnecessary to send this case back to the chambers judge to apply the criteria set out here, because it is apparent from his reasons that, had he done so, he would have ordered interim costs in favour of the respondents. Sigurdson J. found as a fact that the Bands were in extremely difficult financial circumstances and could not afford to pay for legal representation. The only alternative which he suggested might be available for funding the litigation was a contingent fee arrangement, which, as I have stated, was not feasible. He found the Bands' claims of aboriginal title and rights to be *prima facie* plausible and supported by extensive documentary evidence; although the claim was not so clearly valid that there was no need for it to be tested through the trial process, it was certainly strong enough to warrant pursuit. Finally, Sigurdson J. found the case to be one of great public importance, raising novel and significant issues resolution of which through the trial process was very much in the interests of justice. He even went so far as to urge the executive branches of the federal and provincial governments to provide funding so that the respondents' claims could be addressed.

46 Applying the criteria I have set out to the evidence in this case as assessed by the chambers judge, it is my view that each of them is met. The respondents are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward. The issues sought to be raised at trial are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme.

47 The conditions attached to the costs order by Newbury J.A. ensure that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown (see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 186), and also that there

will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid by the appellant. I would uphold her disposition of the case.

VII. Disposition

48 The appeal is dismissed with costs to the respondents.

Major J.:

49 At issue in this appeal is how trial courts should be guided in their award of interim costs. When are these advance costs appropriate? How much deference should appellate courts give to the trial judge's discretion in the matter?

50 Four Indian bands are suing the Crown in right of British Columbia, to establish aboriginal title over land they wish to log. Because this litigation will be expensive, they seek interim costs — that is, advance costs awarded whether or not they are successful at trial. By any standard, this is an extraordinary remedy.

51 The chambers judge could not find a supporting precedent and in the exercise of his discretion he chose not to grant interim costs. The British Columbia Court of Appeal, and now my colleague LeBel J., reversed the chambers judge on what appears to be a new rule for interim costs. With respect for the contrary view, I conclude that Sigurdson J. interpreted the applicable principles correctly and can find no basis for reversing his discretion. I would therefore allow the appeal.

52 The appeal raises difficult questions. In particular, how may impoverished parties sue to establish what is submitted to be constitutionally supported rights? Constitutional issues, however, were not pursued in this appeal. The respondents rely solely on the common law rules on costs.

53 Traditionally, costs — usually party and party costs — are awarded after the ultimate trial or appellate decision and almost always to the successful party. Party and party costs in all Canadian jurisdictions are only partial indemnification of the litigants' legal costs. In certain cases, interim costs may be awarded to a spouse suing for the division of property as a consequence of separation or divorce. The ratio of the matrimonial cases is clear: a spouse usually owns or is entitled to part of the matrimonial property; some success on the merits is practically assured. Thus, the traditional purpose of costs — indemnification of the prevailing party — is preserved.

54 But to award interim costs when liability remains undecided would be a dramatic extension of the precedent. Furthermore, to do so in a case with serious constitutional considerations where the Crown is the defending party would be an unusual extension of highly exceptional private law precedent into an area fraught with other implications.

55 The common law is said to evolve to adapt prevailing principles to modern circumstances. But the common law of costs should develop through the discretion of trial judges. This equitable trial-level discretion, developed over centuries, is essential to the primary traditional use of the discretionary costs power by courts: to manage litigation and case loads. It may be that there are public law questions where access to justice can be provided through the discretionary award of interim costs. Even so, such cases must lie closer to the heart of the interim costs case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate *reversal* of that discretion.

I. Background

56 My colleague has fairly characterized the facts of this litigation. However, some highlighting of those facts may be useful.

57 In 1999, the four respondent Indian bands (the "Bands") began logging Crown land. Funds from that activity were to be used for housing and other desperately needed social services. The British Columbia Minister of Forests served the Bands with stop-work orders and commenced proceedings to prevent further logging. The Bands challenged the orders and claimed aboriginal title to the lands.

58 At the British Columbia Supreme Court, Sigurdson J. ruled that the question of aboriginal title was sufficiently complex that a trial was necessary. The Bands stated that they could not afford to litigate and even if they could, they would have preferred to use such funds to provide social services. The Bands claimed that they had been unable to find any governmental or *pro bono* sources of aid. They therefore petitioned for interim costs — costs in advance of trial. The Bands' motions were originally grounded in the constitutional question of title. They now seek interim costs on the basis of the trial court's inherent and statutory cost power.

59 The chambers judge conducted a thorough examination of the case law on interim costs and, in the exercise of his discretion, concluded at para. 129:

> I find that the respondents' argument that its trial costs be paid in advance must fail. The issue of liability is very much in dispute and the trial costs are substantial. To order the payment of trial costs would require prejudging the case on the merits which, of course, I cannot do. Although I have a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area. I recognize that these respondents are in a difficult position. However, counsel may be prepared to represent them on a contingency basis and, if successful, the respondents will undoubtedly receive significant indemnity for their costs. I recommend, however, that the Federal and Provincial Crown consider providing some funding so that these disputes, which have some elements of test cases, if they cannot be settled, can be properly resolved at trial.

II. Analysis

A. The Law of Costs

60 The standard rule on party and party costs is that they are generally awarded to the successful litigant at the end of litigation. These costs are a contribution to the successful party's actual expense. Full indemnification by way of solicitor-client costs is infrequently ordered in Canada. Such costs require unusual and egregious conduct by the losing party. On rare occasions the court may award solicitor-client costs where equity is met by doing so.

61 My colleague points to what he describes as a modern trend in the law on costs — its use as an instrument to encourage litigation in the public interest. With respect, I think this proposition mistakes public funding to pursue *Charter* claims as an exercise in awarding costs. It is a separate function. Although the trial judge retains a discretion on the question of costs in such cases, they have always been awarded at the conclusion of the litigation.

B. The Law of Interim Costs

62 As a matter of public policy as reflected in federal and provincial rules of court, costs are usually awarded at the conclusion of trial as a contribution to the successful party's legal expenses. However, the common law on interim costs — costs in advance of trial — has been more confined and almost exclusively restricted to family law litigation to allow the impecunious spouse and children access to the court. The reason for such restrictive use is apparent since awarding costs in advance could be seen as prejudging the merits. While there is limited jurisdiction to award interim costs, it is logical that the party who must pay them and informed members of society might, in the absence of compelling reasons, have a reasonable apprehension of bias in favour of the recipient. The objectivity of the court making such an order will almost automatically be questioned.

63 The award of costs before trial is a more potent incentive to litigation than the possibility of costs after the trial. The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs are useful in family law, but should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. As laudable as that objective may be, the remedy lies with the legislature and law societies, not the judiciary.

64 LeBel J. concludes from his review of the case law on interim costs that they may be granted when (i) the party seeking the costs would be unable to pursue the litigation otherwise; (ii) there is a *prima facie* case of sufficient merit; and (iii) there are present "special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate" (para. 36). He finds that such special circumstances may exist if the case is in the public interest and is a test case. With respect, I come to a different result.

65 I agree that the case must be exceptional in order to attract interim costs. Of necessity, the proposition that extraordinary circumstances practically always exist where the public interest is invoked is too broad to meet the exceptional requirement. LeBel J. accepts that most public interest cases would satisfy this criterion (para. 38). This is why he leaves to the discretion of the trial judge the decision as to whether the case is "special enough" to warrant an order. The difficulty for the trial judge is that this does not provide any ascertainable standard or direction. To say simply that the issues transcend the individual interests in the case and have not yet been resolved (para. 40) does not assist the trial judge in deciding what is "special enough". An examination of past *Charter* cases will demonstrate that dilemma.

66 Test cases are referred to by LeBel J. and involve situations where important precedents are sought. In my view, the proposition that "it [would be] contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40), without more, is not sufficient. A trial judge can draw no direction from this proposal.

67 But even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. On the contrary, the litigation here is likely to involve the application of principles enunciated by this Court in cases such as *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), and *R. v. Vanderpeet* (1996), 50 C.R. (4th) 1 (S.C.C.). There is no evidence to establish that these land claims should be considered exceptional. Nor is there anything to establish how the new criteria would apply in a different way between one impecunious aboriginal party and another.

68 It is worth noting that the honour of the Crown is not at stake in this appeal and that there is no reason to distinguish the aboriginal claimants from any other impecunious persons claiming rights under the Constitution with regard to the availability of costs. The new definition of extraordinary circumstances must therefore apply generally and its impact measured accordingly. There is no doubt that the conclusions of LeBel J. will result in an increase of interim costs applications while offering little in the way of guidance to trial judges.

69 The interim costs case law suggests narrow guidelines. Interim costs have been awarded in two circumstances: (i) in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled; and (ii) in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. In those cases it is still necessary that the party seeking advanced costs show that they would otherwise be unable to proceed with litigation.

70 The matrimonial cases involving the division of assets upon divorce comprise the oldest line of interim costs jurisprudence. At common law, a wife could be awarded interim costs to help her maintain her divorce action. This rule has been generally recognized in statute and Canadian case law. See *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 (Alta. C.A. [In Chambers]). See also *Randle v. Randle* (1999), 254 A.R. 323, 1999 ABQB 954 (Alta. Q.B.), where interim costs were granted in an action concerning the division of property between common law spouses.

71 There are three legal characteristics that explain why the post-marital contest serves as the exception to the standard rule that costs "follow the event". These three characteristics are guidelines for the exercise of discretion in the award of interim costs.

72 First, at common law, husbands usually had control and legal ownership of the marital purse and property, ensuring in most cases that wives did not have the financial resources to pursue litigation. See *McDonald*, *supra*, at para. 20. Therefore, the first required element of an interim cost award is that the party seeking the award is impoverished,

and would not be able to pursue the litigation without such an award. It is acknowledged in this appeal that each of the bands are without funds.

73 Second, the marital relationship is perhaps unique in the mutual support owed between spouses. Thus, generalizing beyond the marital context, there must be a special relationship between the parties such that the cost award would be particularly appropriate. Where, as in this appeal, no right under s. 35 of the *Constitution Act, 1982* is implicated and the matter involves the provincial Crown rather than the federal Crown, this special relationship cannot automatically be presumed.

