S.C.C. FILE NO. 38871

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN

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 OF CANADA

RESPONDENT
(RESPONDENT)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(BUSINESS DEVELOPMENT BANK OF CANADA, RESPONDENT)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Respondent, Business Development Bank of Canada ("**BDC**"), submits that the Applicant is unable to satisfy the test for leave to appeal to this Court because the decision (the "**ABCA Decision**") of the Alberta Court of Appeal ("**ABCA**"), from which leave to appeal is sought does not disclose any reviewable errors of law and, in any event, an appeal of the ABCA Decision is not of sufficient public importance because it is moot, raising academic questions only.

2. The issues raised in the Applicant's application for leave to appeal (the "**Leave Application**") relate to the interplay between sections 11.2(2), 11.51(2), and 11.52 " (collectively, the "**Priming Provisions**") of the *Companies' Creditors Arrangements Act*, RSC 1985 c C-36 (the "***CCAA***"), which empower a *CCAA* court to grant priority charges in favour of interim lenders, directors and officers, the monitor, and administrative professionals (collectively, the "**Priming Charges**") for the purpose of facilitating a restructuring, and the statutory deemed trust provisions of the *Income Tax Act*, RSC 1985, c. 1 (5th Supp) (the "***ITA***"), *Canada Pension Plan,* RSC 1985, c C-8, and the *Employment Insurance Act*, SC 1996, c 23 (collectively, the "**Fiscal Statutes**").

3. The position advanced by the Applicant in these proceedings unnecessarily "pits two of Parliament's objectives against each other: avoiding the social and economic costs of a debtor liquidating its assets…and the collection of source deductions, which lie 'at the heart' of income tax collection."[1] The Applicant, as it did first before the Alberta Court of Queen's Bench (the "**ABQB**")[2] and subsequently before the ABCA, yet again seeks to advance the policy objectives of the Fiscal Statutes at the expense of the broad, remedial purpose of the *CCAA* – effectively undermining both legislative regimes. The irony of this approach was noted in the ABCA Decision as follows:

> [48] [The] remedial purpose [of the *CCAA*] has been recognized time and again in the jurisprudence…Not only does the Crown's position undermine

[1] *Canada v Canada North Group Inc*, 2019 ABCA 314, at para 3.
[2] *Canada v Canada North Group Inc*, 2017 ABQB 550, at paras 107-109.

> the objective of the *CCAA*, it will also result in fewer restructurings which will necessarily result in reduced tax revenue. Undermining the remedial objective of the *CCAA* for the sake of tax collection disregards the obvious benefit for the government of successful corporate restructurings. In other words, the Crown is biting off the hand that feeds it. Indeed, in this case, the Priming Charges allowed the debtor to continue to operate its business and raise sufficient funds to satisfy both the Priming Charges and the Crown's claim. When the statutes are read harmoniously, as the chambers judge did, the objectives of both the Fiscal Statutes and the *CCAA* can be achieved.[3]

4. As further demonstrated below, the Leave Application does not raise any issues of sufficient public importance justifying this Court's intervention because: (i) the issues raised in the Leave Application have been correctly determined by cogent and persuasive decisions of the ABQB and the ABCA; (ii) the ABCA Decision from which the Applicant seeks leave to appeal is consistent with this Court's decision in *Century Services Inc v Canada (Attorney General)*[4]; and (iii) the issues pertaining to the relative priority of the deemed trust and the Priming Charges are, in any event, moot and academic only, as the Applicant's deemed trust claim has already been paid in full.[5]

B. Facts

5. For purposes of this Memorandum of Argument, BDC accepts the facts as set out in Part I of the Applicant's Memorandum of Argument.

C. The ABCA Decision

6. On November 3, 2017, the Applicant obtained leave to appeal from the judgment of the ABQB (the "**Appeal**"), reported as *Canada North Group Inc (Re)*, 2017 ABQB 363 (the "**ABQB Decision**"), on the following issue:

> [5] …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

[3] *Supra* note 1 at para 48.
[4] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 ("***Century Services***").
[5] The Leave Application at paragraph 53.

priority over the claim of the Minister of National Revenue for unremitted source deductions?[6]

7. The Appeal was heard on October 5, 2018 and, on August 29, 2019, the ABCA Decision was released, pursuant to which the majority of the ABCA rejected the Applicant's assertion that "the deemed trust supersedes all", including the provisions of the *CCAA* for the following reasons:

(a) the presumption of statutory coherence requires that the provisions of the *CCAA* and the Fiscal Statutes be read to work together as part of a larger statutory scheme that must be considered as a whole[7];

(b) applying principles of harmonious interpretation to the *CCAA* and the Fiscal Statutes avoids an absurdity – being the erosion of interim financing in *CCAA* proceedings, as interim lenders would be reluctant to offer interim financing where such financing was subordinate to CRA statutory deemed trust amounts[8];

(c) if CRA's statutory deemed trusts had absolute priority in *CCAA* proceedings, section 6(3) of the *CCAA* (which requires the payment of deemed trust amounts within six months of sanction of a *CCAA* Plan) would be unnecessary and, since "every provision serves a purpose," CRA's interpretation could not be correct[9];

(d) since the court has the authority to displace CRA's claims in *CCAA* proceedings, Parliament intended to authorize courts to exercise control over the Crown's interests while monitoring restructuring proceedings[10]; and

(e) even if there was, as CRA had asserted, a conflict between the *CCAA* and the Fiscal Statutes, the implied exception rule (*generalia specialibus non derogant*) supported the [ABQB Decision] because the *CCAA* applies in special circumstances, whereas the Fiscal Statutes are of general application.[11]

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[6] *Canada v Canada North Group Inc*, 2017 ABCA 363, at para 5.
[7] *Supra* note 1 paragraph 45.
[8] *Ibid* at paras 49-52.
[9] *Ibid* at para 53.
[10] *Ibid* at para 54.
[11] *Ibid* at paras 55-56.

8. Following its analysis of the *CCAA* and the Fiscal Statutes, the ABCA majority concluded that:

   (a) the interest created by the deemed trust provisions of the Fiscal Statutes in favour of the Applicant is a "security interest", not a proprietary interest[12]; and

   (b) sections 11.2, 11.51 and 11.52 of the "*CCAA* give the court the ability to grant priority to charges necessary for restructuring ahead of the Crown's security interest arising out of the statutory deemed trusts under the Fiscal Statutes."[13]

9. The Appeal was therefore dismissed, and it is from this decision that the Applicant now seeks leave to appeal.

PART II QUESTION IN ISSUE

10. The issue in this application is whether the Applicant ought to be granted leave to appeal the ABCA Decision, having regard to the established test for granting leave to appeal to this Court.

PART III ARGUMENT

A. Introduction

11. There are two problems with the within application. The first is that the arguments of the Applicant in its Leave Application are focused on the correctness of the ABCA Decision and the majority's interpretation of the relationship between the *CCAA* and the Fiscal Statutes. The problem is that this is not the test for determining whether leave will be granted. As Justice Sopinka explained in his speech "The Supreme Court of Canada", this Court is not simply a "court of error" and in considering whether to exercise its discretion to grant leave, the fact that a court below reached an incorrect result is not in itself sufficient.[14] The second problem with the Leave Application is that the proposed appeal to

[12] *Ibid* at para 32.
[13] *Ibid* at para 59.
[14] Justice Sopinka, "The Supreme Court of Canada" (10 April 1997), cited in D. Lynne Watt et al., *Supreme Court of Canada Practice*, 2019 (Toronto: Carswell, 2019), at page 477.

this Court deals with a purely academic matter. This Court will not decide abstract questions of law and will rarely grant leave where the appeal is academic.[15]

12. Fundamentally, these proceedings are about the nature of the deemed trusts in favour of the Applicant under the Fiscal Statutes, and whether a supervising court in *CCAA* proceedings possesses the jurisdiction to subordinate those deemed trusts pursuant to the Priming Provisions in order to facilitate a debtor company's restructuring.

