

COURT FILE NUMBER 1703 12327

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

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. and 1371047 ALBERTA LTD.

DOCUMENT **APPLICANTS' BENCH BRIEF FOR FIRST EXTENSION
APPLICATION**

ADDRESS FOR SERVICE AND CONTACT
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A. INTRODUCTION

1. On July 5, 2017, the Honourable K.G. Nielson granted an Initial Order under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**") in favour of Canada North Group Inc. ("**Canada Group**"), Canada North Camps Inc. ("**CNC**"), Campcorp Structures Ltd. ("**Campcorp**"), D.J. Catering Ltd. ("**DJ**"), 816956 Alberta Ltd. ("**816956**"), 1371047 Alberta Ltd. ("**1371047**"), (Canada Group, CNC, Campcorp, 816956 and 1371047, collectively, the "**CCAA Parties**").
2. An application by Canadian Western Bank ("**CWB**") to appoint a Receiver over the CCAA Parties was heard simultaneously and dismissed.
3. The CCAA application was done on notice to the secured creditors of the CCAA Parties, as is this extension application.
4. By granting an Initial Order instead of a Receivership Order, the CCAA Parties have been able to continue to operate, generate revenue, maintain employment and provide vital services to Alberta and British Columbia.
5. The overriding purpose of the CCAA is artfully articulated by Justice Deschamps writing for the majority of the Supreme Court of Canada in *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at paras 15 - 18 [Tab 1]:

As I will discuss at greater length below, the purpose of the CCAA — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the BIA serve the same remedial purpose, though this is achieved through a rules based mechanism that offers less flexibility.

Prior to the enactment of the CCAA in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The CCAA was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

Parliament understood when adopting the CCAA that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

Early commentary and jurisprudence also endorsed the CCAA's remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from

liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement

Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

6. Consistent with the overriding purpose of the CCAA, the Initial Order has started a process that will allow the CCAA Parties to maximize the return for creditors and preserve the value of the business as a going concern.
7. The maximum time for an initial stay under the CCAA is thirty days. Given the timing of the extension application and the time to file materials, the materials in support of the extension application are being prepared two short weeks since the Initial Order was granted.
8. The CCAA Parties, along with 1919209 Alberta Ltd. ("**1919209**"), seek an Order providing for:
 - (a) An extension of the stay of proceedings granted in the Initial Order to November 3, 2017 or such other date as deemed appropriate by the Court ;
 - (b) Adding 1919209 as an Applicant to these CCAA proceedings and having the terms of the Initial Order apply to it as if it was included in the definition of "Applicant" as defined in the Initial Order, from and after the date it is added;
 - (c) Expanding the stay of proceedings to include:
 - (i) all proceedings against Heart Lake CNC Limited Partnership, Heart Lake Group GP Ltd., Wandering River Properties Ltd., and Canada North Group LP Holdings Ltd. (collectively, the "**Third Parties**"); and
 - (ii) Court of Queen's Bench Action No. 1603 19168 brought by Max Fuel Distributors Ltd. as against Shayne McCracken.
9. The requested relief will allow the CCAA Parties to continue to work with the Monitor and the CRO to the ultimate end of presenting a viable Plan of Arrangement to the creditors.

B. EXTENSION OF STAY OF PROCEEDINGS

10. The extension should be granted as the CCAA Parties have acted in good faith and with due diligence. Further, the circumstances make an extension order appropriate.

11. S. 11.02(2) of the CCAA provides the jurisdiction for the Court to extend an Initial Application:

Stays, etc. — other than initial application

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

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

12. S. 11.02(3) of the CCAA further provides the test for an extension:

Burden of proof on application

The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Appropriate Circumstance

- 13. The causes of the insolvency and the financial circumstances of the CCAA Parties were thoroughly canvassed at the Initial Application.
- 14. Those same circumstances continue. The CCAA Parties are fundamentally viable businesses caught in an industry downturn caused by the 2014 collapse of oil prices that has created a liquidity crisis and potentially unsustainable debt burden.
- 15. On an operational analysis, particularly given the increased work arising from the unfortunate BC fires, the operations of the CCAA Parties are better than initially projected. The forecast for the fall remains positive.
- 16. The positive financial performance of the CCAA Parties makes the extension appropriate:

See, for example *ScoZinc Ltd., Re*, 2009 NSSC 108 at para. 10 and 12 [Tab 2]

17. The CCAA Parties have advised that they are pursuing a variety of sales and investment options and processes to maximize value and recovery for the creditors.
18. Granting the extension will advance the purposes of the CCAA in providing the necessary breathing space to allow the CCAA Parties to restructure:

A number of decisions have considered whether "circumstances exist that make the order appropriate". In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), the Court emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the CCAA. Justice Deschamps stated at para. 70:

... Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs.

When granting an extension, it is a prerequisite for the petitioner to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the CCAA. The debtor company must show that it has at least "a kernel of a plan": *Azure Dynamics Corp., Re*, 2012 BCSC 781 (B.C. S.C. [In Chambers]).

North American Tungsten Corp., Re, 2015 CarswellBC 2232 at paras 25 - 26 [Tab 3]

19. The preliminary plan of the CCAA Parties remains to return operations to profitability given the returned demand, consider sale of some of the assets of the CCAA Parties, and seek new financing or equity investment as required to provide a viable Plan of Arrangement.

Good Faith

20. The CCAA Parties have and continue to act in good faith.
21. Canadian Western Bank ("CWB") takes issue with the margining of the Grand Rapids' Receivables (as defined in the Second Affidavit of Shayne McCracken).
22. The CCAA Parties have explained that the Grand Rapids' Receivables were treated in the ordinary course of the business of the CCAA Parties and margined as provided for in the Credit Agreement with CWB.
23. The CCAA Parties have acted honestly and in a commercially reasonable manner with CWB. There is certainly no evidence to suggest otherwise.
24. The CCAA Parties clearly meet the definition of good faith set out by The Honourable Justice J.E. Topolniski in *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 [Tab 4] ("*San Francisco*") at paras. 14 - 16:

The term "good faith" is not defined in the CCAA and there is a paucity of judicial consideration about its meaning in the context of stay extension applications. The opposing landlords on this application rely on the following definition of "good faith" found in *Black's Law Dictionary* to support the proposition that good faith encompasses general commercial fairness and honesty:

A state of mind consisting of: (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealings in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage. 9 [Emphasis added]

"Good faith" is defined as "honesty of intention" in the *Concise Oxford Dictionary*.

Regardless of which definition is used, honesty is at the core.

25. Further, the good faith test under the CCAA is properly limited to good faith in the CCAA proceedings - not all prior conduct with creditors:

While "good faith" in the context of stay applications is generally focused on the debtor's dealings with stakeholders, concern for the broader public interest mandates that a stay not be granted if the result will be to condone wrongdoing.

Although there is a possibility that a debtor company's business practices will be so offensive as to warrant refusal of a stay extension on public policy grounds, this is not such a case. Clearly, San Francisco's sale of knockoff goods was illegal and offensive. Most troubling was its sale to an unwitting public of goods bearing counterfeit safety labels. Allowing the stay to continue in this case is not to minimize the repugnant nature of San Francisco's conduct. However, the company has been condemned for its illegal conduct in the appropriate forum and punishment levied. Denying the stay extension application would be an additional form of punishment. Of greater concern is the effect that it would have on San Francisco's creditors, particularly the unsecured creditors, who would be denied their right to vote on the plan and whatever chance they might have for a small financial recovery, one which they, for the most part, patiently await.

San Francisco has met the prerequisites that it has acted and is acting with due diligence and in good faith in working towards presenting a plan of arrangement to its creditors.

San Francisco, ibid, at paras. 30 - 32

Due Diligence

26. In the short two weeks since the Initial Order was granted, the CCAA Parties have made material progress.
27. In a complex restructuring like the one at hand, there is an initial period where the CRO and Monitor need to first understand the business and structure in order for the later steps in the restructuring to proceed effectively.

28. As detailed in Shayne McCracken's Second Affidavit, those initial steps are well underway.
29. Further, unsolicited investment and purchase interest has also arisen, which the CCAA Parties, in conjunction with the Monitor and the CRO are pursuing.
30. The efforts of the CCAA Parties to date certainly meet the requirement of due diligence.

C. ADDING 1919209 ALBERTA LTD. AS AN APPLICANT

31. On gaining a better understanding of the role of 1919209, the CCAA Parties now seek to have 1919209 added as an applicant.
32. As 1919209 Alberta Ltd., is an affiliated company with two of the current applicants, there is also no question that the Court has jurisdiction to add it as an applicant.
33. In the recent case of *Guestlogix Inc. (Re)*, 2016 ONSC 1348, Morawetz J. [TAB 5] added a guarantor of the debtor company that was subject to a CCAA proceeding.
34. Justice Morawetz noted the guarantor was insolvent and in default of its obligations, the guarantor was highly integrated with the debtor company, and, that by including the guarantor, the debtor company would be able to include all the assets of the guarantor in a potential transaction.
35. Justice Morawetz found it appropriate to grant the guarantor protection under the CCAA and include it in the CCAA proceedings.
36. In the circumstances of 1919209, its operations are inextricably linked to those of the CCAA Parties:
 - (a) 1919209 leases equipment for the purpose of providing such equipment to CNC; and
 - (b) This equipment is important to the operations of CNC.
37. Therefore, in order to provide an effective restructuring plan of the CCAA Parties, 1919209 ought to be included as an applicant.

D. STAYING PROCEEDINGS AGAINST THIRD PARTIES

38. The CCAA Parties seek the expanded stay against the Third Parties as a practical way to deal with the complex corporate structure of the CCAA Parties and the interrelated claims and operations.
39. As set out in the Second Affidavit of Shayne McCracken, each of the Third Parties is facing claims arising from the camp business of the CCAA Parties and none of Third Parties are presently actively carrying on new business.
40. Accordingly, it is just and equitable to expand the stay without the additional complexity and challenges of adding these Third Parties as applicants.

41. The stay in respect of the Max Fuel Distributors Ltd. action as against Shayne McCracken is just and equitable as it is consistent with the Initial Order providing a stay in respect of collateral enforcement of claims arising from the CCAA Parties against Shayne McCracken.
42. A practical, flexible approach to CCAA proceedings is encouraged by the Courts:

Thus in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) at para. 21, the Supreme Court of Canada described the CCAA regime as a flexible, judicially supervised reorganization process that allows for creative and effective decisions. It noted that with reorganizations becoming increasingly complex:

[61] ...CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

...

[70] ... Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company.

Lemare Holdings Ltd., Re, 2012 BCSC 1591 [TAB 6]

43. The requested expansion of the stay of proceedings is consistent with the fundamental insolvency principal that claims in an insolvency situation should be dealt with in a single orderly process instead of a first in time free for all:

While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against

the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the CCAA and the BIA allow a court to order all actions against a debtor to be stayed while a compromise is sought.

Ted Leroy Trucking, supra. at para. 22 [Tab 1]

44. The Court has inherent jurisdiction to grant stays of proceedings.
45. As acknowledged by Justice Romaine in *Calpine Canada Energy Ltd., Re* 2006 ABQB 153, 2006 CarswellAlta 446 at para. 33 [TAB 7], though the CCAA does not explicitly provide the power to stay proceedings against noncorporate entities, the Court has the inherent jurisdiction to grant a stay of proceedings where it is just and convenient to do so.

E. ALLOCATION

46. Some of the secured creditors have raised concerns about how the concerns with respect to the Administration Charge, Interim Financing Charge, and Directors' Charge (as defined in the Initial Order) (collectively referred to as the "Charges") will be allocated among the assets.
47. The Initial Order, at paragraph 47, provides that any interested party may apply for an order allocating the Charges among the various assets of the CCAA Parties.
48. The caselaw is consistent that the Court has broad and equitable jurisdiction to determine appropriate allocation of the Charges among the assets: See *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 2001 CarswellAlta 1636 [*Hunters*] [TAB 8] where Chief Justice Wachowich states at para 15:

Equity informs the decisions made by courts in the exercise of their jurisdiction under the CCAA. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the CCAA costs. That is not to say that equity calls for an equal allocation of costs.

...

... it is equitable rather than equal treatment which is the objective in CCAA proceedings.

49. What is equitable is to be determined on the facts of each individual case, and, as acknowledged by Wachowich C.J., equitable is not necessarily equal..
50. In *Winnipeg Motor Express Inc., Re*, 2009 MBQB 204, 2009 CarswellMan 383 [TAB 9], Justice Suche provides the following further comments on allocation of charges under the CCAA at para 41:

I turn, then, to the question of principles of allocation of Court Ordered Charges under the CCAA. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 305 A.R. 175 (Alta. Q.B.). While it is unfair to ignore the degree of

potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the CCAA make a strict accounting on a cost benefit basis impractical and ultimately defeating. It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.

51. Justice Such further states at paragraph 48:

I agree with the view expressed in *Hunjan International Inc., Re* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.), that where the allocation is *prima facie* fair, the onus is on an objecting creditor to demonstrate that the proposal is unfair or prejudicial. The monitor, after all, is both court appointed and is intimately familiar with the details of the restructuring, including the particular costs incurred and what has transpired within the company's business operations during the restructuring period.

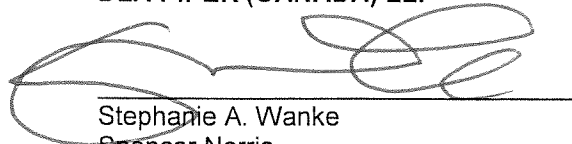
52. Accordingly, the following principles apply:

- (a) All assets of the applicants under the CCAA proceedings should be subject to the Charges;
- (b) Allocation should be determined at a later date when the benefit of the CCAA proceedings to the various classes of creditors can be determined.

53. The CCAA Parties respectfully submit that the first extension and related relief sought are appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th DAY OF JULY, 2017.

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1371047 Alberta Ltd. and 1919209 Alberta Ltd.

Table of Authorities

1. *Ted Leroy Truckign [Century Services] Ltd., Re*, 2010 SCC 60, 2010 CarswellBC 3419.
2. *ScoZinc Ltd., Re*, 2009 NSSC 108, 2009 NSSC 108.
3. *North American Tungsten Corp., Re*, 2015 BCSC 1376, 2015 CarswellBC 2232.
4. *San Francisco Gifts Ltd., Re*, 2005 ABQB 91, 2005 CarswellAlta 174.
5. *Guestlogix Inc. (Re)*, 2016 ONSC 1348, 2016 CarswellOnt 3323.
6. *Lemare Holdings Ltd.*, 2012 BCSC 1591, 2012 CarswellBC 3294.
7. *Calpine Canada Energy Ltd., Re* 2006 ABQB 153, 2006 CarswellAlta 446.
8. *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 2001 Carswell 1636.
9. *Winnipeg Motor Express Inc., Re*, 2009 MBQB 204, 2009 CarswellMan 383.

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010]
G.S.T.C. 186, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12
B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296
B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

**Century Services Inc. (Appellant) and Attorney General of Canada on
behalf of Her Majesty The Queen in Right of Canada (Respondent)**

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA
205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.);
reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C.
2011 (Eng.) (B.C. S.C. [In Chambers])

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Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Headnote

Tax — Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyait que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal

— Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative

context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation

témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la préséance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

Table of Authorities

Cases considered by *Deschamps J.*:

Air Canada, Re (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]) — referred to

Air Canada, Re (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) — referred to

Alternative granite & marbre inc., Re (2009), (sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny*) 2009 G.T.C. 2036 (Eng.), (sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*) [2009] 3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, (sub nom. *9083-4185 Québec Inc. (Bankrupt), Re*) 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re (2000), 2000 CarswellOnt 3269, 19 C.B.R. (4th) 158 (Ont. S.C.J.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City)*) [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville)*) 215 N.R. 81, (sub nom. *Doré v. Verdun (City)*) 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — distinguished

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. *Minister of National Revenue v. First Vancouver Finance*) 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance*) 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Gauntlet Energy Corp., Re (2003), 30 Alta. L.R. (4th) 192, 2003 ABQB 894, 2003 CarswellAlta 1735, [2003] G.S.T.C. 193, 49 C.B.R. (4th) 213, [2004] 10 W.W.R. 180, 352 A.R. 28 (Alta. Q.B.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Komunik Corp., Re (2010), 2010 CarswellQue 686, 2010 QCCA 183 (C.A. Que.) — referred to

Komunik Corp., Re (2009), 2009 QCCS 6332, 2009 CarswellQue 13962 (C.S. Que.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282 (Ont. C.A.) — considered

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142, 1992 CarswellBC 542 (B.C. C.A.) — referred to

Quebec (Deputy Minister of Revenue) c. Rainville (1979), (sub nom. *Bourgeault, Re*) 33 C.B.R. (N.S.) 301, (sub nom. *Bourgeault's Estate v. Quebec (Deputy Minister of Revenue)*) 30 N.R. 24, (sub nom. *Bourgeault, Re*) 105 D.L.R. (3d) 270, 1979 CarswellQue 165, 1979 CarswellQue 266, (sub nom. *Quebec (Deputy Minister of Revenue) v. Bourgeault (Trustee of)*) [1980] 1 S.C.R. 35 (S.C.C.) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, (sub nom. *R. v. Royal Bank*) 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) — considered

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Skydome Corp., Re (1998), 16 C.B.R. (4th) 118, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]) — referred to

Solid Resources Ltd., Re (2002), [2003] G.S.T.C. 21, 2002 CarswellAlta 1699, 40 C.B.R. (4th) 219 (Alta. Q.B.) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — referred to

Cases considered by *Fish J.*:

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Cases considered by *Abella J.* (dissenting):

Canada (Attorney General) v. Canada (Public Service Staff Relations Board) (1977), [1977] 2 F.C. 663, 14 N.R. 257, 74 D.L.R. (3d) 307, 1977 CarswellNat 62, 1977 CarswellNat 62F (Fed. C.A.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City)*) [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville)*) 215 N.R. 81, (sub nom. *Doré v. Verdun (City)*) 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — referred to

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — considered

R. v. Tele-Mobile Co. (2008), 2008 CarswellOnt 1588, 2008 CarswellOnt 1589, 2008 SCC 12, (sub nom. *Tele-Mobile Co. v. Ontario*) 372 N.R. 157, 55 C.R. (6th) 1, (sub nom. *Ontario v. Tele-Mobile Co.*) 229 C.C.C. (3d) 417, (sub nom. *Tele-Mobile Co. v. Ontario*) 235 O.A.C. 369, (sub nom. *Tele-Mobile Co. v. Ontario*) [2008] 1 S.C.R. 305, (sub nom. *R. v. Tele-Mobile Company (Telus Mobility)*) 92 O.R. (3d) 478 (note), (sub nom. *Ontario v. Tele-Mobile Co.*) 291 D.L.R. (4th) 193 (S.C.C.) — considered

Statutes considered by *Deschamps J.*:

Bank Act, S.C. 1991, c. 46

Generally — referred to

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

Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [cn. 1992, c. 27, s. 38(1)] — considered

s. 81.2 [cn. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27

Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23(3) — referred to

s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19

en général — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 2930 — referred to

Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3

Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.09 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — referred to

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Fairness for the Self-Employed Act, S.C. 2009, c. 33

Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

Interpretation Act, R.S.C. 1985, c. I-21

s. 44(f) — considered

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30

Generally — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

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

Generally — referred to

s. 67(2) — considered

s. 67(3) — considered

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23 — considered

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

Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

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

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Interpretation Act, R.S.C. 1985, c. I-21

s. 2(1)"enactment" — considered

s. 44(f) — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

Deschamps J.:

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("*GST*") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of *GST*. The deemed trust extends to any property or proceeds held by the person collecting *GST* and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions *GST*, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of *GST*. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for *GST* claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding \$5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the *GST* monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of \$305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing \$1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of \$5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law* 2005 (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an

unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*...

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

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

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

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating

a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdon (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), was held to have repealed a more specific provision of the earlier *Quebec Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this

one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of *CCAA* law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), *aff'd* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases

simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer

one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in

bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

Fish J. (concurring):

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

227 (4) Trust for moneys deducted — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Extension of trust — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

- (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break

the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

Abella J. (dissenting):

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11¹ of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

222 (3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

18.3 (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision.

I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoc J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

[T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,² s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

...

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37.(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(f) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (i);

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

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

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

- (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

- (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
- (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

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

- (i) the expiration of the order,
- (ii) the refusal of a proposed compromise by the creditors or the court,
- (iii) six months following the court sanction of a compromise or arrangement,
- (iv) the default by the company on any term of a compromise or arrangement, or
- (v) the performance of a compromise or arrangement in respect of the company; and\

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

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

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

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

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

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

...

20. [Act to be applied conjointly with other Acts] — 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.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

...

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

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

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

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

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

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) Burden of proof on application — The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

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

- (i) the expiry of the order,
- (ii) the refusal of a proposed compromise by the creditors or the court,
- (iii) six months following the court sanction of a compromise or an arrangement,
- (iv) the default by the company on any term of a compromise or an arrangement, or
- (v) the performance of a compromise or an arrangement in respect of the company; and

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

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

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

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

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

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

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

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

Pension Plan, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole

purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

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

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

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

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

Footnotes

¹ Section 11 was amended, effective September 18, 2009, and now states:

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.

2 The amendments did not come into force until September 18, 2009.

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2009 NSSC 108
Nova Scotia Supreme Court

ScoZinc Ltd., Re

2009 CarswellNS 177, 2009 NSSC 108, 176 A.C.W.S. (3d) 25, 276 N.S.R. (2d) 1, 52 C.B.R. (5th) 200, 880 A.P.R. 1

**IN THE MATTER OF The Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, as amended**

AND IN THE MATTER OF A Plan of Compromise or Arrangement of ScoZinc Limited (Applicant)

D.R. Beveridge J.

Heard: March 20, 2009

Judgment: March 20, 2009

Written reasons: April 6, 2009

Docket: Hfx. 305549

Counsel: Mr. John G. Stringer, Q.C., Mr. Ben R. Durnford for Applicant

Mr. Robert MacKeigan, Q.C. for Mr. Grant Thorton

Mr. Graham Lindfield for Komatsu

Mr. Robert Carruthers for Molnar Welding

Subject: Insolvency; Contracts; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Proposal --- Companies' Creditors Arrangement Act --- Arrangements --- Effect of arrangement --- Stay of proceedings

Unforeseen collapse in commodity prices for lead and zinc caused debtor company to seek protection under Companies' Creditors Arrangement Act ("CCAA") — Debtor company was granted initial stay — Debtor company brought motion to extend stay order and to relieve company from service of motion on certain creditors — Motion granted — Jurisdiction to extend stay of proceedings was set out in s. 11(4) of CCAA — All creditors were given notice as required and made aware of initial stay order by individual mailings, publication in paper and on monitor's website — There were three preconditions for stay: that it was appropriate in circumstances, that applicant acted in good faith and that applicant acted with due diligence — Evidence clearly established that debtor company met test for stay — Debtor company secured commitment with view of financing preparation of plan of arrangement and which better secured company's ability to fulfil terms of plan of arrangement — Monitor's report demonstrated commitment by debtor company to properly secure and stabilize mine assets.