74 But third, and dispositive to this appeal, in the marital cases *there is a presumption that the property that is the subject of the dispute is to be shared in some way*. See *Randle*, *supra*, at para. 22. Generally, it is the *distribution* of assets and *extent* of support that are at issue in a divorce action, not whether such a division and such support are owed. In a sense, *some liability is assumed*; all that is to be litigated is the *extent* of the liability. LeBel J. blunts the bite of this element, reducing it to the modest requirement that "[t]he claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40). The traditional roots of the costs power require more than *prima facie* merit. The costs power originally provided indemnification — the prevailing party won costs. In a divorce action, however, it was assumed that the spouse, usually the wife, would be awarded something; the question was how much.

75 The matrimonial cases can therefore be seen as exceptional not because they dispensed with the rule that the prevailing party won costs (and the related principle that judges not predetermine the merits of the case), but because they dispensed with the need to wait for the end of trial to decide which party prevailed, for some liability was presumed.

76 In this appeal, Sigurdson J.'s reluctance to "prejudg[e] the case on the merits" was appropriate. Unlike the divorce cases, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal.

77 In summary, in my opinion the ratio of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs:

1. The party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case.

2. There is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate.

3. It is presumed that the party seeking interim costs will win some award from the other party.

78 In my view, a court should be particularly careful in the exercise of its inherent powers on costs in cases involving the resolution of controversial public questions. Not only was such precedent not required at common law, but by incorporating such an amorphous concept without clearly defining what constitutes "special circumstances", the distinction between the traditional purpose of awarding costs and concerns over access to justice has been blurred.

79 As noted earlier, certain corporate and trust actions form another line of interim costs cases with a different ratio. In those cases, a litigant sues on behalf of a corporation or trust, and seeks interim costs. Such cases are an exception to the general rule on costs because the court makes the costs order on behalf of the corporation or trust. For example, where a shareholder sues directors on behalf of the corporation, it is presumed that the corporation, which in many ways is owned by the shareholders, although under the control of the directors, consents to the paying of the interim costs. It is important to note that in the corporate context, interim costs are specifically addressed by legislation. See British Columbia *Company Act*, R.S.B.C. 1996, c. 62, s. 201; Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 249.

80 Courts may also award interim costs in child custody cases. See *Roberts v. Aasen*, [1999] O.J. No. 1969 (Ont. S.C.J.). Child custody litigation focuses on the best interests of the child for whose welfare both parents are responsible. The

purpose of the interim costs award is not merely to aid one side or the other in funding their litigation but, commensurate with the parents' duty, to help the court find the result most beneficial to the child.

81 The value in considering the derivative and related child custody cases is simply to concede that there are circumstances beyond the matrimonial cases in which interim costs may be appropriate. The cases on appeal do not fit these exceptions.

C. The Trial Judge's Discretion

82 I agree with LeBel J. that a trial judge's discretionary decision on interim costs is owed great deference, and should be disturbed only if "the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts" (para. 43). I also agree that a misapplication of the criteria relevant to an exercise of discretion constitutes an error of law.

83 LeBel J. concludes that because Sigurdson J. failed to apply the newly enunciated criteria of impecuniosity, *prima facie* merit, and public importance, an error of law was (understandably) committed. LeBel J. saw no need to return the case to the chambers judge, and held that Sigurdson J. would have exercised his discretion to grant the award had he the benefit of what is described as new criteria.

84 If this Court enlarges the scope for interim costs it should be seen as a new rule and not an adaption of existing law. On the basis of the law on costs at the time of this application the chambers judge properly exercised his discretion.

85 Sigurdson J. was correct in his assessment that liability remains an open question in this appeal and that ordering interim costs would inappropriately require prejudging the case. Accordingly, he was justified in concluding that "[a]lthough [he had] a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area" ([2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135, at para. 129).

III. Conclusion

86 The common law is to advance by increments while generally staying true to the purposes behind its rules. The new criteria endorsed by my colleague broaden the scope of interim costs to an undesirable extent and are not supported in the case law. In my view, the common law rules on interim costs should not be advanced through an appellate court ignoring and overturning the trial judge's correctly guided discretion. This is more appropriately a question for the legislature. See *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.); *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.)]; and *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925 (S.C.C.).

87 Since Sigurdson J. committed no error of law and did not commit a "palpable error" in his assessment of the facts, I would defer to his decision not to exercise his discretion to make the extraordinary grant of interim costs.

88 I would allow the appeal, with each side to bear its own costs.

Appeal dismissed.

Pourvoi rejeté.

End of Document

TAB 14

2010 ABCA 394
Alberta Court of Appeal

De Lage Landen Financial Services Canada Inc. v. Royal Bank

2010 CarswellAlta 2428, 2010 ABCA 394, [2011] A.W.L.D. 280, 196 A.C.W.S. (3d) 314, 499 A.R. 198, 499 N.R. 198, 514 W.A.C. 198, 73 C.B.R. (5th) 22

De Lage Landen Financial Services Canada Inc. (Applicant / Appellant) and Royal Bank of Canada and PricewaterhouseCoopers Inc., In Its Capacity As Court Appointed Receiver and Court-Appointed Transaction Facilitator (Respondents / Respondents)

Keith Ritter J.A.

Heard: December 1, 2010
Judgment: December 14, 2010
Docket: Edmonton Appeal 1003-0292-AC

Counsel: S.J. Weatherill, K.R. Kawanami for Applicant / Appellant
L.K. Harris for Respondent / Respondent, Royal Bank of Canada
H.A. Gorman for Respondent / Respondent, PricewaterhouseCoopers Inc., in its capacity as Court Appointed Receiver and Court-Appointed Transaction Facilitator

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals

Leave to appeal — Debtor leased equipment from creditor — Debtor obtained stay of proceedings under Companies' Creditors Arrangement Act — Ultimately liquidation was ordered, and purchaser offered to buy certain assets of debtor including leased equipment — Creditor objected to sale of leased equipment — Creditor's application for declaration that equipment was subject to true lease was dismissed — Trial judge found lease was security lease — Creditor's application for stay of order was dismissed, as equipment had been sold and no appeal had been taken — Creditor's applications to appeal were dismissed — Creditor sought to appeal under s. 13 of Act — Application for leave to appeal dismissed — Appeal had minimal chance of success — Matter was not of general importance to practice — Substantial deference was owed to trial judge's consideration regarding nature of lease.

APPLICATION by creditor for leave to appeal judgment regarding nature of lease over equipment.

Keith Ritter J.A.:

1 The applicant seeks leave to appeal pursuant to s. 13, of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) and a stay pending appeal.

2 The applicant was a creditor of Cow Harbour Construction Ltd.'s ("CHC"), by virtue of a lease agreement ("Agreement"), which provided that CHC would rent certain equipment ("Equipment") for a term of 37 months. The Agreement did not contain a purchase option.

3 In the spring of 2010, CHC obtained a stay of proceedings under the *CCAA* to restructure its affairs. Various court applications were heard by an assigned case management judge over the summer of 2010 and, eventually, the *CCAA*

proceedings turned into a liquidation, whereby CHC would restructure by selling its assets. The sales process resulted in an offer from a purchaser, who offered to purchase a large number of CHC's assets, including the Equipment. The applicant objected to the sale of the Equipment, arguing that it could not be sold without its consent.

4 The applicant sought a declaration that, for the purposes of s. 11.01, *CCAA*, the Agreement was a true lease, rather than a financing agreement. This characterization affects how approximately $900,000 in lease payments (currently held in trust by the Receiver's counsel) would be distributed. The applicant claims entitlement to the whole amount if the Agreement is a true lease.

5 On August 25, 2010, the case management judge concluded that the Agreement was a security lease. He also appointed the respondent PricewaterhouseCoopers Inc. as Receiver and granted an order approving the purchase and vesting CHC's assets, including the Equipment, to the purchaser.

6 The applicant applied to the case management judge for a stay of the August 25, 2010 order as it related to the Equipment. The application was dismissed, as it was moot (the Equipment having already been sold) and as no appeal had been taken. The applicant made a further application before the case management judge seeking leave to appeal the August 25, 2010 order as it related to the Equipment and a stay pending the appeal. Both those applications were denied: *Royal Bank v. Cow Harbour Construction Ltd.*, 2010 ABQB 637 (Alta. Q.B.).

7 The applicant seeks leave to appeal pursuant to s. 13, *CCAA*. Section 13 provides:

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

8 The parties agree that the test for leave is whether there are serious and arguable grounds of real and significant interest to the parties. In order to obtain leave, the applicant must demonstrate that the following four criteria are met:

> (a) the point on appeal is of significance to the practice;
>
> (b) the point raised is of significance to the action itself;
>
> (c) the appeal is *prima facie* meritorious or frivolous; and
>
> (d) the appeal will not unduly hinder the progress of the action: *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158, 44 C.B.R. (4th) 96 (Alta. C.A.) at paras. 15-16; *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]) at paras. 6-7. The parties disagree about whether the proposed appeal meets the test.

9 The applicant agrees that the case management judge applied the correct test in determining that the Agreement was a financing lease rather than a true lease. However, it proposes to argue that the case management judge erred by giving equal weight to each factor within that test. It also proposes to argue that there is no case law in Alberta holding that a lease which did not include an option to purchase is anything but a true lease. In resisting the applicant's leave to appeal application, the respondents state that the four criteria have not been met. They also argue that the application was filed out of time, contrary to s. 14, *CCAA*.

10 With respect to the argument that the application is out of time, the applicant argues that s. 14, *CCAA* only requires an appellant to apply to one of the concurrent courts as set out in s. 13, *CCAA* within the time specified. It states that if it does that and is refused, it can then make an application to the other court even though the subsequent application is outside the time limit in s. 14. I have some significant doubts about the viability of this argument as s. 14 includes a mechanism to extend time and the approach suggested by the applicant seems to render that mechanism meaningless. However, I prefer to deal with this application on the basis of whether leave should be granted, as this analysis leads to the conclusion urged by the respondents in any event.