13. The substance of the Leave Application was first heard by Justice Topolniski who, on September 9, 2017, issued the ABQB Decision dismissing the Applicant's claim that the deemed trust provisions create a "proprietary interest" for the following reasons:

   (a) the definition of a "security interest" in s. 224(1.3) of the *ITA* includes a "deemed or actual trust". The *ITA* is the enabling statute of the Crown's deemed trusts. It would be inconsistent to characterize the deemed trusts in a way contrary to their enabling statutes[16];

   (b) the Applicant's position unnecessarily implied that the provisions of the Fiscal Statute and the *CCAA* are in conflict, which apparent conflict could be avoided by harmoniously interpreting the statutes[17];

   (c) after applying the principle of statutory interpretation that legislation should be construed in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme, the ABCA majority concluded that the Applicant's statutory deemed trusts have priority over all security interests, except those ordered under the Priming Provisions of the *CCAA*[18]; and

   (d) sections 11.2, 11.51 and 11.52 of the *CCAA* give the court the jurisdiction to grant priority to charges necessary for restructuring ahead of the Applicant's security interest arising out of the deemed trusts.[19]

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[15] *Ibid*, at page 478.
[16] *Supra* note 1 at para 19.
[17] *Ibid* at para 20.
[18] *Ibid* at para 21.
[19] *Ibid* at para 21.

14. The ABQB Decision was subsequently upheld in the ABCA Decision, wherein the majority of the ABCA, concluded as follows:

> [32] …the chambers judge correctly interpreted the nature of the Crown's interest. The Crown's interest under the deemed statutory trust provisions of the Fiscal Statutes is akin to that of a secured creditor, but ranking ahead of all other secured creditors. The Crown does not hold a proprietary interest. Section 227(4.1) of the *ITA* does not elevate the Crown's claim to a proprietary interest.[20]

15. BDC submits that the Applicant is incorrect in its assertion that the ABCA Decision "muddies the law and undermines both the legislation and the decisions of this Court interpreting this legislation"[21], as the ABCA Decision was grounded in well-established principles of statutory interpretation and is consistent with this Court's decision in *Century Services*. BDC further submits that an appeal of the ABCA Decision is not of sufficient public importance because the issues are moot: the claim secured by the deemed trust in favour of the Applicant has been paid out in full.

B. The ABCA Decision Discloses No Reviewable Errors and any Appeal is Moot

16. The question of whether the Applicant's deemed trusts are security interests or proprietary interests is one of statutory interpretation. In characterizing the nature of the Applicant's deemed trust pursuant to the Fiscal Statutes as "security interests" capable of being subordinated pursuant to the Priming Provisions, the majority of the ABCA employed the correct approach to statutory interpretation. Its decision is consistent with, and supported by, "prior case law and the definitions of 'secured creditor' and 'security interest' in the Fiscal Statutes and the *CCAA*."[22]

17. After concluding that the nature of the deemed trust pursuant to the Fiscal Statutes is a "security interest", as opposed to a proprietary interest, the ABCA next considered whether the deemed trust could be subordinated pursuant to the Priming Provisions of the *CCAA*. In this respect, the ABCA summarized the Applicant's position (the same position in the Leave Application), as follows:

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[20] *Ibid* at para 32.
[21] *Supra* note 5 at para 52.
[22] *Supra* note 1 at para 32.

> [44] The Crown argues that the language of the Fiscal Statutes is clear: Parliament intended that the Crown's interest in unremitted source deductions cannot be subordinated to any other secured interest, including court-ordered Priming Charges. It relies on the opening words of s. 227(4.1) of the *ITA*: "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 ..." The Crown submits, and my colleague finds, that these words lead to one conclusion: the deemed trust supersedes all.[23]

18. The majority of the ABCA, dismissed this argument and, as detailed further below, BDC respectfully submits that, in doing so: (i) the ABCA majority applied the correct approach to statutory interpretation; (ii) the ABCA Decision is consistent with both the respective legislative schemes of the *CCAA* and the Fiscal Statutes; and (iii) the ABCA Decision is consistent with *Century Services*.

(i) The majority applied the correct approach to statutory interpretation

19. The Applicant asserts in the Leave Application that "there is no need to look beyond the four corners of section 227(4.1) [of the *Income Tax Act*] to determine the scope of priority it creates"[24], and further that "[t]he majority [of the ABCA] ignored the plain reading of subsection 227(4.1) of the *ITA* due to its concerns about the consequences of giving effect to the plain reading, namely undermining the remedial purpose of *CCAA* and thwarting the restructuring process."[25] In advancing this argument, the Applicant invites this Court to: (i) adopt an incorrect and overly restrictive approach to statutory interpretation; (ii) overlook the interplay between two statutory regimes; and (iii) consider the provisions and purpose of the Fiscal Statutes to the exclusion of the *CCAA*.

20. The Applicant advanced similar arguments before the ABCA. In rejecting the Applicant's restrictive approach to statutory interpretation, the ABCA majority referred to and relied upon the following well-established principles of statutory interpretation:

    (a) today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense

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[23] *Ibid* at para 44.
[24] *Supra* note 5 at para 45.
[25] *Ibid* at para 37.

harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament[26];

(b) there is a "presumption of coherence" in which "it is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal"[27];

(c) there is a general presumption that legislation passed by Parliament does not contain contradictions or inconsistencies, and that each provision is capable of operating without coming into conflict with any other[28]; and

(d) if a conflict is unavoidable, meaning it cannot be resolved by adopting an interpretation that would remove the inconsistency, the court is faced with the question of which provision should prevail having regard to the legislature's intent.[29]

21. The ABCA majority applied these well-established principles of statutory interpretation and, as detailed further below, correctly determined that: (i) a statutory deemed trust pursuant to the Fiscal Statutes is a security interest, not a proprietary interest[30]; and (ii) since statutory deemed trusts are security interests, they can be subordinated pursuant to the Priming Provisions.[31]

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[26] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 ("***Rizzo Shoes***"), at para 21 [relied on in the *ABCA Decision*, at para 26].
[27] R Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (LexisNexis Canada, 2014) at para 11.2 [cited with approval in the *ABCA Decision* at para 27].
[28] *Thibodeau v Air Canada*, 2014 SCC 67 at para 93 [relied on in the *ABCA Decision*, at para 28].
[29] *Lévis (City) v Fraternité des policiers de Lévis Inc*, 2007 SCC 14 at para 58 [relied upon in the *ABCA Decision*, at para 29].
[30] *Supra* note 1 at para 32.
[31] *Ibid* at paras 44-45 and 59.

(ii) The deemed trust is a security interest

22. Applying the correct principles of statutory interpretation necessitates consideration of both: (i) the nature of the Applicant's deemed trusts pursuant to the Fiscal Statutes and the *CCAA*; and (ii) the jurisdiction to subordinate a deemed trust pursuant to the Priming Provisions. The ABCA expressly considered these issues, as well as the relationship and interplay between the following provisions of the Fiscal Statutes and the *CCAA*:

(a) the definition of "secured creditor" in the Fiscal Statutes (in particular, the definition at section 224(1.3) of the *ITA*)[32];

(b) the definition of "secured creditor" in the CCAA[33];

(c) sections 227(4) and 227(4.1) (the extension of the deemed trust provisions) of the *ITA*[34]; and

(d) the jurisdiction of a *CCAA* court to grant the Priming Charges pursuant to the Priming Provisions.[35]

23. Section 224(1.3) of the *ITA* defines "secured creditor"[36] as "a person who has a security interest in the property of another person", and expressly includes deemed trusts. Indeed, section 224(1.3) of the *ITA* goes on to provide that the term "security interest"[37] means:

> <u>any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes</u> an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge<u>, deemed or actual trust</u>, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for [emphasis added].[38]

24. On appeal before the ABCA, the Applicant conceded "that s. 224(1.3) of the *ITA* provides that deemed or actual trusts are security interests, but [argued] that this definition does not apply when the Crown is asserting its deemed trust claim."[39] The Applicant advances a

[32] *Ibid* at para 19-20 and 37-39.
[33] *Ibid* at paras 40-43.
[34] *Ibid* at paras 44-45.
[35] *Ibid* at paras 11, 23, and 59.
[36] *ITA*, ss 224(1.2) and 224(1.3); *Ibid* at paras 38-39.
[37] *Ibid.*
[38] *ITA*, ss 224(1.2) and 224(1.3).
[39] *Supra* note 1 at para 39.

