S.C.C. File No. 38871

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

B E T W E E N:

HER MAJESTY THE QUEEN

APPLICANT
(Applicant)

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.
(as represented by Ernst & Young Inc.)

RESPONDENTS
(Respondents)

and

ERNST & YOUNG INC.
(in its capacity as Monitor and not in its personal capacity)

RESPONDENTS
(Respondents)

and

BUSINESS DEVELOPMENT BANK OF CANADA

RESPONDENTS
(Respondents)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(ERNST & YOUNG INC. In its capacity as Monitor and not in its personal capacity, RESPONDENT)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART 1 – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. It is well established that "insolvency law is an indispensable component of commercial economies" which plays a "broad social and economic role in overall economic planning: the survival of financially distressed firms and the economic activity that they generate are in themselves important objectives of the system"[1].

2. The role of the Court in proceedings under the *Companies' Creditors Arrangement Act*[2] ("CCAA") 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. Typically, this requires balancing multiple interests"[3].

3. This Court has accepted that Parliament has endorsed a broad reading of the Court's discretion under the CCAA which, when considering the appropriately purposive and liberal interpretation which should be given to the legislation, is sufficient in most instances to ground measures necessary to achieve the legislation's objectives[4].

4. Her Majesty the Queen (the "Crown") applies to this Court for leave to appeal the decision of the Alberta Court of Appeal ("ABCA") in *Canada* v. *Canada North Group Inc.*[5] (the "ABCA Decision") which upheld a CCAA supervisory court's ability to exercise its discretion to grant priming charges a priority over the deemed trusts for employee source deductions under the *Income Tax Act* ("ITA")[6], the *Canada Pension Plan* ("CPP")[7] and the *Employment Insurance Act* ("EIA")[8] (the ITA, CPP and EIA are herein collectively called the "Fiscal Statutes").

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[1] *Rescue! Companies' Creditors Arrangement Act (2nd Edition)*, 2013 at pg. 5
[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
[3] *Canada North Group Inc., Re.*, 2017 ABQB 550 at para 21
[4] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 65-68
[5] 2019 ABCA 314 ("ABCA Decision")
[6] *Income Tax Act*, RSC 1985, c. I-1
[7] *Canada Pension Plan*, RSC 1985, c. C-8
[8] *Employment Insurance Act*, SC 1996, c 23

5. Ernst & Young Inc. (the "Monitor"), in its capacity as the Court appointed Monitor of Canada North Group Inc. (now 667402 Alberta Ltd.), Canada North Camps Inc. (now 18512398 Alberta Ltd.), 816956 Alberta Ltd., 1371047 Alberta Ltd. and 1919209 Alberta Ltd. (collectively, the "Debtors"), opposes the granting of leave.

6. The Debtors, since April 30, 2018, have ceased to be active participants in the proceedings. The Monitor's role has been expanded to allow it to liquidate the Debtors' remaining assets. The deemed trust claims have been paid in full.

7. The majority decision of the Alberta Court of Appeal was properly grounded in statutory interpretation and the established law with respect to the Court's jurisdiction in CCAA restructuring cases to grant orders securing:

a. the fees and disbursements of insolvency professionals,

b. and interim lender's loans to the companies, and

c. directors' indemnity charges

(collectively referred to as "Priming Charges"[9])

in priority to all other claims and interests of secured creditors, including the deemed trusts arising under the Fiscal Statutes.

8. There are no provisions contained within either the Fiscal Statutes or the CCAA which expressly prohibit a CCAA supervising court from granting the Priming Charges in priority to the Crown claims.

9. Ultimately, when considered fully, all matters to be addressed on this application for leave have already been determined by the Court. The Monitor submits that the issues presented in this case are not of such a nature and significance as to warrant leave being granted and are now clearly moot.

[9] CCAA subsections 11.52, 11.2 and 11.51

PART II – PROCEEDINGS AND BACKGROUND

10. The Monitor does not take issue with the facts as set out in Part I of the Crown's Memorandum of Argument. However, the facts as presented are incomplete.