11 I conclude that factors (a) and (c) lead to my rejecting this leave application. With respect to the issue of importance to the practice, the applicant argues that this Court has never considered whether a lease agreement without a right of ultimate purchase to the lessee is a security lease. Accordingly, it says, this issue is significant to legal practice surrounding the *CCAA*. However, stating the issue in that way is re-stating it.

12 It is clear that the parties argued before the case management judge that he should consider the factors in *Smith Brothers Contracting Ltd., Re* (1998), 53 B.C.L.R. (3d) 264, 1998 CarswellBC 678 (B.C. S.C.). One of the factors set out in that case is whether there is any right of acquisition. Therefore, the proposed issue is really about the weight given to a relevant factor in comparison to the weight given to other factors. This leads to the question of prospect of success on appeal.

13 This court has stated, with respect to many contexts, that substantial deference is accorded to the weight given by trial, chambers, and case management judges, to the factors in legal tests. Any deference afforded is amplified when the judge is a case management judge whose decision is part of a series of decisions relating to an ongoing court process.

14 That is the case here, where the applicant seeks to appeal the portion of the decision dealing with the rentals and not the direction that the Equipment be included in the sale of assets. Proceedings under *CCAA* often involve compromise. A case management judge is in the best position to assess whether a particular directive is fair in the context of the compromises made by everyone involved in the proceedings. The case management judge alluded to this in his reasons.

15 The applicant points to a British Columbia decision which suggests *in obiter* that there should be a hierarchy in the factors used to determine if a lease is a true lease or a financing lease. In my view, this *obiter* runs contrary to current trends about how to weigh the factors in a legal test and about the deference afforded to courts of first instance in this respect. If one factor trumps the others, there is simply no point in including the others in the test.

16 In sum, I conclude that the chances of success with respect to this appeal are minimal and that the proposed issue is not important to the practice surrounding the *CCAA*. Leave to appeal is denied.

Application dismissed.

TAB 15

Rescue!

The Companies' Creditors Arrangement Act

Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.

University of British Columbia Faculty of Law and
Peter Wall Institute for Advanced Studies

Second edition

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as "debtor in possession" or "DIP" financing,[2] a distinction can be made between interim financing that allows the debtor corporation to continue operating during a brief period of workout negotiations and a variety of other court-ordered charges that are given priority in order to cover the expenses of the restructuring proceedings or to protect particular vulnerable creditors, often called priming liens. Notwithstanding that there was no express language in the *CCAA* prior to 2009 providing for interim financing, Canadian courts found that they had the jurisdiction to order such financing.[3] Effective 2009, the *CCAA* contains provisions for interim financing, essentially a codification of the tests that the courts had been applying, but with specific protections built in, such as notice and protection of pre-filing security.

Similarly, the courts have consistently affirmed their ability to order priming liens or priority charges in favour of insolvency officers during a *CCAA* proceeding. These charges allow the debtor corporation access to the professional services of the monitor, chief restructuring officer, other workout experts, and lawyers that can assist with a successful workout. Prior to 2009, such financing orders had been approved by the courts to cover administrative charges in many *CCAA* proceedings;[4] to reduce director and officer liability exposure;[5] to cover expenses;[6]

---

2 The term "debtor in possession" or "DIP" financing, which has been used in Canada, was borrowed from the terminology used in restructuring proceedings under Chapter 11 of the US *Bankruptcy Code*. (US *Code*, Title 11). Paragraphs §1107, §1108 and §364 of the US *Bankruptcy Code*, read together, provide that a debtor in possession may obtain credit, and set out the rules applicable to this credit. While the terminology used in Canada is similar, the rules applicable to the interim financing are very different and should not be confused, as the US rules are highly codified. Moreover, Parliament chose not to use the term in the *CCAA* when it codified interim financing effective 2009.

3 *Re United Used Auto & Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 (B.C.S.C. [In Chambers]), affirmed [2000] B.C.J. No. 409, 16 C.B.R. (4th) 141 (B.C.C.A.), leave to appeal allowed but appeal discontinued [2000] S.C.C.A. No. 142, 2000 CarswellBC 2132, 2000 CarswellBC 2133 (S.C.C.); *Re Dylex Ltd.* (13 January 1995), Doc. B-4/95 (Ont. Gen. Div.); *Re T. Eaton Co.*, 1997 CarswellOnt 5954 (Ont. Gen. Div.). See articles J. Gollob, "Distressed Debt Lenders and their Impact on Restructurings and Workouts in Canada", *Annual Review of Insolvency Law, 2004* (Toronto: Carswell, 2005) 173-186 and Janis Sarra, "Governance and Control: The Role of Debtor-in-Possession Financing under the *CCAA*", *Annual Review of Insolvency Law, 2004* (Toronto: Carswell, 2005) 119-172.

4 *Re Air Canada*, 2003 CarswellOnt 2465 (Ont. S.C.J. [Commercial List]); *Re United Used Auto & Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 (B.C.S.C. [In Chambers]), affirmed [2000] B.C.J. No. 409, 16 C.B.R. (4th) 141 (B.C.C.A.), leave to appeal allowed but appeal discontinued [2000] S.C.C.A. No. 142, 2000 CarswellBC 2132, 2000 CarswellBC 2133 (S.C.C.).

5 *Re Stelco Inc.*, [2004] O.J. No. 549, 2004 CarswellOnt 483 (Ont. S.C.J. [Commercial List]); *Re Air Canada*, 2003 CarswellOnt 1220 (Ont. S.C.J. [Commercial List]); *Re Canada 3000 Inc.*, 2002 CarswellOnt 1598 (Ont. S.C.J.), reversed in part 2004 CarswellOnt 149 (Ont. C.A.), additional reasons 2004 CarswellOnt 1915 (Ont. C.A.), reversed in part 2006 CarswellQue 4890, 2006 CarswellQue 4891 (S.C.C.); *Re Philip Services Corp.*, Doc. 99-CL-3442, 4166CP/98.

6 *Re General Publishing Co.*, [2003] O.J. No. 2358, 2003 CarswellOnt 2094 (Ont. S.C.J.); *Re Dylex Ltd.*, [2002] O.J. No. 1505, 2002 CarswellOnt 1183 (Ont. S.C.J.), discussing this charge under the *CCAA* and the *BIA*. *In the Matter of the Companies' Creditors Arrangement Act, Canadian Red Cross Society/La scoieté canadienne de la croix-rouge*, (Ont. S.C.J.), Court File No. 98-CL-002970.

have been made within the *CCAA* proceeding as a matter of convenience, it was a decision that was made independently of the provisions of the *CCAA* and the *BIA* and of any order previously made under the *CCAA*.[342] In the result, leave to appeal from the order was not required.[343]

3. The Role of Intervenors

The courts do allow intervenors in appellate cases in respect of *CCAA* matters; the recent intervention of a number of organizations in the *Indalex* Supreme Court of Canada case is an example.[344] The courts have set out their expectations in terms of filing requirements for such intervenors.

In *Pope & Talbot*, an appellant brought an application seeking an order that it be added as a party or an intervenor with the same rights as a party to the wage claim action, and an order allowing it to defend itself and its insured debtor.[345] The chambers judge concluded that it should not be permitted to participate in the defence of the underlying action as a party or through its coverage counsel "because this could permit the insurer, even unwittingly, to sculpt the case in a manner that vitiates coverage" and that the defence must be "coverage neutral". Further, the chambers judge concluded that there is no provision in the Rules of Court that would permit an insurer to add itself as a party or intervene in an underlying action.[346] The chambers judge also declined to allow its counsel to represent the debtor as it would provide access to privileged documents that may concern the coverage defence.[347]

4. Circumstances in which Leave has been Denied

As a result of the appellant court's deference to the *CCAA* supervising judge, the judgments in which leave to appeal is denied are more numerous than those cases in which leave is granted. The following judgments discuss the types of issues for which leave will be denied.

The Ontario Court of Appeal in *Re Timminco Ltd.* denied leave to appeal from the decision of a motion judge who had granted priority for interim financing.[348] The motion judge had invoked the doctrine of paramountcy. The Court of Appeal held that in the *CCAA* context, leave to appeal is to be granted sparingly, and only

342 *Ibid.* at para. 11.
343 *Ibid.* at para. 12.
344 *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 (S.C.C.).
345 *Re Ted LeRoy Trucking Ltd.*, 2011 BCCA 319, 2011 CarswellBC 1851 (B.C.C.A. [In Chambers]).
346 *Ibid.* at para. 20.
347 *Ibid.* at para. 23.
348 *Re Timminco Ltd.*, 2012 CarswellOnt 9633 (Ont. C.A.).

TAB 16

2008 ABCA 412
Alberta Court of Appeal

PricewaterhouseCoopers Inc. v. Canada (Superintendent of Bankruptcy)

2008 CarswellAlta 1962, 2008 ABCA 412, [2009] A.W.L.D. 140, 49 C.B.R. (5th) 33

In the Matter of the Bankruptcy of Fantasy Construction Ltd. Estate No. 109703 PricewaterhouseCoopers Inc. (Respondent / Applicant) and Office of the Superintendent of Bankruptcy (Applicant / Respondent) In the Matter of the Proposal of Southbend Construction Ltd. Estate No. 24-095683 Browning Crocker Inc. (Respondent / Applicant) and Office of the Superintendent of Bankruptcy (Applicant / Respondent)

J. Côté J.A.

Heard: December 3, 2008

Oral reasons: December 3, 2008 *

Docket: Edmonton Appeal 0803-0145-AC, 0803-0146-AC

Counsel: M.J. McCabe, Q.C. for Respondent / Applicant, PricewaterhouseCoopers Inc.
K.A. Rowan for Respondent / Applicant, Browning Crocker Inc.
K.N. Lambrecht, Q.C., G. Christidis for Appellant / Respondent, Office of the Superintendent of Bankruptcy

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — General principles

Superintendent of Bankruptcy brought motion for leave to appeal — Motion granted in part on conditions — Conditional leave granted with respect to three questions of law — How should s. 128(3) of Bankruptcy and Insolvency Act be interpreted? In particular, do its last 11 words modify all, or only part, of preceding words of subsection? — Is Directive 10 of Superintendent of Bankruptcy ultra vires? — Is holder of builders' lien under Alberta, British Columbia, or Yukon legislation, against land not owned by insolvent person, automatically "secured creditor" of insolvent person within meaning of Act, if that person has made an accepted proposal or has been petitioned, or has assigned itself, into bankruptcy, irrespective of wording of any proposal? — If Superintendent was willing to abide by costs conditions, then he could take out formal order giving leave to appeal — If Superintendent thought that litigation would be too expensive, then he could abandon leave motion.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 2 "secured creditor" — referred to

s. 128(3) — referred to

MOTION by Superintendent of Bankruptcy for leave to appeal.