MOTION by debtor company to extend stay order and to relieve company from service of motion on certain creditors.

D.R. Beveridge J. (orally):

I have before me today a motion to accomplish two things. The first to extend the initial stay order granted by me on December 22, 2008 [*ScoZinc Ltd., Re*, 2008 CarswellNS 743 (N.S. S.C.)]. On January 20, I extended the stay by 60 days to March 20, 2009. The second is to relieve the company from service of the motion on creditors except those asserting claims against ScoZinc in excess of \$100,000 and those asserting a lien under the *Builders' Lien Act*.

2 The background to the company's initial stay application is set out in two earlier decisions by me. I will not review in any detail that background information other than to note that it was the unforeseen, and unfortuitous collapse in commodity prices for lead and zinc that caused the company to seek protection under the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36.

3 The jurisdiction of this court to extend the stay of proceedings is set out in Section 11(4) of the *CCAA*, which provides:

A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

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

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

4 The discretion by the court is not unfettered. Section 11(6) of the *CCAA* limits the court's ability to extend a stay. It provides:

The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

5 Glennie, J., in *Cansugar Inc., Re*, 2004 NBQB 7 (N.B. Q.B.) adopted with approval the test set out by Houlden & Morawetz in *The 2004 Annotated Bankruptcy & Insolvency Act* on what is required to satisfy Sections 11(4) and (6) of the *CCAA*. The test set out by those authors is as follows:

To obtain an extension, the application must establish three pre-conditions:

(a) the circumstances exist that make the order appropriate;

(b) that the applicant has acted and continues to act in good faith; and

(c) that the applicant has acted and continues to act with due diligence.

6 In relation to the general approach to extensions one must have regard to the overall purpose of the *CCAA*. This can be found in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) where Justice Farley wrote at p.31:

The *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the *CCAA*.

7 These principles were reviewed and approved by MacAdam, J. of this court in *Federal Gypsum Co., Re*, 2007 NSSC 347 (N.S. S.C.).

8 I am satisfied here that all creditors have been given notice as required. In addition, I would doubt that not only creditors other than those with claims in excess of \$100,000 and under the *Builders' Lien Act*, have been made aware of the initial stay order by individual mailings, publication in the *Chronicle Herald*, and on the monitor's website.

9 The initial stay order provides that any creditor who wishes to be heard can do so on two-day's notice. Some creditors have appeared today. They do not oppose the application for a further extension of the stay.

10 In my opinion, the evidence clearly demonstrates that the test that I have set out above is met. I note that, although the actual revenues and expenses experienced by ScoZinc since the grant of the initial stay are at variance with the budgeted revenue and expenses, in my opinion, that variance is not attributable to any mismanagement or fault of the company.

11 Mr. Daniel Rozon of Grant Thornton has filed his fourth report dated March 19, 2009. In his report he indicates that in fact final costs will be close to budget for the period under review, but that revenue receipts were substantially lower due to ongoing production problems and price decreases on final settlements. The forecast expenses and revenues for the upcoming period will suffer accordingly, but appear to still be within tolerances permitted by the available DIP financing.

12 The evidence before me also demonstrates that there has been at least a tentative rebound on commodity prices which may bode well for the future.

13 Even more significant for the proceedings under the *CCAA* is the recent agreement with Golden River. Not all of the specific details are yet available, but it is clear that Acadian Mining and ScoZinc efforts have secured what appears to be a significant commitment with a view to financing the preparation of a plan of arrangement and to better secure the company's ability to fulfil the terms of any such final plan of arrangement.

14 In the view of the monitor, this agreement, if allowed to be completed and is completed, would permit ScoZinc to present a satisfactory plan of arrangement to its creditors. The claims process is well underway with the deadline having passed on March 16, 2009. Approximately \$5.5 million worth of secured creditors have asserted claims, and \$28 million for unsecured creditors. Only forty known creditors did not present a claim. Those forty only represent a total aggregate value of \$194,000.

15 Mr. Felderhof's affidavit and the monitor's report demonstrate a commitment by ScoZinc to properly securing and stabilizing the mine assets and minimizing the environmental concerns that are obviously in need of addressing.

16 The monitor in his report writes:

Since the date of the Second Order, ScoZinc's management has worked diligently to continue operations of the mine and mill site, has worked to secure an investment to address concerns of the stakeholders as well as commenced the North Wall stabilization project for the purpose of securing the mine assets. Consequently, it is the Monitor's opinion that the Company has acted and is acting in good faith and with due diligence and that the proposed extension to the Stay Termination Date is appropriate and in the best interest of its stakeholders.

17 I have no hesitation in concluding that the test for an extension of the stay has been met. The order is granted.

Motion granted.

2015 BCSC 1376
British Columbia Supreme Court

North American Tungsten Corp., Re

2015 CarswellBC 2232, 2015 BCSC 1376, [2015] B.C.W.L.D. 6686, [2015] B.C.W.L.D. 6687, 256 A.C.W.S. (3d) 767

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of North American Tungsten Corporation Ltd. Petitioner

Butler J., In Chambers

Heard: July 8, 2015

Judgment: July 9, 2015

Docket: Vancouver S154746

Counsel: John R. Sandrelli, Jordan D. Schultz, for Petitioner

Kibben M. Jackson, for Monitor, Alvarex & Marsal Canada Inc.

William E.J. Skelly, for Callidus Capital Corporation

Mary Buttery, H. Lance Williams, for Government of Northwest Territories

Jonathan McLean, Angela L. Crimeni, for Wolfram Bergbau and Hütten AG, Global Tungsten & Powders Corp.

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Debtor company was involved in exploration, development, mining and processing of tungsten and other minerals — World market for tungsten was depressed — Debtor sought protection under Companies' Creditors Arrangement Act — At time of initial order, debtor had significant cash flow problems — Debtor applied for extension of stay of proceedings granted in initial order, and for approval of interim financing — Applications granted — Extension of stay was appropriate.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Debtor company was involved in exploration, development, mining and processing of tungsten and other minerals — World market for tungsten was depressed — Debtor sought protection under Companies' Creditors Arrangement Act — At time of initial order, petitioner had significant cash flow problems — Debtor had extensive discussions with monitor and stakeholders to put in place potential Sale and Investment Solicitation Process (SISP), and arrived at agreement for interim financing which would be secured by debtor's property and take priority over all secured creditors — Debtor applied for extension of stay of proceedings, and for approval of interim financing — Applications granted — Interim financing approved — Operating plan debtor had implemented responded to cash flow problems and was intended to put debtor in position to enhance prospects of viable restructuring and/or future SISP — Interim financing would allow debtor to satisfy obligations along with its ongoing revenues from operations through to November 2015 — By that time SISP should be well underway and perhaps concluded.

Table of Authorities

Cases considered by *Butler J., In Chambers*:

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List])
— referred to

Azure Dynamics Corp., Re (2012), 2012 BCSC 781, 2012 CarswellBC 1545, 91 C.B.R. (5th) 310 (B.C. S.C. [In Chambers]) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — followed

Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — considered

Timminco Ltd., Re (2012), 2012 CarswellOnt 9633, 2012 ONCA 552, 2 C.B.R. (6th) 332 (Ont. C.A.) — followed

Statutes considered:

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

Generally — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(a) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(d) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(e) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(f) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(g) [en. 2007, c. 36, s. 65] — considered

APPLICATIONS by debtor company for extension of stay of proceedings, and for approval of interim financing.

Butler J., In Chambers:

1

THE COURT: This is my ruling on the applications I heard yesterday. The petitioner, North American Tungsten Corporation Ltd. (the "Company"), applies for an extension of the stay of proceedings which was granted in the initial order in this matter on June 9, 2015 (the "Initial Order"), and seeks approval for interim financing pursuant to s. 11.2 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

2 I will set out the background to this matter and the parties' positions. For the reasons that follow, I am approving the Company's application to extend the stay and approving the interim financing facility on the terms proposed as those were modified during the course of argument yesterday. As always, if a transcript of this ruling is ordered, I reserve the right to amend it, but only as to form, not substance.

Background

3 The Company is involved in the exploration, development, mining and processing of tungsten and other minerals. The main capital assets of the Company are the Cantung Mine located in the Northwest Territories and the Mactung property, an undeveloped exploration property located on the border of the Yukon Territory and the Northwest Territories. The Mactung property is one of the largest deposits of tungsten in the world. It has received approvals from the federal and Yukon governments to proceed to the next stage of development, but a very large capital investment will be required to construct a mine.

4 The Company sought protection under the *CCAA* as a result of circumstances mostly beyond its control, including a severely depressed world market for tungsten. At the reduced price the Company has been receiving for its tungsten, the Cantung Mine was generating sufficient cash flow to pay the majority of its operational and administrative costs but was unable to meet its financing costs. At the time of the Initial Order, the Company was experiencing significant cash flow problems.

5 Alvarez & Marsal Canada Inc. was appointed Monitor under the Initial Order. A summary of the amounts claimed as owing by secured creditors and their respective security interests as at July 7, 2015 is set out in the Monitor's Fourth report. I will refer to that summary because an understanding of the security interests held by the principal creditors is necessary to consider the issues raised on this application.

6 Callidus Capital Corporation is owed approximately \$13.33 million. This is secured by all present and after-acquired property not related to Mactung. That includes more than 200 pieces of mining equipment used at the Cantung Mine. The Monitor has opined that there is sufficient value in the equipment to satisfy that debt.

7 The Government of Northwest Territories ("GNWT") is owed \$24.67 million. This is secured by all present and after-acquired property related to Mactung. While there is some issue and ongoing negotiation about the actual amount of debt which arises from the Company's reclamation obligations, it is significant.

8 Global Tungsten & Powders Corp. ("GTP") and Wolfram Bergbau und Hütten AG ("WBH") are the Company's only two customers for all of the tungsten produced from the Cantung Mine. The total indebtedness to the customers is approximately \$8.16 million. They also hold security over all present and after-acquired property related to Mactung.

9 Debenture holders are owed \$13.58 million, which is secured by all present and after-acquired property of the Company.

10 Queenwood Capital Partners II LLC ("Queenwood II") is owed approximately \$18.51 million, secured by all present and after-acquired property of the Company. The principals of Queenwood II are related to Company insiders.

11 The total amount of the secured debt is in the range of \$80 million. There is also approximately \$14 million in unsecured liabilities. The reported book value of the assets at the time of the Initial Order was approximately \$64 million, which included a value of \$20 million for the Mactung property. The fair market value or realizable value has not been determined by the Monitor.

12 The somewhat unique situation here is that Callidus does not have security over the Mactung property and the GNWT and the customers do not have security over the Cantung property.

13 The stay granted by the Initial Order expired yesterday, but I extended it until July 10, 2015 to allow me to consider the arguments advanced on this application. Since the Initial Order, management of the Company has been working in good faith to develop a plan of arrangement. Management has developed an operating plan to manage cash flow through the next several months. I will not refer to the projected cash flow except to say that it anticipates receipt of the interim financing and continued revenues of more than \$22 million from operations.

14 The Company has been involved in extensive discussions with the Monitor and stakeholders to put in place a potential Sale and Investment Solicitation Process ("SISP"). To date the plan has involved re-focusing on surface mining and milling ore stockpiles rather than underground mining. Employees have been terminated. If the interim financing is obtained, the Company plans to continue operations at the mine until the end of October 2015, including management of environmental care. It plans to conduct an orderly wind down of underground mining activities, including a staged sale of equipment used in the underground work. It plans to reconfigure the mill facilities to facilitate tailings reprocessing so that it can use existing tailings stores as well as the surface extraction as a revenue source. It also plans to undertake limited expenditures on Cantung reclamation and Mactung environmental work with a view to increasing asset values. It hopes to seek court approval of a SISP in the next couple of weeks.

15 As a result of difficulties arising from timing of receipt of payments from GTP, one of the customers, the cash flow problems for the Company became critical within the last ten days. The Company sought interim financing and received an offer from a third party. Callidus was opposed to that offer of financing and the Company eventually obtained a \$500,000 loan from Callidus on June 29, 2015 on a short-term basis (the "Gap Advance"). They continued to negotiate and arrived at an agreement for interim financing (the "Interim Facility") and a forbearance agreement (the "Forbearance Agreement"). These form the basis for the application before this court. Terms of these agreements which are relevant to the application include:

- a) the \$500,000 Gap Advance would be deemed to be an advance under the Interim Facility;
- b) Callidus will advance an additional \$2.5 million, which along with the Gap Advance would be secured over all of the property of the Company and have priority over the secured creditors; and
- c) the Company will have to make repayments to Callidus by certain dates and those payments include payments of interest and principal on the existing loan facility (the "Post-Filing Payments").

16 At the hearing of the application, one of the more contentious issues was the Company's request that the court make the order in relation to the Gap Advance *nunc pro tunc*. This term was sought because s. 11.2(1) of the *CCAA* allows a court to make an order for interim financing but "The security or charge may not secure an obligation that exists before the order is made."

17 Of course the Gap Advance was an obligation which existed before the making of any order for interim financing. During the course of argument yesterday, the Company withdrew the application for a *nunc pro tunc* order in relation to the Gap Advance. This occurred because Callidus agreed to modify the terms of the Interim Facility such that the Gap Advance will be treated as an advance under its existing facility. In other words, the proposed Interim Facility is now for a \$2.5 million loan facility and not \$3.0 million, as set out in the application.

Position of the Company

18 The Company says that in all of the circumstances, proceeding with the Forbearance Agreement and the Interim Facility is better for the petitioner's restructuring efforts and necessary given the urgent need for funding. It stresses that without access to the interim financing, it will be unable to meet its ongoing payroll obligations or its negotiated payment terms for the post-filing obligations. It will be unable to continue restructuring and will likely face liquidation by its secured creditors. It also says there is greater value for all stakeholders if the Company is permitted to continue operating as a going concern. It says there would likely be no recovery for creditors other than the senior secured creditors without access to the Interim Facility. The local community of Watson Lake and local businesses would suffer significantly, as 100 employees would be out of work. Further, the Company says there is little prejudice to the secured creditors. In addition, it says if the mine site is abandoned, there would be a larger reclamation obligation, which would be to the detriment of the GNWT and other creditors with claims against an interest in the Mactung property.

Position of the Customers

19 The customers oppose the Interim Facility and the extension of the stay. They argue that the financing of \$2.5 million at interest rates of 21% will not help the Company emerge from this process with a workable plan. They argue that putting the Cantung Mine into care and maintenance as of November and hoping that tungsten prices rise in the future is not a workable plan.

20 The customers say the result of approval of the Interim Facility is that the security interests of WBH and GTP would be prejudiced because those interests would be subordinated to Callidus as well as the GNWT. Finally, they argue that the bankruptcy of the Company and sale of its assets is inevitable no matter what happens.

Position of the GNWT

21 The GNWT does not oppose the extension of the stay nor the granting of the Interim Facility. However, it opposes the Forbearance Agreement which would grant the Interim Facility priority over the GNWT Mactung security, which it holds to secure the environmental and reclamation obligations of the Company. It says that it would be prejudiced as a result of the granting of that priority and that in the circumstances here there is no reason to do so. It says that Callidus would effectively receive approximately \$1.5 million in Post-Filing Payments in very short order, which essentially allows it an unfair priority.

The Monitor

22 The Monitor provided detailed comments supporting the Company's application for interim financing as well as the stay. In doing so it made the following observations:

- Without the interim financing, the Company would have no choice but to immediately cease operations. This would negatively impact the progress of reclamation of the mine and tailings ponds and may have a negative impact on the near term market value of the Mactung property.
- The key senior management of the Company remain in place and are committed to pursuing restructuring solutions or transactions that will see an orderly transition of ownership and stewardship of the assets.

- The Interim Facility is supported by Queenwood II and the debenture holders, the creditors who potentially have the most to lose.
- Based on the confidential appraisal, it appears that the equipment values in aggregate exceed the amounts due to Callidus, which may eliminate or at least mitigate the potential prejudice to creditors having security over Mactung.
- The terms of the Interim Facility including interest rates and fees are consistent with market terms for interim financings in the context of distressed companies and are commercially reasonable in these circumstances when compared to the terms of other court approved interim financing facilities.

23 The Monitor concludes its comments in its Fourth Report by stating that "the interim financing contemplated by the Interim Lending Facility and the Forbearance Agreement will enhance the prospects of a viable restructuring and/or a future SISP being undertaken by the Company. Overall... the Monitor is of the view that, balancing the relative prejudices to the stakeholders, the terms of the Forbearance Agreement and Interim Lending Facility are reasonable in the circumstances and the Monitor supports the Company's application..."

Extension of the Stay

24 I turn now to the reasons for granting the extension of the stay. Subsection 11.02(2) of the *CCAA* provides that the Company may apply for an extension of the stay of proceedings for a period that the court considers necessary on any terms that the court may impose. Subsection 11.02(3) provides:

(3) The court shall not make the order unless

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

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

25 A number of decisions have considered whether "circumstances exist that make the order appropriate". In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), the Court emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the *CCAA*. Justice Deschamps stated at para. 70:

... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs.

26 When granting an extension, it is a prerequisite for the petitioner to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the *CCAA*. The debtor company must show that it has at least "a kernel of a plan": *Azure Dynamics Corp., Re*, 2012 BCSC 781 (B.C. S.C. [In Chambers]).

27 It is also appropriate for the company to use the *CCAA* to effect the sale of the company's business as a going concern. While the main focus of the legislation is the reorganization of insolvent companies, a sales and investment solicitation process (SISP) may be the most efficient way to maximize the value of stakeholders' interests and minimize the harm which stems from liquidation: *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]).

28 When *CCAA* proceedings are in their early stages, it is appropriate for courts to give deference when considering extensions of the stay, provided the requirements of s. 11.02(3) have been met. See, for example, *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]).

29 The good faith and due diligence requirement of s. 11.02(3) includes observance of reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process.

30 I am satisfied that it is appropriate to grant the extension of the stay as sought by the Company. I reject the position of the customers that the Company has failed to put forward any kind of plan. The operating plan which the Company has begun to put in place responds to the existing cash flow problems and is intended to put the Company in a position to enhance the prospects of a viable restructuring and/or a future SISP.

31 It is more than a kernel of a plan. It is a strategy to move forward in an orderly way which may provide benefits to all stakeholders. It takes into account the remedial purpose of the legislation and attempts to minimize the potential social and economic losses of liquidation of the Company. None of the parties suggested that the Company is acting with an absence of either good faith or due diligence, and I am satisfied from the evidence of Mr. Lindahl and the comments of the Monitor that the Company is indeed proceeding in a fashion which fulfills its obligations of good faith and due diligence.

The Interim Facility

32 I turn to my reasons for approving the interim financing. Subsection 11.2(4) of the *CCAA* sets out factors which the court must consider in determining whether to grant a priority charge to an interim lender. The factors in that section which are most relevant to this application are:

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

...

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

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

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

(g) the monitor's report... if any.

33 While the factors listed in that section should be considered, the court may also consider additional factors, which may include the following as set out in *Timminco Ltd., Re*, 2012 ONCA 552 (Ont. C.A.) at para. 6, and I am paraphrasing:

a) without interim financing would the petitioner be forced to stop operating;

b) whether bankruptcy would be in the interests of the stakeholders; and

c) would the interim lender have provided financing without a super priority charge...

34 In *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) at paras. 58 and 59, the Court approved of the following factors which had been considered by the chambers judge:

a) the applicants needed additional financing to support operations during the period of the going concern restructuring;

b) there was no other alternative available and in particular no suggestion that the interim financing would have been available without the super priority charge;

c) the balancing of prejudice weighed in favour of approval of the interim loan facility.

35 When I consider all of these factors, I am satisfied that it is appropriate to approve the Interim Facility. My reasons for doing so include the following:

- The cash flow projections show that the \$2.5 million from the Interim Facility will be sufficient to allow the Company to satisfy obligations along with its ongoing revenues from operations through to November 2015. By that time the SISP should be well underway and perhaps concluded.
- I accept the Monitor's comments regarding the Interim Facility and Forbearance Agreement. In other words, I accept that the Company would not be able to find other interim financing on more favourable terms and that without such financing, the Company would have no choice but to immediately cease operations.
- I further accept the Monitor's comment that cessation of the operations would negatively impact the reclamation of the Cantung Mine and tailings ponds and may have a negative impact on the market value of the Mactung property.
- The Interim Facility enhances the Company's prospects of carrying out a successful SISP and presenting a viable plan to its creditors. If it is forced to shut down its operations, the Company will likely not be able to continue these proceedings and could not continue with the SISP.
- Bankruptcy and a forced liquidation of the assets is not in the best interests of any stakeholder.
- It is unlikely that any creditor will be materially prejudiced by the priority financing. There are two significant reasons for this. First, I accept the Monitor's view that the equipment security is likely to be sufficient to satisfy the existing debt to Callidus. Second, to the extent that the payments to Callidus under the Interim Facility cover Post-Filing Payments, those will likely be offset by the fact that the ongoing operations will result in the conversion of substantial inventories of unprocessed ore. That ore is Cantung property and so it is currently subject to the existing Callidus security. Under the operating plan, revenue from that asset will be used for ongoing operations.
- I further accept the comments of the Monitor and the submissions of the Company that keeping the Cantung Mine operating will likely assist the Company in managing its environmental obligations and thus limit the risk that the GNWT will be faced with a significant reclamation project. As counsel for the Monitor indicated, abandonment of the mine is likely to result in greater costs. The situation would undoubtedly be somewhat chaotic.
- Finally, I conclude that the Interim Facility will further the policy objectives underlying the *CCAA* by mitigating the effects of an immediate cessation of the mining operations which would result in the loss of employment for the Cantung Mine workers and negatively impact the surrounding community.

36 Before concluding, I will make one final comment regarding the requirements of the Forbearance Agreement that the Company make the Post-Filing Payments to Callidus. The Initial Order permits such payments to Callidus. Further, there is nothing in the *CCAA* which prohibits these payments. In the circumstances I have already outlined above, the use of the inventories of unprocessed ore to fund ongoing operations would only be possible with the approval of the Interim Facility. In other words the Post-Filing Payments may be offset by the revenues earned from that asset, which would be a benefit to all creditors.

37 In summary, I am granting the extension of the stay. I believe the request was to July 17, 2015. I will hear from counsel on that issue if there is some other date that is preferred. Further, I approve the Forbearance Agreement and the Interim Facility in the amount of \$2.5 million, and as previously indicated, the Gap Advance is not included in that.

38 What about the date for an extension of the stay?

39

MR. SCHULTZ: Yes, My Lord. So that'll turn a little bit on your availability actually, as was indicated by Mr. Sandrelli, the Company anticipates bringing an application to coincide with the end of the stay for a further extension and approval of a SISP. The Company is also hopeful that an application to approve as was alluded to some further financing from Callidus in respect to the GTP receivable. So I guess I am in your hands a little bit as to whether you might be available on the 17th for an hour to hear those.

40

THE COURT: I can be available, but it would have to be by telephone. I am in Williams Lake next week.

41

MR. SCHULTZ: Okay.

42

THE COURT: So I think that we should proceed with that because the next couple weeks after that I am probably not available.

43

MR. SCHULTZ: Okay. In that case then the 17th is probably the best day, and that would be the day we will be seeking the extension to for now.