11. The Debtors' restructuring plan initially began with a section 50.4(1) *Bankruptcy and Insolvency Act*[10] ("BIA") Notice of Intention to Make a Proposal to creditors filing, which very quickly changed to a plea for CCAA relief[11].

12. The originating CCAA materials were served on the Crown via courier at its Edmonton office (the Offices of Canada Revenue Agency ("CRA")) on June 28. The service package included:

a. The Originating Application returnable July 5, 2017 seeking a stay of proceedings and a 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 $1,000,000.00, administrative charge of $1,000,000.00, and the director's indemnity charge of $150,000.00; and

c. An Affidavit of a Director of the Debtors attesting to only a $1,140,000.00 debt to CRA for source deductions and GST but only in respect of two of the Debtors[12].

13. The Debtors' motion, along with a cross-motion brought by the Debtors' primary lender to appoint a Receiver, proceeded on July 5, 2017. The lender's application to appoint a Receiver was refused. The Initial Order under the CCAA was granted which included typical service provisions and a comeback clause. The Priming Charges were granted with a $500,000.00 reduction in the Administrative Charge. The Crown did not appear.

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[10] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
[11] *Canada North Group Inc., Re.*, *supra*, at para. 7
[12] *Canada North Group Inc., Re.*, *supra*, at para. 8

14. On July 6, 2017, the Debtors served CRA with the Initial Order by mailing it to the CRA office. Also on that day, the CRA employee responsible for filings in Western Canada received the Initial Order[13].

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

16. By July 13, the service package had made its way to the CRA office and to the CRA's representative.

17. By July 20 the Interim Lender had advanced $900,000.00 of the priority $1,000,000.00 facility. That day, the Debtors had also served a motion to extend the stay of proceedings which motion was returnable July 27, 2017.

18. A further application was served July 25 to increase the interim financing. It was also returnable July 27, 2017.

19. On July 26, CRA provided unfiled versions of the application which is the subject matter of this leave application.

20. On July 27, the Debtors' motion proceeded. The Crown appeared but took no position on the increase in interim financing. In the result the stay of proceedings was extended to September 26, 2017, and the interim financing charge was increased to $2,500,000.00. After the Court delivered its reasons for the decision, Crown counsel advised that the Crown would be filing a motion to vary the Initial Order respecting the priority of the Priming Charges to the deemed trust claims of the Crown[14].

21. The Crown's application was dismissed. It obtained leave to appeal to the Court of Appeal. At the time of its leave application, the proceedings were still extant. While the Justice of the Court of Appeal granting leave recognized that by the time the matter was to be heard by the Court it may well be moot, he granted leave nonetheless. By the time the Court of Appeal heard the

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[13] *Canada North Group Inc., Re., supra*, at para. 9-10
[14] *Canada North Group Inc., Re., supra*, at para. 11-17

appeal, the matter was indeed moot: the Crown had been repaid in full and one of the initial Debtors, Campcorp Structures Ltd. ("Campcorp"), was no longer subject to the proceedings.

22. While no Plan of Arrangement or vote of creditors was ever held, by Order dated April 30, 2018, the Court of Queen's Bench of Alberta authorized the conclusion of a transaction. With the conclusion of that transaction, the directors of the Debtors resigned and the Monitor was granted enhanced powers for the purpose of liquidating the balance of assets of the Debtors. Campcorp ceased to be part of the proceedings after that date.

PART II – QUESTION IN ISSUE

23. The issue is whether this application raises issues of national and public importance. With respect, this moot case does not.