J. Côté J.A.:

1 I am going to give leave to appeal on some conditions as to costs. I will draft those reasons setting conditions as to costs later and let you have a copy.

2 The Superintendent of Bankruptcy will have an option. If the Superintendent of Bankruptcy is willing to abide by the costs conditions, then he will be able to take out a formal order giving leave to appeal on certain grounds and with those conditions. But if the Superintendent of Bankruptcy thinks that the litigation is too expensive, then he can just abandon his leave motion, and there will be no leave to appeal. The Superintendent's election should be in writing.

3 I will now give you the three questions of law on which leave is granted conditionally.

(a) How should s. 128(3) of the *Bankruptcy and Insolvency* Act be interpreted? In particular, do its last 11 words modify all, or only part, of the preceding words of the subsection?

(b) Is Directive 10 of the Superintendent of Bankruptcy *ultra vires*, in part or whole?

(c) Is the holder of a builders' lien under Alberta, British Columbia, or Yukon legislation, against land not owned by the insolvent person, automatically a "secured creditor" of the insolvent person (within the meaning of the *Bankruptcy and Insolvency Act*), if that person has made an accepted proposal or has been petitioned, or has assigned itself, into bankruptcy, irrespective of the wording of any proposal?

4 Now I have before me motions for leave to appeal in two appeals. There was a third, but that has been resolved. Questions (a) and (b) apply to both appeals. Question (c) only applies to the Southbend Construction appeal.

5 I will also deal with costs of the motion today in the reasons which I file later giving terms and conditions respecting costs for granting leave.

Motion granted in part on conditions.

Footnotes

* Corrigendum issued by the court on December 11, 2008 has been incorporated herein.

TAB 17

2008 ABQB 340
Alberta Court of Queen's Bench

Climenhaga v. Alberta (Superintendent of Bankruptcy)

2008 CarswellAlta 2156, 2008 ABQB 340, [2008] A.J. No. 1180, [2009] 8 W.W.R. 113, [2009] A.W.L.D. 1079, 168 A.C.W.S. (3d) 707, 456 A.R. 40, 50 C.B.R. (5th) 218, 8 Alta. L.R. (5th) 305

In the Matter of The Bankruptcy of Cutting Edge Foods Inc. Estate No. 95482

Dr. David Climenhaga (Applicant) and Office of the Superintendent of Bankruptcy (Respondent)

In the Matter of The Bankruptcy of Fantasy Construction Ltd. Estate No. 109703

PriceWaterhouseCoopers Inc. (Applicant) and Office of the Superintendent of Bankruptcy (Respondent)

In the Matter of The Proposal of Southbend Construction Ltd. Estate No. 24-095683

Browning Crocker Inc. (Applicant) and The Office of the Superintendent of Bankruptcy (Respondent)

J.E. Topolniski J.

Heard: February 5, 2008
Judgment: June 6, 2008
Docket: Edmonton BK03-95482, BK03-109703, BK03-95683

Counsel: Jeremy H. Hockin for Applicant, Dr. David Climenhaga
George T. Christidis for Respondent, Office of the Superintendent of Bankruptcy
Michael J. McCabe, Q.C. for Applicant, PriceWaterhouseCoopers Inc.
Kentigern A. Rowan for Applicant, Browning Crocker Inc.

Subject: Insolvency; Estates and Trusts

Headnote

Bankruptcy and insolvency — Administration of estate — Payment of superintendent's levy

Creditors in role of mortgagees, assignee of lands, and builders' lien claimant disputed requirement to pay superintendent's levy under s. 147 of Bankruptcy and Insolvency Act — Hearings held regarding requirement to pay levy, which were consolidated into single hearing — Certain payments not subject to levy — Superintendent of Bankruptcy may interpret Act, but must be correct in his findings — Directive regarding payment of levy when encumbered assets are liquidated is ultra vires to extent that it requires secured creditor to produce proof of security — Act does not require that assets be sold at price of creditor's claim or better to constitute redemption, and directive is ineffective to the extent it conflicts with Act — If mortgagees were paid in full no liability for levy arose for mortgagees — Filing of proofs of claim itself was not determinative — If proofs of claim showed intent to surrender security or claim for deficiency as unsecured creditor, then levy was payable from any dividends — Review ordered to determine nature of claim — Lien claims were not against developer but against developer's customers — Of four claims, three were subject to trust and not subject to levy — Unclear whether certain other funds subject to trust, and hearing ordered to determine issue — Lien claimants were not secured creditors and calling them so in the proposal did not make them so — Participating in claims process did not convert trust interest to secured creditor status — Sale order regarding equitable assignee's claim stated that proceeds were held in trust in place of purchase assets, and no liability for levy existed.

HEARING to determine liability for superintendent's levy under *Bankruptcy and Insolvency Act*.

J.E. Topolniski J.:

I. Introduction

1 The Superintendent of Bankruptcy's (Superintendent) demand that four mortgagees (Re Fantasy Construction Ltd.), an equitable assignee of lands (Re Cutting Edge Foods Inc.), and builders' lien claimants (Re Southbend Construction Company Ltd.) pay the Superintendent's levy under s. 147 of the *Bankruptcy and Insolvency Act* [1] (*BIA*) is the subject of this dispute.

2 PriceWaterhouseCoopers Inc. (PWC), the trustee in bankruptcy of Fantasy Construction Ltd., and Browning Crocker Inc. (BCI), the proposal administrator of Southbend Construction Company Ltd., seek advice and directions pursuant to s. 34 of the *BIA* as to the *vires* of the Superintendent's Directive No.10, entitled *Redemption of Security and Section 147 Levy of the BIA* (19 December 1997) and liability for the levy. Citing ss. 37, 136(2) and 147 of the *BIA* as the foundation for his application, Dr. David Climenhaga (Dr. Climenhaga), a secured creditor of Cutting Edge Foods Inc., seeks a declaration that he is not liable for the levy. Sufficient funds have been withheld in each case to pay the levy pending the outcome of the respective applications.

3 A preliminary challenge by the Office of the Superintendent of Bankruptcy (OSB) to this Court's jurisdiction to determine the *vires* of Directive 10 resulted in my decision assuming jurisdiction [2] and an unsuccessful application for leave to appeal that decision. [3]

II. The Actors

4 A brief overview of the circumstances of the three cases and the actors sets the stage for the analysis concerning the *vires* challenge and, ultimately, liability for the levy regardless of the outcome of that determination.

A. Fantasy Construction Ltd. (Fantasy)

5 Banking on generating a better sale price, PWC obtained the cooperation of four mortgagees to refrain from commencing or continuing foreclosure proceedings in order to facilitate its attempt to sell the mortgaged lands. Ultimately, two of the mortgagees filed "proofs of claim." PWC secured an offer for the lands that would see the mortgagees paid in full. An unsecured creditor opposed the sale because it thought a better offer could be found. Burrows J. disagreed, and approved the sale and payout of the sale proceeds, with the mortgagees directed to be paid in full. While the sale proved to be fruitful for the mortgagees and PWC (which had its account, the vast majority of which did not pertain to the sale, significantly paid down), no funds flowed to the unsecured creditors.

6 PWC characterizes the sale as a redemption of the four mortgagees' interests in the land that cannot trigger the levy irrespective of the *vires* of Directive 10. The OSB characterizes the sale as participation by the mortgagees in the bankruptcy, which when coupled with the trustee's non-compliance with Directive 10, triggers the levy.

B. Southbend Construction Inc. (Southbend)

7 The proposal in Southbend was made by a building contractor to compromise its unsecured creditors' claims and to resolve builders' lien claims, the claimants of which had *in rem* rights not against Southbend, but against its customers. The proposal referred to the lien claimants as secured creditors and called on them to deliver proofs of claim and voting letters to BCI. The proposal, which ultimately was accepted by the creditors and sanctioned by the Court, provided for payment of the lien claims on BCI's say-so and delivery of a discharge of lien. The payment was made from trust funds held by Southbend's solicitors, comprised of funds transferred by a British Columbia Supreme Court order made in a builder's lien action, funds paid by a landowner, and funds paid by Southbend prior to making the proposal.

8 None of the lien claimants' proofs of claim were disallowed by BCI. The votes provided by twelve of the fourteen lien claimants were collected, but not counted in tallying the creditors' votes on the proposal. Ultimately, these lien claimants received payment (minus holdback for the levy) from Southbend's counsel, which also paid money directly to other lien claimants who, for some unknown reason, did not engage in the proposal process.

9 BCI characterizes the lien claimants as property claimants incapable of attracting the levy, irrespective of the description of them as "secured creditors" in the proposal and their questionable participation in the proposal. It contends that the proposal simply provided an efficient means of resolving the builders' lien claims and furthering the capture of residual funds for the benefit of the estate. BCI argues that, in any event, as trust funds were the source of payments to the lien claimants, there can be no liability for the levy. The OSB's view is that the lien claimants participated in and benefited from the proposal. Therefore, they must pay.