similar argument in the Leave Application, acknowledging that the definition of security interest includes a "deemed or actual trust", while simultaneously asserting that "this definition applies for the limited purpose of determining if a third party is a secured creditor; this is not relevant to determining whether the Crown, as a deemed trust beneficial holder, is a secured creditor pursuant to the *CCAA*."[40]

25. The ABCA correctly rejected "this argument for the same reason as the chambers judge" on the basis that it would be "illogical to interpret the statutory deemed trust interests in a way contrary to [the Applicant's] enabling statutes."[41] The illogical nature of the Applicant's argument – that the deemed trust provisions create a proprietary interest, as opposed to a security interest – is further illustrated in the *CCAA*'s definition of "secured creditor", which also expressly applies to trusts:

> **secured creditor** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of all, or any property of a debtor company as security for indebtedness of the debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, <u>or 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</u>, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds [emphasis added].[42]

26. On appeal before the ABCA, the Applicant argued that the reference to "trust" in the *CCAA*'s definition of "secured creditor": (i) is nested within the reference to bonds; (ii) is only in relation to an instrument securing *a bond* of a debtor company; and (iii) if Parliament intended for "secured creditor" to include holders of trusts, there would be a third reference to "a holder of a trust" drafted in parallel to the first two classes.[43]

27. The ABCA correctly rejected this argument, noting that: (i) the Crown's interest could be characterized as a 'charge' and therefore would be covered by the opening words of the

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[40] *Supra* note 5 at para 43.
[41] *Supra* note 1 at para 39.
[42] *CCAA*, s 2(1).
[43] *Supra* note 1 at para 42.

definition of "secured creditor" in the *CCAA*; and (ii) if the Fiscal Statutes and the *CCAA* are read harmoniously, then Parliament has defined "security interest" in the *Income Tax Act* as including a deemed trust."[44]

28. There is no demonstrable error in this conclusion, and the ABCA's conclusion was grounded in the following well-established principles relating to the Applicant's deemed trusts: (i) deemed trusts are akin to a floating charge over all of the assets of the tax debtor in the amount of the default[45]; (ii) deemed trusts are not true trusts[46]; (iii) deemed trusts do not attach to particular assets[47]; and (iv) since a debtor is not precluded from alienating property subject to a deemed trust, it follows that their character will change over time[48]

29. In sum, the Applicant's approach to statutory interpretation: (i) is overly and unnecessarily restrictive; (ii) is not supported by the express language of the relevant provisions of the Fiscal Statutes and/or the *CCAA*; and (iii) is contrary to the prior jurisprudence of this Court. The interest created by the deemed trust provisions of the Fiscal Statutes is a "security interest" and it is illogical to assert or hold otherwise.

(iii) Jurisdiction to grant the Priming Charges

30. After concluding that deemed trusts are security interests, rather than proprietary interests, the ABCA majority next considered whether the deemed trusts could be subordinated to the Priming Charges. In answering this question in the affirmative, the ABCA majority cited the following five reasons for rejecting the Applicant's assertion that the deemed trust provisions of the Fiscal Statutes "supersede all"[49]: (i) the presumption of statutory coherence; (ii) the Applicant's interpretation creates an absurdity; (iii) the Applicant's interpretation of the Fiscal Statutes would render provisions of the *CCAA* meaningless and inoperative; (iv) provisions of the *CCAA* expressly authorize a *CCAA* court to exercise

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[44] *Ibid* at para 43.
[45] *First Vancouver Finance v MRN*, 2002 SCC 49 ("**First Vancouver**") at para 40; *Ibid* at paras 34-35.
[46] *Royal Bank of Canada v Sparrow Electric Corp*, 1997 CanLII 377 (SCC), [1997] 1 SCR 411 at para 31; *Ibid* at para 34.
[47] *Supra* note 45 at para 40.
[48] *Ibid* at para 41.
[49] *Supra* note 1 at para 44.

control over the Applicant's deemed trust; and (v) even if there was a conflict between the *CCAA* and the provisions of the Fiscal Statutes, the implied exception rule would resolve this conflict in favour of the *CCAA*.

31. The Applicant bears the onus of demonstrating that the issues raised in the Leave Application are of sufficient importance to warrant intervention by this Court. While the test the Applicant must meet is public "importance", and not correctness, a brief consideration of each factor enunciated by the ABCA in dismissing the Appeal demonstrates that: (i) the ABCA Decision was correctly decided; and (ii) the Leave Application does not raise issues of sufficient public importance that justify further judicial intervention.

(iv) The presumption of statutory coherence

32. The *CCAA* and the Fiscal Statutes are part of a larger statutory scheme. As correctly observed by the ABCA majority, the presumption of statutory coherence requires that the provisions of the *CCAA* and the Fiscal Statutes be read together to achieve Parliament's intended objective.[50]

33. The Applicant's position at all levels in these proceedings necessarily implies a conflict between the Fiscal Statutes and the *CCAA*: on the one hand, Parliament has drafted provisions that purport to grant a super-priority to court-ordered Priming Charges under the *CCAA*, while on the other hand Parliament has apparently, and at the same time, granted super-priority to the Applicant's deemed trusts.[51]

34. While the Applicant denies that its position in the Leave Application creates such a conflict, it also, and somewhat paradoxically, states that, "[i]nsofar as a court may find a conflict [between the Fiscal Statutes and the *CCAA*], the blanket paramountcy phrase that introduces the extension of trust provisions resolves any conflict."[52] Under this interpretation of the Fiscal Statutes and the *CCAA*, the Applicant asserts that:

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[50] *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 49.
[51] *Supra* note 1 at para 20.
[52] *Supra* note 5 at para 44.

(a) the *CCAA* provisions permit a court to make an order declaring that a company's property is subject to a security or charge, and that the security or charge ranks in priority over the claim of any secured creditor of the company as "secured creditor" is defined in section 2 of the *CCAA*; and

(b) the deemed trust provisions remove the property subject to the deemed trust from the debtor's estate before the commencement of the *CCAA* proceedings, and as such the Crown's deemed trust property is not available to be charged as a security for the priming charges.[53]

35. However, and as noted by the ABCA majority, this position is: (i) inconsistent with the express provisions of the Fiscal Statutes and the *CCAA* (both of which, on a plain reading, provide that the Applicant's interest is a security interest, not a proprietary interest); and (ii) "fails to reconcile the objective of tax collection" with the broad, remedial purpose of the *CCAA*, thereby effectively undermining the objectives of both:

> [48] …Not only does the Crown's position undermine the objective of the *CCAA*, it will also result in fewer restructurings which will necessarily result in reduced tax revenue. Undermining the remedial objective of the *CCAA* for the sake of tax collection disregards the obvious benefit for the government of successful corporate restructurings. In other words, the Crown is biting off the hand that feeds it [emphasis added].[54]

36. The outcome for which the Applicant advocates is unnecessary. As correctly observed by the ABCA majority, "when the statutes are read harmoniously…the objectives of both the Fiscal Statutes and the *CCAA* can be achieved,"[55] and were in fact achieved in these proceedings, as "the Priming Charges allowed the debtor to continue to operate its business and raise sufficient funds to satisfy both the Priming Charges and the Crown's claim."[56]

(v) The interpretation avoids an absurdity

37. As this Court stated in *Rizzo Shoes*, there is a general, and well-established presumption that Parliament does not intend to produce absurd consequences:

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[53] *Ibid* at para 43.
[54] *Supra* note 1 at para 48.
[55] *Ibid.*
[56] *Ibid.*

> [27] …It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté [P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)], an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile ([R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994)], at p. 88).[57]

38. The Applicant's assertion that the deemed trust creates a proprietary interest in its favour is inconsistent with the express language of both the Fiscal Statutes and the *CCAA*, and is fundamentally incompatible with the broad, remedial objectives of the *CCAA*. The Applicant has recognized this incompatibility, acknowledging before both the ABQB and the ABCA that, if successful, its position would have a "chilling effect"[58] on commercial restructuring pursuant to the *CCAA*. The Applicant's interpretation, therefore: (i) leads to ridiculous or frivolous consequences; (ii) is extremely unreasonable or inequitable; (iii) is illogical or incoherent; and (iv) is incompatible with other provisions or with the object of the legislative enactment at issue (namely, the Fiscal Statutes and the *CCAA*).