PART III – ARGUMENT

A. Introduction

24. The arguments of the Crown are in large part focussed on the correctness of the ABCA Decision. However, that is not the test for determining whether leave will be granted. This Court is not simply a "court of error." 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. This Court will not decide abstract questions of law and will rarely grant leave where the appeal is academic.[15]

25. Contrary to the assertions of the Crown, the ABCA Decision does not result in uncertainty in the interpretation of the relevant Statutes, nor does it undermine the applicable legislation, such that it warrants an intervention by this Court. Rather, the ABCA Decision eliminated any uncertainty in the interaction between the Fiscal Statutes and CCAA in a manner which confirms their harmonious interaction and adheres to the presumption of coherence and other principles of statutory interpretation. The CCAA and Fiscal Statutes have been interpreted to work together to achieve the remedial and policy objectives of the Fiscal Statutes and the CCAA.

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[15] Justice Sopinka, "The Supreme Court of Canada" (10 April 1997), cited in D. Lynne Watt et al., Supreme Court of Canada Practice, 2017 (Toronto: Carswell, 2017) at pp. 479-480.

26. In respect of the Crown's correctness arguments, the ABCA Decision was correct. It determined the applicable principles of statutory interpretation and applied them properly. Further, the Crown's arguments are contrary to the jurisprudence established by this Court with respect to the treatment of the deemed trust for unremitted source deductions and insolvency proceedings in general.

27. The Crown also acknowledges in its submissions that the Crown and the Priming Charge creditors have been paid in full so the priority dispute in this case is now moot. The Monitor adds that in addition to the foregoing, one of the parties which was subject to a deemed trust claim at the commencement of the proceedings, Campcorp, is no longer a part of the proceedings. The Crown therefore continues this as a test case when there are no practical implications for the parties. This Court should dismiss this application for leave rather than expending judicial resources adjudicating a matter which is moot and does not warrant the intervention of this Court.

B. The Issues Raised by the Crown are not Significant or Novel

1. Deemed Trusts are Security Interests, not Propriety Interests

28. The nature of the interests created in favour of the Crown by the Fiscal Statutes has been previously considered by this Court.

29. In *Sparrow Electric*[16], the Crown lost a priority dispute between its deemed trust claim and a pre-existing security interest under the *Bank Act*[17]. In reaching its decision, this Court noted that "[a]t the same time that legislators have sought to protect the fiscal integrity of public institutions through the devices of statutory trusts and liens, however, they have also endeavoured to protect the security interests of those private institutions who are involved in providing credit to Canadian businesses."[18]

30. This Court goes on to say that, in respect of the interpretation of legislation with conflicting objectives, "the interpretation by the courts of such legislation and the development of the jurisprudence generally in this area must, to every extent possible, seek to achieve predictable

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[16] *Royal Bank of Canada* v. *Sparrow Electric Corp.* 1997 1 SCR 411 ("*Sparrow Electric*")
[17] *Bank Act*, SC 1991, c. 46.
[18] *Sparrow Electric* at para. 20

results."[19] Justice Iacobucci, writing for this Court, characterized the Crown's deemed trust for unremitted source deductions as "not in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust".[20]

31. Following the *Sparrow Electric* decision, Parliament expanded section 227(4) of the ITA and added section 227(4.1), which the Crown asserts creates a proprietary interest in its favour over assets of the Debtors.

32. Following the above noted amendments, this Court again considered and commented on the nature of the deemed trust provisions in *First Vancouver*[21]. Justice Iacobucci considered the general scheme and legislative background of section 227(4.1) of the ITA, and stated that:

> The collection of source deductions has been recognized as 'at the heart' of the income tax collections in Canada… Because of the importance of collecting source deductions, the legislation in question gives the Minister the vehicle of the deemed trust to recover employee deemed tax deductions which employers fail to remit to the Minister.[22]

33. This Court concluded that the deemed trust is similar to a floating charge over all of the debtor's assets in favour of the Crown but that property subject to the deemed trust can be alienated by the debtor, after which the deemed trust applies to the proceeds. The deemed trust is not a true trust, nor is it governed by common law requirements under ordinary principles of trust law.[23]

34. The characterization of the deemed trust as a floating charge is consistent with it being a security interest, not a proprietary claim.