44

THE COURT: All right. The stay is extended to July 17, 2015.

Applications granted.

2005 ABQB 91
Alberta Court of Queen's Bench

San Francisco Gifts Ltd., Re

2005 CarswellAlta 174, 2005 ABQB 91, [2005] A.W.L.D. 1426, [2005] A.J. No. 131,
10 C.B.R. (5th) 275, 137 A.C.W.S. (3d) 242, 378 A.R. 361, 42 Alta. L.R. (4th) 377

**In the Matter of the Companies' Creditors
Arrangement Act, R.S.A. 1985, c. C-36, As Amended**

And In the Matter of a Plan of Compromise or Arrangement of San Francisco Gifts Ltd., San Francisco Retail Gifts Incorporated (Previously Called San Francisco Gifts Incorporated), San Francisco Gift Stores Limited, San Francisco Gifts (Atlantic) Limited, San Francisco Stores Ltd., San Francisco Gifts & Novelties Inc., San Francisco Gifts & Novelty Merchandising Corporation (Previously Called San Francisco Gifts and Novelty Corporation), San Francisco (The Rock) Ltd. (Previously Called San Francisco Newfoundland Ltd.) And San Francisco Retail Gifts & Novelties Limited (Previously Called San Francisco Gifts & Novelties Limited)

Topolniski J.

Heard: January 17, 2005
Judgment: February 9, 2005
Docket: Edmonton 0403-00170

Counsel: Richard T.G. Reeson, Q.C., John Bridgdear, Howard J. Sniderman for Companies
Michael McCabe, Q.C. for Monitor, Browning Crocker Inc.

Jeremy H. Hockin for Oxford Properties Group Inc., Ivanhoe Cambridge 1 Inc.; 20 Vic Management Ltd.; Morguard Investments Ltd.; Morguard Real Estate Investments Trust; Millwoods Town Centre, Edmonton; Park Place, Lethbridge; Metro Town, Burnaby, B.C.; Northgate Mall, Edmonton; Brandon Shopping Mall, MB; Herongate Mall, Ottawa; Westmount Shopping Centre, London; Village Mall, St. John's Nfld; Kingsway Garden Mall; Westbrook Mall; Bonnie Doon Shopping Centre; Red Deer Centre; Marlborough Mall; Circile Park Mall; Kildonan Place Mall; Cambridge Centre; Oshawa Centre; Tecumseh Mall; Downtown Chatham Centre; Simcoe Town Centre; Niagara Square; Halifax Shopping Centre; RioCan Property Services; 1113443 Ontario Inc.; Shoppers World, Brampton, ON; Tillicum Mall, Victoria, BC; Confederation Mall, Saskatoon, SK; Parkland Mall, Yorkton, SK; Cambrian Mall, Sault Ste. Marie, ON; Northumberland Mall, Cobourg, ON; Orangeville Mall, Orangeville, ON; Renfrew Mall, Renfrew, ON; Orillia Square Mall, Orillia, ON; Elgin Mall, St. Thomas, ON; Lawrence Square, North York, ON; Trinity Conception Square, Carbonear, Nfld; Charlottetown Mall, Charlottetown PEI; Timiskaming Square
Kent Rowan for Locher Evers International, Neuvo Rags, Quality Press
Tim Shelley (Agent Employee) for Lauer Transportation Services

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency — Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Debtor operated national chain of novelty goods stores with some 400 employees — Debtor obtained Companies' Creditors Arrangement Act (CCAA) protection on January 7, 2000 — Stay of proceedings under CCAA was extended three times with expectation that entire CCAA process would be completed by February 7th, 2005 — On December 30, 2004, debtor pleaded guilty to nine counts of wilful copyright infringement and paid \$150,000 fine — Debtor had sold lamps with counterfeit safety certification labels and was found to have other counterfeit goods

in its possession — Debtor brought application for further extension of time — Application granted — Stay was extended to July 19, 2005 — This was not case where debtor's business practices were so offensive as to warrant refusal of extension on public policy grounds — Debtor's conduct was illegal and offensive, but debtor had already been condemned for its illegal conduct in appropriate forum — Denying extension would be additional form of punishment — Of greater concern was effect on unsecured creditors who would be denied right to vote on plan and any chance for small financial recovery — Debtor met prerequisites of acting with due diligence and in good faith in working towards presenting plan of arrangement to its creditors — Delay was primarily attributable to time required for debtor to seek leave to appeal from prior classification decision — Monitor was satisfied that debtor was financially viable despite payment of fine — Potential adverse effect of debtor's misconduct on business relationships was sheer speculation at this point.

Table of Authorities

Cases considered by *Topolniski J.*:

Agro Pacific Industries Ltd., Re (2000), 2000 BCSC 837, 2000 CarswellBC 1143, 76 B.C.L.R. (3d) 364, 5 B.L.R. (3d) 203 (B.C. S.C.) — considered

Associated Investors of Canada Ltd., Re (1987), 56 Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, 67 C.B.R. (N.S.) 237, (sub nom. *First Investors Corp., Re*) 46 D.L.R. (4th) 669, 1987 CarswellAlta 330 (Alta. Q.B.) — considered

Associated Investors of Canada Ltd., Re (1988), 60 Alta. L.R. (2d) 242, 89 A.R. 344, 71 C.B.R. (N.S.) 71, 1988 CarswellAlta 310 (Alta. C.A.) — considered

Avery Construction Co., Re (1942), [1942] 4 D.L.R. 558, 24 C.B.R. 17, 1942 CarswellOnt 86 (Ont. S.C.) — referred to

Canadian Cottons Ltd., Re (1951), 33 C.B.R. 38, [1952] Que. S.C. 276, 1951 CarswellQue 27 (C.S. Que.) — referred to

Fracmaster Ltd., Re (1999), 1999 CarswellAlta 461, 245 A.R. 102, 11 C.B.R. (4th) 204 (Alta. Q.B.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) — referred to

Juniper Lumber Co., Re (2000), 2000 CarswellNB 117 (N.B. Q.B.) — considered

Juniper Lumber Co., Re (2001), 2001 NBCA 30, 2001 CarswellNB 114 (N.B. C.A.) — referred to

Meridian Development Inc. v. Toronto Dominion Bank (1984), [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576, 1984 CarswellAlta 259 (Alta. Q.B.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — referred to

Pacific National Lease Holding Corp., Re (August 17, 1992), Doc. A922870 (B.C. S.C.) — referred to

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Rio Nevada Energy Inc., Re (2000), 2000 CarswellAlta 1584, 283 A.R. 146 (Alta. Q.B.) — considered

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.) — referred to

Sairex GmbH v. Prudential Steel Ltd. (1991), 8 C.B.R. (3d) 62, 1991 CarswellOnt 215 (Ont. Gen. Div.) — considered

Skeena Cellulose Inc., Re (2001), 2001 BCSC 1423, 2001 CarswellBC 2226, 29 C.B.R. (4th) 157 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

Companies Act, 1929 (19 & 20 Geo. 5), c. 23

s. 153 — referred to

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

Generally — considered

s. 11(6) — referred to

Copyright Act, R.S.C. 1985, c. C-42

Generally — referred to

s. 42 — referred to

APPLICATION by debtor for further extension of stay of proceedings under *Companies' Creditors Arrangement Act*.

Topolniski J.:

Introduction

1 The San Francisco group of companies (San Francisco) obtained *Companies' Creditors Arrangement Act*¹ (CCAA) protection on January 7, 2000 (Initial Order). Key to that protection was the requisite stay of proceedings that gives a debtor company breathing room to formulate a plan of arrangement. The stay was extended three times thereafter

with the expectation that the entire *CCAA* process would be completed by February 7th, 2005. That date was not met. Accordingly, San Francisco now applies to have the stay extended to June 30, 2005.

2 A small group of landlords opposes the motion on the basis of San Francisco's recent guilty plea to *Copyright Act* offenses and the sentencing judge's description of San Francisco's conduct as: "...a despicable fraud on the public. Not only not insignificant but bordering on a massive scale..." The landlords suggest that this precludes any possibility of the company having acted in "good faith" and therefore having met the statutory prerequisite to an extension. Further, they contend that extending the stay would bring the administration of justice into disrepute.

3 San Francisco acknowledges that its conduct was stupid, offensive and dangerous. That said, it contends that it already has been sanctioned and that it has "paid its debt to society." It argues that subjecting it to another consequence in this proceeding would be akin to double jeopardy. Apart from the obvious consequential harm to the company itself, San Francisco expresses concern that its creditors might be disadvantaged if it is forced into bankruptcy.

4 While there has been some delay in moving this matter forward towards the creditor vote, this delay is primarily attributable to the time it took San Francisco to deal with leave to appeal my classification decision of September 28, 2004. Despite the opposing landlords' mild protestations to the contrary, it is evident that the company has acted with due diligence. The real focus of this application is on the meaning and scope of the term "good faith" as that term is used in s. 11(6) of the *CCAA*, and on whether San Francisco's conduct renders it unworthy of the protective umbrella of the Act in its restructuring efforts. It also raises questions about the role of a supervising court in *CCAA* proceedings.

Background

5 San Francisco operates a national chain of novelty goods stores from its head office in Edmonton, Alberta. It currently has 62 locations and approximately 400 employees.

6 The group of companies is comprised of the operating company, San Francisco Gifts Ltd., and a number of hollow nominee companies. The operating company holds all of the group's assets. It is 100 percent owned by Laurier Investments Corp., which in turn is 100 percent owned by Barry Slawsky (Slawsky), the driving force behind the companies.

7 Apart from typical priority challenges in insolvency matters, this proceeding has been punctuated by a series of challenges to the process and its continuation, led primarily by a group of landlords that includes the opposing landlords.

8 On December 30, 2004, San Francisco pleaded guilty to nine charges under s. 42 of the *Copyright Act*,² which creates offences for a variety of conduct constituting wilful copyright infringement. The evidence in that proceeding established that:

(a) An investigation by the St. John's, Newfoundland, Fire Marshall, arising from a complaint about a faulty lamp sold by San Francisco, led to the discovery that the lamp bore a counterfeit safety certification label commonly called a "UL" label.³ The R.C.M.P. conducted searches of San Francisco stores across the country, its head office, and a warehouse, which turned up other counterfeit electrical UL labels as well as counterfeit products bearing the symbols of trademark holders of Playboy, Marvel Comics and others.

(b) Counterfeit UL labels were found in the offices of Slawsky and San Francisco's Head of Sales. There was also a fax from "a Chinese location" found in Slawsky's office that threatened that a report to Canadian authorities about the counterfeit safety labels would be made if payment was not forthcoming.

(c) *Copyright Act* charges against Slawsky were withdrawn when San Francisco entered a plea of guilty to the charges;

(d) The sentencing judge accepted counsels' joint submission that a \$150,000.00 fine would be appropriate. In passing sentence, he condemned the company's conduct, particularly as it related to the counterfeit labels, expressing grave concern for the safety of unknowing consumers.⁴

(e) San Francisco was co-operative during the R.C.M.P. investigation and the Crown's prosecution of the case.

(f) San Francisco had been convicted of similar offences in 1998.

9 Judge Stevens-Guille's condemnation of San Francisco's conduct was the subject of local and national newspaper coverage.

10 The company paid the \$150,000.00 fine from last year's profits.

Analysis

Fundamentals

11 The well established remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement by an insolvent company with its creditors to the end that the company is able to stay in business. The premise is that this will result in a benefit to the company, its creditors and employees.⁵ The Act is to be given a large and liberal interpretation.⁶

12 The court's jurisdiction under s. 11(6) to extend a stay of proceedings (beyond the initial 30 days of a *CCAA* order) is preconditioned on the applicant satisfying it that:

(a) circumstances exist that make such an order appropriate; and

(b) the applicant has acted, and is acting, in good faith and with due diligence.

13 Whether it is "appropriate" to make the order is not dependant on finding "due diligence" and "good faith." Indeed, refusal on that basis can be the result of an independent or interconnected finding. Stays of proceedings have been refused where the company is hopelessly insolvent; has acted in bad faith;⁷ or where the plan of arrangement is unworkable, impractical or essentially doomed to failure.⁸

Meaning of "Good Faith"

14 The term "good faith" is not defined in the *CCAA* and there is a paucity of judicial consideration about its meaning in the context of stay extension applications. The opposing landlords on this application rely on the following definition of "good faith" found in *Black's Law Dictionary* to support the proposition that good faith encompasses general commercial fairness and honesty:

A state of mind consisting of: (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealings in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage.⁹ [Emphasis added]

15 "Good faith" is defined as "honesty of intention" in the *Concise Oxford Dictionary*.¹⁰

16 Regardless of which definition is used, honesty is at the core. Honesty is what the opposing landlords urge is desperately wanting now and, as evidenced by San Francisco's earlier conviction for *Copyright Act* offences, was wanting in the past.

17 Accepting that the duty of "good faith" requires honesty, the question is whether that duty is owed to the court and the stakeholders directly affected by the process, including investors, creditors and employees, or does the *CCAA*

cast a broader net by requiring good faith in terms of the company's dealings with the public at large? As will be seen from the following review of the jurisprudence, it usually means the former.

18 *Rio Nevada Energy Inc., Re*¹¹ and *Skeena Cellulose Inc., Re*¹² both involved opposed stay extension applications. In *Skeena Cellulose Inc.*, one of the company's two major secured creditors argued that the company's failure to carry out certain layoffs in the time recommended by the monitor showed a lack of good faith and due diligence. Brenner C.J.S.C. found that the delay in carrying out the layoffs was not a matter of bad faith. Given the severe consequences of terminating the stay, he granted the extension.

19 Romaine J. rejected a suggestion of lack of good faith arising from a creditor dispute and allegations of debtor dishonesty in *Rio Nevada Energy Inc.*, finding that: "Rio Nevada has acted and is acting in good faith *with respect to these proceedings*." ¹³ [Emphasis added]

20 *Sairex GmbH v. Prudential Steel Ltd.*¹⁴ involved an application by a creditor to proceed against a company under CCAA protection. Farley J. declined the application despite his sympathy for the creditor's position and his view that the creditor could make out a fairly strong case. He said: "... I would think that public policy also dictates that a company under CCAA protection or about to apply for it should not be allowed to engage in very offensive business practices against another and thumb its nose at the world from the safety of the CCAA." ¹⁵ In the end, he concluded that the dominant purpose behind the company's actions was not to harm the creditor.

21 Inventory suppliers in *Agro Pacific Industries Ltd., Re*¹⁶ sought to set aside a CCAA stay on the ground that the company had not been acting in good faith in entering into contracts. The suppliers' contention that the company knew it was in shaky financial circumstances when it ordered goods and that it did so to pay down the secured creditors was rejected by Thackeray J. He was not satisfied that there was any lack of good faith or collusion between the company and its secured creditors to disadvantage the unsecured creditors.

22 *Juniper Lumber Co., Re*¹⁷ addressed a creditor's allegations of bad faith in the context of an application to set aside the *ex parte* Initial Order. Turnbull J. held that, while fraud may not always preclude CCAA relief, it was of such a magnitude in that case as to warrant setting aside the order. He commented that: "basic honesty has to be present" in the course of conduct between a bank and its customer. ¹⁸ However, his decision was overturned by the Court of Appeal because the necessary evidentiary foundation was wanting. ¹⁹

23 *Nova Metal Products Inc. v. Comiskey (Trustee of)*,²⁰ although addressing instant trust deeds, which are no longer of concern under the present CCAA, offers a useful discussion of "good faith." Doherty J.A., dissenting in part, commented:

...A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the court has the means available to it, apart entirely from s. 3 of the Act, to prevent misuse of the Act. In cases where the debtor company acts in bad faith, the court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors. ²¹

24 Doherty J.A. referred to an article by L. Crozier, "*Good Faith and the Companies' Creditors Arrangement Act*," ²² in which the author contends that the possibility of abuse and manipulation by debtors should be checked by implying a requirement of good faith, as American bankruptcy courts routinely do by invoking good faith to dismiss applications under Chapter 11 of the *Bankruptcy Code* where the debtor's conduct in filing for reorganization is found to constitute

bad faith.²³ He also suggests that, as a result of the injunctive nature of the stay, the court's power to take into account the debtor's conduct is inherent in its equitable jurisdiction.

25 An obligation of good faith in the context of an application to sanction a plan of arrangement was implied in *Associated Investors of Canada Ltd., Re*²⁴ While *First Investors* was an atypical *CCAA* proceeding, it is worth discussion. Allegations that fraud had been committed on creditors and consumers/investors led to the additional appointment of both a receiver and an inspector under the Alberta *Business Corporations Act*. The inspector had a broad mandate to investigate the company's affairs and business practices that included inquiring into whether the company had intended to defraud anyone.

26 Berger J. (as he then was) noted that the *CCAA* is derived from s. 153 of the English *Companies Act*, 1929 (19 and 20 Geo. 5) c. 23. Having sought assistance from other legislation with wording similar to the *CCAA* and with a genesis in the British statute,²⁵ he concluded that the court should not sanction an illegal, improper or unfair plan of arrangement.²⁶ He emphasized that: "If evidence of fraud, negligence, wrongdoing or illegality emerges, the Court may be called upon by interested parties to draw certain conclusions in fact and in law that bear directly upon the Plans of Arrangement."²⁷ He also determined that, while it might be expedient to approve the plans, the court was bound to proceed with caution, "so as to ensure that wrongful acts, if any, do not receive judicial sanction."²⁸

27 In the end, Berger J. adjourned the application pending receipt of a report by the inspector. His decision was reversed on appeal²⁹ on the basis that there was nothing in the plans that sanctioned wrongful acts or omissions. The Court of Appeal remitted the matter back for reconsideration on the merits, stating that while the discretion to be exercised must relate to the merits or propriety of the plans, the court could consider whether approving the plans would sanction possible wrongdoing or otherwise hinder later litigation.

Supervising Court's Role

28 The court's role during the stay period has been described as a supervisory one, meant to: "...preserve the *status quo* and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure."³⁰ That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained.

29 Although the supervising judge's main concern centres on actions affecting stakeholders in the proceeding, she is also responsible for protecting the institutional integrity of the *CCAA* courts, preserving their public esteem, and doing equity.³¹ She cannot turn a blind eye to corporate conduct that could affect the public's confidence in the *CCAA* process but must be alive to concerns of offensive business practices that are of such gravity that the interests of stakeholders in the proceeding must yield to those of the public at large.

Conclusions

30 While "good faith" in the context of stay applications is generally focused on the debtor's dealings with stakeholders, concern for the broader public interest mandates that a stay not be granted if the result will be to condone wrongdoing.³²

31 Although there is a possibility that a debtor company's business practices will be so offensive as to warrant refusal of a stay extension on public policy grounds, this is not such a case. Clearly, San Francisco's sale of knockoff goods was illegal and offensive. Most troubling was its sale to an unwitting public of goods bearing counterfeit safety labels. Allowing the stay to continue in this case is not to minimize the repugnant nature of San Francisco's conduct. However, the company has been condemned for its illegal conduct in the appropriate forum and punishment levied. Denying the stay extension application would be an additional form of punishment. Of greater concern is the effect that it would have

on San Francisco's creditors, particularly the unsecured creditors, who would be denied their right to vote on the plan and whatever chance they might have for a small financial recovery, one which they, for the most part, patiently await.

32 San Francisco has met the prerequisites that it has acted and is acting with due diligence and in good faith in working towards presenting a plan of arrangement to its creditors. Appreciating that the *CCAA* is to be given a broad and liberal interpretation to give effect to its remedial purpose, I am satisfied that, in the circumstances, extending the stay of proceedings is appropriate. The stay is extended to July 19, 2005. The revised time frame for next steps in the proceedings is set out on the attached Schedule.

33 Although San Francisco has paid the \$150,000.00 fine, the Monitor is satisfied that the company's current cash flow statements indicate that it is financially viable. Whether San Francisco can weather any loss of public confidence arising from its actions and resulting conviction is yet to be seen. Its creditors may look more critically at the plan of arrangement, and its customers and business associates may reconsider the value of their continued relationship with the company. However, that is sheer speculation.

Schedule

Time Frames

1. February 14, 2005 Date Monitor posts Notice to Creditors on website
2. February 14, 2005 Date Monitor publishes the advertisement for one day in Globe & Mail or National Post
3. April 1, 2005 Date for receipt of claims from creditors
4. May 13, 2005 Date by which Monitor must send Notice of Revision or Disallowance.
5. June 13, 2005 Last date for bringing application to challenge a Notice of Revision or Disallowance.
6. June 27, 2005 Date for creditors meeting to vote on the Plan.
7. July 11, 2005 Date for court application to approve Plan (if required).
8. August 18, 2005 Date for Distribution to Prove Unsecured Claims

Stay Extended to July 19, 2005

Application granted.

Footnotes

- 1 R.S.A. 1985, c. C-36, as am.
- 2 R.S.C. 1985, c. C-42.
- 3 Underwriters' Laboratories (UL) operates facilities globally for the testing, certification and quality assessment of products, systems and services. Products are tested to Canadian standards and, if the product complies with those standards, UL issues an identification or listing mark confirming certification (Transcript of the proceedings held December 30, 2004 at pp.4-5)
- 4 Judge Stevens-Guille said: "Quite frankly, this is and should be described as nothing else than a despicable fraud on the public. Not only not insignificant but bordering on a massive scale company, stores, all of these places that we have been told they had stores...We are talking about electrical appliances that cause fires bought by someone who whether they relied on the UL certificate or not it had a certificate on it and to go to the exercise of getting cheap stuff somewhere and dressing it up with false labels and false safety certificates causes me great pause, such pause that if it were an individual who pled guilty before

me today my starting point would be a term of imprisonment in a federal penitentiary, without a doubt." (Transcript of the proceedings held December 30, 2004 at pp. 18/15-18 and 19/2-11).

5 See for example *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) and *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.).

6 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.).

7 *Avery Construction Co., Re*, [1942] 4 D.L.R. 558 (Ont. S.C.), at 559.

8 *Fracmaster Ltd., Re* (1999), 11 C.B.R. (4th) 204 (Alta. Q.B.); aff'd (1999), 11 C.B.R. (4th) 230 (Alta. C.A.).

9 *Black's Law Dictionary*, 7th ed. (St. Paul, Minnesota: West Group, 1999), p.701.

10 *The Concise Oxford Dictionary of Current English*, 6th ed., (Oxford, Eng.: Clarendon Press, 1976), p.373.

11 (2000), 283 A.R. 146 (Alta. Q.B.).

12 2001 BCSC 1423, 29 C.B.R. (4th) 157 (B.C. S.C.).

13 *Rio Nevada Energy Inc.*, at para. 31.

14 (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.).

15 *Sairex GmbH*, at p. 73.

16 2000 BCSC 837, 76 B.C.L.R. (3d) 364 (B.C. S.C.).

17 *Juniper Lumber Co., Re* (N.B. Q.B.).

18 *Juniper Lumber Co., Re*, at para. 13.

19 2001 NBCA 30 (N.B. C.A.).

20 (1990), 1 O.R. (3d) 289 (Ont. C.A.).

21 *Elan Corp.*, at p. 313.

