TAB 6

2011 ABQB 223
Alberta Court of Queen's Bench

Royal Bank v. Cow Harbour Construction Ltd.

2011 CarswellAlta 533, 2011 ABQB 223, [2011] A.W.L.D. 2213, 201 A.C.W.S. (3d) 335, 516 A.R. 125, 76 C.B.R. (5th) 143

Royal Bank of Canada (Plaintiff) and Cow Harbour Construction Ltd. and 1134252 Alberta Ltd. (Defendant's)

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

In the Matter of 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 Cow Harbour Construction Ltd.

K.D. Yamauchi J.

Heard: March 25, 2011
Judgment: April 5, 2011
Docket: Edmonton 1003-11241, 1003-05560, BKCY 24-115359

Counsel: Bryan Maruyama for Applicant, Matthews Equipment Limited, operating as Hertz Equipment Rental
Randall S. Van de Mosselaar for Respondent, PricewaterhouseCoopers Inc., receiver of Cow Harbour Construction Ltd.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
IX Proving claim
IX.4 Practice and procedure
IX.4.b Filing proof of claim

Headnote

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Filing proof of claim
Debtor company C Ltd. sought and was granted relief under Companies' Creditors Arrangement Act — Initial order imposed stay of proceedings and prohibited creditors defined by order to be "critical suppliers" from filing builders' liens against lands on which C Ltd. did work or furnished materials in respect of improvements — Court established process pursuant to which creditors claiming to be critical suppliers could assert their claims — Monitor e-mailed proof of claim package to parties, allegedly including creditor H Ltd.'s law firm, which set out claims bar date — H Ltd. did not file proof of claim in time — Receivership order was granted — Law firm denied having received e-mails allegedly sent by Monitor — H Ltd. applied for leave to file proof of claim after claims bar date — Application granted — Leave granted to H Ltd. to file proof of claim after claims bar date — H Ltd.'s failure to file proof of claim was result of inadvertence — H Ltd. was not attempting to seek unjustified advantage by not filing claim and was not improperly manipulating process — H Ltd., by providing Receiver with its proof of claim immediately on being advised, or reminded, of its need to provide it, showed that it acted in good faith — Because of immateriality of H Ltd.'s claim relative to proofs of claim as whole, C Ltd.'s other creditors' awareness of H Ltd.'s potential claim, and fact that nothing had been done concerning those claims to date, neither critical

suppliers nor Receiver would suffer any prejudice if leave was granted to H Ltd. to file its claim.

Table of Authorities

Cases considered by *K.D. Yamauchi J.*:

Air Canada, Re (2004), 2004 CarswellOnt 1843, 49 C.B.R. (4th) 175 (Ont. S.C.J. [Commercial List]) — considered

BA Energy Inc., Re (2010), 70 C.B.R. (5th) 24, 2010 CarswellAlta 1598, 2010 ABQB 507 (Alta. Q.B.) — considered

Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, [2001] 2 W.W.R. 477, (sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.) — considered

Ivorylane Corp. v. Country Style Realty Ltd. (2004), 2004 CarswellOnt 2567 (Ont. S.C.J. [Commercial List]) — considered

Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73, 1994 CarswellBC 620 (B.C. S.C.) — considered

Statutes considered:

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

s. 243(1) — referred to

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

Judicature Act, R.S.A. 2000, c. J-2
s. 13(2) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 11.16 — referred to

R. 11.17 — referred to

R. 11.20 — referred to

APPLICATION by creditor for leave to file proof of claim after claims bar date set out in court order.

***K.D. Yamauchi J.*:**

I. Introduction

1 Cow Harbour Construction Ltd. ("Cow Harbour") sought relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). By an order dated April 7, 2010, as amended by further order dated July 6, 2010 (collectively, the "Initial Order"), this Court granted Cow Harbour the relief it was seeking. The Initial Order appointed Deloitte & Touche Inc. as monitor with respect to those proceedings (the "Monitor").

2 Matthews Equipment Limited, operating as Hertz Equipment Rental ("Hertz") is one of Cow Harbour's creditors. Hertz has applied to this Court seeking an order granting it leave to file a proof of claim in a critical suppliers' claims process that this Court established by way of court order. Hertz missed the court-ordered deadline for filing its proof of claim.

3 PricewaterhouseCoopers Inc., in its capacity as Cow Harbour's court-appointed receiver, along with other creditors, oppose Hertz's application.

II. Facts

4 The Initial Order imposed a stay of proceedings on all of Cow Harbour's creditors. Specifically, the Initial Order prohibited creditors, defined by the Initial Order to be "Critical Suppliers," from filing builders' liens against lands on which Cow Harbour did work or furnished materials in respect of improvements. Were it not for the Initial Order, these Critical Suppliers would have been entitled to file valid and enforceable builders' liens. To protect the Critical Suppliers' claims, the Initial Order granted them a charge over Cow Harbour's property, not to exceed $8,000,000 (the "CS Charge").

5 Hertz rented to Cow Harbour various equipment including heaters, loaders, light towers and generators. Hertz issued invoices to Cow Harbour for those rentals between December 23, 2009 and April 1, 2010. As at April 1, 2010, Cow Harbour owed Hertz $178,598.47, representing rental arrears for that period (the "Debt"). The Debt was unsecured.

6 On May 19, 2010, the Monitor circulated its Fifth Report to the Court (the "Monitor's Fifth Report") among Cow Harbour's creditors. The Monitor's Fifth Report contained, among other things, a list of those creditors that the Monitor classified to be the holders of true leases with Cow Harbour, as opposed to capital, or financing, leases. Hertz was among those creditors that the Monitor classified as holding a true lease.

7 The Monitor's Fifth Report also recommended that this Court establish a formal claims process pursuant to which those creditors claiming to be Critical Suppliers could assert their claims. By an order dated May 21, 2010 (the "May 21 Order"), this Court established a process by which the Monitor's counsel would circulate a proof of claim form to those claimants who wanted to establish themselves as a Critical Supplier (a "Proof of Claim"). The Monitor's counsel would send the Proof of Claim form to Cow Harbour's equipment lessors and persons to whom Cow Harbour owed money as at April 1, 2010. All recipients had to complete and deliver the Proof of Claim to the Monitor by June 16, 2010 ("Claims Bar Date"). The May 21 Order paras. 11(c) and 11(d) said:

> (c) any lessor or claimant of a payable failing to deliver to the Monitor by [the Claims Bar Date], a completed Proof of Claim, shall be disqualified as a Critical Supplier and not entitled to the benefit of the [CS Charge], unless otherwise ordered by the Court; and
>
> (d) so soon as practical following [the Claims Bar Date], the Monitor shall report to this Honourable Court, with respect to the Proofs of Claim received and other matters relating to claimants under the [CS Charge].

8 Hertz retained Parlee McLaws LLP ("Parlee McLaws") in or about April, 2010, to act as its legal counsel in Cow Harbour's *CCAA* proceedings. Marilyn Ann White, Credit Manager for Hertz ("Ms. White"), was the "sole point of contact" between Hertz and Parlee McLaws. All of Hertz's communications with Parlee McLaws ultimately went through Ms. White. Ms. White filed an affidavit and a supplementary affidavit in support of Hertz's application and subjected herself to questioning on her affidavit. Ms. White's supplemental affidavit specifically responded to the matters arising out of her questioning

9 Ms. White stated that as a "routine matter," Parlee McLaws forwarded to her emails and court documents that were filed and which Parlee McLaws received from the Monitor with respect to the Cow Harbour's *CCAA* proceedings.

10 On May 28, 2010, the Monitor's counsel sent, via email (the "May 28 Email"), a copy of the May 21 Order, to the service list, which included Bryan Maruyama, Dean Hitesman, and Jerry Hockin, all of Parlee McLaws.

11 On June 1, 2010, the Monitor's counsel sent to Bryan Maruyama, Dean Hitesman, and Jerry Hockin, all of Parlee McLaws, via email (the "June 1 Email"), a copy of the Proof of Claim "package" that claimants would use if they wanted to make a claim as a Critical Supplier, and setting out the Claims Bar Date.

12 Ms. White does not recall whether she received the May 28 Email or the June 1 Email. She has reviewed her email archives and has found no record of the May 28 Email or the June 1 Email. As well, Hertz's systems department informed Ms. White that once an email received by anyone at Hertz has been deleted, it cannot be retrieved.

13 There was nothing that prevented Ms. White from asking Parlee McLaws to check their "sent items" to see whether (contrary to their "routine" practice) they failed to forward either the May 28 Email or the June 1 Email to Hertz or to Ms. White. She did not make that inquiry.

14 Hertz did not file a Proof of Claim with the Monitor by the Claims Bar Date.

15 On August 25, 2010, this Court granted an order in which it appointed PricewaterhouseCoopers Inc. as receiver (the "Receiver") of all of Cow Harbour's and 1134252 Alberta Ltd.'s current and future assets, undertakings and properties (the "Receivership Order"). This Court granted the Receivership Order pursuant to the *Judicature Act*, RSA 2002, c. J-2, s. 13(2) and the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 243(1) ("*BIA*").

16 Parlee McLaws provided Hertz's Proof of Claim to the Receiver on January 12, 2011, together with the supporting invoices.

17 On January 12, 2011, this Court granted a further order (the "January 12 Order"), in which it ordered, among other things, that in accordance with the May 21 Order, any creditor who did not file a Proof of Claim by June 16, 2010, shall, unless otherwise ordered, be conclusively deemed not to be a Critical Supplier.

18 Hertz now requests this Court to grant it leave to file its Proof of Claim, even though it failed to file it on or before the Claims Bar Date.

III. Issue

19 Whether this Court should grant Hertz leave to file its Proof of Claim subsequent to the Claims Bar Date.

IV. Discussion

20 *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.) at para. 26, held that courts, in a *CCAA* proceeding, respond to the following questions when they are determining whether they will permit a claimant to file its claim after the expiry of a deadline for filing claims:

> (a) Was the delay caused by inadvertence and if so, did the claimant act in good faith?
>
> (b) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
>
> (c) If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
>
> (d) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

1. Inadvertence and Good Faith

21 *Blue Range* held that "inadvertent" includes carelessness, negligence, accident, and is unintentional (para. 27).

22 Hertz argues that the inadvertence in this case is attributable to Parlee McLaws failing to advise Hertz to file its Proof of Claim in advance of the Claims Bar Date. In fact, Hertz argues that it did not receive the Proof of Claim at all and did not recognize the need to file its Proof of Claim until Parlee McLaws advised it to do so on January 12, 2011. Hertz completed its Proof of Claim and had Parlee McLaws submit it to the Receiver on the day that Parlee McLaws brought this requirement to its attention. Finally, Hertz argues that its failure to file its Proof of Claim was not the result of any deliberate act attributable to Hertz.

23 The Receiver argues that while "inadvertence" sets a seemingly low standard, it is not sufficient for a party to claim inadvertence if there is no explanation for its failure to file its claim on time. In the absence of conduct evidencing "inadvertence," a period of inadvertence will have "ceased to run" when a claimant's solicitor is given specific notice of a claims bar date.