C. Dr. David Climenhaga v. OSB (Cutting Edge Foods)

10 Dr. Climenhaga's involvement in a sale of assets ultimately found to be secured in his favour began with his consenting to a Court order (made without prejudice to the rights of secured creditors to exercise their security rights) allowing the trustee, Bill McCullough & Associates Inc. (McCullough) to sell all of the bankrupt's assets. When Dr. Climenhaga's security was questioned, his consent became conditional on being paid in full from the sale proceeds. A tangle ensued.

11 McCullough demanded a proof of claim and release of his interest in the assets covered by the security, and then obtained a Court order (again made without prejudice to the rights of secured creditors) approving the sale. The order provided that the proceeds were to stand in place of the secured assets, and directed McCullough to hold the proceeds in trust until further order. As Dr. Climenhaga's counsel had been unable to obtain instructions, the order was directed to be held. Six days later (coincidentally, one day after Dr. Climenhaga told McCullough that he opposed the sale and intended to enforce his security), McCullough obtained Court approval to enter the order. Dr. Climenhaga subsequently delivered a "proof of claim" and notice under s. 130 of the *BIA* requiring McCullough to elect whether to redeem the security. McCullough disallowed the proof of claim. After the disallowance was reversed on appeal, McCullough paid the full value of what Dr. Climenhaga said he was owed, less a holdback for the levy.

12 Dr. Climenhaga characterizes his situation as one of an unwitting and unwilling participant in a sale of assets which were secured in his favour, the result of the sale being that he was paid the full value of his claim, minus a holdback for the levy. As such, he contends that he cannot be liable for the levy. The OSB maintains that the nature of Dr. Climenhaga's participation is irrelevant. He used and benefited from the system. Therefore, he must pay.

D. The Superintendent

13 The Superintendent is a creature of statute, whose authority is derived from Part I of the *BIA*. Charged with supervising the administration of all *BIA* matters, a significant facet of the Superintendent's work involves licensing, monitoring and disciplining of trustees in bankruptcy. The Superintendent's work also includes investigating bankruptcy offences, record keeping and maintaining statistics.

14 In *Sam Lévy & Associés Inc. c. Mayrand,*[4] Martineau J. commented as follows on the supervisory function of the Superintendent:

> The decisions made by a trustee under the Act in the administration of the property of an insolvent debtor have a direct impact on the creditors' rights. Thus, it is clear that Parliament intended to guarantee a high degree of protection for creditors and public confidence in the system of bankruptcy and assignment of property by an insolvent debtor: hence the supervisory role assigned by the Act exclusively to the Superintendent.

15 According to Beaudry J. of the Federal Court Trial Division in *Canada (Procureur général) c. Sam Lévy & Associés Inc.*:[5] "[t]he Act gives the Superintendent the power to review the administration of trustees' affairs and estates. It allows him to take administrative and conservatory measures for the protection of the public."

16 The Superintendent is authorized to intervene in any matter before the courts.[6] The Superintendent also is authorized to issue directives on a broad range of topics concerning administration of the *BIA*, a power derived from ss. 5(4)(b) to (e), which read:

5(4) The Superintendent may

(b) issue, to official receivers, trustees, administrators of consumer proposals made under Division II of Part III and persons who provide counselling pursuant to this Act, directives with respect to the administration of this Act and, without restricting the generality of the foregoing, directives requiring them

(i) to keep such records as the Superintendent may require, and

(ii) to provide the Superintendent with such information as the Superintendent may require;

(c) issue such directives as may be necessary to give effect to any decision made by the Superintendent pursuant to this Act or to facilitate the carrying out of the purposes and provisions of this Act and the General Rules, including, without limiting the generality of the foregoing, directives relating to the powers, duties and functions of trustees, of receivers and of administrators as defined in section 66.11;

(d) issue directives governing the criteria to be applied by the Superintendent in determining whether a trustee licence is to be issued to a person and governing the qualifications and activities of trustees; and

(e) issue directives prescribing the form of any document that is by this Act to be prescribed and the information to be given therein.

[Emphasis added.]

III. The Issues

17 There are two main issues in these applications:

1. Is Directive 10 *ultra vires* the Superintendent's powers?

2. Is there liability for the levy in the Fantasy, Southbend, and Cutting Edge Foods matters?

IV. Is Directive 10 ultra vires the Superintendent?

A. Superintendent's Directives

18 Directives issued by the Superintendent to date cover a variety of topics, both mundane and substantive, including the appropriate paper size to be used for fax transmissions (Directive 9R2 - *Fax and Electronic Filing*), the duties and responsibilities of trustees and administrators in performing the assessment of an individual debtor (Directive No. 6R - *Assessment of an Individual Debtor*), assisting the trustee in equitably and consistently determining the portion of the bankrupt's income that should be paid into the bankrupt's estate under s. 68(3) of the Act (Directive No. 11R - *Surplus Income*), and the subject directive about the requirements to avoid the levy payable under s. 147 of the *BIA* in the case of liquidation of encumbered assets on behalf of a secured creditor (Directive 10 - *Redemption of Security and Section 147 Levy of the BIA*).

19 Section 5(5) of the *BIA* provides that: "Every person to whom a Superintendent's directive is issued under paragraph (4)(b) or (c) is obliged to comply with the directive in the manner and within the time specified therein." Accordingly, trustees must comply with the Superintendent's directives, failing which they are subject to disciplinary proceedings, which can lead to sanctions, the ultimate sanction being loss of the trustee's license to practice. [7]

20 Pursuant to s. 5(6) of the *BIA*, directives issued by the Superintendent under s. 5 of the Act are deemed not to be statutory instruments within the meaning and for the purposes of the *Statutory Instruments Act*. [8]

21 Subsections 5(4)(b) to (c), 5(5) and 5(6) of the *BIA* were enacted in 1992. To date, the reported decisions concerning the directives mainly address their application rather than their *vires*. [9]

B. Section 147 Levy

22 The subject of Directive 10 is the levy under s. 147 of the *BIA*. Before embarking on a discussion of the *vires* of the directive, it is useful to describe the levy.

23 It has been referred to as a "form of taxation" on creditors, intended to defray the general expenses of supervision by the OSB. [10] In characteristic fashion, Registrar Funduk minced no words in his description of the levy as: "... a tax regardless of semantics and it is a tax imposed on creditors who receive a dividend or a payment on account of the debt owed to them." [11] Similarly, the OSB characterizes the levy as "...in essence a tax imposed on debtors and creditors who use the bankruptcy system to deal with their affairs." It is payable on all payments made by a trustee by way of dividend or otherwise on account of the claims of creditors, whether unsecured, preferred or secured.

24 The levy is authorized by s. 147 of the *BIA*, which reads as follows:

> 147(1) For the purpose of defraying the expenses of the supervision by the Superintendent, there shall be payable to the Superintendent for deposit with the Receiver General a levy on all payments, except the costs referred to in subsection 70(2), made by the trustee by way of dividend or otherwise on account of the claims of creditors, whether unsecured, preferred or secured creditors, and including Her Majesty in right of Canada or a province claiming in respect of taxes or otherwise.
>
> (2) The levy referred to in subsection (1) shall be at a rate to be fixed by the Governor in Council and shall be charged proportionately against all payments and deducted therefrom by the trustee before payment is made. [12]

25 The predecessor of s. 147, s. 106, was enacted in 1950 and corresponds to s. 126 of the original *Bankruptcy Act*, which was enacted in 1919 and brought into force in 1920. [13] The provision has not been amended significantly since that time.

26 Section 136(c) of the *BIA* affords the levy the status of a priority claim, ranking it in third place after testamentary expenses and the costs of administration/trustee's fees.

C. Directive 10

27 Directive 10, issued on December 19, 1997, provides in part:

> **Purpose**
>
> This Directive is intended to specify the operation of section 147 of the *BIA* in the case of the liquidation of encumbered assets on behalf of a secured creditor. It is also aimed at ensuring greater transparency and uniformity in the trustee's presentation of the statements of receipts and disbursements, as well as a standard approach to the examination of these statements by bankruptcy officers.

. . .

Subject

This Directive is issued pursuant to paragraph 5(4)(b) of the Act and it establishes the circumstances in which trustees are viewed as acting in a double capacity and the circumstances in which they are considered to be making a redemption of security. This Directive also establishes the cases in which the levy prescribed by section 147 of the Act is payable on amount[s] paid to secured creditors.

In addition, it establishes the procedure to be followed in presenting a redemption in the statement of receipts and disbursements.

Sections of the Act Concerned:

13.4; 128; 147; and 152.

Related Directive Concerned:

15R.

Policy

Except in the cases listed below, the section 147 levy is payable on all payments by a trustee to a secured creditor. This principle stands even if a third party such as, for example, a notary public, liquidator or an auctioneer makes the payment to the secured creditor for and on behalf of the trustee.

Since the redemption is not a "consensual operation", but rather a unilateral action taken by the trustee with the intention of obtaining an advantage for the estate, it therefore excludes the case of the trustee acting on behalf of the secured creditor.

A trustee acting in this capacity can redeem a security only through the mechanism provided for in subsection 128(3) of the Act.

Exceptions

1. The trustee obtained a mandate from the secured creditor and complied with the provisions of section 13.4 of the Act, Directive No. 15R, sections 245 and following sections (if applicable), and the assets were sold while the trustee acted as an agent, receiver or mandatary but not as trustee.

2. The trustee proceeded with redemption of the security within the meaning of subsection 128(3) of the Act. In such a case, all of the following conditions must be fulfilled:

a) the secured creditor must produce a proof of claim prior to the offering of the encumbered assets for sale. Should the secured creditor not produce a proof of claim, it is the trustee's responsibility to take advantage of the provisions of subsection 128(1) of the Act;

b) the encumbered assets must be sold at a net price superior to, or at least equal to, either the total of the claim or the amount of the valuation of the security as established by the creditor in the creditor's proof of claim;

c) to show that it is a redemption that fulfils these conditions, the trustee must file, with the statement of receipts and disbursements, an attestation pursuant to Appendix 1 of this Directive...

For the purpose of this directive the net price is the gross price paid by the purchaser less the trustee's disbursements and remuneration pertaining to the redemption.