22 (1989), 15 Can. Bus. L.J. 89.

23 Crozier cites *Victory Construction Co. Inc., Re*, 9 B.R. 549 as an example of this. The court in that case found that the debtor company's purpose in filing under c. 11 was to isolate assets from its creditors rather than to reorganize the business. At p. 558, the court commented that good faith was "an implicit prerequisite to the filing or continuation of a proceeding under Chapter 11 of the *Code*."

24 (1987), 46 D.L.R. (4th) 669 (Alta. Q.B.), at 673-674, (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.); See also *Agro Pacific Industries Ltd., Re*, footnote 16, at para. 40 where Thackray J. held that there was an implied duty of good faith on initial applications.

25 *First Investors*, at p. 676.

26 *First Investors*, at p. 677.

27 *First Investors*, at p. 678.

28 *First Investors*, at p. 678.

- 29 (1988), 89 A.R. 344, 71 C.B.R. (N.S.) 71 (Alta. C.A.).
- 30 McFarlane J.A. in *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]), at 270, quoting with approval Brenner J. in the court below at (B.C. S.C.) at para. 26.
- 31 L. J. Crozier, footnote 22 at p. 95, quotes Edith H. Jones, in "The Good Faith Requirement in Bankruptcy," Proceedings of the 61st Annual Meeting of the National Conference of Bankruptcy Judges, 1987, as statingd that: "... the bankruptcy judge usually at the instance of counsel, upon the filing of appropriate motions, is principally responsible to protect the institutional integrity of the bankruptcy courts, preserve their public esteem, and do equity in specific cases."
- 32 *Associated Investors of Canada Ltd., Re* (1988), 89 A.R. 344 (Alta. C.A.) at para. 16; *Canadian Cottons Ltd., Re* (1951), 33 C.B.R. 38 (C.S. Que.).

2016 ONSC 1348
Ontario Superior Court of Justice

GuestLogix Inc., Re

2016 CarswellOnt 3323, 2016 ONSC 1348, 264 A.C.W.S. (3d) 568

Guestlogix Inc.

G.B. Morawetz R.S.J.

Heard: February 12, 2016
Judgment: February 12, 2016
Docket: CV-16-11281-00CL

Counsel: Rebecca Kennedy, for Applicant

Robert Kennedy, for Vistara Capital Partners Fund I Limited Partnership, by its General Partner, Vistara Fund I GP Inc.

Caitlin Fell, for Comerica Bank

Virginie Gauthier, for Monitor, PricewaterhouseCoopers Inc.

Sonja Pavic, for Board of Directors

Subject: Insolvency

Headnote

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

Adding party — Applicant sought order adding GLI Ltd. as applicant in proceedings under Companies' Creditors Arrangement Act (CCAA) — GLI Ltd. had bank account in Canada — GLI Ltd. was guarantor of Comerica facility and second secured term loan — Comerica provided notice that applicant's default was continuing and that all outstanding amounts were due — Applicant asserted that applicant and GLI Inc. were integrated entities and cash management system is operated and managed by employees in Canada and all cash was ultimately consolidated to applicant — Applicant brought motion to add applicant — Motion granted — It was appropriate to grant GLI Inc. protection under CCAA and to add GLI Inc. as applicant in CCAA proceedings — It was appropriate to grant priority to administration charge and directors' charge — Interim financing facility was approved and interim lender's charge was granted — Applicants anticipated continuing in ordinary course under CCAA and using interim financing to fund cash flow requirements — Applicants were to manage their own affairs during CCAA proceedings — Applicants' secured lenders supported CCAA proceeding — Interim facility would provide stability to process and allow sale and investor solicitation process to be completed — No creditor would be materially prejudiced and they would have benefit from enhanced value to enterprise through continued operations.

MOTION to add corporation as applicant in Companies' Creditors Arrangement Act Proceeding.

G.B. Morawetz R.S.J.:

1 On February 12, 2016, the Record was endorsed: "The motion was not opposed. Motion granted and Orders signed in the form presented. Brief reasons will follow".

2 These are the reasons.

3 The Applicant seeks an order adding GuestLogix Ireland Limited ("GuestLogix Ireland") as an Applicant in these CCAA proceedings.

4 The Applicant also seeks an Interim Lender's Charge.

5 Counsel for the Applicant submits that GuestLogix Ireland is a debtor company to which the *CCAA* applies. GuestLogix Ireland has a bank account in Canada and counsel submits, GuestLogix Ireland is a company as defined in the *CCAA*.

6 Further, counsel submits that GuestLogix Ireland is insolvent as it is a guarantor of both the Comerica Facility and the Second Secured Term Loan. On February 8, 2016, Comerica Bank provided notice to the Applicant and its guarantors that the Applicant's default was continuing and that all outstanding amounts are under the Comerica Facility were due.

7 Counsel further submits that the Applicant and the GuestLogix Ireland are highly integrated entities, and the cash management system is operated and managed by employees in Canada and all cash is ultimately consolidated to the Applicant. Accordingly, counsel submits that due to the structure of the cash management system, GuestLogix Ireland is unable to satisfy its obligations under the guarantees they granted in relation to the Comerica Facility and the Second Secured Term Loan.

8 Counsel further submits that by including GuestLogix Ireland as an Applicant in these *CCAA* proceedings will allow the Applicant to include all of the assets of GuestLogix Ireland in a potential transaction. Based on the informal sale and investor solicitation process commenced by Canaccord, parties expressed in interest in purchasing the assets of both the Applicant and OpenJaw Technologies Limited ("OpenJaw"). GuestLogix Ireland owns 100% of the outstanding shares of OpenJaw, and the Applicant submits that maximization of the value for the Applicant stakeholders cannot be achieved within these *CCAA* proceedings unless GuestLogix Ireland is included as an Applicant.

9 I am satisfied that circumstances exist in this case that make it appropriate to grant GuestLogix Ireland protection under the *CCAA* and add GuestLogix Ireland as an Applicant in these *CCAA* proceedings.

10 The Applicant also requests that the Administration Charge (as defined in the February 9, 2016 endorsement) rank in priority to all security interest of secured creditors, statutory or otherwise, to secure the payment of fees and expenses incurred in connection with this *CCAA* proceedings in the amount of \$250,000.

11 The authority to provide such a charge is set out in section 11.52 of the *CCAA* and the non-exhaustive factors that the court may consider when granting an Administration Charge are set out in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]).

12 In *Canwest*, Pepall J. (as she then was) set out following non-exhaustive list of factors of the court may consider when granting an Administration Charge:

- (a) The size and complexity of the business being restructured;
- (b) The proposed role of the beneficiaries of the charge;
- (c) Whether there is an unwarranted duplication of roles;
- (d) Whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) The position of the secured creditors likely to be affected by the charge;
- (f) The position of the Monitor.

13 In this case, the Monitor is of the view that the amount of the Administration Charge is reasonable and the circumstances and notice has been provided to secured creditors.

14 I am satisfied that it is appropriate to grant priority to the Administration Charge.

15 Similar priority is also sought for the Directors' Charge. I am satisfied that priority should also be afforded to
the Directors' Charge.

16 Section 11.51 of the *CCAA* provides the statutory jurisdiction to grant the Directors' Charge.

17 In *Jaguar Mining Inc., Re* (2013), 2014 ONSC 494 (Ont. S.C.J. [Commercial List]), the court stated that in order to grant a Directors' Charge, the court must be satisfied of the following factors:

- (a) Notice has been given to the secured creditors likely to be affected by the charge;
- (b) The amount is appropriate;
- (c) The Applicant could not obtain adequate indemnification insurance for the directors at a reasonable cost;
- (d) The charge does not apply in respect of any obligation incurred by directors as a result of directors' gross negligence or willful misconduct.

18 The Applicant submits that the above factors are satisfied in this case, and that the amount requested is reasonable
in the circumstances having regard to the potential liabilities.

19 I note that the amount requested was confirmed as being reasonable in my endorsement of February 9, 2016.

20 Further, the benefit of the Directors' Charge will only be available to the extent that liability is not covered by the directors' and officers' liability insurance, which provides coverage up to \$10,000,000.

21 I am satisfied that this is an appropriate case to grant a Directors' Charge and to provide it with the priority set
out in the order.

22 With respect to the Interim Lender's Charge, Vistara Capital Partners Fund I Limited Partnership ("Vistara Capital") by its general partner Vistara Fund I GP Inc. ("Vistara GP"), and such other lenders among Beedie Capital Partners Fund I Limited Partnership ("Beedie Capital"), by its general partner, Beedie Capital Partners Inc. (collectively, the "Vistara Lenders") and Comerica Bank ("Comerica"), and collectively with the Vistara Lenders (the "Interim Lender") has agreed to provide interim financing to the Applicant to a maximum principal of US \$3,000,00, pursuant to commitment letter between the Applicant and the Interim Lender dated February 11, 2016 ("Interim Facility").

23 The proposed Amended and Restated Initial Order contemplates granting the Interim Lender a Charge ("Interim Lender's Charge") on all of the Applicant's current and future assets ("Property").

24 The proposed restated initial order contemplates that the Interim Lender's Charge will have priority over all other interests in the property, saved for the Administration Charge and the Directors' Charge.

25 Section 11.2 of the *CCAA* provides that, on notice to the secured lenders who are likely to be affected by the charge, the court has jurisdiction to grant the Interim Lender's Charge.

26 In this case, the secured creditors that will be affected by the Interim Lender's Charge are the interim lender's pre-filing interest in the Applicant's property.

27 Section 11.2(4) provides that in deciding whether to grant the Interim Lender's Charge, the court is to consider the following factors:

- (a) The period during which the company is expected to be subject to proceedings under the *CCAA*:

- (b) How the company's business and financial affairs are to be managed during the proceedings;
- (c) Whether the company's management has the confidence of its major creditors;
- (d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) The nature and value of the company's property;
- (f) Whether any creditor would be materially prejudiced as a result of the security or charge;
- (g) The monitor's report referred to in section 23(1)(b) of the *CCAA*.

28 In this case, the Applicants anticipate continuing in the ordinary course under the *CCAA* and using the interim financing to fund cash flow requirements. It is also noted that the Applicants will manage their own affairs during these *CCAA* proceedings. Further, the Applicants secured lenders support the *CCAA* proceeding. I am also satisfied that the Interim Facility will provide stability to the process and allow the sale and investor solicitation process to be completed.

29 I am also satisfied that no creditor will be materially prejudiced and they will have the benefit from the enhanced value to the enterprise through continued operations.

30 It is also noted that the propose Monitor supports the granting of the Interim Lenders' Charge.

31 Accordingly, I am satisfied that the Interim Financing Facility should be approved and that the granting of the Interim Lender's Charge is appropriate.

32 Orders have been signed to give effect to the foregoing.

Motion granted.

2012 BCSC 1591
British Columbia Supreme Court

Lemare Holdings Ltd., Re

2012 CarswellBC 3294, 2012 BCSC 1591, [2013] B.C.W.L.D. 914, [2013] B.C.W.L.D. 915, [2013]
B.C.W.L.D. 916, [2013] B.C.W.L.D. 917, [2013] B.C.W.L.D. 918, 223 A.C.W.S. (3d) 307, 96 C.B.R. (5th) 35

**In the Matter of the Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, As Amended**

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, As Amended

In the Matter of a Plan of Compromise or Arrangement of Lemare Holdings Ltd., Lemare
Lake Logging Ltd., Lone Tree Logging Ltd., C.&E. Roadbuilders Ltd., Coast Dryland
Services Ltd., Dominion Log Sort Ltd., and Central Coast Industries Ltd. (Petitioners)

Grauer J.

Heard: October 16, 18, 19, 2012

Judgment: October 26, 2012

Docket: Vancouver S124409

Counsel: K. Denhoff, D. Dahlke for Petitioners October 16, 2012

M. Buttery, L. Williams for Petitioners October 18, 19, 2012

R. Payne, M. Weintraub for Her Majesty The Queen in Right of the Province of British Columbia on October 16, 2012

D. Hatter, S. Davis for Her Majesty The Queen in Right of the Province of British Columbia on October 18, 19, 2012

R. Morse for Toronto-Dominion Bank, TD Equipment Finance Canada Inc.

M. Verbrugge for Monitor

Subject: Insolvency; Civil Practice and Procedure; Natural Resources

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

Petitioner company obtained initial order pursuant to Companies' Creditors Arrangement Act (CCAA), including stay of proceedings until comeback hearing — Province provided proposal letters to company respecting stumpage and penalty owing, but did not obtain lien over unsecured creditors because it did not issue assessment due to stay of proceedings — Company brought application for extension of stay and for claims process order (CPO) — Province brought application to set aside initial order or to terminate stay — Company's application granted; province's application dismissed — Court had jurisdiction to make initial order — Company was "debtor company" because it was insolvent, according to totality of evidence — There was looming liquidity crisis that would deprive company of ability to pay its debts as they became due without benefit of stay — Province's proposed assessed stumpage and penalties totalling over \$12 million qualified as contingent claims — In addition, company had \$10 million liability for trust loan — Court should not have declined to exercise jurisdiction to make initial order — Province's assessment and penalties could be dealt with by compromise or arrangement under s. 19(1) of CCAA.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Petitioner company obtained initial order pursuant to Companies' Creditors Arrangement Act (CCAA), including stay of proceedings until comeback hearing — Province provided proposal letters to company respecting stumpage and penalty owing, but did not obtain lien over unsecured creditors because it did not issue assessment due to stay of

proceedings — Company brought application for extension of stay and for claims process order (CPO) — Province brought application to set aside initial order or to terminate stay — Company's application granted; province's application dismissed — Court had jurisdiction to make initial order — Company was "debtor company" because it was insolvent, according to totality of evidence — There was looming liquidity crisis that would deprive company of ability to pay its debts as they became due without benefit of stay — Province's proposed assessed stumpage and penalties totalling over \$12 million qualified as contingent claims — In addition, company had \$10 million liability for trust loan — Court should not have declined to exercise jurisdiction to make initial order — Province's assessment and penalties could be dealt with by compromise or arrangement under s. 19(1) of CCAA.

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Petitioner company obtained initial order pursuant to Companies' Creditors Arrangement Act (CCAA), including stay of proceedings until comeback hearing — Province provided proposal letters to company respecting stumpage and penalty owing, but did not obtain lien over unsecured creditors because it did not issue assessment due to stay of proceedings — Company brought application for extension of stay and for claims process order (CPO) — Application granted — CPO was granted, subject to certain modification — Stay was extended — All that province would lose in CPO was time-consuming step of appeal by company to Minister of of Forests, Lands and Natural Resource Operations, which did not amount to prejudice to province — Fairness did not require modification of stay to permit province to proceed to assessment — Appropriate provision could be made to facilitate crystallization in claims process that preserved to province ability to take full advantage of onus and proof provisions that it would have under Forest Act process.

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Initial application — Miscellaneous

Claims process order — Petitioner company obtained initial order pursuant to Companies' Creditors Arrangement Act (CCAA), including stay of proceedings until comeback hearing — Province provided proposal letters to company respecting stumpage and penalty owing, but did not obtain lien over unsecured creditors because it did not issue assessment due to stay of proceedings — Company brought application for extension of stay and for claims process order (CPO) — Application granted — CPO was granted, subject to certain modification — Stay was extended — All that province would lose in CPO was time-consuming step of appeal by company to Minister of Forests, Lands and Natural Resource Operations, which did not amount to prejudice to province — Fairness did not require modification of stay to permit province to proceed to assessment — Appropriate provision could be made to facilitate crystallization in claims process that preserved to province ability to take full advantage of onus and proof provisions that it would have under Forest Act process.

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous

Evidence — Petitioner company obtained initial order pursuant to Companies' Creditors Arrangement Act, including stay of proceedings until comeback hearing — Company brought application for extension of stay and for claims process order (CPO) — Province brought application to set aside initial order or to terminate stay — Company brought application to exclude evidence within province's application — Application for extension of stay and CPO was granted; application for exclusion of evidence was granted in part; province's application was dismissed — Objectionable evidence consisted of province's affidavit that stated that company refused to comply with province's demand to inspect certain materials — Province had returned materials pursuant to court order quashing province's warrants, but attempted immediately to seize them again by relying on information it obtained unlawfully — Two lines of affidavit were struck out that referred to company's refusal to permit inspection of returned materials.

Table of Authorities

Cases considered by *Grauer J.*:

AbitibiBowater Inc., Re (2010), 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, 2010 QCCS 1261, 2010 CarswellQue 2812 (C.S. Que.) — referred to

Air Canada, Re (2006), 2006 CarswellOnt 8175, 28 C.B.R. (5th) 317 (Ont. S.C.J. [Commercial List]) — referred to

British Columbia v. Lemare Lake Logging Ltd. (2012), 2012 BCSC 193, 2012 CarswellBC 345 (B.C. S.C.) — referred to

Harvey, Re (2004), (sub nom. *Harvey (Bankrupt), Re*) 373 A.R. 373, 2004 ABQB 773, 2004 CarswellAlta 1424, 6 C.B.R. (5th) 23 (Alta. Q.B.) — referred to

Lemare Lake Logging Ltd. v. British Columbia (Minister of Forests & Range) (2009), 2009 BCSC 909, 2009 CarswellBC 1800 (B.C. S.C. [In Chambers]) — referred to

Lemare Lake Logging Ltd. v. British Columbia (Minister of Forests & Range) (2009), 2009 BCSC 902, 2009 CarswellBC 1791 (B.C. S.C.) — referred to

Lemare Lake Logging Ltd. v. British Columbia (Minister of Forests & Range) (2011), 2011 BCSC 903, 2011 CarswellBC 1781 (B.C. S.C.) — referred to

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Thow, Re (2009), 2009 BCSC 1176, 2009 CarswellBC 2293, 57 C.B.R. (5th) 222 (B.C. S.C.) — distinguished

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

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

s. 2 "debtor company" — referred to

s. 3(1) — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.1(2) [en. 1997, c. 12, s. 124] — considered

s. 11.1(3) [en. 1997, c. 12, s. 124] — considered

s. 19(1) — considered

s. 19(2) — considered

s. 19(2)(c) — considered

s. 19(2)(d) — considered

Forest Act, R.S.B.C. 1996, c. 157

Generally — referred to

Pt. 11 — referred to

Pt. 11.1 [en. 2006, c. 13, s. 17] — referred to

s. 130 — considered

s. 130(1)(b) — referred to

s. 130(1)(c) — referred to

s. 130(1)(d) — considered

s. 142.2 [en. 2006, c. 13, s. 17] — considered

s. 142.9 [en. 2006, c. 13, s. 17] — considered

s. 142.21(a) [en. 2006, c. 13, s. 17] — considered

s. 142.51 [en. 2006, c. 13, s. 17] — considered

s. 142.61 [en. 2006, c. 13, s. 17] — considered

s. 142.81 [en. 2006, c. 13, s. 17] — considered

s. 142.91 [en. 2006, c. 13, s. 17] — considered

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009

Generally — referred to

R. 18-3 — considered

APPLICATION by petitioner company for further stay and claims process order; APPLICATION by province to set aside initial order or terminating stay; APPLICATION by petitioner to exclude evidence within province's application.

Grauer J.:

Introduction

1 On June 21, 2012, on the *ex parte* application of the petitioners, I granted an Initial Order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the CCAA) granting relief that included a stay of proceedings until the comeback hearing, which I set for July 20, 2012, and appointing Alvarez & Marsal Canada Inc. as monitor on behalf of the Court.

2 On July 20, 2012, the petitioners sought an extension of the stay, and the pronouncement of a claims process order (CPO). Counsel for Her Majesty The Queen in Right of the Province of British Columbia (the Province) advised that they wished to apply to set aside the initial order, but were not ready to proceed. They asked for an adjournment. Unhappy with their delay, I denied the adjournment, but as things turned out, that is what happened anyway. What was understood at the time was that the Province and the petitioners were to discuss a means of dealing with the Province's claim within the CCAA process. They were unable to come to an agreement.

3 On September 6, 2012, we reconvened to hear the Province's application, but the petitioners objected to the admissibility of certain evidence that the Province sought to adduce. Counsel for the Province argued that he was not in a position to deal with that objection notwithstanding that the petitioners had raised their concern as soon as the affidavits in question were delivered. Still unhappy with the delay, I nevertheless granted the adjournment given the basis of the objection, and I directed the petitioners to put their objection into the form of an application.

4 On October 16, 2012, I heard the petitioners' application to exclude evidence. I gave my ruling at the end of the day with reasons to follow. On October 18 and 19, 2012, nearly four months after my Initial Order, I heard the Province's application for an order setting that order aside, or alternatively terminating the stay. I also heard the petitioners' application for a further stay and a claims process order.

5 What follows are my reasons on all three applications.

Background

6 The petitioners, whom I shall describe collectively as Lemare, constitute an integrated forestry business located on northern Vancouver Island, where they are a major employer.

7 For some considerable time, Lemare has been at loggerheads with the Province, particularly what is now styled the Ministry of Forests, Lands and Natural Resource Operations (MOF), over stumpage that the Province claims Lemare owes and has not paid due to wilful under- and non-reporting. Nothing in these reasons addresses the merits of that claim.

8 Various aspects of that dispute, other than its merits, have occupied a significant amount of Court time over the last several years, the circumstances of which have given rise to considerable acrimony between the parties. On three separate occasions, this Court has quashed warrants obtained by the Province pursuant to which, variously, logs, documents, items, computer disks, drives and data files and other information were seized from Lemare, and declared the seizures unlawful. I did so myself in March of 2009. So did Mr. Justice Ehrcke in July of 2011 and Mr. Justice Affleck in February of 2012¹. Mr. Justice Affleck also struck out a civil claim alleging fraud that the Province had commenced against Lemare, on the basis that it was an abuse of process.

9 At this point, there is not much trust left between the parties. Lemare feels persecuted. The Province feels cheated.

10 In the meantime, Lemare went through a successful internal reorganization involving generational change that contributed to the viability of its core business. One cloud on the horizon was, and remains, a potential liability on the guarantee of a \$10 million loan used to fund a Retirement Compensation Arrangements Trust (RCA trust) for the former principal shareholder.

11 Then, in the latter part of May 2012, the horizon clouded up considerably. Lemare received a proposal letter from Jason Kruger CA, Audit Supervisor with the Forest Revenue Audit Program (FRAP) of the Income Taxation Branch, Ministry of Finance.

12 This 10-page letter, dated May 23, 2012, supported by some 177 pages of documentation, proposed to adjust the total amount of stumpage payable by Lemare. A second proposal letter dated June 14, 2012, also supported by voluminous documentation, proposed the assessment of a further amount. Both letters proposed, in addition, the assessment of a penalty of 100% of the amounts said to be owing.

13 The sum of the two proposed assessments against Lemare was \$4,996,837, plus 100% penalty, plus interest, yielding a total in excess of \$12,000,000.

14 In these circumstances, Lemare appeared before me on June 21, 2012, without notice to any party other than its current operating lender, the Toronto-Dominion Bank (TD), asserting that it was insolvent within the meaning of the CCAA and that it required the Act's protection in order to facilitate a restructuring of its business enterprise and the continuation of its ability to carry on business. I granted the order.