39. Neither Justice Topolniski nor the majority of the ABCA erred in observing that "the consequences of [the Applicant's] proposed interpretation [of the Fiscal Statutes and the *CCAA*] are properly considered as part of the interpretive exercise,"[59] and could realistically include the following:

    (a) the erosion of interim financing ("which is necessary to achieve the purposes of the *CCAA*, with approximately 75% of restructurings requiring the aid of interim lenders")[60];

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[57] *Supra* note 26 at para 27 [relied upon in the *ABCA Decision*, at para 49].
[58] *Supra* note 1 at para 7; *Supra*, note 2 at para 109.
[59] *Supra* note 1 at para 52.
[60] Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act,* 2nd ed (Toronto: Carswell, 2013) at 199 [cited with approval in the *ABCA Decision* at para 50].

(b) a decreased willingness from directors and insolvency professionals, who "are essential to the process", to fully engage in the restructuring process because they will not be protected from the Priming Charges[61]; and

(c) the injection of an unacceptable level of uncertainty into the insolvency process.[62]

40. BDC submits that the ABCA majority correctly rejected the Applicant's approach in favour of a "harmonious interpretation" of the Fiscal Statutes and the *CCAA*, thereby avoiding the absurd consequence (i.e., a "chilling effect" on commercial restructurings pursuant to the *CCAA*) that necessarily flow from the Applicant's position.

(vi) All provisions of the CCAA have meaning

41. Section 6(3) of the *CCAA* prohibits the court from sanctioning a compromise or arrangement unless the plan of compromise or arrangement provides for payment in full of, among other things, amounts owed pursuant to the Fiscal Statutes and subject to the Applicant's deemed trust "within six months after court sanction of the compromise or arrangement of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02."[63]

42. Section 11.09(1) of the *CCAA* grants courts the power to stay the Crown's garnishment right under s. 224(1.2) of the *ITA*.[64]

43. These provisions clearly contemplate that the Applicant's rights pursuant to the Fiscal Statutes are brought within and made subject to the statutory regime of the *CCAA*. As observed by the ABCA majority:

(a) if the Applicant's position that statutory deemed trusts under the Fiscal Statutes have absolute priority, section 6(3) would be unnecessary because the Applicant would always be paid first[65]; and

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[61] *Supra* note 2 at para 108; *Supra* note 1 at para 50.
[62] *Supra* note 1 at para 51.
[63] *Supra* note 42, s 6(3); *Ibid* at para 53.
[64] *Supra* note 42, s 11.09(1); *Supra* note 1 at para 54.
[65] *Supra* note 1 at para 53.

(b) section 11.09(1) of the *CCAA* is illustrative of Parliament's intent to authorize courts to exercise control over the Applicant's interests while monitoring restructuring proceedings. The Applicant's position necessarily implies "that a court ordered stay would not apply to [its] claim"[66].

44. The Applicant's interpretation of the Fiscal Statutes and the *CCAA* effectively renders sections 6(3) and 11.09(1) of the *CCAA* (and, as discussed below, section 37 of the *CCAA*) meaningless. Accordingly, BDC submits that the ABCA did not err in rejecting the Applicant's interpretation, as "[t]he legislature avoids tautology: every provision serves a purpose."[67]

(vii) The CCAA is a special purpose statute

45. Finally, the ABCA majority noted that, even if there was a conflict between the Fiscal Statutes and the *CCAA*, the following implied exception rule supported Justice Topolniski's conclusion:

> [55] …When two provisions are in conflict and one of them deals specifically with the matter in question while the other has a more general application, the conflict may be resolved by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.[68]

46. In applying the implied exception rule (*generalia specialibus non derogant*), the ABCA majority stated the following:

(a) broadly speaking, the *CCAA* applies in special circumstances (i.e., commercial restructuring), while the Fiscal Statutes are of general application[69];

(b) at the level of the provisions, the Priming Provisions in the *CCAA* are narrow, precise, limited to only those charges necessary for restructuring, and subject to ongoing judicial oversight[70];

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[66] *Ibid* at para 54.
[67] *Ibid* at para 53.
[68] *Ibid* at paras 55-58.
[69] *Ibid* at para 57.
[70] *Ibid.*

(c) in a *CCAA* proceeding, the court is typically balancing multiple interests as it moves the *CCAA* process forward. In contrast, the *ITA* deals generally with income tax collection, giving the Minister a mechanism to recover employee tax deductions that employers fail to remit to the Minister[71]; and

(d) the intended effect of the *ITA* is not diminished by giving effect to the *CCAA*. The Applicant's interest remains specially protected as against all other secured creditors save those charges that are necessary to implement restructurings. This interpretation recognizes that the *CCAA* carves out a discretion for the court to achieve the intended legislated purpose of the *CCAA*.[72]

47. BDC submits that the ABCA majority correctly applied the "implied exception rule", effectively resolving any apparent conflict between the Fiscal Statutes and the *CCAA*.

(viii) The ABCA Decision is consistent with Century Services

48. Finally, although the Applicant asserts that it "muddies the law and undermines both the legislation and the decisions of this Court interpreting the legislation", the ABCA Decision is consistent with this Court's decision in *Century Services*.

49. *Century Services* considered the legislative history of section 37(1) of the *CCAA* in the context of whether the language used in the *Excise Tax Act* (RSC 1985 c E-15) (the "***ETA***") for the GST deemed trust created a conflict with provisions of the *CCAA*, and whether, by virtue of the conflict, the provisions of the *CCAA* could apply to nullify the deemed trust created by the *ETA*. Notably, this Court observed that the language used in the *ETA* that created the GST deemed trust "resemble[d] that of statutory deemed trusts for source deductions and incorporate[d] the same overriding language and reference to the *BIA*."[73]

50. In particular, this Court specifically held that deemed trusts have, subject to specific exemptions enumerated in the *CCAA*, been nullified in the restructuring context:

> [37] Through a 1997 amendment to the *CCAA*...Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the

[71] *Ibid*.
[72] *Ibid* at para 58.
[73] *Supra* note 4 at para 49.

> Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:
>
> > 18.3(1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> This nullification of deemed trusts was continued in further amendments to the *CCAA*...where s. 18.3(1) was renumbered and reformulated as s. 37(1):
>
> > 37(1) subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for her Majesty unless it would be so regarded in the absence of that statutory provision.[74]

51. In determining that the deemed trust created by the *ETA* was nullified by section 37(1) of the CCAA, this Court emphasized that "[t]he internal logic of the *CCAA*...militate[d] against upholding the *ETA* deemed trust for GST" [75].

52. In this regard, *Century Services* enunciates that the crucial distinction between source deductions deemed trusts under the Fiscal Statutes and the *ETA* deemed trust is one of preservation and priority. Indeed, referring to sections 18.3 and 18.4 (now sections 37(1) and 37(2)) of the *CCAA*, this Court stated:

> [38] ...It is noteworthy that in...the *CCAA*...the exceptions concern source deductions...The relevant provision of the CCAA reads:
>
> > 18.3 (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*.
>
> Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.
>
> [39] Meanwhile, in...s. 18.4 (1) of the *CCAA*...other Crown claims are treated as unsecured. These provisions establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions.[76]

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[74] *Ibid* at para 37.
[75] *Ibid* at para 46.
[76] *Ibid* at paras 38-39.