35. Further support for the deemed trust being in the nature of security interests as opposed to being a proprietary claim is found in other statutes. Most notably, the ITA, the source for the deemed trust in relation to income tax, and the BIA.

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[19] *Sparrow Electric* at para. 22
[20] *Sparrow Electric* at para. 31
[21] *First Vancouver Finance* v. *MNR*, 2002 SCC 49 ("*First Vancouver*")
[22] *First Vancouver* at para. 22
[23] *First Vancouver* at paras. 4 and 6.

a. ITA

36. The ITA is the enabling statute for the Crown's statutory deemed trust interest. Section 224(1.3) of the ITA provides that the term "security interest" means:

> 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, <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.[24]

37. It was reasonable for the Courts below to consider this definition as an aid to interpreting the Statutes harmoniously. The Crown's interest clearly falls within this definition. It is illogical to conclude that a Court may not look to this definition to determine Parliament's view on the nature of the Crown's interest.

b. The BIA Treatment

38. While this case is not a case under the BIA, the Court can look to other statutes to determine how Parliament has treated the deemed trusts in the Fiscal Statutes for guidance in attempting to interpret the statutory regimes harmoniously. The BIA, unlike the CCAA, sets out a voting system. This is part of the rules based process under the BIA versus a more open process under the CCAA. The CCAA does not set out a voting mechanism, that is for the Court to determine in the process.

39. In the context of voting on restructuring proposals under Division I of the BIA, Parliament took specific steps to address the nature of the deemed trust claims in the Fiscal Statutes for the purpose of voting.

40. In section 54(2.1) of the BIA, Parliament specifically stipulated that:

> For greater certainty, subsection 224(1.2) of the *Income Tax Act* shall not be construed as classifying as secured claims, for the purpose of subsection (2), claims of Her Majesty in the Right of Canada or a province for amounts that could be subject to a demand under…" (the relevant provisions of the Fiscal Statutes).[25]

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[24] ITA, section 224 (1.3)
[25] BIA, section 54(2.1)

41. In the BIA context, therefore, Parliament took the deliberate step to ensure that the deemed trusts created by the Fiscal Statutes would not be classified as secured claims for the purpose of voting. This ensures the Crown's veto and eliminates the ability of secured creditors to outvote the Crown[26]. If the deemed trusts were truly proprietary claims, this stipulation would not be required.

42. Parliament clearly saw fit to exempt the deemed trust claims arising under the Fiscal Statutes from the treatment as secured claims but only for the purposes of voting. No other exemptions for the deemed trusts in the Fiscal Statutes are created either in the BIA or in the CCAA.

43. This is further support for the proposition that Parliament treats the deemed trust claims as security interests, not proprietary interests, a conclusion which has been reached by this Court in *First Vancouver* and was recognized by both Courts below.

44. This treatment of the deemed trust as secured claims then fits with the definition of "secured creditor" under section 2(1) of the CCAA, which includes the holder of a trust in respect of all or any property of the debtor company. The CCAA and Fiscal Statutes are not in conflict. They each define the Crown's interest as that of a secured creditor such that that interest can be subordinated to the Priming Charges if a Court considers it appropriate to do so.

45. Even if the Crown's claim for unremitted source deductions were not a trust within the meaning intended under the definition of "secured creditor" in the CCAA, this Court's characterization of the Crown's interest in *Sparrow Electric,* and later in *First Vancouver* makes it clear that its interest would be classified as a "charge", which would also bring it within the meaning of secured creditor for the purpose of section 2(1) of the CCAA.

2. The CCAA and Fiscal Statutes Should be Interpreted Harmoniously

46. The ABCA and the chambers judge before it correctly interpreted the CCAA and Fiscal Statutes in accordance with the principles established by this Court in *Thibodeau* v. *Air Canada*,[27]

[26] BIA, section 60(1.1) and 62(2)
[27] 2014 SCC 67

where this Court stated that a conflict between two provisions of the same legislature only exists when one cannot be avoided by interpretation.