The Application to Exclude Evidence

15 The Province's application to set aside the Initial Order was based, as we shall see, principally on the argument that Lemare was not insolvent as at June 21, 2012, so that I had no jurisdiction under the CCAA to make the order.

16 The Province also sought to rely on a number of alternative positions. Among them was the assertion that Lemare had not acted in good faith in its dealings with the Province. The Province filed affidavit material that included two paragraphs and a number of exhibits upon which it wished to rely in support of that assertion. Lemare advised the Province of its objection to the materials in question as soon as they were given copies of the affidavits, and before the affidavits were filed. The Province declined Lemare's invitation to withdraw the assertions.

17 At the hearing on September 6, 2012, I, too, questioned the Province about withdrawing the two paragraphs in question on the ground that they appeared to be of marginal relevance given the principal basis of the Province's application, which was jurisdiction. The Province, however, wished to proceed on the full record. Hence the adjournment.

18 The problem raised by Lemare was this. On July 7, 2011, Ehrcke J. quashed three search warrants and ordered the Province to return all items seized and all copies of such items to Lemare within 14 days, that time being intended to give the Province an opportunity to seize the items lawfully as it had indicated it could.

19 For reasons that are not material, the time was extended until November 18, 2011. As the Province had by then neither re-seized the materials through lawful means nor returned all of them, Lemare returned before Ehrcke J. on March 26, 2012. At that time, Ehrcke J. ordered that his Order of July 7, 2011, be amended by replacing an earlier term with the following:

The [Province] shall not use the information from the items seized or any copies of such items against Lemare in any manner, including, but not limited to, in any Court proceeding, administrative proceeding, audit or assessment, unless the [Province has] obtained that information lawfully.

20 On February 17, 2012, two representatives of MOF attended at Lemare's office and, pursuant to Ehrcke J.'s order of July 7, 2011, returned five cardboard boxes. At the same time, Mr. Kruger and a colleague from FRAP attended and demanded an inspection of the same five boxes pursuant to sections 142.2 and 142.21(a) of the *Forest Act*, R.S.B.C. 1996, c. 157, asserting that the boxes contained scaling records. Scaling records are among the documents required to be kept by Lemare for audit or inspection, and which a forest revenue official such as Mr. Kruger is entitled to inspect.

21 Mr. Eric Dutcyvich of Lemare advised Mr. Kruger and his colleague that he required a reasonable amount of time to review the contents of the cardboard boxes to determine whether they contained any items that Lemare was required to produce.

22 On March 8, 2012, Mr. Kruger and his colleague returned and again demanded to inspect the five boxes that had been returned on February 17. Mr. Dutcyvich asked them on what basis they maintained that the contents of those boxes were subject to inspection. He deposed that Mr. Kruger and his colleague acknowledged they had reviewed the contents of the boxes. The boxes were not turned over for inspection, but a number of other documents were made available.

23 The impugned paragraphs of Mr. Kruger's affidavit initially read as follows (I ordered the underlined portion to be deleted at the conclusion of the hearing):

25. On February 17, 2012, forest revenue officials attended the offices of Lemare and attempted to conduct an inspection under s. 142.21 of the Forest Act of copied items that had been returned by MFLNR; Lemare refused to permit inspection of the returned items. Attached to my Affidavit as **Exhibit "C"** is a true copy of the February 17, 2012 inspection demand letter delivered to Lemare at the time of the inspection.

26. On March 8, 2012, forest revenue officials again attended the offices of Lemare to perform an inspection of the returned items. Lemare again refused to permit inspection. Attached to my Affidavit as **Exhibit "D"** is a true copy of the March 8, 2012 inspection demand letter delivered to Lemare at the time of the inspection.

24 Lemare took the position that the entirety of those two paragraphs, together with portions of the inspection demand letters marked as Exhibits "C" and "D", and portions of the two proposal letters annexed to Mr. Kruger's affidavits, were inadmissible as contravening the prohibition ordered by Ehreke J. on March 26, 2012. The two proposal letters had, of course, already been admitted into evidence in support of Lemare's application for the Initial Order.

25 Lemare argued that all of the impugned portions were based on knowledge that Mr. Kruger had only because of his review of the unlawfully seized materials, without which he would not have had any basis for believing that they were subject to seizure. Accordingly, Lemare submitted, although Mr. Kruger was certainly in a position to make a demand for inspection, he could not state that Lemare had failed to comply, because he could only assert a failure to comply on the basis of knowledge he was not entitled to have. Instead, he would have to accept whatever answer Lemare gave to the demand.

26 The Province argued that Mr. Justice Ehreke's order only prevented its officers from reaching into the box, so to speak, and withdrawing information to use against Lemare. It did not prevent them from knowing that Lemare had information and documents that it ought to have disclosed, yet had failed to do so.

27 The Province conceded that if it used information from the seized boxes to assert non-compliance on the part of Lemare, then it would run afoul of Ehreke J.'s order. It pointed out, however, that if Lemare's position was correct, then Lemare would be entitled to lie in response to the demand, and the Province would be powerless to do anything about it even though it knew that Lemare's answer was false.

28 I confess to finding the situation rather surreal — one, indeed, that would have excited the admiration of Lewis Carroll. The Province, forced to return copies of documents it seized unlawfully, gives them over only to attempt immediately to seize them again pursuant to its *Forest Act* powers. But those powers entitle it to the production only of certain items; in asserting that the boxes contained such items, it seemed to be relying on information it obtained unlawfully. On the other hand, for Lemare to argue that the Province is accordingly obliged to accept Lemare's denials on their face though knowing them to be untrue, was hardly reassuring.

29 The fact nevertheless remains that a real dispute exists between the parties as to what Lemare is obliged to produce and what it is not. That dispute should be resolved on bases that do not include unlawful seizure.

30 In the circumstances, I concluded that the underlined portions in the two paragraphs in Mr. Kruger's affidavit, as set out above, did indeed depend upon the use of information from the unlawfully seized boxes, and should therefore be redacted. Although the Province submitted that Mr. Kruger had other sources of information on which to base his demand, I did not find that argument persuasive given the affidavit evidence both of Mr. Kruger and Mr. Dutcyvich.

31 Mr. Kruger was certainly entitled to tell me that forest revenue officials attended on February 17 and March 8, 2012, to perform an inspection. I expect he could also have noted that Lemare produced nothing in response to the demand, although it was too late to redraft the paragraphs, and any revision would invite a response. What, in my view, he could not say in the circumstances was that the items he sought to inspect, and which he deposed that Lemare refused to permit him to inspect, were the very items he had just returned. This is because his entitlement to demand to inspect the specific contents of the boxes (as opposed to documents generally) depended upon his knowing their contents. Without that information, Lemare's refusal was of no relevance. Had his affidavit referred generally to a demand to produce documents that the Province sought, rather than the specific contents of the five returned boxes, I would not have found it objectionable.

32 Although some small portions of both the inspection demand letters and the proposal letters also asserted facts that depended upon knowledge of what was in the boxes of unlawfully seized documents, I ruled them admissible in full. I did so on the basis that they were hearsay documents admitted for the purpose of proving that the Province had issued them, and establishing the positions the Province had taken. The Province did not seek to admit them as proof of the truth of their contents.

The Forest Act Scheme

33 Before turning to the two remaining applications, it is helpful to review the applicable provisions of the *Forest Act* under which the Province's claim arises.

34 The Province submits, and I accept, that the *Forest Act* creates a comprehensive code for the calculation, assessment and collection of stumpage in British Columbia. The payment of stumpage is based on a self-reporting system that is subject to compliance reviews and enforcement through audits and assessments.

35 The recovery of money required to be paid under the *Forest Act*, including assessed stumpage, is governed by Part 11, and provides (section 130(1)(b)) that the amount will bear interest, in the case of an assessment for stumpage, from the date determined by the commissioner to be the date that the stumpage would have been due, and (section 130(1)(c)) may be recovered in Court as a debt due to the government.

36 The assessment of stumpage falls under Part 11.1 of the *Forest Act*. Under section 142.51, if it appears to the commissioner, as is alleged here, that some or all of the Crown timber harvested was not reported in the scale, or was reported incorrectly, then the commissioner may make an estimate of the total amount of stumpage owing, and may assess the harvester or persons dealing in the timber harvested for the amount estimated. She may then assess the amount of interest payable on the amount assessed.

37 Under section 142.61, the commissioner may assess a penalty that does not exceed 100% of the assessment if she is satisfied that the assessment is based upon the person's wilful contravention of the Act, or wilful provision of a false or deceptive statement. That was what was proposed here. Where the commissioner is satisfied that an assessment is based upon the person's contravention of the Act that is not wilful, she may assess a penalty that does not exceed 25% of the assessment.

38 The practice of the FRAP, which carries out the assessment, is to provide foresters with an audit proposal letter in advance of the assessment, to which the forester is allowed 30 days to respond. The assessment will then follow. Thus, in this case, the Province provided the proposal letters of May 23 and June 14, 2012. No formal assessments were issued because of the intervention of the Initial Order's stay of proceedings.

39 Once an assessment is issued, then by section 130(1)(d), the amount stated to be owing constitutes a lien in favour of the government against assets and chattels of the person owing the money, and has priority over all unsecured claims.

40 That priority has not accrued to the Province because the stay prevented the proposed claim from becoming an assessment. Both Lemare and TD are anxious that this remain the *status quo* in order to avoid the Province getting a leg up over other unsecured creditors.

41 By section 142.81, evidence that an assessment has been made is proof, in the absence of evidence to the contrary, that the amount assessed is due and owing, and the onus of proving otherwise is on the person liable to pay the amount assessed. The Province places great emphasis on the advantages it stands to gain from this section, particularly given its belief that Lemare has been less than forthright in its disclosure. Moreover, unless varied on appeal, an amount assessed is valid and binding despite any error, defect or omission in the estimate or assessment or in procedure.

42 Section 142.9 provides the person assessed the right to appeal either the assessment or any penalty to the Revenue Minister. An appeal does not operate as a stay. Under section 142.91, the Revenue Minister's decision may be appealed to this Court by way of petition, and the *Supreme Court Civil Rules* relating to petition proceedings apply. The appeal is a hearing *de novo*. Rule 18-3, governing appeals, does not apply.

43 With this context in mind, I turn to consider the Province's application.

The Application to Set Aside the Initial Order

44 With respect to the Initial Order, the Province raises three issues. The first is whether Lemare met the criteria in subsection 3(1) of the CCAA so as to give the Court jurisdiction to proceed under that Act.

45 The second issue, raised in the alternative, is whether the Court should decline to exercise its jurisdiction under the CCAA if that jurisdiction exists.

46 The third is raised in the further alternative: if the Court has and chooses to exercise its CCAA jurisdiction, should it revise the terms of the stay of proceedings in order to permit an assessment to issue under Part 11.1 of the *Forest Act*?

1. Jurisdiction

47 The Province submits that this Court lacked jurisdiction to make the Initial Order because the CCAA does not apply to the petitioners. The Province relies on subsection 3(1):

3. (1) This Act applies in respect of the debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

48 On the evidence, there is no doubt that the petitioners are affiliated companies, and that the total of claims against them is more than \$5,000,000. The issue, then, is whether they are "debtor companies". The CCAA defines "debtor company" as any company that is "bankrupt or insolvent". As none of the petitioners is bankrupt, the question turns on whether they are insolvent. That word is not defined in the CCAA.

49 On June 21, 2012, I concluded that the test had been met. Since then, further evidence has been filed including an affidavit from a chartered accountant, Terrence MacDonald, and four reports from the monitor. Mr. MacDonald offers the opinion that it cannot be conclusively determined from the financial statements that were before me in June whether the petitioners are insolvent. It follows that the financial statements do not establish that the petitioners are not insolvent. What in my view did and still does establish that they are insolvent is the totality of the evidence. That view is supported by the monitor who has provided four reports and has raised no suggestion that this is not an appropriate

case for relief under the CCAA. On the contrary, the monitor has very much supported the process, and advises that Lemare has set about it in good faith.

50 The Province argues that I cannot rely on the amounts set out in its proposal letters as these were never crystallized as assessments and penalties. Consequently, the Province submits, they cannot be valued even as contingent claims, and the penalties cannot be taken into account at all because they do not qualify even as a contingent obligation until the commissioner exercises her discretion to assess them.

51 In the particular situation before me, I am not persuaded by that argument. These parties have been battling over the issue of stumpage for three years. Their respective positions have become quite clear. The Province's proposals are set out in great detail, together with all of the assumptions upon which they are based, the reasons for the conclusions to which the Province has come, and the facts, assumptions and reasoning for the imposition of penalties. All of this is supported by hundreds of pages of documents annexed to these letters. The penalties are proposed to be assessed at 100% instead of 25% on the basis of Lemare's alleged wilful misconduct. Three years of interaction has yielded no hint of any suggestion that the Province would ever consider softening that position. No such hint emerged from the proceedings before me. An assessment of stumpage and penalties in the amount proposed, on all of the evidence, was not a mere possibility. It was a near certainty.

52 In these circumstances, the suggestion that the proposed amounts of assessed stumpage and penalties do not constitute a valuation of a claim in the absence of an assessment, and therefore do not constitute contingent claims, does not accord with reality. The valuation of the proposed claims could hardly be clearer.

53 In this way, I find the situation is distinguishable from that considered by this Court in *Thow, Re*, 2009 BCSC 1176 (B.C. S.C.), where an administrative penalty issued by the B.C. Securities Commission after bankruptcy, based on the bankrupt's prior conduct, was held not to be a claim provable in bankruptcy. Key to that decision was that the penalty could not have been imposed prior to the bankruptcy because at that time the commission had still to conduct an investigation, hold a hearing, make findings and reach a decision. In this case, however, there had been a lengthy investigation, findings had been made and conclusions drawn. All that was necessary to complete the evolution from proposal to assessment was the formality of issuing it — see, for instance, *Harvey, Re*, 2004 ABQB 773 (Alta. Q.B.), and note also *Air Canada, Re* (2006), 28 C.B.R. (5th) 317 (Ont. S.C.J. [Commercial List]). Although it is true that Lemare had an opportunity to respond to the proposal, the Province had already heard everything Lemare had to say, and was singularly unimpressed.

54 Accordingly, I am satisfied that both the proposed assessed stumpage and the proposed penalties qualify as contingent claims.

55 The question remains as to whether the existence of these contingent claims renders Lemare insolvent. The Province submits that the petitioners do not meet the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA), because at the time of the initial order they were not unable to meet their obligations as they generally became due, and it could not be said that their property if fairly disposed of would not be sufficient to enable payment of all obligations due and accruing due.

56 Although courts have generally had regard to the BIA definition of "insolvent person" when dealing with insolvency under the CCAA, the modern trend is to take into account the different objectives of the CCAA. These address the interests of a broader group of stakeholders, and include a more comprehensive process to preserve the debtor company as a going concern.

57 Thus in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) at para. 21, the Supreme Court of Canada described the CCAA regime as a flexible, judicially supervised reorganization process that allows for creative and effective decisions. It noted that with reorganizations becoming increasingly complex:

[61] ...*CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*.

...

[70] ... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company.

58 In *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused; 2004 CarswellOnt 2936 (Ont. C.A.), the Court dealt with a submission, like the Province's here, that the Initial Order should be reversed on the ground that Stelco was not a "debtor company" because it was not "insolvent" as defined by the BIA.

59 Mr. Justice Farley, whose views in this area do not bind me but are entitled to the highest respect, made the following observations, which I have taken the liberty of paraphrasing:

- *On timing*: the usual problem is leaving the application for an Initial Order too late. *CCAA* should be implemented at a stage prior to the company's death spiral. Thus objections in the reported cases have been based not on an absence of insolvency, but on the proposed plan being doomed to failure as coming too late. [Paras. 13-15]
- *On stakeholders*: these include not only the company and its creditors, but also its employees and their interest in a viable enterprise. Thus there is an emphasis on operational restructuring so that the emerging company will have the benefit of a long-term viable fix, to the advantage of all stakeholders. [Paras. 17-20]
- *On the test for insolvency*: given the time and steps involved in a reorganization, the condition of insolvency perforce requires an expanded meaning under the *CCAA*. What the debtor must do is meet the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the *CCAA* in the context and within the purpose of that legislation. The BIA definition of insolvent person is acceptable with the caveat that under the first branch (unable to meet obligations as they generally become due), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. Considering the notion of 'insolvent' contextually and purposively, the question is whether, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection and procedure by Court authorization pursuant to a *CCAA* order. [Paras. 26 and 40]

60 There is, of course, no precise and invariable formula. This is not a "cookie cutter" exercise. As Farley J. pointed out, the matter must be decided on the basis of credible evidence and common sense, employing a principled, purposive and contextual approach.

61 The Province argues that the *Stelco Inc., Re* case is wrongly decided, or in the alternative, that it must be confined to its particular facts which are distinguishable from those before me. I consider it, with respect, to be correctly decided. While the facts are quite different, the principles are not.

62 As I see this case, given the context of Lemare's operations, including the admittedly highly contingent liability for the RCA trust loan, the Province's proposal letters setting forth a fully articulated and documented claim for over \$12,000,000 that would, once formalized, lead to statutory lien rights, gave rise to a reasonably foreseeable expectation of a looming liquidity crisis that would deprive Lemare of the ability to pay its debts as they generally became due without the benefit of a stay. Thus this Court had jurisdiction. Having regard to the interests of the stakeholders, including the

Province, other unsecured creditors, Lemare, its employees, and the North Island economy to which Lemare is such a contributor, the situation cries out for the protection of the CCAA. To delay action until Lemare had been fatally wounded would have served the interests of no one.

2. Discretion

63 The careful reader may discern from the preceding paragraph that I do not agree with the Province's alternative submission that if this Court has CCAA jurisdiction it should decline to exercise it.

64 The Province argued first that I should not accept as credible Lemare's plea of insolvency due to the proposed assessments when Lemare has vigorously contested them. Having found that the assessment of stumpage and penalties in the amount proposed was a near certainty, and given the single-mindedness with which the Province has pursued its claims against Lemare, I do not find this argument persuasive. Lemare is entitled to dispute claims, which is one of the reasons that a CCAA Court normally provides for a claims process.

65 The Province then argues that there is no pressing need for Lemare to restructure. I disagree, as indicated above. As counsel for TD points out, the prospect of Lemare obtaining financing to deal with its liability is vanishingly small. Moreover, that the *Forest Act* provides Lemare with appeal rights likely to occupy a good deal of time, first to the Minister and then to this Court, does not relieve the pressure, particularly when those appeals do not stay the claims.

66 The Province submits that its response cannot be known. It may well reduce the claims, or voluntarily stay its claims during the appeal process, or come to some agreement with Lemare about repayment that would relieve these pressures. I do not doubt the sincerity of counsel, but given the history of acrimony between the parties, this is at best speculation. It would be unfair either to expect such accommodation from the Province, or to require Lemare to order its affairs as if it were forthcoming. If the Province should indeed decide to alter its position in a manner that significantly changes Lemare's financial prospects, then that can be taken into account through subsequent applications. The process is a flexible one.

67 The Province next asserts that since its claim is in connection with the harvesting of Crown timber, a public resource, it would be an injustice and contrary to the public interest to thwart the statutory scheme, particularly the commissioner's entitlement to rely on assumptions and place the onus of proof on Lemare.

68 The public interest, I think, cuts both ways. The public certainly has an interest in the Crown recovering stumpage and penalties owed to it. The public also has an interest in seeing enterprises such as these, being major employers and economic contributors, continue in business. I agree with the Province, particularly in view of past dealings between the parties, that in this case both the public interest and fairness support maintaining its statutory advantages concerning the ability to rely upon assumptions, and putting the onus of proof upon Lemare. These, however, may be adequately addressed in the claims process part of this proceeding.

69 The Province then turns to the nature of its dispute with Lemare, relying on its allegation of wilful misconduct. This, it submits, is not appropriate for determination through a CCAA claims process, and relies in particular on subparagraphs 19(2)(c) and (d) of the CCAA:

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

...

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

(d) any debt or liability resulting from obtaining property or services by false pretenses or fraudulent misrepresentation, other than a debt or liability of the Company that arises from an equity claim....

70 These are issues that arise at a later time in this process, when a proposed compromise or arrangement falls to be considered. The Province argues, however, that its penalty claim will be caught by these provisions and therefore, as a matter of discretion, the CCAA process should not be initiated.

71 I am not presently convinced that either subparagraph will prove to be applicable, although I do not decide that issue. It was not fully argued. For present purposes, I do not see this contingency tipping the balance of all of the other factors and interests that must be weighed, and accordingly I decline to refuse CCAA protection because of it.

72 I take the same view of the Province's final point, which is that FRAP proposes to assess portions of the assessments against Lemare against two of its principals, who are also licensees. These total some \$563,000. Although no proposal letters have yet been issued in this regard, the Province argues that they give rise to the risk of duplicative proceedings as they will be dealt with under the *Forest Act*, and may lead to inconsistent results.

73 I do not see that the possibility that the Province will proceed in this way alters the balance, with or without the other factors argued by the Province.

74 It follows that, having found that this Court has jurisdiction under the CCAA, I decline as a matter of discretion to refuse to exercise that jurisdiction.

3. The Scope and Effect of the Stay

75 The Province accepts that, pursuant to section 11.02 of the CCAA, a stay can properly prevent the Revenue Minister from taking enforcement action under section 130 of the *Forest Act* in order to collect an amount owing pursuant to an assessment. The Province argues, however, that the exception set out in section 11.1(2) means that it cannot be stayed from making an assessment or taking any steps to obtain information relevant to the proposed assessment.

76 According to section 11.1(2):

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

77 On the evidence, it is clear that the Province has already carried out its investigation. The only step left was to review any response to the proposal letters forthcoming from Lemare, which Lemare has indicated that it waives, viewing it as an exercise in futility.

78 For the reasons discussed above, I have concluded that the proposed assessments and penalties set out in the proposal letters qualify as contingent claims. They are therefore claims that may be dealt with by a compromise or arrangement under section 19(1), subject to s. 19(2). I further conclude that under the *Forest Act* scheme, in the circumstances of this case, the issuing of an assessment, which gives rise to lien rights and recovery rights, constitutes a step in "the enforcement of a payment ordered by the regulatory body" within the meaning of section 11.1(2) of the CCAA. What we are concerned with here are the financial consequences of past actions, not the regulation of ongoing conduct. See, for instance, *AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1 (C.S. Que.). If I had concluded otherwise, then the situation would likely have qualified for the exception set out in section 11.1(3).

79 Finally, the Province submits that if the other relief it seeks is denied, it would nevertheless be just and equitable to lift or amend the stay of proceedings in order to permit the commissioner to make an assessment against Lemare, thus crystallizing the claim in relation to both stumpage and penalty. Mr. Hatter assured me that in seeking this, the Province was in no way attempting to gain a priority advantage in relation to other unsecured creditors.

80 I propose to consider this aspect of the matter in relation to Lemare's application for a claims process order.

81 The application to set aside or terminate the Initial Order is dismissed.

The Application for a Claims Process Order

82 Lemare has submitted a CPO in what is a substantially standard form. One portion that departs from standard terms deals with claims by the Province:

CROWN CLAIMS

29. In the event the Crown wishes to assert a Crown Claim against the Petitioners and/or any Director and/or any Officer, the Crown shall file and serve on the relevant parties an application before the Court prior to the Claims Bar Date setting out the amount of the Crown Claim, the basis therefore and any other information necessary for the Court to determine the Crown Claim ("Adjudication Application").