53. *Century Services* is clear: save for the exceptions specified in section 37(2) of the *CCAA*, section 37(1) nullifies the Crown's priority in respect of deemed trusts, and any claims made in relation to unprotected deemed trusts claims are, in essence, unsecured claims. The conclusion to be drawn from this distinction is one of priority, not proprietary. Section 37(2) preserves source deductions deemed trusts pursuant to the Fiscal Statutes, and protects the Crown against ranking as an unsecured creditor in relation to such claims. This is consistent with the principles articulated in *First Vancouver*, as Justice Iacobucci specifically held that the deemed trust provisions will give the Applicant priority over other secured creditors in situations where "the Minister and secured creditors of a tax debtor both claim an interest in the tax debtor's property."[77]

54. *Century Services* is therefore dispositive of the issues raised by the Applicant, as:

(a) the deemed trust provision in the *ETA* begins with "despite any other provision of this Act";

(b) there is no meaningful difference between the judicial interpretations of "despite" and "notwithstanding"[78]; and

(c) if the Applicant's interpretation of the Fiscal Statutes (which begins with "notwithstanding") is correct, one would expect that the deemed trust pursuant to the *ETA* (which begins with "despite") would <u>also</u> override the provisions of the *CCAA* and continue to apply– which is the very position that this Court rejected.

55. Deemed trusts under the Fiscal Statute cannot override the *CCAA*, just as the deemed trust in the *ETA* could not. Both are subject to section 37(1) of the *CCAA* – the only distinction is that the deemed trusts under the Fiscal Statutes are "saved" or "preserved" by section 37(2) of the *CCAA*. To accept the Applicant's interpretation of section 227(4.1) would effectively render sections 37(1) and 37(2) of the *CCAA* inoperative, which is contrary to the well-established principle that every component of a statute must have meaning.[79]

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[77] *Supra* note 45 at para 28.

[78] *Global Aerospace Inc v Insurance Co of State of Pennsylvania*, 2010 SKCA 96 at para 75 – "the ordinary meaning of 'notwithstanding' is 'despite' or 'in spite of'".

[79] *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26 at para 128.

(ix) An appeal of the ABCA Decision is moot

56. The Applicant recognizes that an appeal of the ABCA Decision is moot, as "both the Crown and the priming charge creditors have been paid in full."[80] For all of the foregoing reasons, and despite the Applicant's argument to the contrary, there is no compelling reason for this Court to depart from its usual practice and grant leave to hear a moot appeal that raises academic questions only.

C. Conclusion

57. The ABCA Decision is not, as asserted by the Applicant, an intrusion "into the role of the legislative branch." Rather, the ABCA Decision is predicated on a correct and harmonious interpretation of the *CCAA* and the Fiscal Statutes. That interpretation effectively fulfills the underlying policy objectives of both statutory schemes. The ABCA Decision discloses no reviewable errors, is consistent with prior jurisprudence of this Court (and, in particular, *Century Services*) and, in any event, is moot because the Applicant's claim, secured by the deemed trust, has been paid in full.

58. For these reasons, BDC submits that the Applicant has not met the heavy onus of demonstrating that issues raised in the Leave Application are of sufficient importance to justify or warrant further judicial intervention or consideration. Accordingly, the Leave Application ought to be dismissed.

PART IV – SUBMISSION ON COSTS

59. The Respondent seeks costs for its response to the Leave Application, as the issues raised by the Applicant are moot.

PART V – ORDER REQUESTED

60. The Respondent asks this Court to grant an order refusing the Leave Application and awarding costs of this application to the Respondent.

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[80] *Supra* note 5 at para 53.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF DECEMBER, 2019

as agent for

Per: Jeffrey Oliver & Mary I. A. Buttery, Q.C.
Cassels Brock & Blackwell LLP
Counsel for Business Development Bank of Canada

PART VI – TABLE OF AUTHORITIES

A. Legislation

Statutes	**Paragraph Reference**
Companies' Creditors Arrangement Act, RSC 1985, c C-36 ss 2(1), 6(3), 11.2, 11.51, 11.52, and 37	2, 7, 8, 13, 25, 34, 41, 42, 43, 44, 49, 50, 51, 52, 53, and 55
Income Tax Act, RSC 1985, c. 1 (5th Supp) ss 224(1.2), 224(1.3), 227 (4) and 227(4.1)	13, 14, 17, 19, 22, 23, 24, and 42

B. Jurisprudence

Cases	**Paragraph Reference**
ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board), 2006 SCC 4	32
Bristol-Myers Squibb Co v Canada (Attorney General), 2005 SCC 26	55
Canada v Canada North Group Inc, 2019 ABCA 314	3, 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 56, and 57
Canada v Canada North Group Inc, 2017 ABCA 363	6
Canada North Group Inc (Re), 2017 ABQB 550	3, 6, 13, 14, 38, and 39
Century Services Inc v Canada (Attorney General), 2010 SCC 60	4, 15, 18, 48, 49, 50, 51, 52, 53, 54, and 57

First Vancouver Finance v MRN, 2002 SCC 49	28 and 53
Insurance Company of the State of Pennsylvania v Global Aerospace, Inc, 2010 SKCA 96	54
Lévis (City) v Fraternité des policiers de Lévis Inc, 2007 SCC 14	20
Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27	20 and 37
Royal Bank of Canada v Sparrow Electric Corp, 1997 CanLII 377 (SCC), [1997] 1 SCR 411	28
Thibodeau v Air Canada, 2014 SCC 67	20

C. Secondary Materials

Secondary Sources	**Paragraph Reference**
Justice Sopinka, "The Supreme Court of Canada" (10 April 1997), cited in D. Lynne Watt et al., *Supreme Court of Canada Practice*, 2019 (Toronto: Carswell, 2019)	11
R Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (LexisNexis Canada, 2014)	20
Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act,* 2nd ed (Toronto: Carswell, 2013)	39

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Supreme Court of Canada Practice

Part 4—Supreme Court Rules

Sopinka, The Supreme Court of Canada
D. Lynn Watt, Jeffrey Beedell, B.A., LL.B., M.E.S, Guy Régimbald, Graham Ragan, Matthew Estabrooks

— The Supreme Court of Canada

— The Supreme Court of Canada

1

The Supreme Court of Canada was established by The *Supreme Court of Canada Act* of 1875 pursuant to the *Constitution Act, 1867* which authorized the Parliament of Canada to "provide for the constitution, maintenance, and organization of a general court of appeal for Canada."

Bills for the creation of the Supreme Court of Canada were introduced and withdrawn by Sir John A. Macdonald in Parliament in 1869 and 1870. The first bill was criticized as conferring too wide an original jurisdiction and the proposed Court was seen as an instrument of the federal government to be used in the control of provincial law. After these two abortive attempts, Macdonald ceased his efforts to create the Court since the existence of the 1869 bill identified the Court with the very centralized "Macdonaldian constitution" and contained a real potential for the creation of a unitary state. Finally, Télesphore Fournier, the Liberal Minister of Justice introduced a new bill which eventually received royal assent in 1875.

The original Court had six judges headed by the Hon. Sir Buell Richards, the first Chief Justice. They were sworn in October 8, 1875 in the Senate Chamber, followed by a banquet at Government House tendered by the Earl of Dufferin, the Governor General. By law, two of the judges had to come from Quebec. By custom two were appointed from Ontario and one each from the other original provinces, Nova Scotia and New Brunswick. The average age of the Court was 57 making this one of the youngest benches in the history of the Court. Interestingly, one of the judges was Télesphore Fournier who, as the Liberal Minister of Justice, introduced the bill creating the Court.

In dramatic contrast to the present day, there were no cases to be heard at the first sitting of the Court on January 17th, 1876. In April, the first matter before the Court was a reference from the Senate requesting the Court's opinion on a private bill. In the reference entitled *In re Brothers of the Christian Schools in Canada* , the divisive religious issue arose over whether the dominion had the constitutional authority to incorporate a Roman Catholic society of teachers. Protestant senators objected, and the Supreme Court ruled that the bill fell within the provinces' constitutional authority over education rather than within Ottawa's powers. The Court dealt with three cases in a one-week sitting in June, 1876. It was not convened again until the following January, when regular sessions began with a full agenda.

Among the important cases dealt with in the January session of 1877 was a claim by a pew holder for damages for interference with his right to occupy pew #68 in St. Andrew's Church in Montreal. He won and was awarded punitive damages of $300.00.