47. This Court has previously determined that "[t]he starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable."[28]

48. Further, as this Court found in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*[29], the modern approach to statutory interpretation is the only correct approach:

> …[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[30]

49. The ABCA followed the correct approach by applying the presumption of coherence, and interpreting the words of the CCAA and Fiscal Statutes in their entire context and in their grammatical and ordinary sense harmoniously with the schemes of the Acts, the objects of the Acts and the intentions of Parliament as directed by this Court in both *Bristol* and in *Rizzo & Rizzo Shoes Ltd. Re.*[31]

50. The CCAA and Fiscal Statutes are part of a larger statutory scheme. They should be considered in context with one another with consideration given to their intended goals.[32]

51. The provisions of the CCAA must be interpreted with its remedial purpose in mind. The ABCA properly considered the remedial purpose of the CCAA, and its duty to give the CCAA and Fiscal Statutes such "fair, large and liberal construction and interpretation as best ensures the attainment of its objects".[33]

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[28] *Lévis (City) v. Fraternité des Policiers de Lévis Inc.*, 2007 SCC 14 at para. 47
[29] 2005 SCC 26
[30] *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26 at para. 95
[31] *Rizzo & Rizzo Shoes Ltd. Re* [1998] 1 SCR 27 at para. 21
[32] *Atco Gas & Pipelines Ltd*. v. *Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 49
[33] *Interpretation Act*, RSC 1985, c. I-21

52. In *Century Services*[34], this Court confirmed that the inherent jurisdiction of the Court to grant priority charges was not abrogated by the 2009 amendments. At paragraph 19, Justice Deschamps wrote the following in respect of the CCAA:

> Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives.[35]

53. Justice Deschamps further noted that "[j]udicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence".[36]

54. In *Century Services*, this Court concluded that, "[W]hen an order is sought that does realistically advance the CCAA's purposes, the Court has the discretion to make the order."[37]

55. The Crown takes the position that the language in subsection 227(4.1) of the ITA is a "notwithstanding clause" that is used to ensure that the Crown's deemed trust prevails notwithstanding any provisions of the CCAA. The logical extension of the argument is that the Court has no discretion to grant Priming Charges over the interests of the Crown. The Monitor respectfully disagrees with the Crown's position. Nowhere within the ITA, specifically subsection 227(4.1), nor in the CCAA does Parliament stipulate that the Court is precluded from exercising its discretion to grant the Priming Charges priority over the deemed trust provisions in the Fiscal Statutes.

56. This Court has emphasized the need for clear and explicit language to oust the inherent general jurisdiction of the provincial superior courts:[38]

> The requirement for such language in this context, which originated in English law (*Peacock v. Bell* (1667), 1 WMS. Saund. 73, 85 E.R. 84 at pp/ 87-88), is

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[34] *Century Services Inc.*
[35] *Century Services* at para. 19
[36] *Century Services* at para. 59
[37] *Century Services* at para. 68-71
[38] *Ordon Estate v Grail*, [1998] 3 SCR 437 at para 46; *Lizotte c. Aviva Cie d'assurance du Canada,* 2016 SCC 52 at para 57

> based on the fundamental role played by the inherent jurisdiction of the superior courts in the common law system inherited by Canada.[39]

57. It is presumed that legislatures respect the common law, and "do not intend to interfere with common law rights, to oust the jurisdiction of common law courts, or generally to change the policy of the common law."[40]

58. "Those presumptions permit the courts to insist on precise and explicit direction from the legislature before accepting any change. The common law is thus shielded from inadvertent legislative encroachment."[41]

59. The Crown's submission is that subsection 227(4.1) of the ITA supersedes not only any provision in any other federal enactment, but also ousts the jurisdiction of the Court to exercise its discretion to grant the Priming Charges in priority over the deemed trusts in the Fiscal Statutes where the CCAA now expressly provides the authority which was previously grounded in inherent jurisdiction. That cannot be a correct interpretation as the legislation does not set out specifically in clear and explicit language that the Court's general jurisdiction, and the ability to exercise its discretion under the provisions of the CCAA, is ousted. Had parliament made the decision to do so, it would have needed to say so expressly[42] [43].