The receipts, the disbursements as well as the trustee's remuneration pertaining to the redemption must be recorded in the statement of receipts and disbursements. If the trustee makes several redemptions, the trust must submit an equivalent number of Appendices with the statement.

In the event that the trustee sells unencumbered and encumbered assets in the same transaction, the disbursements must be shares *pro rata* between these two categories of assets. If another method is used, the trustee must indicate the method used and justify the choice.

28 Directive 10 identifies as one of its objectives: "... to ensure that the body of creditors is not penalized in any way and does not bear any cost for the trustee's liquidation of encumbered assets on behalf of a secured creditor." The Directive indicates in the "*Subject*" statement that it is meant to establish "the circumstances in which trustees are viewed as acting in a double capacity and the circumstances in which they are considered to be making a redemption of security."

29 The following general principles relating to the levy are relevant to this application:

1. A creditor disputing liability for the levy bears the onus of establishing that he or she is not so liable. [14]

2. Levy is not payable where the trustee is acting in another capacity (i.e. as mandatory, agent or receiver); [15]

30 The law is divided on:

1. Whether s. 128 of the *BIA* is a complete codification of the trustee's right of redemption; [16]

2. Whether the secured creditor must file a proof of claim before a trustee purports to redeem by paying the whole debt;

3. Whether a secured creditor who allows a trustee (not acting in a double capacity) to sell the bankrupt's assets covered by his or her security is necessarily liable for the levy; [17]

4. The effect of filing or not filing a proof of claim on a secured creditor's liability for the levy. [18]

D. Vires of Directive 10

31 PWC and BCI assert that Directive 10 affects the rights of secured creditors, overrules case law, and usurps the court's function of interpreting the *BIA*. They contend the Directive is *ultra vires* as an unauthorized infringement on Parliament's right to legislate and the Court's right to adjudicate.

1. Rules of Statutory Interpretation

32 Analysis of the *vires* of Directive 10 necessarily begins with an overview of the most relevant principles of statutory interpretation.

33 The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text *The Construction of Statutes*, 2d ed.(Toronto: Butterworths, 1983) at p. 87, as cited in countless cases, including *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26: "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."

34 Other relevant principles of statutory interpretation include:

1. The presumption of regularity, which requires the Court to proceed on the assumption that subordinate legislation is within the authority conferred by the enabling Act. The court is not to declare it invalid without clear evidence to support such a finding. [19]

2. Parliament is understood not to legislate gratuitously. Inferences of broader generality under the concept of *expressio unius* are discouraged. [20]

3. The presumption against absurdity; that is, an interpretation that leads to ridiculous or frivolous consequences, is extremely unreasonable or inequitable, is illogical or incoherent, is incompatible with other provisions or with the object of the legislative enactment, or defeats the purpose of a statute or renders some aspect of it pointless or futile. [21]

2. The BIA and Secured Creditors

35 The *BIA* is a statute governed by business principles that puts day-to-day administration into the hands of business people (trustees in bankruptcy and often inspectors) and should not be interpreted in an overly narrow or legalistic fashion. [22] Stated otherwise, *BIA* issues require consideration of the realities of commerce, practicality and business efficacy.

36 Subject to certain provisions of the *BIA*, ss. 79, 127 to 135 and 248(1) included, or unless the court orders otherwise, the bankruptcy of a debtor does not prevent secured creditors from realizing or otherwise dealing with their security as they would have but for the bankruptcy. [23] While secured creditors often are described as strangers to the bankruptcy process, such characterization is not entirely accurate. As noted by the Supreme Court of Canada in *Québec (Commission de la santé & de la sécurité du travail) c. Banque fédérale de développement*: [24]

> The secured creditor did liquidate his security outside the bankruptcy proceeding. However, it must be kept in mind that it is the *Bankruptcy Act* itself which authorizes him to act in this way. Section 49(2) of the Act provides that "a secured creditor may realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it" if s. 49(1) had not had the effect of staying proceedings brought by creditors of the debtor. It is therefore wrong to suggest that the *Bankruptcy Act* does not apply to a creditor who chooses to realize his security outside the bankruptcy proceeding. Sections 49, 57, 98, 101 and 102 of the Act, which deal with secured creditors in this context, only reinforce this opinion.

37 Secured creditors may choose to participate in a bankruptcy by surrendering their security or proving the balance due them after realizing their security. [25] Secured creditors affected by a proposal may choose to participate by voting on the proposal. [26]

38 There are two ways that a trustee can oblige a secured creditor to deliver a proof of security (as compared to a proof of claim, although both types of proof are provided by delivery of Form 31). The trustee can serve a notice under s. 149(1) or s. 128(1). In both cases, a creditor which fails to prove its claim within thirty days or such further time as the court allows, is excluded from receiving a dividend.

39 Typically, notice under s. 149(1) is sent when the trustee is contemplating payment of a dividend and wants to ensure that a secured creditor will not be claiming a dividend as an unsecured creditor. [27] Notice under s. 128(1), which is discussed below in the context of redemption, is intended to allow the trustee to determine whether it should redeem the security. [28] It obliges the creditor to provide the trustee with a proof of security that gives particulars of the security, the date the security was given, and the value at which the secured creditor assesses the security.

40 In the context of a bankruptcy, if a secured creditor delivers a proof of claim or proof of security, s. 135 obliges the trustee to examine it and allows the trustee to require further evidence in support of the claim or security. However, partial or complete disallowance of the security by the trustee under s. 135 does not alter the value of the security as assessed by the secured creditor in the proof of security under s. 128 for redemption or realization purposes. If the trustee disagrees with the secured creditor's assessed value, s. 129 provides for a procedure whereby the trustee may force a sale of the security. Section 135 relates to the allowance or disallowance, in whole or in part, of the security itself for the purpose of distribution of dividends from the bankrupt estate. [29]

41 *WorkGroup Designs Inc., Re* [30] instructs proposal administrators to assess the value of a secured creditor's claim under s. 50.1, which specifically addresses the approach to be taken where a proposal has been made to secured creditors, rather than using the general provision in s. 135. [31]

3. The Nature of Directive 10

42 In his Reasons on the jurisdiction challenge, Watson J.A. questioned whether Directive 10 should be classified as "hard" or "soft" law. Mr. Justice Watson's comments invited further discussion of the issue in the context of this application concerning the *vires* of Directive 10. Depending on their perspective, the parties posited that Directive 10 was "hard law" or a hybrid combining features of "soft law" and "hard law." PWC chose to extend the debate to discuss the effect of s. 5(6) of the *BIA*, which provides that the Superintendent's directives are not statutory instruments within the meaning of the *Statutory Instruments Act*. This in turn led to written submissions by the parties who, again depending on their perspective, advocated that Superintendent's directives should be defined as regulations or unenforceable administrative guidelines, given s. 5(6) of the *BIA*. Regrettably, this fulsome discussion did not occur at the time of the jurisdictional challenge.

43 In the jurisdictional challenge I observed that the issuance of a general directive by the OSB was in the nature of a legislative act. I did not rule on whether the Superintendent was within his statutory jurisdiction to issue Directive 10, only that the Superintendent was purporting to do so and as such the action was a matter subject to "judicial scrutiny."

44 *The Dictionary of Canadian Law* [32] defines "legislative act" as "[a]n action or decision which imposes a general rule of conduct. Contrasted with decisional or judicial act which concerns a particular case."

45 Professor J.M. Evans in de Smith, Stanley A., *Judicial Review of Administrative Action*, [33] writes that:

> A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

46 Based on these definitions, I am of the view that the Superintendent undertakes a legislative act in issuing directives pursuant to the *BIA*.

47 In his Reasons for denying leave to appeal the jurisdiction challenge, Watson J.A. observed [34] that Directive 10 has legal consequences and, therefore, is "more affirmative as law than even 'soft law' procedural guidelines to regulate the tribunal process itself," referencing in that regard *Thamotharem v. Canada (Minister of Citizenship & Immigration)*. [35]

48 *Thamotharem* dealt with the validity of a guideline issued by the Chair of the Immigration and Refugee Board, which set a standard practice for questioning a person seeking refugee protection. In determining that the guideline was

"soft law" that did not require Parliamentary approval, the court noted there was no sanction for non-compliance and the guideline was not binding in any event. Of interest is the court's observation at para. 55 that:

> Legislative instruments (including such non-legally binding "soft law" documents as policy statements, guidelines, manuals, and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case by case basis.

49 In Denys C. Holland and John P. McGowan's text, *Delegated Legislation in Canada*, [36] the authors suggest that: "A general rule has developed to the effect that regulations and other examples of subordinate legislation form substantive law, while guidelines and directives, although authorized by statute, do not."

50 The Alberta Court of Appeal in *Johnston v. Alberta (Director of Vital Statistics)* [37] clarified that while this may be the general rule, there is an exception, stating:

> The general rule is that regulations, rules, by-laws and orders are legally binding, but policy statements and guidelines are not, <u>unless "[a] functional and purposive approach to the nature of [the] guidelines reveals that they are a form of law, akin to regulations</u>:" ***Bell Canada v. Canadian Telephone Employees Assn.***, 2003 SCC 36, [2003] 1 S.C.R. 884at para. 37; ***Maple Lodge Farms Ltd. v. Canada***, [1982] 2 S.C.R. 2 at 6-7, 137 D.L.R. (3d) 558; ***Pezim v. British Columbia (Superintendent of Brokers)***, [1994] 2 S.C.R. 557 at 596, 114 D.L.R. (4th) 385; ***Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)***, 2001 ABQB 624, 292 A.R. 86at paras. 75-82.
>
> [Emphasis added.]

51 As the underlying statute in that case did not specifically or by inference contemplate a policy document, the court held the policy did not have the force of law and no legal rights and obligations arose from it.