In June, 1877, the Court heard *Severn v. The Queen* , the first constitutional case heard on its merits. It involved the incredibly important trade and commerce power in the *BNA Act*. This case would reveal the judges' views of Confederation and the extent of provincial and dominion power. The appeal raised the question of the control of business through licensing in which, not surprisingly, both the province and the dominion were highly interested. In the end, four judges found for the dominion, while Strong and Ritchie dissented.

The practice of the Court was to sit with a full bench of six judges. The Court first sat in the Railway Committee Room at the House of Commons, then in several other rooms as they became available. In 1878 the Court moved to its own small, two-storey building at the foot of Parliament Hill on Bank Street, which cost $57,332. It would be another 60 years before construction of the building currently occupied by the Court would begin. The present Queen Mother, then Queen Elizabeth, laid the cornerstone in the presence of her husband, the late King George VI, on May 20, 1939. After delays caused by World War II and the government's using the new building to meet wartime needs, the Court finally took possession in January 1946 and heard its first case there that same month.

In 1927, the number of Supreme Court Justices was increased to seven. In 1949, appeals from the Canadian Supreme Court to the Judicial Committee of the Privy Council in England were abolished, and the number of Justices reached its present total of nine members. Of the nine, three must, by law, be appointed from Québec. By tradition, three are appointed from Ontario, two from the West and one from Atlantic Canada.

Other significant changes to the Court occurred in 1975 when appeals as of right in civil cases were ended and replaced by the right to apply for leave to appeal (s. 40), in 1982 when the existence and composition of the Court were entrenched in the Constitution (see s. 41(d) and 42(d) of the *Constitution Act, 1982*), and in 1985 when the *Act* was amended to provide for written applications for leave to appeal.

The Jurisdiction of the Court

An appeal lies to the Court in civil cases only by leave of the Court. The Act provides simply that leave may be granted from the final or other judgement of the court of last resort in the provinces or of the Federal Court of Appeal if, in the opinion of the Court, it involves any question of public importance or an important question of law or mixed law and fact and is one that ought to be decided by the Court. In criminal cases an appeal exists as of right: (a) in favour of the accused or the Crown on a question of law in respect of which a judge of the court of appeal dissents; (b) in favour of the accused from a judgment of the court of appeal reversing an acquittal. In other cases, leave to appeal must be obtained. The *Criminal Code* provides for leave to appeal from judgments (1) acquitting, (2) convicting, (3) setting aside a conviction, (4) affirming a conviction, (5) setting aside an acquittal, (6) affirming an acquittal. The provisions of the *Criminal Code* do not, however, exhaust the jurisdiction of the Court to grant leave. Notably, in summary conviction offences, resort may be had to s. 40 in respect of a question of law or jurisdiction. While no appeal lies in respect of most interlocutory orders integrally related to the six categories in other cases, leave may be granted under s. 40 of the Act: see *R. v. Adams,* [1995] 4 S.C.R. 707.

The Court also has a unique function to consider important questions referred to it by the Governor-in-Council. Two recent examples, the latter of which is pending, are the *Milgaard Reference* and the *Quebec Separation Reference*.

Leave to Appeal

What are Matters of Public Importance?

The Court has deliberately refrained from giving reasons on leave applications in order to maintain an unfettered discretion as to when leave should be granted. Nonetheless there are certain broad principles and guidelines which we employ which will assist you to identify what is or is not of public importance. This does not mean that every application can be fitted into a pigeon-hole.

The general principles are as follows. We are not a court of error and the fact that a court of appeal reached the wrong result is in itself insufficient. This is still the case if the court of appeal has misapplied or not followed a judgment of this Court. On the other hand, if a misinterpretation of one of our judgments becomes an epidemic in the courts below, then we may want to set the record straight. See, for example, *Askov* and *Morin*.

The general principles are summarized in my address to Law Clerks which I have given in each of the past few years:

> First, each leave memo should assess whether the question of public importance is one that is germane to the disposition of the case or whether it arises only in the alternative or as incidental to the issue which will determine the outcome of the case.
>
> Second, was the issue raised in the courts below? If a determination of fact is an important component of the issue, was it determined by the trial judge? If a *Charter* challenge is involved, it is important to consider whether there exists an appropriate record to determine, for instance, a. s. 1 analysis.
>
> Third, if the law is settled, we usually don't grant leave because a court of appeal has failed to follow it unless this becomes an epidemic. Then we might have to take another case in order to remind the courts below that their obligation is to follow the law. Another example where we may get into a matter shortly after we have decided it is where the courts below are misapplying or misinterpreting our decision and things have gotten out of control. We did that in connection with the issue of unreasonable delay in criminal proceedings.
>
> Fourth, if we have dealt with the issue recently and further issues arise out of our judgment in the application of the matter that we have decided, we don't immediately rush in to decide all subsidiary issues. We like to see what the courts below are doing with our decision, how they are applying it. Two good examples are *Stinchcombe* dealing with the issue of the obligation of the Crown to produce, and *Martin v. Gray* , conflict of interest. There are many subsidiary issues that arise out of those cases and we would like to see how the lower courts are applying our decisions before we get into the matter again.
>
> Fifth, if the issue has been dealt with or is about to be dealt with by legislation, even if it doesn't apply to the case, we usually don't grant leave because that deprives the issue of its public importance.

In criminal cases, although we apply the public importance test, it is not applied as strictly. If an applicant has not had a fair trial or was possibly wrongfully convicted, we may grant leave even in the absence of an "earth-shaking" issue of law.

There are some other rules in criminal cases, and again I quote from my address to Law Clerks:

> There are some special rules in criminal cases. You should consider whether or not this Court has jurisdiction because if we have no jurisdiction then we have no jurisdiction to either grant o dismiss leave to appeal. The rules are quite technical and you should familiarize yourself with the provisions of the *Criminal Code* relating to the power of this Court in criminal appeals.
>
> Furthermore, is leave to appeal necessary because there are appeals as of right and, in some cases, counsel apply for leave to appeal when they have an appeal as of right and that should be highlighted by the law clerk. If there already is an appeal as of right on some issue—for instance, there is an appeal as of right where the judge in a court of appeal dissents on a point of law and the dissent may only be on one point but there are other issues in the case—we generally speaking are more lenient in granting leave if there is already an appeal as of right to this court, especially if the issues are related.

Applications from Quebec also require special considerations. In civil cases involving the common law or provincial statutes, it is usually necessary to show that the matter has importance beyond the boundaries of one province. Cases from Quebec cannot usually meet this requirement and if a question is of public importance in Quebec that is usually sufficient.

The following are some additional and more specific guidelines with respect to what are matters of public importance:

(1) the presence of a constitutional issue in the form of a challenge to a statute, a common law rule or a government practice is usually a strong indication of public importance;

(2) a conflict between courts of appeal of different provinces on issues that should be dealt with uniformly as between provinces;

(3) a novel point of law:

Examples:

reversing the burden of proof of causation;

extending liability for economic loss;

reconsidering the test for informed consent in medical malpractice;

(4) interpretation of an important federal statute or provincial statute that exists in several provinces.

(5) defining aboriginal rights.

Even if a point of public importance is involved, there are several principles which militate against granting leave:

(a) the lack of a solid foundation (referred to above);

(b) the Court has settled the main question and subsidiary questions arise in working out of the judgment (referred to above);

(c) a point is moot. We would only grant leave if the issue is not likely to come here as a live issue, i.e., it is evasive of review;

(d) the court of appeal was plainly right. There may still be reason to grant leave if a decision binding on the whole country is desired; ex.: *R. v. Haigh* (Ont. C.A.).

The applications generally fall into three categories: (1) frivolous, which are obviously to be dismissed; (2) obvious grants; (3) all others which are not obvious grant or dismiss.

Procedure on Applications for Leave

When the papers have been filed the application is referred to the Court. This means that the application is referred to a panel of three judges. The members of the panel are provided with an objective summary and a memorandum prepared by staff lawyers which contain an analysis of the issues in order to ferret out the issue of public importance. The judges vote by written memorandum. If the panel or majority votes to grant, the application goes on the “B” list. If the majority votes to dismiss, the dissenting member may place the application on the “D” list. If there is no dissent, or the dissenting member does not place the application on the “D” list, the panel must advise the other members of the Court of their intention to dismiss unless any member of the Court wishes to place the application on the “D” list.