24 The Receiver further argues that Hertz has not provided sufficient or any evidence of conduct amounting to inadvertence, whether on Hertz's behalf, or on behalf of Parlee McLaws. In fact, it argues, there is no evidence to indicate why Hertz did not file its Proof of Claim in a timely manner. While Hertz argues that this was a result of Parlee McLaw's inadvertent failure to provide the documents to Hertz, there is no evidence to support this assertion. This is so, despite the fact that Ms. White was specifically asked this question during questioning and subsequently filed a supplemental affidavit.

25 The Receiver argues that this Court may provide the relief Hertz seeks only if Hertz proves "exceptional circumstances." This term comes from *Ivorylane Corp. v. Country Style Realty Ltd.*, 2004 CarswellOnt 2567 (Ont. S.C.J. [Commercial List]) at para. 47. The court, in that case, cites *Blue Range* for this proposition. This Court does not agree that *Blue Range* made this a part of the test. Instead, it requires this Court to examine the facts before it in the light of the 4 questions it posed. Whether the result of that analysis is exceptional or unexceptional matters not.

26 The description of "inadvertent" in *Blue Range*, says that the action is "unintentional." It is difficult to imagine a situation where carelessness, negligence or accident could be "intentional" and still be inadvertent, unless the court in that case was envisaging a situation where a claimant is wilfully blind or procrastinating. Nonetheless, to determine inadvertence, one must look at the circumstances in which the claimant found itself. For example, was there an advantage to Hertz "lying in the weeds" until the Claims Bar Date passed? Although we must examine this question, as well, when deciding whether any prejudice flows, it is important to answer that question at this stage.

27 Hertz's statement that it was not lying in the weeds is not sufficient. Further, the Receiver argues that there is no evidence before this Court to indicate why Hertz did not file its Proof of Claim in a timely manner. While this Court agrees with the Receiver that it is Hertz's onus to show why it requires an extension, Romaine J. in *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.), tells us that "the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case" (para. 34).

28 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), the court would not grant the claimant leave to pursue his claim after the creditors had approved a plan of arrangement and the court sanctioned it. He became aware of the *CCAA* proceedings at some point during the proceedings and at various stages throughout the proceedings, his solicitors contacted the debtor's solicitors to inquire about the process. He, however, did not pursue his claim until a point where he could recover potentially more than the debtor's other creditors. The court in *Blue Range* said of the *Lindsay* case:

> 18 ... [T]he case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

29 The Receiver forcefully argued that, on the evidence, we still do not know whether Parlee McLaws ever forwarded the May 28 Email or the June 1 Email to Hertz. Ms. White's supplemental affidavit says nothing more than that Hertz is unable to retrieve emails once they are deleted. That may be so, but this lack of evidence does not completely answer the question. We must look at "the specific circumstances of the case" to answer it. In this case, there would be no advantage for any creditor to simply lie in the weeds. They could lose their claim completely or they could be subject to a costs claim. The only advantage could be that they would not have to incur the cost of having to file a Proof of Claim. As well, there could be a practical advantage, such as the one outlined in *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.). That situation does not apply in this case. This Court finds that there would be no advantage to Hertz by its lying in the weeds and the only explanation for it not filing its Proof of Claim was inadvertence on its part or on the part of Parlee McLaws.

30 The Receiver rightly points out that service on a solicitor of record is service on the claimant. In fact the *Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 11.16, 11.17 and 11.20 permit this. Does the *Blue Range* test of unintentional negligence, carelessness and accident apply equally to the claimant's solicitors, as well as the claimant itself? Or is the *Blue Range* test limited only to claimants? If it is the latter, then the claimant's remedy would be as against the Alberta Lawyers Insurance Association. With respect to the former, the court in *Air Canada, Re* (2004), 49 C.B.R. (4th) 175 (Ont. S.C.J. [Commercial List]), allowed the claimant to file its late notice when counsel had acknowledged that it was through its inadvertence that the notice had not been filed on time, and that corrective action was taken promptly and that the extension of time would not cause a hardship to any interested party or prejudice the debtor company's reorganization.

31 This Court does not countenance solicitors' negligence, but in the unique circumstances of this case where there are 3 solicitors from the same firm dealing with numerous clients involved in a *CCAA* matter, one can see how the solicitors might be inadvertent. In fact, throughout this Court's involvement in this matter, Parlee McLaws has made submissions which, at the same time, support and contest a particular approach to a matter. One would have thought that solicitors with the experience of those involved in this matter would never allow something like this to happen.

32 This Court must also assess whether Hertz was acting in good faith in these circumstances. A simple assertion that it was acting in good faith is not enough. This analysis can be done by answering what appears to be two sides of the same coin. Was Hertz acting in bad faith and was it acting in good faith? With respect to the former, the "lying in the weeds" analysis will answer that question. With respect to the latter, a court will find that a claimant is acting in good faith if it submits its claim as soon as it becomes aware of the situation. See *e.g. Blue Range* at paras. 28 and 30. In the case at bar, Hertz, through Parlee McLaws, provided its Proof of Claim to the Receiver immediately on being advised of the need so to do.

33 This Court finds that Hertz's failure to file its Proof of Claim was the result of Parlee McLaws' "inadvertence." To this end, this Court chooses to follow the approach that the court took in *Air Canada*. In the alternative, if Hertz did receive the Proof of Claim, it failed to file the Proof of Claim through its own inadvertence. As well, Hertz, by providing the Receiver with its Proof of Claim immediately on being advised, or reminded, as the case may be, of its need to provide it, shows that it acted in good faith.

2. Prejudice

34 Hertz argues that having this Court granting it leave to file its Proof of Claim after the Claims Bar Date, and the claim itself, would have a negligible impact on the Critical Supplier claims process. The Receiver has not yet (1) completed its review of the previously submitted Proofs of Claim; (2) completed the appeals process in respect of the Receiver's review of the previously submitted Proofs of Claim; or (3) made any distribution in respect of the CS Charge. Hertz has not been "lying in the weeds."

35 It further argues that its claim was known to the Monitor and the other creditors. The Monitor categorized Hertz as a true lessor. The Monitor communicated that categorization to all creditors in the Monitor's Fifth Report. Hertz was also known to the Receiver and is listed as having an unsecured claim in the amount of $196,966.29, in the Notice and Statement of Receiver dated August 31, 2010, that the Receiver circulated to all of Cow Harbour's creditors, pursuant to the *BIA*.

36 Furthermore, Cow Harbour's creditors were aware that there were other creditors who had filed late Proofs of Claim. This Court has not yet adjudicated on the validity of the other late-filed proofs of claim.

37 Finally, Hertz argues that none of Cow Harbour's creditors will have lost a realistic opportunity to do anything that they otherwise might have done. Conversely, had Hertz submitted its Proof of Claim on time, each of the other creditors would have proceeded in exactly the same fashion as they did.

38 The Receiver argues that in any consideration of prejudice, this Court should weigh the prejudice to the Receiver or a monitor in a *CCAA* proceeding on its ability carry out its duties and effect a level of predictability and finality in *CCAA* or receivership proceedings.

39 *Blue Range* (para. 36) tells us that timing is a key element when determining whether Hertz or the other Critical Suppliers will suffer any prejudice if this Court were to grant Hertz leave to file its claim. What does this mean? Had the Receiver completed its analysis of the Critical Suppliers' issue and distributed funds then this Court might be less inclined to allow Hertz to file its Proof of Claim. As well, Cow Harbour's other creditors were aware of Hertz's potential claim through many of the Monitor's reports: *Blue Range* at para. 39. This Court has not adjudicated on the admissibility of any of the other late Proofs of Claim, as yet.

40 *Blue Range* at para 37, also tells us that materiality is relevant to the issue of prejudice. Assuming that Hertz's claim is the agreed-upon amount of $178,598.47, its claim, as against the total amount of the Proofs of Claim of $49,962,687.68 is .357%. In *Blue Range*, the court found a .435% claim to be immaterial. Surely, .357% is even less material.

41 Even if materiality is not *sine qua non* of this Court's analysis, the fact that the Critical Suppliers will receive less money, should this Court grant Hertz leave to file its Proof of Claim, is not something this Court need consider:

> 37 In a *CCAA* context ... the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the *CCAA* involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31.

42 Because of the immateriality of Hertz's claim relative to the Proofs of Claim as a whole, Cow Harbour's other creditors' awareness of Hertz's potential claim, and the fact that nothing has been done concerning these claims to this point, this Court finds that neither the Critical Suppliers nor the Receiver will suffer any prejudice if this Court were to grant leave to Hertz to file its claim.

43 Because this Court finds that there would be no "relevant prejudice" that flows as a result of its approving Hertz's late filing, this Court does not intend to deal with the third and fourth *Blue Range* questions.

Conclusion

44 Proceedings under the *CCAA* are meant to deal with compromises and arrangements among a debtor company and its creditors. If a creditor fails to file its claim in those proceedings because of its solicitors' negligence or its own inadvertence, as defined in *Blue Range*, it should be permitted to argue that, nonetheless, a court should permit it to file its claim. That is the reason why *Blue Range* outlined the four questions and why this Court inserted the "unless otherwise ordered by the court" provision in the May 21 Order and the January 12 Order.

45 The objective of a claims procedure order was set out by Romaine J. in *BA Energy* as follows:

> 41 The objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure order provides the debtor and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors given the financial circumstances of the debtor and that may be sanctioned by the court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a late claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.

> 42 The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

46 It is important to note that each case depends on its unique facts. This Court finds that Hertz was not attempting to seek an unjustified advantage by not filing its claim or that it was improperly manipulating the process. Its failure to file its claim was inadvertent. Accordingly, this Court grants Hertz leave to file its Proof of Claim subsequent to the June 16, 2010 deadline.

Application granted.

End of Document

TAB 7

2004 CarswellOnt 2567
Ont. S.C.J. [Commercial List]

Ivorylane Corp. v. Country Style Realty Ltd.

2004 CarswellOnt 2567, [2004] O.J. No. 2662, [2004] O.T.C. 529, [2004] O.T.C. 575, 131 A.C.W.S. (3d) 803

IVORYLANE CORPORATION (Plaintiff) and COUNTRY STYLE REALTY LIMITED (Defendant)

Cumming J.

Heard: June 8, 2004
Judgment: June 22, 2004
Docket: 64624/02

Counsel: Geoffrey Ketcheson for Plaintiff
Alistair Riswick for Defendant

Subject: Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.3 Arrangements
    XIX.3.e Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Plaintiff was landlord who leased premises to defendant for operation of eatery — Tenant was required to pay fixed monthly rent as well as variable amount calculated as percentage of insurance, taxes and maintenance — Tenant paid monthly fee but not additional charges — Tenant commenced proceedings under Companies' Creditors Arrangement Act — Claims Procedure Order issued, which required tenant to send proof of claim information and instruction letters to creditors — Tenant did not send claim and instruction letter to landlord — Creditors approved plan under Act — Landlord later obtained all additional charges accumulating before proceedings under the Act — Landlord brought action for return of unpaid charges, totalling $146, 892.12 — Tenant brought motion for determination of entitlement to arrears — Claim of landlord was not barred by plan, which prevented only affected unsecured claim — Landlord's claim was unaffected secured claim — Although plan allowed for repudiation of lease, tenant had not repudiated — Landlord not to be penalized for not filing proof of claim in time required by plan, as tenant was in breach of obligation to send proof of claim forms and instruction letter to landlord — Issues resolved in favour of landlord.