60. The Crown further takes the position that "there is no need to look beyond the four corners of subsection 227(4.1) to determine the scope of priority it creates".[44] With respect, the Crown's position in that regard is directly contrary to the modern approach to statutory interpretation and the principle of legislative coherence.

61. The Crown's position fails to consider Parliament's clear commitment to allowing companies to restructure under the CCAA or the BIA for the benefit of their stakeholders. The Court's ability to grant Priming Charges in priority to all other interests is a vital part of allowing

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[39] *Ibid*
[40] *Sullivan on the Construction of Statutes,* 5th ed. (Markham: LexisNexis, 2008) at 431
[41] *Sullivan on the Construction of Statutes,* 5th ed. (Markham: LexisNexis, 2008) at 432
[42] *Ordon Estate v. Grail, supra*
[43] *Sparrow Electric, supra*, at para. 112
[44] Applicant's Memorandum of Argument, at para 45.

companies to obtain financing for the purpose of making restructuring possible. CCAA restructurings are of vital importance to Canada's economy and provide companies with the much-needed ability to continue production of goods and services, preserve jobs, and ultimately benefit all of their stakeholders.

62. If the Crown's proposed interpretation of the CCAA and Fiscal Statutes were adopted, it would prevent the CCAA from fulfilling its remedial purpose and would ultimately have a severe chilling effect on restructuring in Canada.

63. In upholding the Chambers Justice, the ABCA Decision correctly applied the modern approach to statutory interpretation. It upheld an interpretation of the Fiscal Statutes and CCAA in their entire context and in their grammatical and ordinary sense harmoniously with the schemes of the Acts, the objects of the Acts and the intentions of Parliament, with a view to ensuring that the schemes of the Acts operate coherently with one another.[45]

3. The ABCA Decision Creates Certainty

64. Contrary to the assertions of the Crown, the ABCA Decision creates certainty in the interpretation of the Fiscal Statutes and the CCAA.

65. The ABCA's Decision has the effect of allowing restructurings to continue as they have in the past, which solidifies certainty in the law in times of economic uncertainty. If the Crown's position were adopted, it would create uncertainty not only in the interpretation of what constitutes a secured creditor and a trust under the CCAA and Fiscal Statutes, but also in the operation of restructuring law as a whole, and in the Canadian economy in general.

66. Should this Court dismiss this application for leave to appeal, the certainty provided by the ABCA Decision will be further solidified.

4. The Crown's Interest is Protected Regardless

67. The Crown's deemed trust claims under the Fiscal Statutes remain protected regardless.

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[45] *Rizzo* at para 21.

68. Subsection 6(3)[46] of the CCAA prohibits the Court from sanctioning a compromise or arrangement unless the plan of compromise or arrangement provides for payment in full to the Crown, within six months of the sanction of the plan, of all amounts that could be subject to a demand under the Fiscal Statutes.[47]

69. Subsection 6(3) of the CCAA would have no purpose if the Crown's statutory deemed trust had absolute priority or if it gave the Crown a proprietary interest in the assets of the Debtors. Parliament avoids tautology, and does not draft provisions that do not serve a purpose.[48]

70. Subsection 6(4) of the legislation requires a company seeking approval by the Court of a compromise or arrangement to not be in default of remittances due to Her Majesty which became due after the time of the granting of the Initial Order before approval may be granted[49].

71. Additionally, if a company defaults on the payment of any amount which becomes due to Her Majesty for deemed trusts under the Fiscal Statutes after the date of an Initial Order, there is an automatic lifting of the stay in favour of the Crown which enables the Crown to proceed to collect on its obligation without more[50].