As a result of this process, applications are either placed on the “B” or “D” list for discussion at the Conference. All others are dismissed. After discussion at the Conference, the panel makes its final decision. This discussion can get quite spirited.

In some cases, the merits in an application will be disposed of in a case that will be heard before the appeal which is the subject of the application could be perfected. In such a case the outcome of the leave application will likely be determined in the case which will precede it. The case is placed on the “C” list. In some cases, we will already have decided the point by the time the application reaches us. If the Court of Appeal applied the law as it stood before it was altered by the subsequent decision, the applicant will want the benefit of the change. Our option used to be to grant leave or dismiss. In the latter cases, there was an injustice. This occurred in *Reekie v. Messervey,* 66 D.L.R. (4th) 767. We dismissed the application notwithstanding that our decision in *Scarf v. Wilson* reversed the British Columbia Court of Appeal judgment in that case. The Court of Appeal in *Reekie* applied its decision in *Scarf*. After dismissing the application for leave we received an application for reconsideration. This in itself had problems. Our Rules said that there was to be no re-hearing of an application for leave. We decided that that prohibition only applied when there was an oral hearing, and granted leave. This problem was a recurring one and it became obvious that we could not grant leave in all the cases on the "C" list or cases such as *Reekie* that sought the benefit of changes in the law. Accordingly, we had our Act amended to provide us with a remand power.

Remand Power

Section 43(1.1) of the Act provides:

> (1.1)
> Notwithstanding subsection (1), the Court may, in its discretion, remand the whole or any part of the case to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

Section 43(1.1) of the *Supreme Court Act* provides another option for the Court with respect to leave applications. Cases that might otherwise be placed on the "C" list can be remanded to the court of appeal or the court of original jurisdiction. This option will be exercised in cases in which a decision of this Court is determinative of the result of the case and was not applied below. If the result could be affected by another issue, then the case will not ordinarily be remanded. Leave will only be granted in such a case if the other issue is one of public importance.

The remand power could also be used if leave to appeal should be granted but a factual basis is lacking. Ordinarily, leave would just be refused, but there may be circumstances in which it is preferable not to dismiss forcing these or other litigants to start from scratch in order to bring the issue here. In such circumstances, the case might be remanded to the trial court. Remanding to the trial court may present problems that are not encountered when remanding to the court of appeal. This is particularly so in criminal cases where we have to worry about the effects on the rights of the accused in re-opening the case, etc. These are matters that will have to be worked out.

The Court has decided that we will not follow any hard and fast rule concerning soliciting further representations when we propose to exercise the remand power. We will not ask for further submissions unless there is good reason to believe that additional useful information will be obtained by doing so.

Finally, the remand power provides that we may order "any further proceedings that would be just ..." Usually that will be that the matter is "remanded to the court of appeal to be reconsidered (or dealt with) in accordance with this Court's decision in *X v. Y* ".

Oral Hearings of Leave Applications

On occasion we order an oral hearing of an application for leave. This is rare and only happens when there is an issue of jurisdiction to hear the applications for leave. A decision on jurisdiction must be decided by the Court. Accordingly, a panel of 5 to 9 judges will hear the application and dispose of the issue of jurisdiction and the application for leave.

Intervention

In an appeal raising a constitutional question, the appellant must apply to have a constitutional question stated. In this event, all Attorney Generals and their equivalents in the Territories are entitled to intervene. Other parties wishing to intervene must apply and be given leave. The criterion is whether the party applying will likely bring a fresh perspective. This is a rather narrow window because an intervention is not allowed to enlarge the litigation by raising new issues.

The range of applicants is infinite and even God has applied to intervene. The application reads:

> This is an application for leave to intervene by "God, in the person of James Russell Sterritt, on behalf of the Kingdom of God and the Crown of Christ." God supports the Appellants as they will produce a "better order" in the land. God expresses His disapproval that Canada has departed from the monarchic model originally stipulated for the Dominion.

The Law Clerk's comments are as follows:

> It appears that the Almighty has finally lost it after all these years. He does not establish any cognizable interest in the proceedings. Although His arguments are certainly "novel and different," the connection to the issues is tenuous. Most of the issues He raises are not justiciable and beyond the power of this Court to remedy. While I hesitate to incur His wrath, I would nevertheless recommend that leave to intervene be denied.

The Oral Hearing of the Appeal

Time limits are imposed which generally allow each party one hour. The appellant is usually allowed 5 minutes for reply or such additional time as is not used up during the appellant's main presentation. An orange light forewarns counsel that 5 minutes remain and a red light signals the expiry of the time. These lights have been the subject of much humour.

In order to reduce the volume of material filed for the appeal, we have in the works an amendment to the Rules which will provide that only one copy of the record will be filed. This will be forwarded from the Court of Appeal. The appellant will file with his or her factum the excerpts that are referred to in the factum. The respondent will do the same.

The Conference

Immediately after the argument, we retire to our Conference room to consider the disposition of the appeal. Each judge in turn briefly states how he or she would dispose of the appeal. the result of this process is either a unanimous opinion or a division. Usually, someone volunteers to write and, of course, if there is a division the writer will be a judge in the majority camp. Generally, no one is assigned to write for the dissenters because it may turn out that all will agree when the majority decision is circulated.

The Judgment

The process of drafting the reasons takes an average of three months. On occasion, we give judgment from the bench. This occurs more frequently in appeals as of right or appeals that do not raise any question of law that requires us to elaborate on the law as stated by the court of appeal. Moreover, in some cases, we deliver judgment from the bench, reasons to follow. We do this when the Court is unanimous as to the result and there is good reason to believe that there is some urgency in having the matter settled. We did this recently in *Easton v. Brant County Board of Education* in the *Lap Dancing* case. In each case, there was a strong view that the uncertainty that would be created by a delay was prejudicial to the public interest. In *Brant*, it was important for school boards to know whether the policy of the Department of Education in placing disabled pupils was lawful. In the *Lap Dancing* case, the necessity of a judgment from the bench was less obvious because the Court of Appeal had ruled that the practice was illegal and we were confirming that decision. I am not convinced of the wisdom of this course except in rare circumstances. It leaves everyone wondering what are the reasons. For instance, in the *Lap Dancing* case, what practices are illegal?

Returning to the drafting of the reasons, the writer will circulate draft reasons. Usually for the writer this is where the tough slugging starts. First of all, if the draft does not persuade dissenters, one of them will announce that he or she will be writing the other way. As a matter of courtesy, judges will refrain from concurring with the circulating reasons to permit the dissenting judgment to try to do its work. Once the dissent is circulated, judges will sign on to either side but usually on condition that changes be made. This is often a lengthy process and one of some delicacy. Changes suggested by one judge may be opposed by another. If the writer wishes to maintain the support of both, a compromise is necessary. The majority judgment, therefore, is reached as a result of compromise and is not in exactly the terms the writer might have wanted. This calls to mind the story about the Earl of Selborne, [as told by Justice Martland]. On the occasion of the opening of the Law Courts in the Strand in 1882, The Lord Chancellor, the Earl of Selborne, had called a meeting of the judges to whom he submitted a draft address which they were going to present to the Queen. It contained the following sentence:

> Your Majesty's Judges are deeply sensible of their own many shortcomings.

Sir George Jessel, Master of the Rolls, refused to be a party to it. He said that he was not conscious of any shortcomings and if he were, he would not expect to sit on the bench. Lord Justice Bowen presented a compromise:

> Your Majesty's Judges are deeply sensible of the many shortcoming of each other.

The Use of Law Clerks

People, especially lawyers, are most interested in the role of law clerks. It is generally known that they prepare bench memos prior to the appeal which provide judges with a “road map” as to the preparation and disposition of the appeal. This is usually the subject of discussion between the clerk and the judge before the appeal. Do they influence the decision? In my lecture to the new law clerks I stress that they are not there to persuade their judge to a particular agenda. Rather, they are to give the judge a balanced account to ensure that the judge makes his or her decision with the benefit of complete and balanced information. They are free to make a recommendation but it has no influence if not supported by the facts and the law when presented in an even-handed way. With respect to discussions between a judge and law clerk, Lorne Sossin in his article “The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada” says:

> As in the case of leave memoranda, it is impossible to accurately gauge the influence of these discussions on the outcome of the Justice's decision making. It is rare for a Justice to be completely unaffected by these exchanges. After all, the purpose of the discussions is for the Justice to form an opinion as to the proper interpretation of the applicable law or policy concerns of a particular case. If the Justice already has made up her or his mind on an appeal, there is hardly much point to discussing it with clerks. *This being said, it was often sensed that these discussions were held more for the edification of the clerks than for the enlightenment of the Justices*.