Table of Authorities

Cases considered by *Cumming J.*:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 1992 CarswellOnt 163 (Ont. C.A.) — referred to

Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, *(*sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.) — considered

Blue Range Resource Corp., Re (2001), 2001 CarswellAlta 1209, 2001 CarswellAlta 1210, 283 N.R. 391 (note), 299 A.R. 179 (note), 266 W.A.C. 179 (note) (S.C.C.) — referred to

Ontario v. Canadian Airlines Corp. (2001), 2001 CarswellAlta 1488, 2001 ABQB 983, 29 C.B.R. (4th) 236, [2002] 3 W.W.R. 373, 98 Alta. L.R. (3d) 277, 306 A.R. 124 (Alta. Q.B.) — referred to

Robinson v. Royal Bank (1995), 26 O.R. (3d) 627, 1 R.P.R. (3d) 25, 1995 CarswellOnt 1388 (Ont. Gen. Div.) — referred to

Statutes considered:

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

s. 6 — pursuant to

Limitations Act, R.S.O. 1990, c. L.15
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 21.01(1)(a) — considered

R. 20.01(3) — pursuant to

Words and phrases considered

CLAIM

Paragraph #5 of the CPO defines "Claim" broadly, to include "any liability or obligation of any kind whatsoever...whether liquidated, unliquidated...fixed, contingent, matured, unmatured, disputed, ...future....and whether or not such right is executory or anticipatory in nature...". In my view, this definition would include a landlord with a lease having an unexpired term as a person with an "existing Claim" even if the rent was up to date.

MOTION by tenant for determination of landlord's entitlement to rent arrears.

***Cumming J.*:**

The Motion

1 This motion raises significant issues as to the application of court orders to an unsecured landlord creditor's claim in a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

2 The defendant, Country Style Realty Limited ("CSRL"), moves for summary judgment pursuant to Rule 20.01(3) of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, as am. (the "Rules"), to dismiss the plaintiff's claim. The defendant also seeks the determination of a question of law arising from an Order made by Madam Justice Lax January 7, 2002. The defendant relies upon Rule 21.01(1)(a), which permits a party to move for a determination of a question of law raised by a pleading where the determination may dispose of the action or substantially shorten the trial. Affidavit evidence has been

admitted by the agreement of both parties.

Background

3 The plaintiff Ivorylane Corporation ("Ivorylane") was the landlord of premises in Shanty Bay, Ontario. These premises were leased as of May 5, 1993 to CSRL for use as a coffee and donut restaurant (the "Ivorylane lease"). Rent was payable monthly. The rent consisted of two components: a fixed monthly amount and an additional amount determined as 32.05% of the taxes, maintenance and insurance ("TMI") for the total complex. The TMI was adjusted each year and increased upwards.

4 There is common ground that CSRL did not pay the entirety of the TMI component. Rather, CSRL continued to pay the fixed monthly amount, ignoring the TMI adjusted increases.

5 On March 10, 1999, Ivorylane sent CSRL a detailed account of the TMI arrears, demanding payment. Meetings then took place between representatives of the parties to discuss the matter in April 1999. However, CSRL did not make the TMI payments.

6 On February 26, 2002, counsel for Ivorylane forwarded to CSRL an updated summary of the TMI arrears to December 31, 2001. There is common ground the TMI arrears totaled $146,892.12 as of December 31, 2001.

7 CSRL responded by faxed letter dated March 6, 2002 that it (and related companies) had commenced proceedings under the *CCAA*. The Initial Order in the *CCAA* proceedings was made by Mr. Justice Colin Campbell December 13, 2001, providing for a stay of proceedings while CSRL was under court protection.

8 Deloitte & Touche ("DT") was appointed by the Initial Order as Monitor of CSRL to monitor the business and affairs of CSRL. Mr. Paul Denton, a senior vice-president of DT, the affiant for CSRL in this proceeding, was the operational person on behalf of the Monitor. A "Plan of Compromise or Arrangement" (the "Plan") was to be filed by January 31, 2002.

9 The Initial Order (para. #18 (f)) entitled CSRL, *inter alia*, to "repudiate any lease...without prior notice". Mr. Denton was aware of the Ivorylane lease. He states that DT examined all of the leases and financial data relating to CSRL's retail locations. He states that "the decision was made not to repudiate" the Ivorylane lease.

10 Mr. Denton says in his affidavit that CSRL "continued to make all rental payments to Ivorylane that it was obligated to make pursuant to the Lease for the period after the filing date for the *CCAA* application, being December 13, 2001."

11 This statement is incorrect inasmuch as CSRL did not make the required TMI payments after the filing date until Ivorylane took legal proceedings in July, 2003. CSRL, the tenant, would know, of course, that it was not making the required TMI payments. As well, "having examined all of the leases and financial data with respect to [CSRL's] retail locations", Mr. Denton presumably would have been aware of the obligation of CSRL to pay TMI. An examination of the financial data together with the lease obligations should have revealed that CSRL was in significant arrears in respect of the TMI rental component.

The Claims Procedure Order and other Court Orders

12 Lax J. made an Order ("Claims Procedure Order" or "CPO") January 7, 2002 requiring, *inter alia*, (para. #3 CPO) that there be delivered (by facsimile transmission, personal delivery, courier or pre-paid mail) to each known existing creditor a Proof of Claim and Instruction Letter along with a copy of the Order by 11:59 pm January 8, 2002. Second, the CPO required (para. #4) that a Notice to Creditors be placed in the national edition of the Globe and Mail newspaper for two days commencing January 9, 2002.

13 CSRL did not deliver to Ivorylane a Proof of Claim, Instruction Letter and a copy of the CPO. There was no communication to Ivorylane as to the *CCAA* proceeding until Ivorylane received CSRL's March 6, 2002 letter.

14 Paragraph #5 of the CPO defines "Claim" broadly, such that the claim of Ivorylane for TMI arrears is within the meaning of the term as so defined.

15 Paragraph #6 of the CPO provides that any creditor not returning a Proof of Claim by the "Claims Bar Date" would be forever barred from asserting such claim and the claim would be "forever extinguished". The Claims Bar Date ultimately became February 11, 2002.

16 Paragraph #7 of the CPO further provides, *inter alia*, that CSRL deliver a Proof of Claim to a creditor "arising from or caused by the repudiation of any...lease".

17 Meetings of creditors were held pursuant to a "Meetings Order" of Greer J. dated January 31, 2002. The creditors participating voted to approve the Plan by the necessary majorities mandated by the *CCAA*.

18 On March 7, 2002, Spence J. made an Order (the "Sanction Order"), pursuant to s. 6 of the *CCAA*, giving sanction and approval to the Plan dated January 31, 2002.

19 Paragraph #15 of the Sanction Order provides that all obligations or agreements to which CSRL is a party as of the "Effective Date" remain "in full force and effect, unamended" as of that date. The "Effective Date" is deemed to be the date of the Monitor's Certificate being filed with the Court, certifying that all of the conditions precedent to implementation of the Plan have been satisfied.

20 Paragraph #17 of the Sanction Order provides that "any prosecution ...of any claim...discharged or terminated by the Plan...is...forever barred."

21 CSRL continued in the leased premises until the end of its term August 31, 2003. After a bailiff took distress on its behalf, Ivorylane managed in July 2003 to force CSRL to pay the TMI arrears that had accumulated subsequent to the *CCAA* proceedings.

The Issue

22 The issue in this hearing relates to whether Ivorylane is entitled to the TMI arrears of $146,892.12 which had accrued prior to December 31, 2001. This issue is to be determined by considering the impact, if any, of the *CCAA* proceedings, Court Orders and the Plan upon such claim for arrears. The test for the summary judgment motion under Rule 20.01(3) is whether there is a genuine issue for trial with respect to Ivorylane's claim. Is it "plain and obvious" as a matter of law that Ivorylane's claim cannot succeed? There is a required determination under Rule 21.01(1)(a) of a question of law, being the interpretation of the meaning and impact of the Court Orders in this *CCAA* proceeding.

23 Mr. Denton concludes in his affidavit that "[t]he plaintiff's claim in this action has been released, extinguished and barred by the Claims Procedure Order and the Plan." I disagree. My reasons follow.

Application of the Law

The question as to the possible impact of the Plan upon Ivorylane's claim

24 The Plan dated January 31, 2002, defines those unsecured creditors who would be affected by the Plan as those with "Affected Unsecured Claims", as set out in Schedule "A" thereto.

25 In contrast, the Plan refers to "Unaffected Obligations", defined as those listed on Schedule B of the Plan. Schedule B, para. (f) refers to:

> [R]eal property leases ...which have *not been repudiated* or terminated as at the Subsequent Claims Bar Date and in respect of which there has been no written agreement to allow a Claim. [My emphasis]

26 The Ivorylane lease was not repudiated. CSRL's obligation(s) to Ivorylane under the lease was an "Unaffected Obligation."

27 Mr. Denton asserts that the Plan dealt only with those creditors who had filed the requisite Proof of Claim and that Ivorylane was obliged to do so but failed. I disagree.

28 It is only those unsecured creditors who have "Affected Unsecured Claims" who are required by the Plan to file Proofs of Claims. (This is seen from the chain of definitions in s. 1.1 of the Plan for "Proof of Claim", "Affected Creditor", "Affected Claim", "Affected Unsecured Claim" and "Affected Unsecured Creditor".)

29 An "Affected Unsecured Creditor" can be "a holder of a Landlord Claim". However, a "Landlord Claim" is defined as meaning an "Affected Unsecured Claim" arising in respect of a "Landlord Repudiation Claim" (not here) or where a claim is acknowledged in consideration of an amendment or variation of the lease terms (not here).

30 Mr. Denton states:

> Schedule "B" to the Plan confirms that non-repudiated or amended leases continue in full force and effect after emergence from CCAA protection, but subject to the compromise of any "Claim" pursuant to the Claims Procedure Order and the Plan.

31 However, while "Claim" is necessarily defined in the Plan, it is only "Affected Unsecured Claims" and "Affected Creditors" of concern to our analysis, as discussed above. That analysis need not be repeated. The "Claim" for TMI of Ivorylane is not compromised by the Plan. It is only "Affected Claims" which are compromised by s. 2.2 (not "Unaffected Obligations": s. 2.3) and s. 5.1 of the Plan.

32 Schedule "B" to the Plan, in setting forth "Unaffected Obligations", includes:

> (f) ...real property leases... which have not been repudiated or terminated....