52 *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)*, [38] a decision of Slatter J. (as he then was), is of particular relevance to the issue of whether Directive 10 has legal effect, as there are a number of parallels between the two cases, including:

> 1. *Skyline* concerned a policy issued under the *Workers' Compensation Act*. The Act gave the Board the power to make policy and made such policies binding on the Appeals Commission. Slatter J. accepted [39] that the policy in issue was simply a clarification of a previous "directive" issued by the Assessment Management Committee that "individuals working in an industry to which the *WCA* applies and who are pooling their labour for completion of a labour contract for another person also engaged in an industry to which the *WCA* applies are each deemed to be workers of that other person ('the principal')." Here, Directive 10 was issued under the *BIA*, which gives the Superintendent the power to issue directives and makes such directives binding on trustees. Directive 10 refers to its substance as "policy."
>
> 2. The policy in *Skyline* was binding on the Appeals Commission but was of financial significance to Skyline, which, based on the policy, was found to be the employer of a subcontractor who had been injured on the job and, as the employer, was subject to assessment. Slatter J. commented that the policy was an "assessment policy" and that while assessments were not truly taxes, they were a compulsory statutory levy. Directive 10 concerns a similar levy and, while binding on trustees, has a potential financial impact on secured creditors.
>
> 3. The *Workers' Compensation Act* under consideration in *Skyline* specified that the orders, rulings, decisions or directions of the Board need not be published in the Alberta Gazette. Slatter J. declined to interpret this as meaning the policy was not otherwise covered by the *Regulations Act*, although he made no finding in that regard as he was of the view that it was unclear whether the policy was a regulation. Section 5(6) of the *BIA*

provides that directives issued by the Superintendent under s. 5 of the Act are deemed not to be statutory instruments within the meaning and for the purposes of the *Statutory Instruments Act*.

53 A notable difference between the present case and *Skyline* is that the matter before Slatter J. was a judicial review of a decision of the Workers' Compensation Appeals Commission, which had upheld a decision of the Workers' Compensation Assessment Review Committee finding Skyline to be the subcontractor's employer. The present applications concerning the *vires* of Directive 10 are for advice and directions.

54 Interestingly, Slatter J. commented in *Skyline* on the potential for different results in scrutinizing a board's statutory interpretation undertaken in its adjudicative role as opposed to statutory interpretation involved in development of "policy," observing that: [40]

> ... As I have previously held, the standard of review for the decisions of the Board would generally be "patent unreasonableness." On the other hand, the standard of review for the validity of subordinate legislation would conventionally be "correctness:" ***Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources***, *supra*, para. 57. This leads to a rather unusual result. If the Board had decided this particular issue *ad hoc*, without any policy in place, its decision would not be reviewed unless it was patently unreasonable. However, if the Board enacts a statutorily authorized policy, conventional thinking would hold that the standard of review of the *vires* of the policy would be correctness. This apparent anomaly can perhaps be justified on the basis that if the decision was made *ad hoc*, the worker would have a right to a hearing, and would be allowed to address the issue without any presumptions. Once a policy is enacted, the worker must effectively explain why the policy should not be applied. Displacing a set policy is usually a significant task...

55 The applicant in *Skyline* argued that: (1) the policy in issue was *ultra vires* the Board; (2) the Board had applied the policy in a way that fettered its discretion; and (3) the policy could not be applied retroactively to the accident that had occurred.

56 In the process of determining the appropriate standard of review to be applied, Slatter J. commented [41] that there were significant policy issues underlying the questions in that case and that those questions were "all within the core jurisdiction of the Workers' Compensation Board and its Appeals Commission, and were intended by the Legislature to be decided by them."

57 Skyline submitted that, whatever the policy-making power of the Board, it could not make a policy that overrode a particular statutory requirement. Slatter J. concluded that the policy was not *ultra vires* as it was supported by the deeming powers given to the Board and complemented by the policy-making power granted to the Board under the Act.

58 Of particular note are the following portions of Slatter J.'s decision: [42]

> In discussing this issue it is appropriate to highlight that there are two different kinds of policy recognized by the law. Almost all administrative tribunals will have various internal directions, precedents, policies, discussion papers, and other materials that indicate the general approach they take to various issues that come before them on a regular basis. These materials may or may not be designated as "policies" but I will refer to them as "informal policies". A second type of policy is a policy that is authorized and sanctioned by the enabling legislation. Section 3.1 of the *Workers' Compensation Act* (supra, para. 16) is an example of an express power granted to an administrative tribunal to adopt policies. <u>Both informal policies and policies authorized by statute must be consistent with the underlying statute, unless a specific power is given to enact policies beyond the scope of the statute. The effect, however, of the two types of policies is potentially different</u>. [Emphasis added.]
>
> . . .

The high water mark in the effect of informal policies arose in ***Ainsley Financial Corp. v. Ontario Securities Commission*** (1994), 21 O.R. (3d) 104, 121 D.L.R. (4th) 79 (C.A.). The Securities Commission had adopted policies on "penny brokers." The policies were written in rigid, mandatory wording, much like regulations, and purported to impose penalties on those who did not comply. The Ontario Court of Appeal summarized the law as follows (at pp. 108-9, authorities omitted):

> . . .
>
> Having recognized the Commission's authority to use non-statutory instruments to fulfil its mandate, the limits on the use of those instruments must also be acknowledged. A non-statutory instrument can have no effect in the face of contradictory statutory provision or regulation... Nor can a non-statutory instrument preempt the exercise of a regulator's discretion in a particular case... Most importantly, for present purposes, a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue *de facto* laws disguised as guidelines...
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> . . .

The *Ainsley* decision resulted in the amendment of most Canadian securities acts to expressly authorize rules or policies of the type in question. Policies adopted pursuant to such specific statutory authority clearly stand on firmer ground, but even their status is not free from doubt. ***R. v. Beaver Creek Correctional Camp, Ex Parte MacCaud***, [1969] 1 O.R. 373, 2 D.L.R. (3d) 545 (C.A.) and ***Martineau v. Matsqui Institution***, [1978] 1 S.C.R. 118, 74 D.L.R. (3d) 1 both concerned Commissioner's directives authorized by s. 29(3) of the *Penitentiary Act*, R.S.C. 1970, c. P-6: "... the Commissioner may make rules, to be known as Commissioner's directives ...". Both decisions held that the Commissioner's directives did not have the full force of law, at least in the same sense as the statute or the regulations. These two decisions have been persuasively criticized: see D.C. Holland and J.P. McGowan, *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at pp. 104-108. In ***Friends of the Oldman River Society v. Canada (Minister of Transport)***, [1992] 1 S.C.R. 3, ***Martineau*** was explained on the basis that the directives were merely administrative, with no legislative content that could make them "law" under the *Federal Court Act* and so subject them to judicial review.

Later cases have given greater effect to policies authorized by statute. In ***Macoon v. Alberta (Workers' Compensation Board)*** (1993), 7 Alta. L.R. (3d) 201, 135 A.R. 183 (C.A.), a decision binding on me, the Court held that the Board's policies do have legal force. The particular policy in issue was found not to contradict the Act, but the Court implied that if it did, it would be invalid. <u>If a statute, a regulation and a policy conflict, the statute would prevail over the regulation, and probably the regulation would prevail over the policy</u>. Other decisions giving legal effect to policies authorized by statute are: ***Strauts v. College of Physicians and Surgeons*** (1996), 42 Admin. L.R. (2d) 219 aff'd (1997), 47 Admin. L.R. (2d) 79 (B.C.) (resolutions on the appropriateness of a particular therapy); *Friends of the Oldman River, supra*, ("*Guidelines Order*" under the Department of the Environment Act has legal force); ***Whelan v. Newfoundland (Workplace Health, Safety and Compensation Commission)*** (1999), 181 Nfld. & P.E.I.R. 192 (Nfld.) and ***Peet v. Canada (A.G.)***, [1994] 3 F.C. 128 (*Conflict of Interest Code* can create rights). [Emphasis added]

Exactly how far a policy can go must in each case be a matter of statutory interpretation of the enabling legislation. As Holland and McGowan, *supra*, state at p. 109:

> A careful examination of the relevant statute's enabling clause as well as of the instrument in question must be undertaken. In this respect, the title of the instrument may be of some, *albeit* slight, aid. The terms "guideline" and "circular", for instance, to us imply a less rigid and more informative content, while "rules" and "directives" seem to suggest a more mandatory, normative substance. We emphasize, however, that the terminology used to describe an instrument should never be seen as determinative of the issue.

Particular issues about scope, such as whether a policy can be retroactive, or can impose sanctions, or levy fees, will depend on the context. See ***Friends of the Oldman River***, *supra*.

59 One of the issues before Slatter J. was whether the statutory policy in issue could narrow, foreclose or "fetter" a discretion granted by the statute. Clearly, an informal policy could not. Mr. Justice Slatter took from his review of the case law that so long as a policy runs parallel to the statute, there is no problem even if the policy suggests how and when the discretion might be exercised. However, the statutory wording must be considered in determining whether a rigid and mandatory policy can constrain statutory discretion. The discretion involved in *Skyline* was the ability of the Board to declare a particular worker to be the worker of one principal rather than of another. In view of the power given to the Board in the definition of "employer" to "deem" a person to be an employer, he concluded that the legislative intent was to allow the Board, in that particular case, to fetter the discretion it was otherwise granted by the Act.

60 In accordance with *Skyline*, the starting point in determining the nature and effect of Directive 10 is the wording of the enabling provisions in the *BIA* and the directive itself.

61 In *BPCL Holdings Inc. v. Alberta*,[43] the appellant challenged the validity of regulations and standards issued pursuant to the *Public Health Act* as being beyond the scope of the authority given by the Act to the Lieutenant Governor in Council. The majority noted[44] that "subordinate legislation must be authorized by the empowering statute and must accord with its object and purpose." Further, the majority agreed[45] with the chambers' judge that a real and meaningful connection must exist between the subordinate legislation and the authority granted to the Lieutenant Governor by virtue of the Act.

62 As stated above, the Superintendent has authority under s. 5(4) of the *BIA* to issue directives to trustees with respect to administration of the Act or as may be necessary to facilitate the carrying out of the purposes and provisions of the Act and the General Rules, including, without limiting the generality of the foregoing, directives relating to the powers, duties and functions of trustees.