With respect to assistance in drafting judgments, this depends very much on the individual judge. Most judges are reluctant to be specific, but a notable exception is Justice Scalia, who at Cambridge acknowledged that his reasons are written by law clerks subject to rigorous editing on his part. I believe that the contribution of a law clerk depends on the judge, the law clerk and the case. In some cases, the law clerk will prepare the first draft based on a skeletal memorandum from the judge. In other cases, depending on the ability of the law clerk, the contribution will be limited to drafting parts of the reasons such as the facts, the issues and the “judgments below.” They also are more up-to-date with respect to language that may not be politically correct.

The Aftermath

One of the less attractive aspects of this job is the criticism that usually follows the release of reasons. Because we deal with issues in respect of which society is seriously divided, there is always a substantial percentage of the population who are unhappy with the result. They are the ones that get the attention of the media and we hear from them directly.

There are also criticisms from lawyers and other judges. The two main ones are (1) that our judgments are too long, and (2) that there are too many concurring judgments. There is some merit in each. First of all, with respect to long judgments, there is no unanimity in this respect. Lawyers and trial judges would prefer a short, snappy judgment that just gives them the bottom line. On the other hand, academics and others who are interested in the development of the law favour a fully reasoned judgment replete with references. I personally try to steer a middle course. In my view it is important to state in plain language the principles that lead to the conclusion, dealing with the major cases and persuasive statements by academic writings. It is not necessary to refer to every case or to set out an anthology of academic writings. I tried to make this point in the recent judgment of *Willick v. Willick* —a case which illustrates my point that there is no uniformity of opinion on the subject of lengthy reasons. It seems that the lesson from *Willick* is you are damned if you do and damned if you don't. I wrote 17 pages for the majority while Justice L'Heureux-Dubé J.'s concurring opinion was 80 pages. Did the legal press or the judges and lawyers who are critical encourage the attempt to reduce the length of reasons? No, the response was the majority wrote a narrow, legalistic judgment that doesn't provide enough guidance with respect to the philosophy of child support. Not a word from those who lead the charge to reduce the length of judgments.

Turning to the problem of multiple reasons, let me explain the dynamics involved when 9, 7 or even 5 judges are involved. In order to attract a majority, it is not usually possible to write the judgment exactly as the writer would want to write. Account must be taken of the views of others. If the writer has done this, then it is the practice of most of my colleagues to concur even though the reasons are not in all respects in the form in which they would like them to be. Indeed, sometimes you have to hold your nose and sign to avoid a *Thomson Newspapers* type of decision. But there are limits. I have signed reasons and been upbraided by persons whose opinion I respect for agreeing to a particular statement in the reasons. A particular statement in the reasons may affect the direction that the law will take in other cases. If the writer insists on retaining the statement, the only recourse is concurring reasons. While I will admit that this approach is not always followed, and on occasion reasons are written that one wonders why they were written, this is the approach that I, and I believe a majority of my colleagues, follow.

Footnotes

1 The following is the text of a speech delivered by the late Justice John Sopinka on April 10, 1997 in Toronto, reproduced with his permission.

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CHAPTER 11

Coherence, Overlap and Conflict Resolution

§11.1 This chapter looks at coherence, both as a legal norm and a practical necessity, and it examines the methods used in statutory interpretation to achieve it. The chapter begins with the concept of overlap, then moves to the determination of when a conflict exists and the rules and techniques relied on by courts to resolve conflicts. It ends with a brief look at another aspect of coherence, namely the coherence between different sources of law – entrenched constitutional law, legislation, common law and international law.

THE PRESUMPTION OF COHERENCE

§11.2 ***Governing principle.*** It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.[1]

§11.3 The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. As La Forest J. wrote in *Friends of Oldman River Society v. Canada (Minister of Transport)*:

> ... there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments.[2]

In *Willick v. Willick*, Sopinka J. wrote:

> With respect to the application of the contextual approach, ... the objective is to interpret statutory provisions to harmonize the components of legislation inasmuch as is possible, in order to minimize internal inconsistency....[3]

1 *R. v. L.T.H.*, [2008] S.C.J. No. 50, 2008 SCC 49, [2008] 2 S.C.R. 739, at para. 47 (S.C.C.).

2 [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3, at 38 (S.C.C.). See also *Diamond Estate v. Robbins*, [2006] N.J. No. 3, at paras. 49-50 (Nfld. C.A.); *Murphy v. Welsh*, [1993] S.C.J. No. 83, [1993] 2 S.C.R. 1069, at 1079 (S.C.C.), *per* Major J.

Rescue!

The Companies' Creditors Arrangement Act

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

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and for general operating purposes, including post-filing trade creditor charges.[7] Interim financing has also been approved in cross-border cases where there is a *CCAA* proceeding and an ancillary proceeding recognized by a US court pursuant to Chapter 15 of the US *Bankruptcy Code*, and prior to that under §304 of the *Code*, or a main proceeding in the US with ancillary proceedings in Canada.[8]

Mr. Justice Clément Gascon, then of the Québec Superior Court, has held that there are five principles operating in the court's consideration of applications for interim financing and priority charges or priming liens: adequate notice of interim financing and priming requests, so that creditors can fully assess the impact of interim financing decisions; sufficient disclosure; timeliness of the request; balancing the prejudice to creditors and other stakeholders; and the principle of granting priority financing as an extraordinary remedy, in the sense that it gives priority over pre-existing claims and thus there must be an appropriate rationale.[9] Canadian courts apply these principles in an effort to find the optimal balancing of prejudice in the exercise of their jurisdiction to grant interim financing or other priority charges. The court must weigh the likely risks against the likely gains of authorizing such financing. This application of principles and balancing of interests is with a view to creating certainty in credit transactions while meeting the objectives of the *CCAA*.

The granting of interim financing may allow a debtor to keep operating, in order to retain value while trying to negotiate a workout with creditors. For stakeholders, such as workers or local governments, it may also result in preservation of their investments, at least for the period that a restructuring plan is being formulated. According super-priority financing has also been aimed at protecting or ensuring compliance with environmental obligations.[10]

The data collected under an SSHRC research grant for cases from 2001 to 2011 set out the frequency and quantum of interim financing, as set out in the chart below. While it appears that only half of all proceedings involved interim financing, that figure is higher, because data are not available for 27% of the cases. Removing the cases where data are not available, interim financing was approved in 214 of 286 or 75% of *CCAA* proceedings.

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7 *Re Smoky River Coal Ltd.*, [2001] A.J. No. 1006, 2001 CarswellAlta 1035 (Alta. C.A.); *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C.S.C.), leave to appeal refused 1992 CarswellBC 1147 (B.C.C.A.); *Re T. Eaton Co.* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.).

8 One example is *Re Consumers Packaging Inc.* (23 May 2001); *Re Consumers Packaging Inc.* (30 May 2001), Doc. 01-1865 (US Bkty Crt. D. Del., 2001) and (12 June 2001), Doc. 01-1865 (US Bkty Crt. D. Del., 2001). However, there have been numerous other cases.

9 *Re Boutiques San Francisco inc.*, 2003 CarswellQue 13882, [2003] Q.J. No. 18940 (Que. S.C.), citing Janis Sarra, "Debtor in Possession Financing: The Jurisdiction of Canadian Courts to Grant Super-priority Financing in *CCAA* Applications" (2000) 23 Dalhousie Law Journal 337.

10 *Re Royal Oak Mines Inc.*, 2000 CarswellOnt 3686 (Ont. S.C.J. [Commercial List]). See also the *Curragh* and *Anvil Range* proceedings.