33 Again, this is precisely the status of Ivorylane.

34 In my view, and I so find, Ivorylane was not an "Affected Unsecured Creditor" obliged to file a Proof of Claim under the Plan. To the contrary. The Plan states expressly in s. 2.3 that the "Plan does not affect holders of Unaffected Obligations". Ivorylane falls within this category. It is also noted that creditors holding "Unaffected Obligations" had no right to vote in respect of the Plan.

35 Section 7.1 goes further to state that CSRL shall be deemed to have ratified "each executory contract and unexpired lease" not previously repudiated or terminated as of the Effective Date pursuant to the Sanction Order when the Plan becomes unconditionally effective. The Ivorylane lease was never repudiated or terminated.

36 The Plan had no adverse impact upon the claim of Ivorylane for TMI arrears. Indeed, the impact of the sanctioned Plan was to confirm that the lease obligations remained in full force and effect.

The question as to the possible impact of the Claims Procedure Order upon the claim of Ivorylane

37 CSRL knew that Ivorylane was one of its creditors. In particular, CSRL knew as of March 10, 1999, that Ivorylane was seeking to enforce its right to the TMI arrears under the lease. There can be no doubt that Ivorylane was a "known existing creditor" within the meaning of para. #3 of the CPO, given the claim for arrears of TMI.

38 Paragraph #5 of the CPO defines "Claim" broadly, to include "any liability or obligation of any kind whatsoever...whether liquidated, unliquidated...fixed, contingent, matured, unmatured, disputed, ...future....and whether or not such right is executory or anticipatory in nature...". In my view, this definition would include a landlord with a lease having an unexpired term as a person with an "existing Claim" even if the rent was up to date.

39 In my view, and I so find, Ivorylane was a person with a "Claim" against CSRL within the definition of paragraph #5 of the CPO. The obligation in paragraph #3 of the CPO must be read in the context of paragraph #5. By this interpretation, CSRL was obliged to send Ivorylane the Proof of Claim and Instruction Letter, along with a copy of the CPO. In my view, and I so find, CSRL was in breach of Paragraph #3 in failing to do so.

40 Had CSRL complied with the obligation under paragraph #3, Ivorylane would have received notice and could then have submitted its Proof of Claim in order to protect its interests.

41 If the financial data of CSRL was incomplete or uncertain, Mr. Denton should have contacted the landlord, Ivorylane, to determine the true situation. Mr. Denton states that he reviewed the accounts payable records "to determine known creditors."

42 Mr. Denton then says that Ivorylane did not appear in those records "because amounts owed...for monthly rental payments prior to the Filing Date had been paid in the ordinary course on an ongoing basis." Although this statement is put forward as a factual statement, it is simply an inferential conclusion on the part of the Monitor. It is not now disputed that the conclusion was inaccurate. The TMI component of the rental payments was not being paid. The Monitor apparently did not realize this. CSRL, the tenant, would know, of course, that the TMI component was not being paid.

43 Moreover, a careful reading of the terms of the lease, coupled with an examination of the financial records as to the quantum of the rent being paid, would establish that CSRL was not meeting its entire rental obligations. A close review of the lease and the payments which had been made to Ivorylane should have raised a question or generated some further inquiry. The lease displayed an obligation to pay a proportionate share of TMI, a figure which would vary from year to year. A review of the rent actually paid under the lease would show a straight line of payments that did not change in quantity.

44 The record establishes that Ivorylane acted in good faith. CSRL was, at the least, negligent in not notifying Ivorylane in accordance with paragraph #3 of the CPO.

45 CSRL says that in any event there was publication of a Notice to Creditors in the newspaper, as required by paragraph #4 of the CPO. In my view, CSRL cannot escape its breach of the obligation imposed by paragraph #3 of the CPO by pointing to the publication of the Notice to Creditors in the newspaper. Unless that notice has been seen by the "known existing creditor", the prejudice caused by the failure of CSRL to comply with paragraph #3 should fall upon CSRL.

46 In my view, and I so find, given CSRL's breach of paragraph #3 of the CPO, Ivorylane is not to be prejudiced for not filing a Proof of Claim by the Claims Bar Date, January 25, 2002 (or the "Subsequent Claims Bar Date" where it applies: see paragraphs #7 and #9 of the CPO.). In my view, paragraph #6 of the CPO, which prospectively bars claims when no Proof of Claim is filed by the Claims Bar Date does not have force in the instant situation.

47 Even if the Claims Bar Date was operative against Ivorylane (and for the reasons above I find that it was not) by reason of the CPO, the Court can relieve against the bar in exceptional circumstances, as I find to be present in the instant situation. See *Blue Range Resource Corp., Re* (2000), 2000 ABCA 285 (Alta. C.A.) ; leave to appeal to S.C.C. refused (S.C.C.); *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.) ; *Ontario v. Canadian Airlines Corp.*, 2001 ABQB 983 (Alta. Q.B.) .

48 In *Enron Canada, supra*, at para. 41, Mr. Justice Whittmann stated that a *CCAA* supervising judge considering a claim filed or amended after a claims bar date in a claims bar order should proceed as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

49 The fact that Ivorylane did not have the opportunity to file a Proof of Claim (assuming for the sake of argument it was obliged to do so) was not only inadvertent on its part but was also due solely to the fault of CSRL. The result of that default on the part of CSRL is that Ivorylane was excluded from the Plan approved by creditors and lost the right to participate in the distributions. The purpose underlying the notice to creditors requirement is to ensure that creditors are treated fairly in respect of their rights. Ivorylane, a "known existing creditor", in being denied notice, was not treated fairly.

50 Moreover, the Claims Bar Date is of no practical import during the Stay Period unless the Sanction Order gives approval to the Plan. That is, the extinguishment of claims is not operative until the Sanction Order is given. In my view, and I so find, paragraph #15 of the Sanction Order supercedes the prospective impact of the bar of claims stipulated by the CPO. Paragraph #15 provides that "all obligations or agreements to which" CSRL is a party as of the Effective Date remain "in full force and effect, unamended." Paragraph #15 applies to the Ivorylane lease as it was never repudiated, but rather, affirmed in the *CCAA* proceeding.

51 As well, in my view, given the failure of CSRL to give notice to Ivorylane as required by paragraph #3, CSRL is estopped from now asserting that the failure to file a Proof of Claim prior to the claims bar date extinguishes the rights of Ivorylane. See *Robinson v. Royal Bank* (1995), 26 O.R. (3d) 627 (Ont. Gen. Div.) .

52 For the reasons given, I find that the claims bar provision contained in paragraph #6 of the Claims Procedure Order of Lax J. does not operate to extinguish Ivorylane's claim to TMI arrears for the pre-filing period prior to December 13, 2002.

53 For the reasons given, I find that the CPO of Madam Justice Lax had no adverse impact upon the plaintiff's claim.

54 It is noted incidentally that the Court queried during the course of submissions whether the *Limitations Act* R.S.O. 1990, c. L.15 might have applicability to Ivorylane's claim. Counsel for Ivorylane pointed out that there was not a defence raised in the pleadings as to a limitation of action because of the lapse of time. Counsel for CSRL made no submissions on this possible issue.

55 There remains a final point to mention. If the lease had been repudiated by CSRL, Ivorylane would have been given the opportunity to file a Proof of Claim. In such event, Ivorylane reportedly would have received only about eight or nine cents on the dollar in respect of its claim for the TMI arrears. Thus, paradoxically, Ivorylane is now arguably better off by not having gone through the compromise of the sanctioned Plan. However, if the lease were to have been repudiated, Ivorylane would have had the option of being free of CSRL as a tenant. CSRL chose not to repudiate, but to affirm the lease.

Disposition

56 The summary judgment motion brought by the defendant is dismissed. It would be enough on such a motion to say that there is a genuine issue for trial. However, on the record before me, as my reasons set forth, I would resolve the issues in favour of the plaintiff. As well, in my reasons I have determined the relevant questions of law pertinent to the issues at hand. In my view, for the reasons given, the plaintiff has a lawful claim for $146,892.12 with pre-judgment interest from January 1, 2002.

Costs

57 The plaintiff is entitled to costs on a partial indemnity basis. I fix the plaintiff's costs at $7500.00 inclusive of G.S.T. and all disbursements.

58 The Court was assisted greatly by the well-articulated submissions by both counsel.

Order accordingly.

End of Document

TAB 8

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.6)

Most Recently Cited in: Industrial Properties Regina Limited v. Copper Sands Land Corp., 2018 SKCA 36, 2018 CarswellSask 252 | (Sask. C.A., May 23, 2018)

R.S.C. 1985, c. C-36, s. 11.2

S 11.2

Currency

11.2

11.2(1)Interim financing

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2(2)Priority — secured creditors

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.2(3)Priority — other orders

The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

11.2(4)Factors to be considered

In deciding whether to make an order, the court is to consider, among other things,

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

(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; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Amendment History

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65

Currency

Federal English Statutes reflect amendments current to May 16, 2018
Federal English Regulations are current to Gazette Vol. 152:10 (May 16, 2018)

End of Document

TAB 9

2017 ABCA 363
Alberta Court of Appeal

Canada v. Canada North Group Inc.

2017 CarswellAlta 2213, 2017 ABCA 363, [2017] A.W.L.D. 6130, [2017] A.W.L.D. 6301, 284 A.C.W.S. (3d) 461, 54 C.B.R. (6th) 5

Her Majesty the Queen in Right of Canada (Applicant / Appellant) and Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., and 1919209 Alberta Ltd. (Respondents / Respondents) and Ernst & Young Inc. (in its capacity as Monitor, and not in its personal capacity) (Respondent / Respondent) and Business Development Bank Canada (Respondent / Respondent)

Frans Slatter J.A.

Heard: November 1, 2017
Judgment: November 3, 2017
Docket: Edmonton Appeal 1703-0237-AC

Counsel: G.F. Body, for Applicant
S.A. Wanke, for Respondents, Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., and 1919209 Alberta Ltd.
D.R. Bieganek, Q.C., for Respondent, Ernst & Young Inc.
J.L. Oliver, for Respondent, Business Development Bank Canada

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Tax — Miscellaneous

Related Abridgment Classifications

Civil practice and procedure
XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.b Application
XXIII.10.b.ii Grounds

Tax
I General principles
I.5 Priority of tax claims in bankruptcy proceedings

Headnote

Civil practice and procedure --- Practice on appeal — Leave to appeal — Application — Grounds
Within Companies' Creditors Arrangement Act proceedings, case management judge determined that "super-priority" charges made in favour of interim financier, directors of debtor companies, and monitor and its counsel had priority over claim of Minister of National Revenue for unremitted source deductions — Minister brought application for leave to appeal — Application granted — Leave was granted on issue of whether judge erred in law in determining that "super-priority" charges made in favour of interim financier, directors of debtor companies, and monitor and its counsel had priority over

claim of Minister for unremitted source deductions — Minister identified substantive issue justifying further appeal — There was no appellate authority directly on point — Even if issue was potentially moot, it should be adjudicated as super-priority funding cases were often resistant to review.