30. The Petitioners and/or any Directors and/or any Officers, as applicable, shall file an application response to any Adjudication Application within 15 days from the Claims Bar Date.

31. Any Adjudication Application shall be heard as soon as practicable by the Court, and any party may apply for directions setting a date therefore [*sic*].

32. If the Crown fails to file a Crown Claim as provided herein, or as the Court may otherwise direct it shall:

(a) be and is hereby forever barred, stopped and enjoined from asserting or enforcing any Crown Claim against any of the Petitioners and/or any of the Directors and/or Officers and all such Crown Claim(s) shall be forever extinguished;

(b) not be permitted to vote on any Plan, if applicable, on account of such Crown Claim(s);

(c) not be permitted to participate in any distribution under any Plan from the proceeds of any sale of the Petitioners' assets, or otherwise, on account of such Crown Claim(s); and

(d) not be entitled to receive further notice in respect of these CCAA proceedings.

33. If the Petitioners fail to respond to the Adjudication Application as provided herein, or the Court may otherwise direct, the Crown Claim(s) as set out in the adjudication application shall be Allowed Claims.

34. The hearing of an Adjudication Application shall be heard as if it were an appeal to the Court under Section 142.9(1) [*sic*] of the *Forest Act*, R.S.B.C. 1996, c. 157, and all onuses or other evidentiary standards contained in the said Act shall apply to the hearing of the Adjudication Application.

83 "Crown Claim" is defined as meaning "any claim of the Crown relating to unpaid stumpage or any other claim pursuant to the *Forest Act*...".

84 I agree with the submissions of Mr. Verbrugge on behalf of the monitor that what I have to consider is whether these sections accomplish the goals of the CCAA with fairness to the Province. This requires a balancing of the need to deal with the Province's claim and all others within the CCAA proceedings to protect everyone equally and allow the company to survive, with the Province's ability to quantify its claim and preserve its advantages concerning the onus of proof.

85 The Province submits that to accomplish this, it is necessary to carve out of the claims process the entire assessment and appeal process from the *Forest Act*. This would contemplate the commissioner making her assessment and assessing a penalty under sections 142.51 and 142.61, Lemare appealing to the Minister under section 142.9, and then appealing

further to this Court by way of petition under section 142.91. Only then would whatever is left of the Province's claim be submitted to the claims process under these CCAA proceedings.

86 With respect, that seems to me to be an enormously cumbersome procedure. It would add very little to the notion of fairness while detracting greatly from an orderly, timely process that preserves the goals of the CCAA. All that the Province really loses by what is proposed in the CPO is the rather time-consuming step of an appeal by Lemare to the Minister. That is no prejudice to the Province. Whether under the CPO or the *Forest Act*, the matter ultimately ends up in this Court. The sooner that happens, the better.

87 I also agree with Mr. Verbrugge that fairness does not require a modification of the stay to permit the Province to proceed to an assessment. It is for the Province to crystallize its claim, as it is for any creditor with a contingent claim. I am satisfied that within the claims process, appropriate provision can be made to facilitate this crystallization in a manner that preserves to the Province the ability to take full advantage of the onus and proof provisions that it would have under the *Forest Act* process.

88 In these circumstances, I am inclined to direct that sections 29 and 34 of the draft CPO be modified so that they read as follows:

29. In the event the Crown wishes to assert a Crown Claim against the Petitioners and/or any Director and/or any Officer, the Crown shall file and serve on the relevant parties an application before the Court prior to the Claims Bar Date ("**Adjudication Application**"). The Adjudication Application shall be in the form of an assessment as if made under sections 142.51 through 142.61 of the *Forest Act*, R.S.B.C. 1996, c. 157, and will constitute proof, in the absence of evidence to the contrary, that the amounts assessed are due and owing. The onus of proving otherwise shall be on the Petitioners.

...

34. The hearing of an Adjudication Application shall proceed as if it were an appeal under section 142.9(1) of the *Forest Act*, taken to the Court instead of the revenue minister, directly from assessments made under sections 142.51 through 142.61 of the said *Act* as set out in the Adjudication Application pursuant to section 29 of this Order, and subject to the further direction of the Court.

89 Because this wording was not the subject of any discussion or submissions during the hearing, the parties have leave to return before me for further brief submissions concerning this modification if they find it necessary to do so.

90 There are two other modifications that the Province submits should be made, with which submission I agree. The first is to paragraph 19(a) of the draft CPO, which deals with creditors who do not file a Proof of Claim within the time limited, and goes on to provide that any such person:

(a) be and is forever barred, stopped and enjoined from asserting or enforcing any Claim against any of the Petitioners and/or any of the Directors and/or Officers and all such Claims shall be forever extinguished.

91 Although this is hardly unusual wording, the Province points out, and I agree, that the extinguishment of claims properly occurs at the later Plan and Sanction Order stage, and should not properly be part of the CPO. What the CPO can properly accomplish is preventing creditors who have not submitted claims in accordance with the process from asserting or enforcing any claim. Accordingly, paragraphs 19(a) and 32(a) should be amended by striking out the words "and all such [Crown] Claims shall be forever extinguished".

92 The Province also objects, properly, to the overly broad definition and treatment of directors and officers. Accordingly the definition of "Directors/Officers Claim" in Schedule "B" to the draft CPO will be amended by deleting the words "or in any other capacity" from the end of the definition. This will limit the definition to claims against directors or officers in their capacity as such.

93 Apart from these modifications, the form of the draft CPO is satisfactory. The stay is extended until November 30, 2012.

94 I remind the parties that the interpretation of the CPO and the administration of the claims process remain subject to the provisions of the CCAA.

Order accordingly.

Footnotes

- 1 *Lemare Lake Logging Ltd. v. British Columbia (Minister of Forests & Range)*, 2009 BCSC 909 (B.C. S.C. [In Chambers]) and 2009 BCSC 902 (B.C. S.C.); *Lemare Lake Logging Ltd. v. British Columbia (Minister of Forests & Range)*, 2011 BCSC 903 (B.C. S.C.); *British Columbia v. Lemare Lake Logging Ltd.*, 2012 BCSC 193 (B.C. S.C.). See also *Lemare Lake Logging Limited and Arsenault v. Minister of Forests and Range*, unreported, 23 November 2010, B.C. Prov. Ct. Vancouver No. 209979-1.

2006 ABQB 153
Alberta Court of Queen's Bench

Calpine Canada Energy Ltd., Re

2006 CarswellAlta 446, 2006 ABQB 153, [2006] A.W.L.D. 1915,
[2006] A.J. No. 412, 152 A.C.W.S. (3d) 833, 19 C.B.R. (5th) 187

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

In the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada
Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources
Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC,
Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

Romaine J.

Judgment: February 24, 2006
Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Q.C., Sean F. Collins, Derek Kearl for Applicants / Cross Respondents
Joseph Pasquariello, Jay A. Carfagnin for Applicants / Cross Respondents
Douglas S. Nishimura for Respondents / Cross Applicants, Pengrowth Corporation and Progress Energy Ltd.
Patrick McCarthy, Q.C., Joseph Krueger for Monitor

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

Headnote

Business associations --- Legal proceedings involving business associations — Partnerships — Actions by or against partnership — Practice and procedure — Miscellaneous issues

Predecessor agreed to sell certain oil and natural gas rights and assets on lands to corporation — Parties simultaneously signed call on production agreement which provided predecessor with reoccurring right of first refusal to purchase any portion of gas or oil produced from lands that were sold on market terms and conditions — On same date agreement was executed, partnership replaced predecessor as purchaser of gas and oil — Partnership was granted initial order restraining persons from terminating or suspending obligations under agreements as long as normal prices were paid by partnership for goods and services provided under such agreements — Corporation gave notice of suspension of delivery of natural gas to partnership under agreement — Corporation alleged that agreement was eligible financial contract and thus exempt from application of stay set out in order — Partnership brought motion for declaration that stay of proceedings contained in initial order applied to agreement — Motion granted — Balance of convenience favoured granting of stay — Irreparable harm could occur given extremely complex corporate and debt structure of partnership, nature of proceedings and evidence of value of partnership assets — If termination of agreement remained stayed, corporation were no worse off than other suppliers of goods and services to partnership — Agreement lacked characteristics or hallmarks of eligible financial contract — Agreement formed part of consideration for sale of lands under original agreement and therefore was not just stand-alone supply contract.

MOTION by partnership for declaration that stay of proceedings contained in order applied to agreement.

Romaine J.:

Introduction

1 The issues in this application and cross-application are:

- a) whether a Call on Production ("COP") Agreement between Pengrowth Corporation and Calpine Canada Natural Gas Partnership is an "eligible financial contract" within the meaning of Section 11.1 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, and
- b) whether the stay imposed with respect to the Calpine Energy Services Canada Partnership by the initial order under the *Companies' Creditors Arrangement Act* should be removed or lifted because this entity is a partnership and not a corporation.

2 I have decided that the COP Agreement is not an eligible financial contract and thereby is stayed by the initial order. I declined to lift the stay on the partnership. These are my reasons.

A. Is the COP Agreement an eligible financial contract within the meaning of Section 11.1 of the CCAA?

Facts

3 By agreement effective September 14, 2002, the Calpine Canada Natural Gas Partnership (the "CCNG Partnership") sold certain oil and natural gas rights and assets located on lands in British Columbia to Pengrowth. It was a term of the purchase and sale agreement that Pengrowth and the CCNG Partnership would enter into a COP Agreement upon closing of the purchase and sale. The COP Agreement is dated October 1, 2000.

4 The COP Agreement provides the CCNG Partnership with a reoccurring right of first refusal to purchase any portion of the gas or oil produced from the lands that were sold on market terms and conditions. The agreement remains in force for as long as gas and oil are produced from the lands, unless terminated sooner by the parties. It provides for a fixed delivery point and a price for the production spelled out by reference to current market prices. It does not compel Pengrowth to produce gas or oil from the lands. The CCNG Partnership has the right to reduce the volumes of production it is entitled to purchase on notice to Pengrowth, and thereafter Pengrowth may market such released volumes elsewhere.

5 On the same date the COP Agreement was executed, the Calpine Energy Services Canada Partnership (the "CESCA Partnership") replaced the CCNG Partnership as purchaser of the gas and oil, and shortly after that, Progress Energy Ltd. was partially novated into the agreement by Pengrowth with the consent of the CCNG Partnership.

6 On December 20, 2005, the Calpine applicants sought, and were granted, an initial order under the CCAA which, together with other relief, restrained persons from terminating or suspending their obligations under agreements with the applicants during the term of the order, as long as the applicants paid the normal prices for the goods and services provided under such agreements.

7 On December 21, 2005, Pengrowth provided notice to the CESCA Partnership that, effective December 23, 2005, it would suspend delivery of natural gas to the CESCA Partnership under the COP Agreement. In that notice, Pengrowth took the position that Calpine's filing for protection under the CCAA constituted a "Triggering Event" as defined in the COP Agreement that allowed suspension and termination of the agreement as of December 27, 2005. In another letter later the same day, Pengrowth alleged that the COP Agreement was an eligible financial contract, and thus exempt from the application of the stay set out in paragraph 9(d) of the initial order.

8 The Calpine applicants brought a motion for a declaration that the stay of proceedings contained in the initial order applies to the COP Agreement, that this agreement is not an eligible financial contract within the meaning of the

CCAA, and for damages against Pengrowth and Progress as a result of their improper termination of services under the agreement. Pengrowth and Progress in turn brought an application to vary the initial order by removing or lifting the stay with respect to the CESCA Partnership on the basis that the CCAA does not apply to partnerships. The question of damages against Pengrowth and Progress was not addressed at the hearing of these motions.

Analysis

9 The Alberta Court of Appeal considered the definition of "eligible financial contract" under the CCAA in the case of *Blue Range Resource Corp., Re*, [2000] A.J. No. 1032 (Alta. C.A.). In that case, the first to consider the definition, there were seven contracts at issue involving Blue Range, which was then under the protection of the CCAA. Two of them were "master agreements" that contemplated that the parties would enter into gas purchase and sale agreements from time to time, to be evidenced at the time of specific sales by confirmation letters. The other agreements were gas purchase and sale agreements between third parties and the wholly-owned subsidiary of Blue Range and guarantees by Blue Range of its subsidiary's obligations under these contracts. According to the Court of Appeal, all of these agreements contained netting out or set-off provisions, although subsequent commentary on the case suggests that some of these provisions were limited. The Court characterized the key issue as whether the long term gas purchase and sale contracts in the case were forward commodity contracts, as it was conceded in the appeal that, if they were, the master agreements and guarantees would be caught by the language of subsections 11.1(k) and (m) of the Act.

10 Fruman, J.A. started her analysis by describing the agreements in question in general terms, noting that the sellers were looking for price certainty and limited downside exposure, predicting that the market price for gas would decline, and that the buyers were gambling that the price would rise such that on delivery they would purchase gas at a price that was below market value. She described at paragraphs 18 to 20 how, at any particular time, the contract might be "in the money" when the market price of gas exceeded the purchase price specified in the contract, or "out of the money" when the market price was less than the purchase price. She described this as the contract being "marked to market", assigning a positive or negative value to the contract. As she noted, gas producers, to hedge risk, might enter into a series of such contracts at different prices for delivery on different dates, some of which would be "in the money" and others of which would be "out of the money". As she stated, "(t)ermination and netting out or set-off provisions permit the purchaser to terminate all the agreements upon a triggering event", thereby allowing the calculation of a termination amount payable by one party to the other. She comments further at paragraph 23:

Forward commodity contracts and other derivatives have a financial value that can readily be calculated; they are commercial hedging contracts that can be used to manage various types of risk, including changes in commodity prices, exchange rates, interest rates and market risks.

11 Fruman, J.A. rejected the distinction between physically-settled and financially-settled contracts in determining whether a contract falls within the definition of eligible financial contracts: at para. 36. However, she also recognized that if the term "forward commodity" contract was interpreted to include physically-settled transactions, it could potentially include every contract to buy or sell on a future date, any "thing produced for use or sale": para. 39. As the Court of Appeal recognized at para. 39, interpreting the term "eligible financial contract" so broadly would defeat the very purpose of the CCAA, to provide an insolvent corporation with the time and opportunity to reorganize its affairs as a viable operation. Fruman, J.A. concluded, at para. 39:

Section 11.1(1) is an exception to a statutory protection which must "be interpreted in light of [the] underlying rationale and not used to undermine the broad purpose of the legislation...": Driedger, 3rd ed., at 369-70. See *National Trustco v. Mead* (1990), 71 D.L.R. 4th 488 at 497-99 (S.C.C.). This dictates a narrower construction of provisions which are excepted from a stay order: *Re Smith Brothers Contracting Ltd.* (1998) 53 B.C.L.R. (3d) 264 at 272 (S.C.).

12 The Court found a narrower construction of the term "forward commodity contract" in the concept of "commodity", which it defined as being interchangeable and:

...readily identifiable as fungible commodities capable of being traded on a futures exchange or as the underlying asset of an over-the-counter derivative transaction. Commodities must trade in a volatile market, with a sufficient trading volume to ensure a competitive trading price, in order that forward commodity contracts may be "marked to market" and their value determined. [*Blue Range Resource Corp., Re* at para.45]

Even so, the Court recognized that not every contract involving the purchase and sale of gas was a forward commodity contract within the meaning of the exception set out in Section 11.1 of the CCAA: at para. 50.

13 Fruman, J.A. referred to industry and expert definitions of forward commodity contracts to aid her in her analysis. Specifically, she focussed on two definitions, as follows:

[Mark E.] Haedicke and [Alan B.] Aronowitz, ["Gas Commodity Markets" in *Energy Law and Transactions Vol. IV* (New York: Matthew Bender & Co. Inc., 1999)] at 88:74-75 define a "forward contract" for the energy industry as:

A customized contract to buy or sell a commodity for delivery at a certain future time for a certain price. It is customized by individual negotiations between two parties, rather than standardised and traded on a board of trade. The parties to the forward contract usually know each other, and in most cases the contract is settled by actual delivery of the commodity.

James Joyce, a specialist in energy risk assessment who provided an expert report in this case, identified the key elements of a forward commodity contract in the natural gas industry to include:

- a) a buyer of natural gas;
- b) a seller of natural gas;
- c) a defined contract term longer than the next day;
- d) a defined volume of natural gas;
- e) a defined delivery and receipt point (including any transportation requirements, as applicable); and;
- f) a defined price or pricing mechanism.

[*Blue Range Resource Corp., Re* at paras. 48 and 49]

14 As the Court noted, the Joyce definition would not capture standard gas utility contracts that do not commit a purchaser to a specific volume of gas for a specified price. However, the contracts at issue in the Blue Range appeal met all of the elements of both the *Haedicke* and *Joyce* definitions, and the Court of Appeal found that they were therefore forward commodity contracts: at paras. 50 and 51.

15 Fruman, J.A. indicated that there is a final test - the fairness of the result. In her analysis of the Blue Range contracts, she found that both parties were fairly treated even though the appellants were allowed to terminate the contracts: *Blue Range Resource Corp., Re*, at paras. 52-53.

16 Fruman, J.A.'s approach was accepted by the Ontario Court of Appeal in the next case to consider the definitions eligible financial contracts, *Androscoggin Energy LLC, Re*, [2005] O.J. No. 592 (Ont. C.A.), in which that Court also rejected the distinction between "physically-settled" and "financial settled" contracts adopted by both the Alberta and Ontario chambers judges.

17 In the Ontario case, the appellants had entered into long term contracts to supply gas to Androscoggin, a corporation under CCAA protection. Androscoggin operated a gas-fuelled co-generation plant. The contract price at which the appellants had agreed to supply gas was below the current market price of gas. The Court of Appeal agreed with the

chambers judge that the contracts should not be characterized as eligible financial contracts, but on a different basis, stating:

The contracts in issue before Fruman J.A. served a financial purpose unrelated to the physical settlement of the contracts. The reasons in *Blue Range Resource Corp.* indicate that the contracts Fruman J.A. examined enabled the parties to manage the risk of a commodity that fluctuated in price by allowing the counterparty to terminate the agreement in the event of an assignment in bankruptcy or a CCAA proceeding, to offset or net its obligations under the contracts to determine the value of the amount of the commodity yet to be delivered in the future, and to re-hedge its position. Unlike the contracts found to be EFCs in *Blue Range Resource Corp.*, *supra*, the contracts in issue here possess none of these hallmarks and cannot be characterized as EFCs. However, mere *pro forma* insertion of such terms into a contract will not result in its automatic characterization as an EFC. Regard must be had to the contract as a whole to determine its character. [emphasis added]

Androscoggin, at para. 15.

18 Analysing the COP Agreement as a whole, it is clear that it lacks the characteristics or hallmarks of an eligible financial contract. It does not fall within the definitions of "forward commodity contracts" cited by Fruman, J.A. in *Blue Range Resource Corp.*, *Re* when the terms "certain price" and "defined price" in those definitions are read as synonymous with "pre-determined" or "fixed" (as I believe is the intent), rather than the broader "able to be determined" meaning submitted by Pengrowth. It is clear that the COP Agreement does not meet the fixed price requirement, but instead depends upon market pricing. In the same vein, the term of the contract is uncertain, not "defined" as required by the Joyce definition, and the volume of gas to be produced, and therefore purchased under the COP Agreement cannot be defined in any real sense. Moreover, although in a sense the COP Agreement gives the CESCA Partnership some certainty of source of supply, Pengrowth is neither obliged to produce, nor obliged to produce at any specific rate.

19 The COP Agreement, due to its nature, cannot be "marked to market", which is contrary to the characteristic noted at paragraph 46 of *Blue Range Resource Corp.*, *Re* that "(f)orward gas contracts ... have a calculable cash equivalent". The COP Agreement, again due to its nature, has no offsetting or netting provisions. Both the *Blue Range Resource Corp.*, *Re* and *Androscoggin Energy LLC*, *Re* decisions refer extensively to the importance of such netting-out provisions to the concept of eligible financial contracts: *Blue Range Resource Corp.*, *Re* at paras. 8, 9, 13, 20, 21, 27, 30 and 53; *Androscoggin Energy LLC*, *Re* at para. 15. Without suggesting that such provisions are necessary in every case before a contract is found to be an eligible financial contract, or that every contract that includes such provisions must be a priori be an eligible financial contract, the importance of such provisions to the determination of whether the contract is truly a derivative or risk management instrument cannot be overemphasized.

20 The price of gas under the COP Agreement is the current market price as determined by various industry measurements, less toll charges. This is not a predetermined, fixed price that in the normal course could prudently be hedged by an off-setting contract. The respondents did not adduce evidence of any hedging of the COP Agreement. While they certainly had no obligation to do so, the lack of such evidence tends to support the conclusion that the COP Agreement is not the type of contract that is part of the forward contract trade.

21 The history or context of the COP Agreement is also note worthy. It was entered into as a condition of the purchase and sale of the lands, an obligation upon Pengrowth that would always be burdensome to it and valuable to the Calpine applicants, given the toll "kicker" in favour of the CCNG Partnership. In that sense, the COP Agreement forms part of the consideration for the sale of the lands, and is not just a stand-alone supply contract.

22 The COP Agreement in its essential terms is analogous to the type of contract specifically exempted from the category of eligible financial contract by Fruman, J.A. at para. 50 in *Blue Range Resource Corp.*, *Re*, a standard gas utility contract. The demand, price and quantity of gas to be purchased is based solely upon the purchaser's needs from time to time at prices that fluctuate.

24 Given that the CCAA's predominate purpose as a remedial statute dictates a narrower construction of section 11.1(1) than the mere enquiry if a contract could fall within one of its "comprehensive and intimidating" list of categories, (*Blue Range Resource Corp., Re*, at para. 10), and given the ingenuity and innovation of those who deal in the derivatives market, there can be no "bright-line" definition that will determine whether a contract falls within the exception set out in the CCAA. While some contracts clearly will fall within the exception, either by their nature or by reason of existing case law, there are others that do not fit so clearly and that may necessitate a more searching analysis by CCAA parties and the court.

26 The respondents also point out that intermediary Calpine entities are involved in the process of transporting the gas, or its equivalent volume, to an eventual end-user, and that some of these intermediaries may be characterized as risk management and gas marketing companies. That being said, they concede that a Calpine entity is likely the end-user of the gas, to the extent that this concept has meaning in the complex business of gas transportation. It is not unexpected that Calpine has risk management subsidiaries, as do most fully integrated gas and electricity companies. The characterization of the purchaser as a forward contract merchant, or not, is not determinative of the Canadian definition of eligible financial contracts, as it is in the United States. As pointed out by Rupert H. Chantrand and Robin B. Schwill in "Shades of Blue: Derivatives in Re *Blue Range Resource Corp.*", 16 B.F.L.R. 427 at p. 431, gas purchasers rarely if ever are the direct end-users of the gas they purchase, whether or not their contract provides for physical settlement.