72. Finally, the granting of the Priming Charges is discretionary. It is not an absolute. It is always open to the Crown to negotiate, rather than to litigate, with the insolvent entity and the stakeholders to address the priority of its claims with respect to the Priming Charges.

73. The legislature's intent to provide protection for the Crown's interest in unremitted employee source deductions is achieved by these sections.

C. Mootness

74. In *Borowski v Canada (Attorney General)*, Justice Sopinka, writing for this Court, noted:

> The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such

[46] CCAA, section 6(3)
[47] Canada North ABCA Decision at para. 53
[48] *Ibid* at para. 53
[49] CCAA, section 6
[50] CCAA, section 11.09(2)

> rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision.[51]

75. Justice Sopinka goes on to say that a two step analysis is used to determine whether an appeal should be heard:

> First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case…[52]

76. This case is moot in two respects: the Crown has been paid, and one of the parties affected by the deemed trust, Campcorp, is no longer part of the proceedings. The Crown has acknowledged that this case is moot. The Monitor respectfully submits that this Court should exercise its discretion to dismiss this application for leave to appeal on this basis.

77. The outcome of a prospective appeal in this matter would have no bearing on the interests of the parties other than to impose undue costs to the participating Respondents and the remaining creditor body which, unlike the Crown, will not have their secured claims paid in full.

78. Further, the Crown submits that this Court should exercise its discretion to hear the appeal because applications for initial orders under the CCAA are frequently before the courts, and these matters can be of a recurring nature and brief duration. However:

> The mere fact… that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.[53]

79. Parliament has now seen fit to reduce the time period for initial stays granted under the CCAA to ten days[54].

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[51] *Borowski v Canada (Attorney General),* [1989] 1 SCR 342, [1989] 3 WWR 97
[52] *Ibid*
[53] *Supra* at para 36
[54] CCAA, section 11.02

80. The stated intention for the change was to provide for more transparency and give parties an opportunity to respond to applications for relief to grant, among other things, the Priming Charges. Parliament has still seen fit to limit Court's the discretion in respect of the granting of those Priming Charges on the Initial Order.[55] Parliament did not, however, choose to eliminate the Court's ability to grant the Priming Charges in priority to the deemed trusts created by the Fiscal Statutes.

81. Contrary to the Crown's submissions, there is no conflicting appellate authority on this matter. *Rosedale Farms*[56] did not involve CCAA proceedings and it is not an appellate level case.

82. This matter is now moot. Dismissing this application settles any uncertainty in Canada, and would be the most efficient manner in which to limit the "social cost of continued uncertainty in law" without requiring this Court to adjudicate on this topic.[57]

PART IV – COSTS

83. As is noted above and acknowledged in the Crown's argument, the issue on appeal in the instant case is moot. The Crown has elected to push this matter as a test case at significant cost to the other parties and the remaining creditors. As such, the Monitor respectfully submits that the Crown ought to be responsible for the Monitor's costs regardless of the outcome.

84. The estate, and by extension the creditor body, should not bear the burden of the costs of this matter where the Crown's claims have already been paid and Campcorp is no longer part of the proceedings. It is important to note that the Monitor's costs of participating in this matter will only serve to reduce the amounts available to distribution to the creditors in these CCAA proceedings if the Crown is not required to indemnify and hold the Estate harmless.

85. If the crown wishes to litigate a matter that is now moot, it should be solely responsible for the cost of doing so.

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[55] CCAA, section 11.001
[56] *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*, 2017 NSSC 160
[57] *Borowski* v. *Canada (Attorney General)* [1989] 1 SCR 342 at 361(e) and 362(b)

PART V – RELIEF REQUESTED

86. The Monitor requests that this application for leave to appeal be dismissed, with costs as set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of December, 2019.