Tax --- General principles — Priority of tax claims in bankruptcy proceedings
Within Companies' Creditors Arrangement Act proceedings, case management judge determined that "super-priority" charges made in favour of interim financier, directors of debtor companies, and monitor and its counsel had priority over claim of Minister of National Revenue for unremitted source deductions — Minister brought application for leave to appeal — Application granted — Leave was granted on issue of whether judge erred in law in determining that "super-priority" charges made in favour of interim financier, directors of debtor companies, and monitor and its counsel had priority over claim of Minister for unremitted source deductions — Minister identified substantive issue justifying further appeal — There was no appellate authority directly on point — Even if issue was potentially moot, it should be adjudicated as super-priority funding cases were often resistant to review.

Table of Authorities

Cases considered by *Frans Slatter J.A.*:

Canadian Imperial Bank of Commerce v. Endurance Energy Ltd. (2016), 2016 ABCA 217, 2016 CarswellAlta 1355 (Alta. C.A.) — followed

Minister of National Revenue v. Temple City Housing Inc. (2008), 2008 ABCA 1, 2008 CarswellAlta 2, [2008] 2 C.T.C. 67, (sub nom. *R. v. Temple City Housing Inc.)* 2008 G.T.C. 1128 (Eng.), [2008] G.S.T.C. 2, (sub nom. *Temple City Housing Inc., Re)* 422 A.R. 4, (sub nom. *Temple City Housing Inc., Re)* 415 W.A.C. 4, 43 C.B.R. (5th) 35 (Alta. C.A.) — considered

Wells Fargo Securities Canada Ltd. v. Sanjel Corp. (2017), 2017 ABCA 120, 2017 CarswellAlta 648, 47 C.B.R. (6th) 289 (Alta. C.A.) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
s. 13 — pursuant to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

APPLICATION by Minister of National Revenue for leave to appeal judgment granting super-priority to certain claims within insolvency proceedings.

***Frans Slatter J.A.*:**

1 The Minister of National Revenue has applied, in accordance with s. 13 of the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, for leave to appeal the decision reported as *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 (Alta. Q.B.). The case management judge described the issue as follows:

> 1 This case is about whether Court ordered "super-priority" security interests granted in a *Companies' Creditor Arrangement Act* (*CCAA*) proceeding can take priority over statutory deemed trusts in favour of Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue (CRA) for unremitted source deductions.

> The test for leave to appeal is well established: Is there a substantive ground justifying an appeal, considering a) whether the point on appeal is of significance to the practice; b) whether the point raised is of significance to the parties and the action; c) whether the appeal is reasonably arguable (or conversely frivolous); and d) whether the appeal will unduly hinder the progress of the insolvency proceedings. See *Wells Fargo Securities Canada Ltd. v. Sanjel Corp.*, 2017 ABCA 120 (Alta. C.A.) at para. 6, (2017), 47 C.B.R. (6th) 289 (Alta. C.A.) and *Canadian Imperial Bank of Commerce v. Endurance Energy Ltd.*, 2016 ABCA 217 (Alta. C.A.) at para. 9.

2 There is no appellate authority directly on point, although the respondents argue that the weight of authority is supportive of the case management judge's conclusions.

3 The respondents also argue that the issue is moot on this record, because there are sufficient assets in this estate to satisfy both the "super-priority" security interests and the claim of the Minister. They argue that the second component of the test is not satisfied, because the outcome is not of significance to this action. The mootness issue was not raised before the case management judge because the valuation of the assets was not finalized at that time. On the other hand, the cases demonstrate that this issue is resistant to review, because the "super-priority" funding is often advanced before the priority claim can be adjudicated. This leads to the problem that the court cannot fairly "unscramble the egg" after the fact: *Canada North Group* at paras. 56, 68, 70; *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1 (Alta. C.A.) at para. 14, (2008), 422 A.R. 4, 43 C.B.R. (5th) 35 (Alta. C.A.). In this appeal there is no need to unscramble the egg, because there are lots of eggs. This may present the occasion where the Court should adjudicate even if the issue is potentially moot.

4 The respondents also argue that it is unfair to have the insolvent companies bear the expense of what is essentially a "test case", and that the Minister should be required to pay the costs of any appeal. The panel that hears the appeal is, however, in the best position to deal with any issues respecting the incremental costs generated by an appeal.

5 I am satisfied that the applicant has identified a substantive issue justifying a further appeal, and leave to appeal is granted on the following issue:

> Did the case management judge err in law in determining that the "super-priority" charges made in favour of the interim financier, the directors of the debtor companies, and the Monitor and its counsel have priority over the claim of the Minister of National Revenue for unremitted source deductions?

As in all appeals, the costs of the appeal will be in the hands of the panel.

6 In order to circumscribe the costs of this appeal, the debtor Canada North Group will (subject to any contrary agreement by counsel) be the lead respondent, and will be entitled to file a full factum as provided for in the *Rules of Court*. Other interested parties may file respondents' factums, but they will not be due until 10 days after Canada North's factum is filed, they are not to be repetitive of arguments made by Canada North, and unless permitted by the Case Management Officer they are to be limited to 8 pages. No party will receive costs of this application.

Application granted.

End of Document

TAB 10

2017 ABQB 550
Alberta Court of Queen's Bench

Canada North Group Inc (Companies' Creditors Arrangement Act)

2017 CarswellAlta 1631, 2017 ABQB 550, [2017] A.W.L.D. 4936, [2017] A.W.L.D. 5003, [2018] 2 W.W.R. 731, 283 A.C.W.S. (3d) 214, 52 C.B.R. (6th) 308, 60 Alta. L.R. (6th) 103

In the Matter of the Companies' Creditors Arrangement Act, RSC 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, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd (Applicants)

J.E. Topolniski J.

Heard: August 11, 2017
Judgment: September 11, 2017
Docket: Edmonton 1703-12327

Counsel: Darren R Bieganek, Q.C., for Monitor, Ernst & Young
George F Body, for Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue
Jeffrey Oliver, for Business Development Bank of Canada
Stephanie A Wanke, for Applicants, Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

Subject: Income Tax (Federal); Insolvency; Tax — Miscellaneous

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
X.5 Claims of Crown
X.5.a Federal
X.5.a.v Miscellaneous

Tax
I General principles
I.5 Priority of tax claims in bankruptcy proceedings

Headnote

Tax --- General principles — Priority of tax claims in bankruptcy proceedings
Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in

proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Miscellaneous
Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts.

Table of Authorities

Cases considered by *J.E. Topolniski J.*:

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140 (S.C.C.) — considered

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1999 (Ont. S.C.J. [Commercial List]) — considered

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — referred to

Christiansen v. Paramount Developments Corp. (1998), 1998 CarswellAlta 1093, 234 A.R. 149, 8 C.B.R. (4th) 220, 1998 ABQB 1005 (Alta. Q.B.) — referred to

Comstock Canada Ltd., Re (2013), 2013 ONSC 4756, 2013 CarswellOnt 9796, 4 C.B.R. (6th) 47, 25 C.L.R. (4th) 175 (Ont. S.C.J.) — referred to

Concrete Equities Inc., Re (2012), 2012 ABCA 266, 2012 CarswellAlta 1572, 96 C.B.R. (5th) 139, 354 D.L.R. (4th) 683, (sub nom. *Sandhu v. MEG Place LP Investment Corp.)* 542 A.R. 12, (sub nom. *Sandhu v. MEG Place LP Investment Corp.)* 566 W.A.C. 12 (Alta. C.A.) — referred to

Elias v. Hutchison (1980), 12 Alta. L.R. (2d) 241, 35 C.B.R. (N.S.) 30, (sub nom. *Catalina Exploration & Development Ltd. v. Hutchison)* 27 A.R. 13, 1980 CarswellAlta 169 (Alta. Q.B.) — referred to

Elias v. Hutchison (1981), 14 Alta. L.R. (2d) 268, 37 C.B.R. (N.S.) 149, 27 A.R. 1, (sub nom. *Catalina Exploration & Development Ltd., Re)* 121 D.L.R. (3d) 95, 1981 CarswellAlta 183 (Alta. C.A.) — referred to

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 43, (sub nom. *Fairview Industries Ltd., Re (No. 2))* 109 N.S.R. (2d) 12, (sub nom. *Fairview Industries Ltd., Re (No. 2))* 297 A.P.R. 12, 1991 CarswellNS 35 (N.S. T.D.) — referred to

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

Fitch v. Official Receiver (1995), [1996] 1 W.L.R. 242, [1996] B.C.C. 328, [1996] B.P.I.R. 152 (Eng. C.A.) — referred to

General Chemical Canada Ltd., Re (2005), 2005 CarswellOnt 210, 7 C.B.R. (5th) 102 (Ont. S.C.J. [Commercial List]) — considered

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

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.) — considered

Lyall, Re (1991), 8 C.B.R. (3d) 82, 1991 CarswellBC 493 (B.C. S.C.) — referred to

Minister of National Revenue v. Temple City Housing Inc. (2008), 2008 ABCA 1, 2008 CarswellAlta 2, [2008] 2 C.T.C. 67, (sub nom. *R. v. Temple City Housing Inc.)* 2008 G.T.C. 1128 (Eng.), [2008] G.S.T.C. 2, (sub nom. *Temple City Housing Inc., Re)* 422 A.R. 4, (sub nom. *Temple City Housing Inc., Re)* 415 W.A.C. 4, 43 C.B.R. (5th) 35 (Alta. C.A.) — considered

Muscletech Research & Development Inc., Re (2006), 2006 CarswellOnt 264, 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) — 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.) — considered

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

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — followed

Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re) (2017), 2017 NSSC 160, 2017 CarswellNS 449 (N.S. S.C.) — referred to

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

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — considered

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — considered

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.) — followed

Temple City Housing Inc., Re (2007), 2007 ABQB 786, 2007 CarswellAlta 1806, [2008] 2 C.T.C. 61, [2007] G.S.T.C. 188, 42 C.B.R. (5th) 274 (Alta. Q.B.) — followed

Thibodeau c. Air Canada (2014), 2014 SCC 67, 2014 CSC 67, 2014 CarswellNat 4124, 2014 CarswellNat 4125, 74 Admin. L.R. (5th) 1, 377 D.L.R. (4th) 193, (sub nom. *Thibodeau v. Air Canada)* 463 N.R. 231, [2014] 3 S.C.R. 340 (S.C.C.) — considered

Statutes considered:

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. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

s. 187(5) — considered

Canada Pension Plan, R.S.C. 1985, c. C-8
Generally — referred to

s. 23(3) — considered

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

s. 2(1) "secured creditor" — considered

s. 11 — considered

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

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(2) [en. 1997, c. 12, s. 124] — considered

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

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.51(2) [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 11.52(1) [en. 2005, c. 47, s. 128] — considered

s. 11.52(2) [en. 2005, c. 47, s. 128] — considered

s. 34(11) — referred to

s. 37 — considered

Employment Insurance Act, S.C. 1996, c. 23
Generally — referred to

s. 86(2) — considered

s. 86(2.1) [en. 1998, c. 19, s. 266] — considered

Excise Tax Act, R.S.C. 1985, c. E-15
Pt. IX [en. 1990, c. 45, s. 12(1)] — referred to

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

s. 224(1.3) "secured creditor" — considered

s. 224(1.3) "secured interest" — considered

s. 227(4) — considered

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

Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.)
Generally — referred to

Personal Property Security Act, S.A. 1988, c. P-4.05
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 3.9 — considered

R. 9.15(1) — considered

R. 9.15(4) — considered

R. 11.14(1)(b) — considered

R. 11.14(2)(b) — considered

Treaties considered:

Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999, ICAO Doc. No. 9740
Generally — referred to

RULING on Canada Revenue Agency's motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National for unremitted source deductions.