28 The last part of the analysis directed by the Court of Appeal in *Blue Range Resource Corp.*, *Re* is the fairness of result test. While this test is not always easy to apply, it appears clearer in this situation than in many. If the respondents were allowed to terminate the COP Agreement, they would derive a benefit from being able to enter into long-term, fixed price contracts for the gas produced from the lands, or selling in the spot market without the burden of transportation costs. The Calpine applicants would derive no benefit from the termination. Although the COP Agreement has value to

the Calpine applicants, no amount would be payable to the CESCA Partnership on its termination. They would lose a valuable contractual asset without compensation. Moreover, the COP Agreement was part of the consideration extracted when Calpine sold the lands to Pengrowth. Therefore, termination of the contract would deprive the Calpine applicants and their creditors of the ongoing benefit of the sale of the lands. Finally, the CESCA Partnership would lose a relatively secure supply of gas at market price.

29 On balance, termination would not meet the fairness of result test. If, however, termination of the COP Agreement remains stayed, the respondents are no worse off than other suppliers of goods and services to the Calpine applicants. The respondents have not adduced evidence that a failure to be able to terminate the contract will cause any prejudice to their hedging strategy. Calpine's creditors as a group will benefit from the value of this contractual asset.

B. Should the stay imposed by the Initial Order extend to the Calpine Energy Services Canada Partnership?

30 The initial order of December 20, 2005 grants the usual stay of proceedings sought in CCAA applications for the benefit of, not only the corporate Calpine entities that applied, but also the CESCA Partnership, CCNG Partnership and the Calpine Canadian Saltend Limited Partnership. Pengrowth and Progress apply pursuant to the come-back provision of the initial order to vary it with respect to the CESCA Partnership. The onus is on the Calpine applicants to justify the extension of the stay to the CESCA Partnership.

31 At the time of the initial application, the Calpine applicants provided an overview of the Calpine group that made it clear that, at least from a corporate organizational prospective, the business affairs of the partnerships are significantly inter-twined with the Calpine corporations and, in some cases, with each other. Calpine submitted that the partnerships are important to the value of the Canadian operations of the Calpine group, and that their value and their key contractual assets should be preserved during the reorganization of the Canadian operations.

32 Currently, the Monitor and Calpine are working together to prepare an analysis of intercorporate debt which will enable the court and Calpine's creditors to better evaluate a proposed plan of restructuring. As indicated by Farley, J. in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at page 4, "(o)ne of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually". While it is early in this CCAA proceeding to make the determination that this is the case with certainty, the evidence adduced so far by Calpine appears to indicate that the treatment of the Calpine group as an integrated system will result in greater value.

33 Although the CCAA does not give a court the power to stay proceedings against noncorporate entities, this court has the inherent jurisdiction to grant a stay of proceedings where it is just and convenient to do so: *Lehndorff General Partner Ltd., Re*, supra at pg. 7; *Campeau v. Olympia & York Developments Ltd.*, [1992] O.J. No. 1946 (Ont. Gen. Div.), at pp. 4-7.

34 It is clear that Calpine has a more than arguable case that a stay involving the Partnerships is necessary and appropriate. It is also likely, given the extremely complex corporate and debt structure of the Calpine group, the cross-border nature of these proceedings, and the evidence I have heard so far in the proceedings of the value of partnership assets, that irreparable harm may accrue to the Calpine group if the stay is not granted. The balance of convenience certainly favours a stay. I find that it is just, reasonable and appropriate in this case to exercise this court's inherent jurisdiction to stay proceedings against the Calpine partnerships.

C. Future Sales or Credit

35 Although relief under this heading was not sought in their Notice of Motion, Pengrowth and Progress have asked for a direction that they are not obliged to deliver gas to the CESCA Partnership on credit and are entitled to immediate payment for any gas delivered after the date of the initial order.

Calpine Canada Energy Ltd., Re, 2006 ABQB 153, 2006 CarswellAlta 446
2006 ABQB 153, 2006 CarswellAlta 446, [2006] A.W.L.D. 1915, [2006] A.J. No. 412...

36 This application is premature, and I adjourn consideration of the issue until the parties have had time to discuss the implications of my decisions relating to the COP Agreement.

Motion granted.

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2001 ABQB 1094
Alberta Court of Queen's Bench

Hunters Trailer & Marine Ltd., Re

2001 CarswellAlta 1636, 2001 ABQB 1094, [2001] A.J. No. 1638, [2002]
A.W.L.D. 61, 110 A.C.W.S. (3d) 795, 305 A.R. 175, 30 C.B.R. (4th) 206

**In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.
C-36, as amended; And In the Matter of the Hunters Trailer & Marine Ltd.**

Wachowich C.J.Q.B.

Heard: November 20, 2001
Judgment: December 14, 2001
Docket: Edmonton 0003-19315

Counsel: *Kentigern A. Rowan*, for Canadian Western Bank
Terrence M. Warner, for CIT Financial Ltd.
Douglas H. Shell, for Deutsche Financial Services
R. Craig Steele, for Bank of America Canada Specialty Group Ltd.
Juliana E. Topolniski, Q. C., for Mr. Blair Bondar
Darcy G. Readman, Darren R. Bieganeck, for UMC Financial Management Inc.
Jeremy H. Hockin, Deborah J. Polyn, for Deloitte Touche Inc.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

U Inc. held first and second mortgage on real property of H Ltd. and assignment of certain life insurance proceeds — Order granted super-priority for debtor in possession financing or administrative costs over all of H Ltd.'s property — Interim receiver brought application to determine allocation of costs, including debtor in possession financing and administrative charges in Companies' Creditors Arrangement Act proceedings, between H Inc.'s major secured creditors — U Inc. allocated 15 per cent of monitor's fees and five percent of debtor in possession financing — Equitable that all major secured creditors be liable for portion of costs — Unfair to ignore differences in type of security held by creditors and degree of potential benefit that could be derived from proceedings under Act — U Inc. was in different position than other major secured creditors — Not equitable that it be allocated same proportion of costs — Interim receiver's proposal that U Inc. be charged percentage of monitor's fees was accepted — Debtor in possession financing was granted to meet H Ltd.'s urgent needs during sorting out period which was for benefit of all creditors — Majority of financing was used for wages, some of which could be attributable to building maintenance — Some of financing was used to provide security on premises — Some of financing was applied to life insurance premiums and protecting policy was of potential benefit to U Inc. — U Inc. was to bear portion of financing costs — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

APPLICATION by interim receiver to determine allocation of costs between major secured creditors.

Wachowich C.J.Q.B.:

THE APPLICATION TO DETERMINE COST ALLOCATION

1 The court-appointed Interim Receiver of Hunters Trailer & Marine Ltd. (Hunters) seeks an Order determining the allocation as between Hunters' major secured creditors of the costs and expenses of the insolvency proceedings, including the "debtor in possession" (DIP) financing and administrative charge provided for in the *Companies' Creditors Arrangement Act* proceedings (*CCAA* costs) and the fees and disbursements of Deloitte & Touche Inc. as Interim Receiver and Trustee in Bankruptcy.

2 Counsel for Deutsche Financial Services (DFS) prepared and circulated a proposal relating to cost allocation. The parties appear to agree with the manner in which costs for the *CCAA* proceedings, the interim receivership and the bankruptcy have been segregated by DFS. The primary issue of contention is the extent to which UMC Financial Management Inc. (UMC), which held a first and second mortgage on the real property of Hunters and an assignment of certain life insurance proceeds, should be responsible for any of the *CCAA* costs. It is acknowledged by the parties that there is no case law directly on point in terms of allocation of *CCAA* costs.

THE ARGUMENTS OF THE PARTIES

3 DFS takes the position that the matter is settled by my Order of October 11, 2000, which gave all *CCAA* costs priority over Hunters' real and personal property. DFS proposes that all major secured creditors share the *CCAA* costs *pro rata* on the basis of their recovery. Each dollar of proceeds realized from the assets would have a percentage cost component to be applied toward payment of the applicable costs. DFS argues that the Court would be readjusting priorities if it assigns all of the cost burden for the *CCAA* proceedings to one class of creditors.

4 CIT Financial Services (CIT) supports the suggestion that all of the secured creditors should participate in the *CCAA* costs. However, it submits that cost allocation should be based on the ratio of a secured creditor's recovery to total recoveries of the secured creditors. In effect, this leads to the same result as the DFS proposal. Canadian Western Bank (CWB) agrees in principle with the allocation of costs proposed by DFS and also contends that any allocation should be based on recoveries. Bank of America did not take any stand on this application.

5 UMC argues that it would be inequitable for it to be forced to bear costs on the basis proposed by DFS or CIT as it would then be liable for a disproportionate amount of the costs. UMC contends that it was a passive creditor which advanced funds based on the value of land rather than on the value of the business as a going concern. As the risk of loss was greater for the operating lenders, they should be responsible for most of the *CCAA* costs. However, UMC concedes that it should bear some of the insolvency costs to the extent that those costs relate to the lands over which it was the primary security holder.

6 The Interim Receiver recommends something of a middle ground. While acknowledging that the *Bankruptcy and Insolvency Act* does not apply to *CCAA* proceedings, it adopts the philosophy of that Act that secured creditors with a commonality of interest should be treated alike. In determining whether creditors fall within the same class, consideration should be given to the nature of the debt giving rise to the claims, the nature and priority of the security in respect of the claims, the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies.

7 The Interim Receiver submits that all of the floor planners and CWB, which held security on non-floored assets and was the DIP lender, have a common interest while the interest of UMC is quite different in terms of the nature and priority of its security, the remedies available to it and the extent of its recoveries. Apparently, the price at which the lands were sold substantially exceeded Hunters' debt to UMC. The Interim Receiver suggests that UMC should bear 15 percent of the Monitor's fees and \$500.00 of the Monitor's legal fees. According to the Interim Receiver, these figures are comparable to the estimate by DFS and its own estimate of UMC's share of the interim receivership costs.

8 UMC supports the Interim Receiver's proposal. In the event that the Court does not agree with this proposal, UMC contends that it would not be appropriate for the Court to make an assessment on the basis of a summary hearing. Rather, DFS should continue to bear the costs and sue the remaining creditors for contribution and indemnity.

WHETHER UMC SHOULD BEAR A PROPORTION OF THE CCAA COSTS

9 The CCAA does not contain any provisions dealing specifically with payment of DIP financing or administrative costs. In my initial Order of October 11, 2000, I granted a super-priority for these amounts over all of Hunters' property. In addition, I directed that:

38. The Monitor shall review the security position of the creditors of Hunters with a view to determining whether any secured creditor is inequitably affected by the priority given to the DIP Financing and Administrative Charge and, if any secured creditor is inequitably affected the Monitor shall report the circumstances and provide its recommendation in connection therewith. Based on such report, and any other information the Court deems pertinent, the Court shall be entitled to apply the Doctrine of Marshalling or such other equitable principles as it sees fit to effect a result that treats all of the creditors equitably having regard to their security, priority and indebtedness as of the date of this Order and in directing the distribution of funds held back pursuant to paragraph 17 of this Order.

10 The present application relates to the allocation of those costs. While it is within the Court's jurisdiction to determine which parties are to bear the costs and in what proportion, I am cognizant of the following cautionary remarks made by Chadwick J. in *Canadian Asbestos Services Ltd. v. Bank of Montreal* (1992), 11 O.R. (3d) 353 (Ont. Gen. Div.), at 359:

The purpose of the Act is not to give a benefit or an advantage to one class of creditors at the expense of other creditors. Likewise, it is the duty and responsibility of the Court not to alter the security arrangements entered into by the company and its various creditors. It is not the Court's duty, responsibility or mandate to attempt to readjust the priorities between the creditors and the applicant company.

11 Chadwick J. in that case ordered that the fees of the monitor and its legal counsel should be paid out of the assets of the company prior to distribution to the creditors as the CCAA proceedings were for the benefit of all creditors. In addition, the court gave priority to funds advanced by two of the creditors so that construction projects could be completed to avoid incurring late penalties and charge-backs. The court reasoned that advancement of those funds was for the benefit of all creditors and that granting priority for payment of the funds would not change the priority of the various other creditors or jeopardize their security.

12 Like the argument raised by UMC in the present case, the secured creditors in *United Used Auto & Truck Parts Ltd.* (2000), 16 C.B.R. (4th) 141 (B.C. C.A.) argued that the super-priority granted for monitor's fees was unfair given that they had no interest in preserving the active business of the debtor. Mackenzie J.A. responded at para. 28:

The object of the CCAA is more than the preservation and realization of assets for the benefit of creditors, as several courts have underlined. In *Chef Ready [Hongkong Bank v. Chef Ready Foods]* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.)..., Gibbs J.A. said that the primary purpose is to facilitate an arrangement to permit the debtor company to continue in business and to hold off the creditors long enough for a restructuring plan to be prepared and submitted for approval. The court has a supervisory role and the monitor is appointed "to monitor the business and financial affairs of the company" for the court. The appointment of a monitor is mandatory when the court grants CCAA relief.

13 The Monitor acts on behalf of the Court for the benefit of all parties (*Starcom International Optics Corp., Re* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]); *Canadian Asbestos Services Ltd. v. Bank of Montreal, supra*). It is for that reason that I was prepared to grant a super-priority for the Monitor's fees and disbursements and those of its legal counsel.

14 All creditors may be affected by a stay imposed in the *CCAA* proceedings and there is at least the potential that all may benefit to some extent from maintaining the company as a going concern. Obviously, any operating creditors who are less than fully secured stand to benefit the most from a successful reorganization. However, I note in this case that UMC along with CWB supported the company's application for an extension of the original stay under the *CCAA*. In terms of a mortgagee such as UMC, allowing the debtor company to continue as a going concern would negate the need for foreclosure proceedings and might result in the mortgagee receiving additional interest payments, if nothing else. Obviously, there is greater risk to the mortgagee in a falling real estate market. However, there is no indication of any such trend in the present case.

15 Equity informs the decisions made by courts in the exercise of their jurisdiction under the *CCAA*. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the *CCAA* costs. That is not to say that equity calls for an equal allocation of costs.

16 The Interim Receiver suggests that costs may be allocated differently between separate classes of creditors. This eventuality was anticipated in my Order of October 11, 2000. The Interim Receiver argues that UMC has no commonality of interest with the other major secured creditors and therefore may be treated differently. UMC does not dispute that it has some obligation in terms of *CCAA* costs but agrees with the Interim Receiver's assessment that it stands in a different position than the floor planners and CWB.

17 Six classes of creditors voted on a reorganization plan in *Keddy Motor Inns Ltd., Re* (1992), 90 D.L.R. (4th) 175 (N.S. C.A.). The appellants were some of the only creditors who were fully secured. They complained that the class of secured creditors was too broad and that they should not have been placed in a class with creditors secured by non-core properties and mechanics' lienholders. Freeman J.A., who delivered the decision of the court, acknowledged that it might have been better if secured creditors of core properties had been placed in a separate class (see also *Wellington Building Corp., Re* (1934), 16 C.B.R. 48 (Ont. S.C.)). However, he was of the view that no substantial injustice had occurred. In response to the appellants' contention that the plan was tailored to individual creditors, Freeman J.A. stated at p. 184:

It necessarily follows that plans for broad classes of secured creditors must contain variations tailored to the situations of the various creditors within the class. Equality of treatment - as opposed to equitable treatment - is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is a proper disclosure. They must, however, be determined to be fair and reasonable within the context of the plan as a whole.

18 Granted, that statement was made in the context of a plan of arrangement. Nevertheless, it is equitable rather than equal treatment which is the objective in *CCAA* proceedings.

19 In his article "Financing the Debtor in Possession", presented at the Tenth Annual Meeting and Conference of the Insolvency Institute of Canada, November, 1999 in Scottsdale, Arizona (online: e-Carswell, Insolvency.Pro), H. Alexander Zimmerman stated:

It does appear fundamentally unfair, and counter-intuitive, that those with little or no economic incentive to allow the debtor to restructure should be asked to bear the cost and risk inherent in funding that restructuring by way of super-priority secured funding which primes (subordinates) their position. It also clearly represents a divergence from the principles in *Kowal* [*Robert F. Kowal Investments Limited v. Deeder Electric Limited* (1975), 9 O.R. (2d) 84 (C.A.)] that, to charge property subject to a pre-existing lien in priority to such lien, the Court must find (a) the consent of such lienholder, or (b) a preservation of or realization upon such property enuring to the benefit of such lienholder, or (c) necessary preservation (of the property itself or for environmental or other public health and safety grounds).

20 I agree that it would be unfair to ignore differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from *CCAA* proceedings. The *CCAA* recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and

second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery.

21 Under the circumstances, I conclude, as did the Interim Receiver, that UMC is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of *CCAA* costs. I agree with the Interim Receiver's proposal that UMC be charged 15 percent of the Monitor's fees and \$500.00 of the Monitor's legal fees, the same percentage proposed for its share of the interim receivership costs. I note that UMC also agreed with this proposal.

22 Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.

23 Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors.

24 Approximately 62 percent of the DIP financing to October 31, 2001 was used for wages. Outside of bankruptcy, wages would have no priority to UMC's interest in Hunters' real property but would have priority to the personal property interests of the other secured creditors. Nevertheless, certain of those wages may be attributable to building maintenance. In addition, some of the DIP financing was used in order to provide security on the premises.

25 An additional 20 percent of the DIP financing was applied to life insurance premiums. Strictly speaking, not all of the premiums can be considered *CCAA* costs as the premiums continue to be paid from the monies advanced for DIP financing. UMC holds an assignment on one of the life insurance policies. While it has made full recovery on the debt owing through the sale of Hunters' land holdings, at the outset of the *CCAA* proceedings there could have been no certainty as to the sale price of the land or UMC's share of the *CCAA* costs. Protecting their security in the life insurance policy by payment of the monthly premiums was at least of potential benefit to UMC, particularly given that UMC may wish to look to this security in the event that its allocation of *CCAA* costs exceeds the amount remaining from sale of Hunters' real property after payment of the initial debt.

26 I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above.

27 UMC argued that I should not make any allocation of costs if I choose not to agree with the Interim Receiver's proposal. In my view, there is nothing to preclude my deciding the matter now. The parties have had an opportunity to make submissions on the issue of allocation of *CCAA* costs and the principles that should be applied in such a determination. There is no need, as there was in *Canadian Imperial Bank of Commerce v. Wm. C. Rieger Co.* (1991), 126 A.R. 69 (Alta. Q.B.), for a special reference to the Master. It is in everyone's best interests that this matter be resolved now.

CONCLUSION

28 UMC is allocated 15 percent of the Monitor's fees, \$500.00 of the Monitor's legal fees and five percent of DIP financing as its share of the *CCAA* costs. This is in addition to its share of the interim receivership costs as calculated by the Interim Receiver.

Order accordingly.

Hunters Trailer & Marine Ltd., Re, 2001 ABQB 1094, 2001 CarswellAlta 1636
2001 ABQB 1094, 2001 CarswellAlta 1636, [2001] A.J. No. 1638, [2002] A.W.L.D. 61...

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2009 MBQB 204
Manitoba Court of Queen's Bench

Winnipeg Motor Express Inc., Re

2009 CarswellMan 383, 2009 MBQB 204, 15 P.P.S.A.C. (3d) 242,
179 A.C.W.S. (3d) 266, 243 Man. R. (2d) 31, 56 C.B.R. (5th) 265

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG
MOTOR EXPRESS INC., 4975813 MANITOBA LTD. and 5273634 MANITOBA LTD. ("the Applicants")

Suche J.

Heard: June 19, 2009

Oral reasons: June 19, 2009

Docket: Winnipeg Centre CI 08-01-56696

Counsel: David R.M. Jackson for Monitor, Ernst & Young Inc.

G. Bruce Taylor, Jennifer J. Burnell for Winnipeg Motor Express ("WME")

Harvey G. Chaiton for Heller Financial Canada Holding Company ("Heller"), GE Canada Leasing Services ("GE"))

Donald G. Douglas for Paccar Financial Services Ltd. ("Paccar"))

Douglas G. Ward, Q.C. for Alterinvest Fund L.P. (BDC)

Robert A. Dewar, Q.C. for Ramwinn Diesel Inc. ("Ramwinn"))

William G. Haight for Key Equipment Finance Canada Ltd.

E. Peter Auvinen for CIT Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc.,
Stoughton Trailers Canada Corp. ("Stoughton"))

Donald R. Knight, Q.C. for Maxim Transportation Services Inc. ("Maxim"))

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Headnote

Personal property security --- Scope of legislation — True lease versus sales financing

W Inc. filed for protection under Companies' Creditors Arrangement Act — M Inc. and S Corp. provided trailers to W Inc. under leases — Monitor recommended that certain charges be allocated among secured creditors on pro rata recovery using actual or estimated recovery — Motion was brought for ruling on appropriate distribution of charges — M Inc. and S Corp. took position that they were true lessors and therefore should not be included in allocation of charges and are entitled to payment for use of property during restructuring under s. 11.3(a) of Act — Agreement between W Inc. and M Inc. was true lease, but agreement with S Corp. was financing lease or sufficiently akin to one to fall outside scope of s. 11.3(a) — Essential bargain between W Inc. and M Inc. was for use of M Inc.'s property — M Inc. undertook all risks associated with ownership of equipment — M Inc.'s agreement did not create security interest — Agreement with S Corp. provided that W Inc. bore entire risk of loss from any cause — W Inc. was required to make payments to S Corp. regardless of loss or any claim against manufacturer of equipment — S Corp. and W Inc. intended that W Inc. purchase vehicle — Ownership was retained by S Corp. solely for purpose of enforcing W Inc.'s obligation.

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

W Inc. filed for protection under Companies' Creditors Arrangement Act — M Inc. and S Corp. provided trailers to W Inc. under leases — Monitor recommended that certain charges be allocated among secured creditors on pro rata recovery using actual or estimated recovery — Motion was brought for ruling on appropriate distribution of charges — M Inc. and S Corp. took position that they were true lessors and therefore should not be included in allocation of charges and are entitled to payment for use of property during restructuring under s. 11.3(a) of Act — Agreement between W Inc. and M Inc. was true lease, but agreement with S Corp. was financing lease or sufficiently akin to one to fall outside scope of s. 11.3(a) — Essential bargain between W Inc. and M Inc. was for use of M Inc.'s property — M Inc. undertook all risks associated with ownership of equipment — M Inc.'s agreement did not create security interest — Agreement with S Corp. provided that W Inc. bore entire risk of loss from any cause — W Inc. was required to make payments to S Corp. regardless of loss or any claim against manufacturer of equipment — S Corp. and W Inc. intended that W Inc. purchase vehicle — Ownership was retained by S Corp. solely for purpose of enforcing W Inc.'s obligation.