DUNCAN CRAIG LLP
Per:

Darren R. Bieganek, QC
Counsel for the Respondent, Ernst & Young Inc.

PART VI - TABLE OF AUTHORITIES

A. Legislation

Statute	Paragraph Reference
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 6, 6(3), 11.001, 11.02, 11.09(2), 11.52, 11.2, 11.51 *Loi sur les arrangements avec les créanciers des compagnies* (L.R.C. (1985), ch. C-36), ss. 6, 6(3), 11.001, 11.02, 11.09(2), 11.52, 11.2, 11.51	Paragraphs 2, 7, 68, 70, 71, 79, and 80
Income Tax Act, RSC 1985, c. I-1, ss. 224(1.3) *Loi de l'impôt sur le revenue* (L.R.C. (1985), ch. 1 (5e suppl.)), ss. 224(1.3)	Paragraphs 4, 36, and 55
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ss. 54(2.1), 60(1.1), 62(2) *Loi sur la faillite et l'insolvabilité* (L.R.C. (1985), ch. B-3), ss. 54(2.1), 60(1.1), 62(2)	Paragraphs 11, 35, 40, and 41
Canada Pension Plan, RSC 1985, c. C-8 *Régime de pensions du Canada* (L.R.C. (1985), ch. C-8)	Paragraph 4
Employment Insurance Act, SC 1996, c 23 *Loi sur l'assurance-emploi* (L.C. 1996, ch. 23)	Paragraph 4
Bank Act, SC 1991, c. 46 *Loi sur les banques*, L.C. 1991, ch. 46	Paragraph 29
Interpretation Act, RSC 1985, c. I-21 Loi d'interprétation (L.R.C. (1985), ch. I-21)	Paragraphs 30 and 51

B. Jurisprudence

Case	Paragraph Reference
Canada North Group Inc., Re., 2017 ABQB 550	Paragraphs 2, 11, 12, 14, and 20
Century Services Inc. v. Canada (Attorney General), 2010 SCC 60	Paragraphs 3, 52, 53, and 54

Canada v. *Canada North Group Inc.* 2019 ABCA 314	Paragraphs 4, 68, and 69
Royal Bank of Canada v. *Sparrow Electric Corp.* 1997 1 SCR 411	Paragraphs 29, 30, and 59
First Vancouver Finance v. *MNR*, 2002 SCC 49	Paragraphs 32 and 33
Thibodeau v. *Air Canada*, 2014 SCC 67	Paragraph 46
Lévis (City) v. Fraternité des Policiers de Lévis Inc., 2007 SCC 14	Paragraph 47
Bristol-Myers Squibb Co. v. Canada (Attorney General), 2005 SCC 26	Paragraph 48
Rizzo & Rizzo Shoes Ltd. Re [1998] 1 SCR 27	Paragraphs 49 and 63
Atco Gas & Pipelines Ltd. v. *Alberta (Energy & Utilities Board)*, 2006 SCC 4	Paragraph 50
Ordon Estate v Grail, [1998] 3 SCR 437	Paragraphs 56 and 59
Lizotte c. Aviva Cie d'assurance du Canada, 2016 SCC 52	Paragraph 56
Borowski v Canada (Attorney General), [1989] 1 SCR 342, [1989] 3 WWR 97	Paragraphs 74, 75, 78, and 82
Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re), 2017 NSSC 160	Paragraph 81

C. Secondary Materials

Secondary Source	**Paragraph Reference**
Rescue! Companies' Creditors Arrangement Act (2nd Edition), 2013 at pg. 5	Paragraph 1
Justice Sopinka, "The Supreme Court of Canada" (10 April 1997), cited in D. Lynne Watt et al., Supreme Court of Canada Practice, 2017 (Toronto: Carswell, 2017) at pp. 479-480	Paragraph 24
Sullivan on the Construction of Statutes, 5th ed. (Markham: LexisNexis, 2008) at 431 and 432	Paragraphs 57 and 58