J.E. Topolniski J.:

Introduction

1 This case is about whether Court ordered "super-priority" security interests granted in a *Companies' Creditor Arrangement Act*[1] (*CCAA*) proceeding can take priority over statutory deemed trusts in favour of Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue (CRA) for unremitted source deductions.

2 Acknowledging that its success on this motion would cause a chill on commercial restructuring, CRA relies on the comeback provision in an initial *CCAA* Order made July 5, 2017 (Initial Order) to vary "super-priority" charges made in favour of an interim financier, the directors of the debtor companies, and the Monitor and its counsel (Priority Charges), which subordinate its deemed trust claims arising under the *Income Tax Act (ITA)*[2], *Canada Pension Plan Act*[3] *(CPP Act)*, and *Employment Insurance Act*[4] *(EI Act)* (collectively, the Fiscal Statutes)[5].

3 CRA's view is that the deemed trusts give it a proprietary, rather than a secured interest in the Debtors' assets that cannot be subordinated. Alternatively, if it is a secured creditor, its first place position under the Fiscal Statutes cannot be undermined by the Priority Charges. Canada North Group Inc, Canada North Camps Inc, Camcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd and 1919209 Alberta Inc (the Debtors), the Monitor, and the interim financer, Business Development Bank of Canada (BDC), strenuously oppose the motion.

4 In addition to the priority issue, there are a number of interconnected, subsidiary issues including: Whether the subject is proper for variance, the onus on a comeback motion, technical service versus actual notice, and delay prejudice.

5 For the reasons that follow, CRA's interest arising under the Fiscal Statutes is properly subordinated by the Priority Charges. Concerning the subsidiary issues, I have (obviously given the foregoing) found that the question is appropriate for a comeback hearing. I have also found that CRA bears the onus and that, even if CRA had prevailed, it would have been inappropriate to disturb the Priority Charges for the period between the Initial Order and this hearing on August 11, 2017, because of the delay prejudice.

The Factual Landscape

6 No surprise given the nature of the proceedings, matters have unfolded quickly.

7 The Debtor's restructuring plan began with s 50.4(1) *Bankruptcy and Insolvency Act* (*BIA*)[6] notice of intention to make a proposal to creditors that very quickly changed to a plea for *CCAA* relief.

8 The originating *CCAA* materials were served on CRA via courier at its Edmonton office (CRA Office) on June 28. The service package included:

a. The originating application returnable July 5, 2017 seeking a stay of proceedings and basket of other relief, including the Priority Charges;

b. A draft form of initial order that set out the sought after charges: Interim financier charge of $1,000,000, administrative charge of $1,000,000, and the director's indemnity charge of $50,000,000; and

c. An affidavit of a director of the Debtors attesting to a $1,140,000 debt to CRA for source deductions and GST (the evidence does not breakdown what is owed for source deductions, which is the only remittance in issue).

9 On July 5, the Debtors' motion and a cross-motion to appoint a receiver of three of the debtor companies by the Debtor's primary lender, Canadian Western Bank (CWB), proceeded. CRA did not appear (more will be said about this later). The Court refused CWB's receivership application and granted the Initial Order, which included typical service provisions and a comeback clause (Comeback Provision). The Priority Charges track the draft form of Order with one change - a (consensual) $500,000 reduction to the administrative charge.

10 On July 6, the Debtors served CRA with the Initial Order by mailing it to the CRA Office, a permissible form of service under Alberta's *Rules of Court*. Also on this day, the CRA employee responsible for *CCAA* filings in western Canada (CRA Representative) received the Initial Order. The curious routing was via a Department of Justice Canada (DOJ) lawyer who was given it by a party that noted CRA's manifest absence at the initial hearing.

11 On July 12, the Monitor published notice of the proceedings in one local and one national newspaper and created a proceeding-specific website.

12 By July 13, the Debtor's service package had wended its way from the CRA Office to the CRA Representative's hands.

13 Next, on July 20, when BDC had advanced $900,000 of the Priority $1,000,000 facility, the Debtors served a motion to extend the stay of proceedings (made in the Initial Order) returnable July 27 (Extension Motion). Again, service was on the CRA Offices.

14 Then, on July 21, CWB served another motion to appoint a receiver also returnable on July 27. CWB served CRA by sending the documents to a DOJ lawyer.

15 On July 25, the Debtors served CRA with an application to increase interim financing returnable July 27 on the ground that they had a new contract to supply camps for firefighters battling the wildfires then ravaging British Columbia (Enhanced Financing Motion).

16 Late on the afternoon of July 26, CRA's counsel emailed an unfiled version of this motion and a draft form of the order to be sought to the Monitor's and Debtors' counsel, who passed the information to BDC's counsel.

17 On July 27, all three motions proceeded. CRA appeared, taking no position. In the result, the stay of proceedings was extended until September 26, and the interim financing was increased to $2,500,000 (written reasons were later filed: 2017 ABQB 508 (Alta. Q.B.)). After the Court delivered its oral reasons for decision, CRA's counsel rose to advise that his client would be filing this motion, noting the risk to BDC for "additional advances subject to the Crown's charges." In response, BDC's counsel indicated that his client had earlier learned of CRA's intentions and was still prepared to advance under the facility.

The Legal Landscape

The CCAA and Judicial Decision Making

18 The *CCAA*'s purpose is to allow financially distressed businesses with more than $5,000,000 debt to keep operating and, where possible, avoid the social and economic costs of liquidation.

19 The *CCAA* process "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."[7]

20 When enacting the *CCAA*, Parliament understood that liquidation of insolvent businesses is harmful to creditors and employees and the optimal outcome is their survival.[8] This notion would not have been lost on Parliament when the *CCAA* was substantially amended in 2009 (2009 amendments). Indeed, in a post-2009 amendment case, *Sun Indalex Finance, LLC v. United Steelworkers*,[9] Cromwell J, concurring in result and writing for McLachlin CJ and Rothstein J, spoke of the *CCAA's* purpose saying:

> [It] is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent.[10]

21 The Court's function during the *CCAA* stay period is to supervise and move the process to the point where the creditors approve a compromise or it becomes evident that the attempt is doomed to fail.11 Typically, this requires balancing multiple interests.

22 *CCAA* s 11 cloaks the Court with broad discretionary power to make any order it considers appropriate in the circumstances, subject to the restrictions set out in the *Act*. However, as the Supreme Court of Canada observed in *Century Services*, there are limits on the exercise of inherent judicial authority in a *CCAA* restructuring.12

23 The Supreme Court also provides this overarching direction for exercising *CCAA* judicial authority in *Century Services*:

> 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 permit13.

24 In interpreting and applying the *CCAA*, the Court is to employ a hierarchical approach, and consider and, if necessary, resolve the underlying policies at play.14

A Brief History of Deemed Trust Litigation

25 While there are other priority cases involving disputes between CRA and insolvent entities, this discussion necessarily begins with *Royal Bank of Canada v. Sparrow Electric Corp.*[15]

26 The contest in *Sparrow Electric* was between CRA's deemed trust claim for unremitted source deductions under the *ITA* and security interests under the *Bank Act*[16] and the Alberta *Personal Property Security Act.*[17] CRA lost the priority battle since the security interests were fixed charges attaching to the secured property when the debtor acquired it. Consequently, CRA's deemed trust had no property to attach to when it later arose. In response to *Sparrow Electric*, Parliament amended the *ITA* by expanding s 227 (4) and adding s 227(4.1) (detailed below).

27 The next noteworthy case is *First Vancouver Finance v. MNR*,[18] which concerned a priority dispute between CRA's deemed tax trusts and the interest of a third party purchaser of assets bought in an insolvency proceeding sale. The interpretation of *ITA* s 227(4.1) was at the fore.

28 The Supreme Court found in favour of the third party purchaser. Writing for the majority, Iacobucci J noted:

a. In principle, the deemed trust is similar to a floating charge over all the debtor's assets in favour of the Crown (at para 40);

b. The deemed trust operates "in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction" (at para 33);

c. Property subject to the deemed trust can be alienated by the debtor, after which the deemed trust applies to the proceeds (at para 42); and

d. The deemed trust is not a "true trust," nor is it governed by common law requirements under ordinary principles of trust law, but the effect of s227(4.1) is to revitalize the trust whose subject matter has lost all identity (citing Gonthier J in *Sparrow Electric*) (at para 27-28).

29 The Supreme Court concluded that Parliament intended s 227(4) and (4.1):

> . . . to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. (at para 28).

30 *First Vancouver* was considered in the 2007 decision, *Temple City Housing Inc (Companies' Creditors Arrangement Act)*,[19] and again in June 2017 in *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*.[20]

31 In *Temple City*, CRA opposed a Priority charge in favour of an interim financier (then termed a debtor in possession, or DIP, financier) on the basis that it had a proprietary interest in the debtor's assets under its (tax) deemed trusts. Unlike this case, it was decided before the 2009 amendments.

32 Like others before her with no statutory authority to grant the super priority charges, Romaine J assessed the merits and relied on the Court's inherent jurisdiction to grant the charge.

33 The Alberta Court of Appeal denied leave to appeal, finding the issue unimportant to the practice because amendments allowing such charges were on the horizon and future cases would engage statutory interpretation (the Court of Appeal's forecast of looming amendments was sidelined by Parliamentary inaction, and the amendments were eventually proclaimed in force on September 18, 2009). The Court also found the issue unimportant to the case itself for two distinct reasons. First, the proceeding had taken on a momentum that would make it virtually impossible to "unscramble the egg." Second, an appeal would hinder the restructuring as the DIP lender would not advance without being in a priority position.

34 Next is the seminal decision in *Century Services*, which considered the deemed trust for GST arising under the *Excise Tax Act* (ETA).[21] Despite the different deemed trust at issue, *Century Services* is important for many reasons including, general interpretation of the *CCAA*, policy considerations, the Court's function, and the parameters for exercising inherent jurisdiction.

35 *Rosedale Farms* concerned deemed tax trusts and a super-priority interim financing charge in a *BIA* proposal scenario. The reasons disagree quite strongly with the logic of *Temple City*. The Court also found that because CRA did not have the requisite notice, it could not be bound by the interim financing Order.

36 I will return to the conflicting views expressed in *Temple City* and *Rosedale Farms* in the context of the priority analysis.

The Statutory Provisions

37 The relevant statutory provisions are set out below. All emphasis is mine.

38 *CCAA* s 2(1) defines the term, "secured creditor" as including:

> **a holder of . . . a trust** in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada... .