63 "To administer" has been described as meaning to serve governmental policy. It is variously defined as: "responsible for the implementation of (the law, justice, punishment, etc.)"[46] or "the management or performance of the executive duties of a government, institution, or business."[47]

64 In *British Columbia Development Corp. v. British Columbia (Ombudsman)*,[48] the Supreme Court of Canada, considered the words "administration" and "administrative" to be "... fully broad enough to encompass all conduct engaged in by a governmental authority in furtherance of governmental policy — business or otherwise."

65 "Facilitate" is defined in the *The Canadian Oxford Dictionary*[49] as: "[to] make (an action, result, etc.) easier, less difficult, or more easily achieved."

66 Directive 10 is said to be issued pursuant to s. 5(4)(b) of the *BIA*, which authorizes the Superintendent to issue directives relating to administration of the Act, including directives requiring trustees to: (i) keep such records as the Superintendent may require; and (ii) provide the Superintendent with such information as the Superintendent may require.

67 To the extent that Directive 10 deals with administration of the Act (for example, the requirement that the trustee file an attestation to show a redemption), it is within the general scope of the authority given by the Act to the Superintendent.

68 Directive 10 states that it is aimed at establishing the circumstances in which trustees will be viewed as acting in a double capacity and the circumstances in which they will be considered to be making a redemption of security. Also, it is intended to establish situations where the levy prescribed by s. 147 of the Act will be payable on amounts paid to

secured creditors, and to establish the procedure to be followed by trustees in presenting a redemption in the statement of receipts and disbursements.

69 In my view, these matters go beyond simple administration of the Act. However, they fall within the broader directive-making authority granted to the Superintendent under s. 5(4)(c) of the *BIA* to facilitate the carrying out of the purposes and provisions of the Act and the General Rules by trustees. Under s. 128(3) of the Act, trustees have the power to redeem security. Pursuant to s. 147(2), they are required to deduct levy from payments made "by way of dividend or otherwise on account of the claims of creditors."

70 Superintendent's directives have been said to serve the purpose of providing trustees and the insolvency community with direction as to how the *BIA* should be interpreted and applied so there will be consistency across Canada. [50]

71 However, the *BIA*, unlike the legislation at issue in *Skyline*, does not give the Superintendent deeming authority with respect to the relevant provisions of the Act. The Superintendent is not entitled to deem that a trustee is acting as trustee of the bankrupt estate rather than as an agent, to deem that a redemption has or has not occurred, or to deem that levy is owing. Directives issued by the Superintendent are meant to assist in administration of or to facilitate the carrying out of the provisions of the *BIA* as properly interpreted.

72 While the Superintendent may be required to interpret the Act in the course of developing directives, if he prefers one line of conflicting case authority over another, he must be correct. Similarly, if the Superintendent interprets a provision of the Act that has not been interpreted by the Courts, he must be correct. In other words, the Superintendent's interpretations must reflect the law. They cannot make or alter it.

73 *Dondale, Re*, [51] a decision by Burnyeat J. of the British Columbia Supreme Court, does not specifically address the *vires* of a Superintendent's directive, but nevertheless it is instructive as it dealt with a requirement by the Superintendent that trustees follow a process that favoured one of two lines of conflicting case authority. The dispute in that case focused on whether a proposal administrator could extend the time for the making of payments under a consumer proposal by a provision in the proposal suspending the operation of s. 66.31 of the *BIA*, which deems the proposal annulled if the debtor is in default of three months of payments.

74 Similar provisions in consumer proposals had been dealt with differently by two Registrars; *Williams, Re* [52] authorized suspension of the operation of s. 66.31, but *Sztojka, Re* [53] did not. By means of a "Position Statement," the Superintendent directed all trustees and administrators that the *Sztojka, Re* approach was to be preferred. Later, the Superintendent amended Form 47 by way of directive in order to reflect the decision in *Sztojka, Re*.

75 Burnyeat J. ruled in *Dondale, Re* that the Superintendent could not dictate the terms of a proposal, stating that: [54]

> Fourth, it was the submission on behalf of the Superintendent that one of the functions of the Superintendent is to oversee compliance with the *Act* and to oppose the approval of proposals or, in this case, consumer proposals, that do not comply with the *Act*. That is not a duty which is imposed on the Superintendent of Bankruptcy under s. 5 of the *Act* or on Official Receivers pursuant to s. 12 of the *Act*. Rather, it is up to the Court to see that proposals and consumer proposals comply with the *Act* when requested to do so pursuant to s. 66.24 of the *Act*. Accordingly, while the Superintendent may intervene where the Superintendent "considers it expedient to do so" (s. 5(4)(a) of the *Act*) and while the Court must take into account submissions made by the Official Receiver (pursuant to s. 66.24(1) of the *Act*), it is up to the Court to decide whether there has been compliance with the *Act*.

76 Burnyeat J. concluded that the effect of the Superintendent's actions was to ignore the clear effect and direction of one line of authority. He noted that in *Williams, Re*, Master Baker observed that while the Superintendent's direction was apparently meant as a temporary solution to address possible inequities created by s. 66.31, it was "hard to see how such a directive and consequent Certificate could withstand a challenge by, say, a creditor." [55]

77 *Dondale, Re* is under appeal by the OSB, which urges that it is both distinguishable and wrong. I agree that it is distinguishable on its facts, but it does provides insight into the Superintendent's right to chose one interpretation of the *BIA* over another in the face of conflicting law.

78 The topics dealt with in Directive 10 are of interest not only to trustees but also to secured creditors. However, it is apparent that Directive 10 is aimed only at trustees and bankruptcy officers. Section 5(5) of the *BIA* provides that: "Every person to whom a Superintendent's directive is issued under paragraph (4)(b) or (c) is obliged to comply with the directive in the manner and within the time specified therein." Trustees are bound by the Directive if it is *intra vires*. As the Superintendent's interpretation of the Act in Directive 10 has the potential to effect secured creditors, that interpretation must be right.

79 In my view, Directive 10 is *intra vires* the Superintendent's powers only to the extent that it is consistent with and properly interprets the *BIA*. If it does not, the Superintendent has exceeded his authority in issuing the directive and it is *ultra vires*. [56]

80 Certain cases have held that the courts are not bound by Superintendent's directives, although regard may be given to them. [57] Whether that conclusion is accurate depends on the *vires* and legal effect of the directive. If it is *intra vires* and was meant to have legal effect, the Court must give effect to the directive just as it would to a statute or regulation.

81 In an annotation to *Clements, Re*, [58] the late C.W. Morawetz Q.C. posited that a Registrar in Bankruptcy could not be bound by a directive issued by the Superintendent unless the directive was strictly in accordance with the then *Bankruptcy Act* or *Bankruptcy Rules*, observing that: "After all, although a 'directive' might be persuasive, it is neither a statute nor a rule or regulation." This observation preceded the 1992 amendments to the *BIA*, which included the Superintendent's express power to make directives (ss.5(4)(b) and (c)), the duty of trustees to comply with those directives (ss.5(5)) and 5(6), and deeming of such directives not to be statutory instruments within the meaning and for the purposes of the *Statutory Instruments Act*, R.S.C. 1985, c. S-22.6.

82 In *Sheriff v. Canada (Attorney General)*, [59] the Federal Court of Appeal considered a Superintendent's directive entitled "Disciplinary Process under sections 14.01 and 14.02 of the Act" in the context of the Superintendent's investigation into the conduct of a trustee, saying (without analysis as to why) this about the directive:

> The Superintendent's Directive describes the procedure to be followed by the OSB in examining the conduct of a trustee which may lead to disciplinary measures involving his or her license. While such directives do not have the force of an act or regulation, they can be used to provide legal context and inform decisions.

83 In *Ryan, Re*, [60] the Superintendent sought a strict interpretation of Directive 12. The New Brunswick Court of Queen's Bench concluded:

> ...In 1992, ss. 5(4)(b) and (c) and ss. 5(5) and 5(6) were added to the *Act*. These amendments give statutory authority to the Directives issued by the Superintendent. If one accepts that a Directive has statutory authority, the Superintendent does not have the competence to waive its application in a specific case unless this power is conferred in the Act, which it is not.

84 In *Bankruptcy and Insolvency Law of Canada*, [61] the authors comment:

> In 1992, ss. 5(4)(b) and (c) and ss. 5(5) and 5(6) were added to the Act. These amendments give statutory authority to the directives issued by the Superintendent. The directives are not statutory instruments so they do not have to be published. If a trustee fails without reasonable excuse to comply with a directive of the Superintendent, the trustee will be liable to have his or her licence suspended or cancelled under s. 14.01(1).

85 Directive 10 is deemed not to be a statutory instrument within the meaning and for the purposes of the *Statutory Instruments Act*, which provides in part:

2(1) In this Act,

"prescribed" means prescribed by regulations made pursuant to this Act;

"regulation" means a statutory instrument

(a) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(b) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament;

"statutory instrument"

(a) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates, or

. . .

but

(b) does not include

. . .

(ii) any instrument referred to in paragraph (a) and issued, made or established by a judicial or quasi-judicial body, unless the instrument is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament.

86 Superintendent's directives are directions made in the execution of a power conferred by or under the *BIA*, which expressly authorizes issuance of directives by the Superintendent. Accordingly, directives appear to fit the definition of "statutory instrument" in the *Statutory Instruments Act*. Pursuant to s. 14.01(12) of the *BIA*, contravention of a directive by a trustee exposes the trustee to possible disciplinary action, including cancellation of the trustee's licence. This can be viewed as a penalty prescribed by an Act of Parliament. Directive 10 appears to have been issued in the exercise of a legislative power conferred by the Act. As a result, it appears to fit the definition of "regulation." However, the *BIA* expressly provides that it is not a statutory instrument for the purpose of the *Statutory Instruments Act*, leading to two possible interpretations:

(a) it is not a statutory instrument (and hence a legislative act with legal effect), despite the fact it facially meets the *Statutory Instruments Act* definition of such; or

(b) it is and all that s. 5(6) means is that it need not be promulgated in accordance with the *Statutory Instruments Act*.