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

W Inc. filed for protection under Companies' Creditors Arrangement Act — Monitor recommended that certain charges be allocated among secured creditors on pro rata recovery using actual or estimated recovery — Charges consisted of DIP loan and administrative charges incurred since stay of proceedings was granted — Motion was brought for ruling on appropriate distribution of DIP loan and administrative charges — Methodology proposed by monitor on its face was fair, had objective basis and was applied uniformly — Utilizing "outstanding indebtedness approach" would not have been better as it would favour one creditor substantially — Where allocation is prima facie fair, onus is on objecting creditor to demonstrate that proposal was unfair or prejudicial — There was no basis to deviate from proposal — All secured creditors received real and meaningful benefit as result of these proceedings — It would be economically self-defeating to undergo analysis to determine who benefited more — Any equipment recovered by lessors after stay was included in allocation — Undue prejudice suffered by equipment lessors who held financing leases had been recognized by previous court order that they be paid as of August 1, 2008 — True lessor derived same benefit as financing lessors from these proceedings and was to share in charges, but amount of lessor's total recovery was discounted by 6 percent for risk of non-performance.

MOTION for ruling on appropriate distribution of DIP loan and administrative charges incurred since stay of proceedings was granted pursuant to s. 11 of *Companies' Creditors Arrangement Act*.

Suche J. (orally):

1 The issue before me today is the appropriate distribution of the DIP loan and administrative charges (collectively referred to as the "Court Ordered Charges") incurred since May 15, 2008, when I granted a stay of proceedings pursuant to s. 11 of the *CCAA*. The DIP loan represents working capital advanced to WME by Heller during the restructuring period; the administrative charges consist of the monitor's fees, its legal fees, WME's legal fees, and director's charges. The amount of these fees is not in issue and both have been paid by Heller out of receivables collected from WME's operations and sale of assets. Thus, the effect of this order will be to require other parties to reimburse Heller for some portion of the \$1.8525 million in issue.

2 The monitor, in its twelfth report dated February 12, 2009, recommends that the Court Ordered Charges be allocated among the secured creditors based on pro rata recovery, using actual or estimated recovery. Total recovery for any creditor includes its direct recovery plus allocated sale proceeds, plus any lease payments recovered, less direct costs, which includes expenditures for such things as repairs or reconditioning.

3 In the result, certain secured creditors will be excluded, namely:

- (i) Daimler Chrysler Financial Services, as I ruled its equipment was not subject to the stay, or the Court Ordered Charges;

(ii) three secured creditors, Richard Sobey, Frontier Capital Partners, and Shaw Satellite Services, whose security is subordinate to BDC, which itself only recovered a minimal amount of WME's outstanding indebtedness.

4 In addition, several office or non-fleet equipment lessors have been excluded on the basis of administrative efficiency because of the very small amount of their respective recoveries.

5 In making its recommendations, the monitor indicates it relied on the following principles:

(i) all secured creditors should contribute to the cost of restructuring;

(ii) a strict accounting on a cost benefit basis is impractical and not necessary or desirable for allocation purposes;

(iii) security arrangements and priorities should not be readjusted as part of this process;

(iv) the proportion each creditor should be allocated need not be equal; and

(v) the allocation should be equitable, rather than equal.

6 The monitor also recommends that no DIP charge should be allocated to any equipment parked and available for pickup at the date of filing, or for units that have not yet been returned to a lessor/lender.

The Parties and Their Positions

Heller

7 Heller provided a demand operating loan to WME margined against 85% of eligible accounts receivable. At the time of the stay, this loan was at \$5,643,297, which was secured by accounts receivable of \$5,868,630. During the restructuring, Heller continued to allow the operating loan to revolve. It advanced approximately \$8,750,000 (Cdn.) and \$2,800,000 (U.S.) under the operating loan to pay WME's ongoing business expenses. The pay down of the loan was as a result of a combination of the sale of assets and collection of receivables. In the end, Heller is projected to suffer a loss of approximately \$55,000. It makes the point that it would likely have avoided this had its collateral not been used to make lease payments of approximately \$394,000 to financing lessors.

8 Heller supports the monitor's recommendation.

GE

9 GE leased 44 tractors and 204 trailers to WME under financing leases. Despite my order of July 3, 2008 requiring WME to pay equipment lessors as of August 1, 2008, GE did not seek payment under any of its leases. Ultimately, GE's equipment was included in the purchase by Newco, although as part of that transaction, GE wrote off approximately \$250,000 in principal and unpaid interest and renegotiated its leases at an interest rate of 9.25%.

10 In calculating GE's net recovery, the monitor used the average between the liquidation value of its equipment and the present value of the leases assumed, discounted at the rate of 9.25%. It was argued by several creditors that this discount is commercially unreasonable, and seriously understates the value of GE's recovery.

11 GE supports the monitor's proposed allocation.

Paccar

12 as at the date of filing, Paccar leased 83 tractors and 19 trailers to WME, pursuant to financing leases. As a result of my order of July 3, 2008, Paccar received \$279,855 in lease payments between August 1 and the date on which its equipment was returned. Although Newco was amenable to including Paccar's equipment in its purchase, Paccar was not agreeable to this. Accordingly, all its equipment (save one or two units which could not be recovered) was returned.

13 Paccar disputes the monitor's proposed allocation, arguing that GE and Heller have received the lion's share of the benefit from these proceedings and have suffered virtually no loss. It further maintains that it has been unduly prejudiced, as have all equipment lessors, by virtue of the fact that its security has been used to the benefit of WME (and the other secured creditors, particularly Heller) during the restructuring. In contrast, Paccar's security has suffered significant deterioration.

14 Paccar maintains that the appropriate methodology would be to recognize the net losses suffered. It points out that its loss from its dealings with WME is approximately \$2.7 million, compared to Heller's loss of \$55,000, on virtually the same level of debt owed. It maintains that GE should be considered to have effected 100% recovery, given that Newco has assumed the leases for its equipment.

15 It also maintains that the benefit of an orderly return by WME was not all that significant, given that Paccar is in the business of supplying transport equipment, and is experienced in recovering vehicles in such situations.

Cit Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc. and Stoughton

16 These four equipment lessors collectively had 115 trailers under lease to WME at the time of filing. Stoughton maintains that its lease is not a financing lease.

17 Collectively they argue that the monitor's methodology is not appropriate as it does not adequately reflect the relative benefit derived from the proceedings by different secured creditors. They, too, argue that Heller and GE have essentially been paid in full, which stands in contrast to their situation, each of them having incurred substantial losses. They also did not have the opportunity to have their equipment included in the Newco purchase.

18 These creditors ask that I allocate specific expenses to the secured creditors who they say benefitted from various expenses, which they did not.

19 When considering the issue of recovery, they say the only benefit they received from the restructuring was the orderly return of equipment. However, they maintain that several of their units should not be included in the calculation as these were recovered through their efforts, with no help from WME. They also argue that they were well equipped to pick up all units and would have happily done so.

Ramwinn

20 Ramwinn provided mechanical services to WME. At the time of the stay, it had some vehicles in its possession and, thus, possessory lienholder rights. It also had lien claims against a significant number of other vehicles. An arrangement was made among the various equipment lessors to whom equipment was to be returned, to pay Ramwinn for the work performed in order to secure release of the equipment. Ramwinn was also granted leave to commence certain actions where the limitation dates were approaching during the restructuring period. It also recovered \$4,738.12 out of the proceeds of sale of WME's redundant assets.

21 Ramwinn argues that the money it received from the equipment lessors should not be included in its net recovery, as it was recovered from third parties, not WME. It also points out that Ramwinn's garagekeeper security was of a different kind than the other secured creditors and gave it priority ahead of all other creditors. Thus, to include its recovery in the allocation, effectively amounts to altering the security arrangements between WME and its creditors, which is something that should not be done.

22 Finally, Ramwinn has a claim against WME in the amount of \$18,679 for an account incurred subsequent to the stay. The monitor disputes liability on the part of WME and asserts the account payable by Newco. This dispute has yet to be resolved. Ramwinn seeks payment of this account, or, at least an order requiring that this amount ought to be set aside by Heller pending the determination of the matter.

Maxim

23 Maxim provided 15 trailers to WME under a lease which it maintains is an operating lease. It was paid its lease payments of \$5,985 per month during the restructuring period, and its leases have been assumed by Newco. It says its registration in the Personal Property Registry is for purposes of giving notice that WME is in possession of its equipment, and is not a registration of a security interest.

BDC

24 BDC was owed approximately \$2.5 million plus interest as at the date of the stay. It holds security over all of WME's assets. In general terms, it was subordinate only to Heller on accounts receivable but had a first charge on all other assets. It recovered \$78,998.79 plus interest from the redundant asset sale and will recover \$260,000 plus interest from the proceeds of the sale to Newco. BDC supports the monitor's methodology and its recommendation, although it argues that the application was premature given that there may be statutory creditors such as Worker's Compensation who might be entitled to be paid their claims in priority to the secured creditors who are being asked to contribute to the Court Ordered Charges. Since the date of the hearing, I have made an order of bankruptcy against WME.

25 I turn, then, to the legal issues raised on this motion.

True Versus Financing Leases

26 Both Stoughton and Maxim claim to be "true" lessors. The significance of this issue is twofold; s. 11.3(a) of the CCAA provides that an owner of property is entitled to require payment for its use during the restructuring. In addition, of course, the recommendation of the monitor is that only the secured lenders be included in the allocation of the Court Ordered Charges.

27 Section 11.3(a) was added to the CCAA in 1997, apparently to clarify, or address, the point made by the British Columbia Court of Appeal in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105, [1990] B.C.J. No. 2278 (B.C. C.A.), namely, that a stay under s. 11, presumably would never be used to enforce the continuous supply of goods or services without payment for current deliveries. The amendment, of course, makes good sense and also brings the CCAA into line with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"), which has a similar provision concerning proposals.

28 The leading authority on the proper interpretation of s. 11.3(a) is *Smith Brothers Contracting Ltd., Re* (1998), 53 B.C.L.R. (3d) 264, [1998] B.C.J. No. 728 (B.C. S.C.). There, Bauman J. relied on jurisprudence arising out of personal property security legislation as a starting point in the determination of the circumstances which would bring a party within s. 11.3(a). The distinction between a true lease - that is, a contract of bailment also known as an operating lease - and a financing, or capital lease, is critical, in a variety of situations. Where a supplier of equipment retains ownership solely for the purposes of enforcing the obligations of the debtor/lessee until payment in full has been made, a security interest is created, and ownership is lost.

29 It is worth observing that the precise legal nature of an agreement in these situations has considerable commercial significance, and seems to have generated something of an ongoing legal struggle. Purveyors of equipment, ever concerned with the legitimate business goal of minimizing risk, try to appear as owners engaging in acts of bailment, thus minimizing the risk of the failure of a debtor/lessee's business, while at the same time passing off the risks of the equipment; that is, loss, damage and defects.

30 At the same time, it is also true that the world of commercial arrangements is increasingly diverse, complex and focused on cost recovery, so it is very difficult to generalize about how any particular type of relationship will be structured.

31 All of this is to say that, with the benefit of sophisticated legal advice and astute business judgment, the true nature of arrangements involving the supply of equipment can be very difficult to peg.

32 In *Smith Brothers*, Bauman J. concluded that s. 11.3(a) should be narrowly construed, given that it is an exception to a s. 11 stay, which in turn is of a remedial nature, and to be interpreted broadly and in a manner which supports the objectives of the *CCAA*. He says:

56 What I take from all of this is that by preserving a limited remedy for lessors, that is, "payment for use", in a field of commercial transactions which, as I have shown with these leases, encompasses a variety of arrangements with much broader remedies on default, s. 11.3(a) can be interpreted as restricting itself to the type of arrangement which is characterized by the narrower bargain. More simply: this analysis suggests that s. 11.3(a) does not cover all leases. Rather, it covers traditional true leases where the essential bargain is payment for use.

33 And further, at para. 61:

61 It is only payments for the use of leased property that are excepted from a s. 11 stay order under s. 11.3(a). Payments for use *and* equity are not. Similarly payments for use *and* equity *and* an option to purchase are not. This is another reason to conclude the s. 11.3(a) is not inclusive of all forms of lease.

34 *Smith Brothers* has been widely accepted and applied by courts across the country. The exclusion of financing leases makes perfect sense, of course, based on the notion of ownership: if the financing lessor has given away ownership, it cannot seek the benefits of ownership. Similarly, the narrow construction of s. 11.3 limiting it to payments for use of equipment only, is consistent with the idea that a supplier could not be expected to continue to provide its product without payment. All this being so, the result has some unintended consequences, which I address later on in these reasons.

35 I turn, then, to the two creditors in this case, Maxim and Stoughton. I have no hesitation in concluding that the agreement between Maxim and WME is a "true" lease. The essential bargain is payment for use of Maxim's property.

36 I say this because a review of Maxim's obligations reveal that it undertakes all the risks associated with ownership of the equipment - it is responsible for providing all parts and supplies, carrying out maintenance and repairs, providing road service for vehicles which suffer mechanical breakdown, supplies substitute vehicles to WME if there has been mechanical failure, and provides and pays for all licencing and taxes. The option to purchase is truly an option, and the purchase price is determined by a formula, which seeks to determine the true market value of the vehicle at the time the option is exercised.

37 It was argued that the "Elective Termination" provision, which allows Maxim to require WME to purchase the equipment in accordance with the Option if a default has not been cured within seven days, changes the nature of the arrangement. I disagree. While on its face it may be an unusual remedy and probably has more bark than bite, it seems that Maxim is letting WME know that it may take tardiness very seriously.

38 The Maxim agreement does not, in my view, create a security interest. In this regard, I prefer the analysis on *Western Express Air Lines Inc., Re*, 2005 BCSC 53, 10 C.B.R. (5th) 154 (B.C. S.C.), over that in *Paccar of Canada Ltd. v. Peterbilt of Ontario Inc.* (2005), 18 C.B.R. (5th) 125 (Ont. S.C.J. [Commercial List]).

39 The agreement between Stoughton and WME is a different matter. When Stoughton's agreement is viewed as a whole, I conclude that it is either a financing lease or sufficiently akin to one to fall outside the scope of s. 11.3(a). In particular, the agreement provides that WME bears the entire risk of loss from any cause and is required to make payments to Stoughton regardless of loss, or any claim against the manufacturer of the equipment. The warranties by

the manufacturers are excluded. All registration, licence fees and taxes are paid by WME, as is any and all maintenance and repair costs.

40 The lease also requires that the vehicle be returned to Stoughton in a condition that would require significant expenditure. This, combined with an option to purchase the vehicle for a stated amount, which appears to be the difference between the initial value of the equipment less payments made over the term of the lease, suggest to me that the parties intended that WME purchase the vehicle, and ownership was retained solely for the purpose of enforcing WME's obligation.

The Law

41 I turn, then, to the question of principles of allocation of Court Ordered Charges under the *CCAA*. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 305 A.R. 175 (Alta. Q.B.). While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the *CCAA* make a strict accounting on a cost benefit basis impractical and ultimately defeating. It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.

42 In *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164 (N.L. T.D.), at para. 17, Hall J. set out the principles to be applied in allocating restructuring costs, as follows:

- (1) The allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;
- (2) The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;
- (3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;
- (4) Exceptions to a uniform application of cost to creditors ought not to be lightly granted. Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;
- (5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

43 I also agree with the decision in *Sulphur Corp. of Canada Ltd., Re*, 2002 ABQB 682, 5 Alta. L.R. (4th) 251 (Alta. Q.B.), where LoVecchio J. concluded that the court has jurisdiction to grant a charge for debtor in possession financing which ranks in priority to provincial statutory liens, in that case a builder's lien.

Analysis and Decision

44 I begin with the observation that the s. 11 stay in this case has accomplished exactly what the *CCAA* intends that it do - it allowed a company in desperate financial circumstances the opportunity to restructure so that part of its business which was viable could carry on.

45 Having said that, good news under the *CCAA* is a relative thing. Substantial financial carnage occurred along the way, not just to the secured creditors, almost all of whom have recovered at least something, but more so to a long list of unsecured creditors as well as the investors. The overriding theme of the individual submissions before me was that each of the parties would have been in a much better position had they been able to simply realize on their security. That may or may not have been so, but of course the point of the *CCAA* is that the collective good and the benefit to all stakeholders governs.

46 The starting point, then, on this motion is the recommendation of the monitor to allocate the Court Ordered Charges among the secured creditors on the basis of a pro rata share using total recovery. This method, in effect, amounts to requiring the secured creditors to pay a fee to collect its outstanding receivables. This certainly is not a novel concept in debt collection.

47 In my view, the methodology proposed by the monitor on its face is fair. It has an objective basis and is being applied uniformly. Utilizing an "outstanding indebtedness approach", which has been applied in other cases, would not be better as it ends up favouring Heller substantially at the expense of most of the secured creditors.

48 I agree with the view expressed in *Hunjan International Inc., Re* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.), that where the allocation is *prima facie* fair, the onus is on an objecting creditor to demonstrate that the proposal is unfair or prejudicial. The monitor, after all, is both court appointed and is intimately familiar with the details of the restructuring, including the particular costs incurred and what has transpired within the company's business operations during the restructuring period.

49 So, then, is there a basis to deviate from the proposal? As noted earlier, while exceptions to a uniform application of costs should not be lightly granted, and the basis for any exception must be reasonably articulable, the court can take into account the different nature of the security held by various creditors, and the potential benefit to them when deciding if the allocation is fair and equitable. This was the focus of much of the argument raised by the secured creditors here.

50 As I said, for the most part, each minimized the benefit or potential benefit to them of the restructuring process, and pointed to how certain expenditures or actions taken were detrimental to their interests.

51 My conclusion is that all the secured creditors who the monitor suggests should participate in the allocation received real and meaningful benefit as a result of these proceedings. Heller's success in collecting receivables was increased and made less costly than had the company been placed in receivership. The equipment lessors' effort, cost, delay, and risk in recovering their equipment from various locations across North America was considerably reduced by virtue of WME's organized return of equipment to its yard or other agreed upon locations. Ramwinn's effort, cost and delay in having its accounts paid was substantially less than had it been required to engage in collecting from the equipment lessors, institute court proceedings, and potentially undergo the process of realizing on equipment in its possession. Those creditors, including Heller, BDC and Ramwinn, who shared in the proceeds from the sale of redundant assets or the purchase by Newco, also received real and meaningful benefit from the efforts of WME and the monitor in conducting the sale and the purchase by Newco would not have happened without the restructuring.

52 Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to objectives of the *CCAA*.

53 I am also of the view that the relative loss - the issue raised by Paccar - results more from the nature of the security and the specific business decisions made by the parties. Heller, and Ramwinn, for example, experienced very small relative losses; BDC's and Alterinvest's loss was considerable. The difference in their respective security is substantial. To make adjustments as Paccar requests would, in my view, amount to readjusting priorities among creditors.

54 At the same time, I do not accept Ramwinn's argument that requiring it to pay the allocation recommended by the monitor is also a violation of this principle. The allocation proposed is not at all disproportionate, in my view, to the benefit accrued to Ramwinn.

55 I also conclude that there is no basis on which I can or should direct that the funds be held to pay for the outstanding claim Ramwinn advances against WME.

56 As to equipment obtained directly by lessors, I am of the view that regardless of how lessors recovered equipment, any equipment recovered post stay should be included in the allocation as suggested by the monitor. Self-help is not to be condoned, and a potential benefit not realized due to a creditor's actions, should not be discounted in this analysis, as to do so falls into a detailed cost benefit analysis.

57 There is one adjustment, however, that I do feel is in order. A discount rate of 9.25% on the present value of GE's leases was used by the monitor. I am not persuaded that this is justifiable. I accept what I take to be the monitor's secondary position of 6% as being reasonable.

Equipment Leases

58 Much attention was paid during these proceedings to the situation of equipment lessors who hold financing leases. Paccar, in particular, but also others, advocated forcefully that they were unduly prejudiced by the stay. They maintain that not only are they not being paid while their assets are being used to the benefit of the other stakeholders, but their underlying security is being rapidly and substantially deteriorated in the process. This, they say, violates one of the fundamental objectives of preventing one creditor from obtaining an advantage over other creditors during the stay period.

59 It strikes me that the fact that true lessors are entitled to be paid further aggravates this problem in circumstances such as WME's where it has a variety of arrangements with equipment suppliers, including some true leases. It is clearly in a debtor company's economic interests to use financed rather than leased equipment during restructuring. This is what seems to have occurred here (although I make no criticism of WME for doing so).

60 It is difficult to know how this situation can be remedied, given that the whole point of the *CCAA* is to relieve a company of ongoing financial burden to allow it the opportunity to restructure. In this case, for example, WME would not have succeeded had been obliged to pay for its equipment during the entirety of the restructuring.

61 On the particular facts of this case, this issue became somewhat easier to address given the nature of WME's business. Equipment to a transportation company is akin to raw goods to a manufacturer, and I was of the opinion that if WME was going to be viable, at a certain point it would have to demonstrate it could pay for the essential means of production. Otherwise, there would be no purpose to continue the stay. Accordingly, I ordered that financing leases would be paid as of August 1, 2008.

62 I say all this not to justify or revisit the basis for my earlier decision, but to get to the point that in considering what is equitable, undue prejudice is a reason to adjust what would otherwise be a uniform approach. I am satisfied that equipment lessors in a business operation such as WME's do suffer undue prejudice. In this case, however, the equipment lessors were paid as of August 1. Being financing leases, those payments were not just for use, but included some amount on account of equity. I conclude, then, that the undue prejudice suffered has been recognized, albeit not totally, perfectly or precisely, but, in my view, in an amount sufficient amount to justify the uniform application of the methodology proposed by the monitor.

63 The last issue is one that perhaps is more controversial. Maxim, the only true lessor, has, in my view, derived the same benefit as the financing lessors from these proceedings. Its trailers were part of WME's network which stretched across North America. As a result of WME's continued operations, its equipment was gathered in and ultimately it was

able to assign its leases to Newco without any interruption. While s. 11.3(a) specifically allows for payments for use of equipment despite the stay, I do not see that there is any statutory prohibition against requiring a contribution to the Court Ordered Charges against such a party. Taking a broad and purposive approach to the *CCAA*, which I am obliged at law to do in determining an equitable distribution of the costs of the restructuring, I conclude that Maxim should share in these charges on some basis.

64 I do this, recognizing that the only authority on point that was provided to me, *Western Express Air Lines Inc.*, came to a different conclusion. However, I note that there, Brenner C.J.S.C. specifically found that:

20 ... If costs are to be allocated in the basis of the benefit to be derived from a successful restructuring, then the lessors should arguably pay nothing. As ordinary creditors for the outstanding lease payments they will likely receive nothing. ...

.....

22 Accordingly under the general equitable principles of the *CCAA* I see no basis for requiring the aircraft lessors to bear a portion of the Existing Charges.

65 Here, I have found the situation to be otherwise. There was a real and meaningful benefit to Maxim.

66 However, just as GE's assumed lease was discounted for the risk of nonperformance by Newco, so, too, should Maxim's. Subject to hearing further submissions on the matter, the amount of Maxim's total recovery should be discounted by the same discount rate, namely, 6%.

Conclusion

67 At the outset of the hearing before me, several disputes remained which concerned the value of various creditors' total recovery.

68 I understand that through a combination of information provided during the hearing and the findings I have made this afternoon, these have all been resolved.

69 I trust that these reasons will allow the monitor to calculate the precise allocation among the parties. However, I recognize that it may be that some aspect of my reasons require either clarification or some addition. Should that be the case, I invite the parties to let me know.

Order accordingly.