39 *ITA* s 224(1.3) defines "secured creditor" as "a person who has a security interest in the property of another person." It defines "security interest" as:

any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, **created by or arising out of a** debenture, mortgage, hypothec, lien, pledge, charge, **deemed or actual trust,** assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for.

40 The *EI Act* and *CPP Act* cross-reference these definitions.

41 The relevant portions of *CCAA* ss 11.2, 11.51, and 11.52 read:

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

42 *CCAA* s 37, previously s 18.2, reads:

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.

(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 (each of which is in this subsection referred to as a "federal provision") . . . .

43 *ITA* ss 227(4) and (4.1) read:

> (4) 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.
>
> (4.1) **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 and property held by any secured creditor** (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) 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 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
>>
>> (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, 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 such a security interest
>
> **and is property beneficially owned by Her Majesty** notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

44 *EI Act* s 86(2.1) and *CPP Act* s 23(3) are identical to *ITA* s 227(4.1).

45 With that legal backdrop, I turn now to address whether I can and, if so should, entertain CRA's motion, or whether it is properly the subject of an appeal to the Court of Appeal.

Jurisdiction to Entertain CRA's Motion

46 The language of the Comeback Provision is typical in initial *CCAA* Orders made in this province and elsewhere. It reads:

> 58 Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

47 The answer to whether I have jurisdiction to entertain CRA's motion or whether it is properly a subject of appeal to the Court of Appeal rests on the answers to: for whom and when is the Comeback Provision is available.

Who can rely on the Comeback Provision?

48 The Comeback Provision is available to any interested party. It is only logical that an interested party that was not given notice of a *CCAA* initial hearing can rely on the comeback clause.[22] Similarly, and depending upon the circumstances, an interested party given notice may also access the comeback clause.

49 CRA is an interested party that received notice of the motion for the Initial Order. While the Initial Order deemed that service to be good and sufficient, CRA's actual knowledge came the day after it occurred.

When can the Comeback Provision be used?

50 Recourse through the comeback clause is available when circumstances change. As explained in *Pacific National Lease Holding Corp., Re*:

> [I]n supervising a proceeding under the C.C.A.A. **orders are made, and orders are varied as changing circumstances require**. Orders depend upon a careful and delicate balancing of a variety of interests and of problems.[23] [emphasis added]

51 Likewise, in *Re Royal Oak Mines Inc*, Blair J (as he then was) observed that the comeback clause is a means of sorting out issues as they arise during the course of the restructuring.[24]

52 Logically, non-disclosure of material information in an *ex parte* initial application also supports recourse via the comeback clause.[25]

53 An analogous form of statutory recourse is found in *BIA* s 187(5). A sparingly used tool, variance under this provision is a practical means of determining if an order should continue in the face of changed circumstances or fresh evidence.[26]

54 Equally, under r 9.15(1) of the Alberta *Rules of Court* the Court can set aside, vary, or discharge an entered judgment or order (interlocutory or final) if it was made without notice to an affected person, or to correct an accident or mistake if the person did not have adequate notice of the trial. In a similar vein, r 9.15(4) allows the Court to set aside, vary, or discharge an interlocutory order by agreement of the parties, or because of fresh evidence, or other grounds that the Court considers just.

55 Likely because many, if not most, *CCAA* authorities deal with variance of *ex parte* initial orders, little is written about recourse by appeal versus comeback. One example is the rather unusual case of *Re Algoma Steel Inc*,[27] where creditors filed a simultaneous comeback motion and appeal of the initial *ex parte* order. The appeal was heard first. The Court of Appeal found that the appeal was premature (because the order was a "lights on" order) and said that variance should have been pursued.

56 Comeback motions must be made *post haste* because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself - which Rowbothom JA described as the virtual impossibility of unscrambling the egg in *Temple City*.[28]

57 Next, I will discuss service and timing concerns.

Service

58 It is trite that the point of service is that a party must get notice of the proceeding and that a party serving documents on a proper address for service must be able to do so with confidence.[29]

59 As previously noted, CRA was served on June 28 at the CRA Office by courier delivery.

60 Rule 11.14(1)(b) provides that service is effected on statutory entities and other entities by "being sent by recorded mail, addressed to the entity, to the entity's principal place of business or activity in Alberta." Recorded mail includes mail by courier and the date of effective service is "on the date acknowledgement of receipt is signed": r 11.14(2)(b).

61 Rule 3.9 requires that an originating application and supporting affidavits be served at least 10 days before the return date. To comply, the Debtors had to serve by June 25, but because this date fell on a weekend, technically compliant service mandated delivery of the service package on June 23.

62 CRA points to the Office of the Superintendent of Bankruptcy's (OSB) website in defence of the position that service was lacking. In part, it reads:

> To make sure insolvency documents are processed quickly and effectively, you should send them to the appropriate area of the CRA.

The webpage also identifies "key processing areas for insolvency documents", which in this case is the office where the CRA Representative is located in Surrey, British Columbia.

63 The OSB website does not assist CRA. While companies seeking relief under the *CCAA* may retain insolvency professionals in advance of their filing, imposing an expectation that debtors heed the OSB's 'unofficial advice' is simply asking too much. More importantly, to require compliance is contrary to the Alberta *Rules of Court*.

64 Properly, CRA does not cast blame on the Debtors for the fact that its own challenges routing mail caused the delay in getting the service package into the right hands. What CRA does say is that despite this, it should have the opportunity to address its significant challenge to the Priority Charges because if the service package was delivered to the regional office responsible for *CCAA* matters by June 25, it was "very likely that CRA would have been represented at the July 5th application."

65 The Debtors effected service, albeit short notice service, on CRA, which the Court deemed to be good and sufficient. Short notice in insolvency proceedings is not a new concept and CRA is not new to insolvency proceedings. Indeed, it is a seasoned and sophisticated player in the *CCAA* arena with access to the might of the federal government's resources.

66 These observations aside, the *CCAA* is not all about technicalities and technical compliance. It is about ensuring maintenance of the *status quo* in the sorting-out period, balancing interests, and, in that vein, hearing from all affected voices whenever it is practicable to do so.

67 In the result, despite the glaring failure of CRA's mail management system and although CRA was effectively and technically served on June 28, the purpose of service was not fulfilled until July 6 when CRA became aware of the Initial Order. On this basis, I am satisfied that I have jurisdiction to hear the variance motion. In finding as I do, I am mindful that CRA is asking whether the Priority Charges ought to have been granted in the first instance, which could well be the subject of appeal. However, *Algoma Steel* supports the notion that variance may be the preferred route where a party did not have actual notice of an order made early in the proceeding.

Timing

68 While comeback relief may be appropriate, it "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question."[30]

69 Armed with knowledge of the Initial Order the day after it was made and well-knowing that the beneficiaries of the Priority Charges would rely upon them, CRA waited twenty days to informally announce its intentions. Then, CRA chose to attend and take no position at the Extension and Enhanced Financing Motions. It also chose to defer advising the Court of this intended motion until after the Court delivered its decision on those motions.

70 CRA's dawdling put BDC, the Monitor, and perhaps the directors at risk of significant prejudice, and it is unfair for it to now ask that the priority be reversed before it gave meaningful notice to all affected parties.

71 The options for fixing the appropriate date of meaningful notice are the date of informal notice, the hearing date, and the release of these Reasons. In my view, the most appropriate date is the hearing of this motion because experience shows

that not all informally announced motions actually proceed.

72 Accordingly, irrespective of whether CRA prevails at the end of the day, all of the Priority Charges should be unaffected until August 11, 2017.

73 I turn next to who bears the onus.

The Onus

74 The authorities disagree on who bears the onus where the party seeking to vary under a comeback clause was served. Indeed, Blair J (as he then was) observed that there may be no formal onus, but there "may well be a practical one if the relief sought goes against the established momentum of the proceeding."[31]

75 In *General Chemical Canada Ltd., Re*,[32] Farley J stated that "[I]n any comeback situation, the onus rests solely and squarely with the [initial] applicant to demonstrate why the original or initial order should stand."

76 In contrast, in *Re Target Canada Co*, Morowetz J directed a comeback hearing that was to be a "true" comeback hearing in which the applying party did "not have to overcome any onus of demonstrating that the order should be set aside or varied."[33] There, the initial order went beyond a usual "first day" order. While service was not addressed, it is evident that many, if not most, of the stakeholders were not represented at the hearing.

77 Considering the practicalities of *CCAA* matters, my view is that barring unforeseen circumstances, the onus on a variation application should be this:

- When the initial application is made *without notice* or with insufficient notice, the initial applicant bears the onus of satisfying the court that the terms of the initial order are appropriate.

- When the initial application is made *with notice*, the onus is on the party seeking the variation to show why it is appropriate and that the relief sought does not prejudice others who relied on the order in good faith.

78 I now turn to the substantive priority issue.

Who has priority?

79 It is beyond debate that *ITA* s227 (4) and the mirrored provisions in *EI Act* (s 86(2) and *CPP Act* (s 23(3)) create deemed trusts, and that *CCAA* s 37(2) explicitly preserves their operation. The debate is simply about whether CRA's interest arising from the deemed trusts can be subordinated by the Priority Charges.

80 Two principal questions arise:

i. What is the nature of CRA's interest?

ii. Does CRA's statutorily secured status elevate it above a Priority Charge?

What is the nature of CRA's interest?

81 CRA relies on the extension of trust provisions in the Fiscal Statutes to support the notion that it holds a proprietary rather than secured interest in the Debtors' property. Key to its position is the effect of the concluding phrase in s 227(4.1):

> Notwithstanding any other provision of this Act . . . property held by any secured creditor... is deemed...and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [emphasis added]

82 CRA asserts that these words take it beyond a mere secured creditor because they do not just *deem* the Crown to be the owner of the interest, but rather, says that it *is* the owner.

83 This is the same position CRA advocated in *Temple City*, where Romaine J distilled these features of tax deemed trusts from *First Vancouver* :

- The "deemed trust" is not in "truth a real one as the subject matter of the trust cannot be identified from the date of creation of the trust;" and

- In principle, the deemed trust is similar to a floating charge over all the assets of the tax debtor in that the tax debtor is free to alienate its property, and when it does, the trust releases the disposed-of property and attaches to the proceeds of sale. To find otherwise would freeze the tax debtor's assets and prevent it from carrying on business, which was clearly not a result intended by Parliament.

84 Justice Romaine determined that despite the concluding words of s 227(4.1) these features were inconsistent with a property interest, noting that the definition of a "security interest" in the *ITA* included a "deemed or actual trust", which supports the interest being capable of having the same treatment as a security interest under the *CCAA*.[34]

85 Moir J in *Rosedale Farms* disagreed finding instead that:

- The analogy of the deemed trust to a floating charge in *First Vancouver* was not about creating security, but rather, sales made in the ordinary course of business. Iacobucci J's statement that the question of priority of secured creditors did not arise is noted.[35]

- The "notwithstanding" language of *ITA* s 227(4.1) expressly overrides the *BIA* and all other enactments thereby giving priority to the deemed trust.[36]

- Reliance on the *ITA* definition of "secured interest" is misguided.[37]

86 Moir J correctly notes Justice Iacobucci's observation that the creation of secured creditor priority did not arise in *First Vancouver* . However, as I read *Temple City*, the analysis did not rest on the floating charge analogy. Rather, like the *ITA* definition of "secured creditor," it was but one of several features supporting the result. That said the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings.

87 *Rosedale Farms* is distinguishable in that it concerned a *BIA* scenario. Nevertheless, even if it were otherwise, like Romaine J, I accept that the definitions of secured creditor and security interest in the *CCAA* and Fiscal Statutes support finding that the interests arising from the deemed trusts are security interests, not property interests. In particular, I note that s 224(1.3) defines a security interest as "any interest in property that secures payment . . . and includes a ... deemed or actual trust ... ."

88 Indeed, it would seem inconsistent to interpret the interest they create in a way contrary to their enabling statutes.

89 For these reasons, I conclude that CRA's interest is a security interest, not a proprietary interest. The impact and interplay of the "notwithstanding" language in *ITA* s 227(4.1), the discussion of which follows, does not change my conclusion.

Does CRA's statutorily secured status elevate it above the Priority Charges?

90 It may appear that *CCAA* ss 11.2, 11.51, or 11.52 conflict with the deemed trust sections in the Fiscal Statutes, and that a strict "black letter" reading of only ss 227(4) and (4.1) may support CRA's interpretation. However, one must not read these provisions in a vacuum. The Fiscal Statutes, the *BIA*, and the *CCAA* are part of complex legislative schemes that operate concurrently and must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[38] Each references the other, expressly or impliedly, and it would be an error to focus on only one section in one piece of the entire scheme.

91 *ITA* s 227(4.1) opens with these words:

> **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 notwithstanding any security interest in such property . . . . [emphasis added] (Notwithstanding Provision)

92 CRA points to the *obiter dicta* of Fish J (in his separate concurring reasons) in *Century Services* (at para 104) finding that Parliament intended deemed trusts to prevail in insolvency proceedings as a complete answer. The other members of the Court did not adopt his reasoning. For that reason, I cannot find his *obiter dicta* to be "the answer."

93 While the *CCAA* preserves the operation of the Fiscal Statutes deemed trusts, it also authorizes the reorganization of priorities through Court ordered priming.

94 CRA urges that the Fiscal Statutes and the *CCAA* can be 'stitched together' to read:

> Notwithstanding [sections 11, 11.2, 11.51, and 11.52 of the *Companies' Creditors Arrangements Act*,] property of [the Applicants] equal in value to the [unremitted source deductions] . . . is beneficially owned by Her Majesty notwithstanding any security interest in such property [including security interests granted pursuant to ss. 11.2, 11.51, or 11.52 of the *CCAA*] and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

95 The problem with "stitching" in this way is that incorporating these sections into the Notwithstanding Provision implies that they are somehow in conflict with it. The Supreme Court of Canada has taken a restrictive view of what constitutes a conflict between statutory provisions of the same legislature.

96 In *Thibodeau v Air Canada*,[39] the Court addressed whether there was a conflict between the *Official Languages Act* and the *Convention for the Unification of Certain Rules for International Carriage by Air*, concluding that there is a conflict between two provisions of the same legislature "*only* when the existence of the conflict, in the restrictive sense of the word, *cannot be avoided by interpretation*"[40] [emphasis added]. Nothing in these *CCAA* sections directly conflict with s 227(4.1) and thus, one must attempt to interpret these provisions without conflict.

97 Further, in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*,[41] the Supreme Court of Canada, dealing with another complex legislative scheme, said:

> The provisions at issue are found in statutes which are themselves components of a larger statutory scheme **which cannot be ignored**:
>
>> As the product of a rational and logical legislature, the statute is considered to form a system. **Every component contributes to the meaning as a whole**, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .
>>
>> (P. -A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p 308)

> As in any statutory interpretation exercise . . . courts need to examine **the context that colours the words and the legislative scheme**. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute **while preserving the harmony, coherence and consistency of the legislative scheme** (***Bell ExpressVu***, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": ***Bristol-Myers Squibb Co.***, at para. 102. [emphasis added]

98 Deschamps J observed in *Century Services*, at para. 15:

> . . . the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

99 She also quoted with approval the reasons of Doherty JA in *Elan Corp v Comiskey*[42] (Doherty JA was dissenting):

> 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.

100 In a survey of *CCAA* cases, Dr. Janis Sarra found that 75% of the restructurings required the aid of interim lenders.[43]

101 In *Indalex*, the Supreme Court of Canada observed the phenomenon, citing Sarra, and said:

> . . . case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries.[44]

102 The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.

103 Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.

104 Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work — where it has the most significance is at the end.

105 Further, the 2009 amendments codifying and elaborating on priority charges that had previously been granted under the Court's residual, inherent jurisdiction, shows Parliament's intention that secured creditors' interests could be eroded if the Court was satisfied of the need.

106 Had Parliament wanted to limit the Court's ability to give priority to these charges, it could have drafted s 11.52(2) (and the mirror provisions) to expressly provide:

> . . . priority over the claim of any secured creditor **except the claim of Her Majesty over deemed trusts under s. 227(4) and (4.1) of the Income Tax Act.**

107 CRA's interpretation recognizes the obvious, underlying policy reason favouring the collection of unremitted source deductions, which is described as being "at the heart" of income tax collection in Canada": *First Vancouver* at para 22. However, it fails to reconcile that objective with the Canadian insolvency restructuring regime and Parliament's continued commitment (as evidenced by the 2009 amendments) to facilitating complex corporate *CCAA* restructurings, even if erosion of security is required.

108 The *CCAA*'s aim is to facilitate business survival and avoid the multiple traumas occasioned by business failure. Interim financiers are an integral part of the restructuring process. Without them, most *CCAA* restructurings could not get off the ground. Likewise, directors and insolvency professionals are essential to the process, and they too need the comfort of primed charges to fully engage in the process. Surely, Parliament knew all of these things when it passed the 2009 amendments authorizing primed charges.

109 CRA's position, which it acknowledges will cause a chill on complex restructurings, undermines the *CCAA*'s purpose for the sake of tax collection. It disregards the rather obvious, that successful corporate restructurings result in continued jobs to fuel and fund its source deduction tax base. Notably, its interpretation fails to reconcile these purposes.

110 The Fiscal Statutes and the *CCAA* should, if possible, be interpreted harmoniously to ensure that Parliament's intention in the entire scheme is fulfilled.

111 It is logical to infer that Parliament intended to create a co-existing statutory scheme that accomplished the goals of both the Fiscal Statues and the *CCAA*. In my view, it is possible to construe these legislative provisions in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme.

112 I conclude that it is the Court's order that sets the priority of the charges at issue. The relevant *CCAA* sections allow the Court, where appropriate, to grant priority *only* to those charges necessary for restructuring. The purpose of the deemed trusts in the Fiscal Statutes is still met as deemed trusts maintain their priority status over *all other* security interests, but those ordered under ss 11.2, 11.51, and 11.52.

113 A harmonious interpretation respecting both sets of statutory goals is one that preserves the deemed priority status over all security interests, subject to a Court order under *CCAA* ss 11.2, 11.51, and 11.52 granting a "super priority' to those charges.

114 For these reasons, I find that the *CCAA* gives the Court the ability to rank the Priority Charges ahead of CRA's security interest arising out of the deemed trusts.

Order accordingly.

Footnotes

1 RSC 1985, c C-36 as amended, ss 11.2, 11.4, 11.51 11.52.

2 RSC, 1985, c 1 (5th Supp) 6.

3 RSC 1985, c C-8.

4 SC 1996, c 23.

5 Para 44 of the Initial Order provides that the Priority Charges constitute a charge on all of the debtors' property which, subject to s

34(11) of the *CCAA*, rank in priority to all other security interests, including trusts, liens, and encumbrances, statutory or otherwise.

6 RSC 1985, c B-3.

7 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 77, [2010] 3 S.C.R. 379 (S.C.C.).

8 *Century Services* at paras 15, 17.

9 *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) at para 205, [2013] 1 S.C.R. 271 (S.C.C.).

10 ***Indalex*** at para 105.

11 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), [1991] 2 W.W.R. 136 (B.C. C.A.) at 140, (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.).

12 *Century Services* at paras 64-66.

13 ***Century Services*** at para 70.

14 *Century Services* at paras 65 and 70.

15 *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.) .

16 *SC 1991, c 46.*

17 SA 1988, c P-4.05.

18 *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] 2 S.C.R. 720 (S.C.C.).

19 *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274 (Alta. Q.B.), leave to appeal denied *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1, 43 C.B.R. (5th) 35 (Alta. C.A.).

20 *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*, 2017 NSSC 160 (N.S. S.C.).

21 *RSC 1985, c E15.*

22 *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) at para 5; *Comstock Canada Ltd., Re*, 2013 ONSC 4756, 4 C.B.R. (6th) 47 (Ont. S.C.J.) at para 49; *Fairview Industries Ltd., Re* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (N.S. T.D.); *CanaSea PetroGas Group Holdings Ltd., Re* (2014), 18 C.B.R. (6th) 283 (Ont. S.C.J.) at paras 13-14.

23 *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265, 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]) at para 30.

24 *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at para 28.

25 *Re CanaSea PetroGas Group Holdings Ltd.*

26 *Elias v. Hutchison* (1980), 12 Alta. L.R. (2d) 241 (Alta. Q.B.) (at para 6), (1980), 35 C.B.R. (N.S.) 30 (Alta. Q.B.), aff'd (1981), 121 D.L.R. (3d) 95, 37 C.B.R. (N.S.) 149 (Alta. C.A.); *Christiansen v. Paramount Developments Corp.*, 1998 ABQB 1005 (Alta. Q.B.) (at para 24), (1998), 8 C.B.R. (4th) 220 (Alta. Q.B.); *Fitch v. Official Receiver* (1995), [1996] 1 W.L.R. 242 (Eng. C.A.); *Lyall, Re* (1991), 8 C.B.R. (3d) 82 (B.C. S.C.).

27 *Algoma Steel Inc., Re*, [2001] O.J. No. 1994 (Ont. S.C.J. [Commercial List]), leave to appeal refused, (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 (Ont. C.A.).

28 At para 14.

29 *Concrete Equities Inc., Re*, 2012 ABCA 266 (Alta. C.A.) at paras 19, 24.

30 *Muscletech*, at para 5.

31 *Royal Oak*, at para 28.

32 *General Chemical Canada Ltd., Re* (2005), 7 C.B.R. (5th) 102 (Ont. S.C.J. [Commercial List]) at para 2.

33 *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.) at para 82.

34 *Temple City*, at para 13.

35 *Rosedale Farms*, at para 39.

36 *Ibid*, para 35.

37 *Ibid*, para 29.

38 *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para 21.

39 *Thibodeau c. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 (S.C.C.).

40 *Thibodeau* at para 92.

41 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.).

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

43 Janis P Sarra, *Rescue!: Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199.

44 ***Indalex*** at para 59.