COURT FILE NO.	1703-12327
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
JUN 18 2018
of the Court

APPLICANT	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C36, AS AMENDED AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF CANADA NORTH GROUP IN., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD. and 1371047 ALBERTA LTD.
DOCUMENT	**WRITTEN BRIEF OF THE RESPONDENT, CANADIAN WESTERN BANK**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLennan Ross LLP #600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Charles P. Russell, Q.C. Telephone: (780) 482-9115 Fax: (780) 733-9757 Email: crussell@mross.com File No.: 165813

TABLE OF CONTENTS

PART 1 STATEMENT OF FACTS

1. Pursuant to an Order of the Court of Appeal (the "**Slatter Decision**"), the Honourable Mr. Justice F. Slatter granted leave to Canada Revenue Agency ("**CRA**") to appeal the decision of the Honourable Madam Justice J.E. Topolniski rendered on September 11, 2017 (the "**CRA Appeal**").

2. Although leave was granted, it was acknowledged in the Slatter Decision that the issue on appeal was potentially moot as there appeared to be sufficient assets in the estate to satisfy both the super-priority claims of CRA and Business Development Bank of Canada ("**BDC**"), who had provided in debtor-in-possession interim financing (the "**DIP Financing**").

3. In the time since the Slatter Decision, the circumstances have changed dramatically, including:

   (a) Canada North Camps Inc.'s ("**CNC**") restructuring CCAA has transformed into a liquidating CCAA;

   (b) The directors of CNC have been removed and the Monitor in these proceedings has been granted expanded powers, similar to that of a Receiver;

   (c) An Order was granted on March 28, 2018, directing the payout of the DIP Financing, thereby eliminating the DIP Financing super-priority interest in these proceedings; and

   (d) CRA's claim has been paid.

4. BDC maintains a claim in this CCAA liquidation with respect to its pre-filing loans only.

5. To the best of its knowledge, neither Canadian Western Bank ("**CWB**") nor any other creditor was consulted when the agreement was reached "by the parties" for BDC to be the lead respondent in the CRA Appeal, the Court of Appeal initially directing CNC's counsel to take that role.

6. The CRA Appeal is set to be heard on October 2, 2018. The Monitor will be filing a factum in response as will be the Insolvency Institute of Canada ("**IIC**") and the Canadian Association of Insolvency and Restructuring Professionals ("**CAIRP**"). The estate of CNC will already be responsible for the Monitor's costs in responding to the CRA Appeal.

PART 2 ISSUES

7. The following issue is raised in this application:

   (a) Is BDC entitled to payment of costs from the estate of CNC to respond to the CRA Appeal?

   (b) Is there an equitable mechanism available to protect the CNC estate from the costs of the CRA Appeal both at the Court of Appeal level and at the Supreme Court of Canada?

PART 3 ARGUMENT WITH RESPECT TO BDC'S REQUEST FOR COSTS

8. In the Slatter Decision, it was CNC that was to be the lead respondent in the CRA Appeal. However, BDC voluntarily reached an agreement with CNC, without input from CNC's creditors, to become lead respondent. At the time this agreement was reached, BDC already knew CNC would be repaying the interim financing in full, and therefore BDC would no longer have a direct economic interest in the outcome of the appeal. At the end of May, 2018, the DIP Financing was paid by the estate of CNC.

9. Although BDC remains a creditor of CNC with respect to a claim in relation to pre-filing CCAA debts, that claim does not carry the same post-CCAA priority status as did the DIP Financing.

10. Both BDC and CRA have been paid out in these proceedings. BDC's position as the former interim financier in these proceedings will not be affected by the outcome of the CRA Appeal. As partly conceded to by BDC in their brief, BDC's real interest in participating in the appeal is to generally protect its interim financing business as a whole.

11. BDC is not required to incur the costs of responding to this appeal, and the estate of CNC is receiving no consideration for incurring the costs of funding BDC's response to the appeal. CWB submits that there is no legal basis for the estate of CNC to pay those costs.

12. CWB submits that from the CNC estate's perspective, BDC's role in the CRA Appeal is unnecessary as the Monitor, with its expanded powers, the IIC and CAIRP are all making arguments in opposition to CRA.

13. The estate of CNC is already incurring the costs of responding to the CRA Appeal by bearing the costs of the Monitor's participation in the appeal and those of BDC prior to its payout. If there is to be a party to be the lead respondent in the appeal, it ought to be the Monitor who still has a direct interest in the CCAA liquidation. CNC's creditors ought to not pay the costs of two parties responding to a moot appeal.

14. BDC's current interest in the CRA Appeal is limited to its broader business as an interim financier. It is unfair to force CNC's creditors to bear the costs of enhancing the certainty of BDC's general business of interim financing, where there is no benefit to the general body of CNC's creditors in doing so.

15. The suggestion that BDC's entitlement to repayment of the DIP Financing in these proceedings could be challenged and therefore BDC has an ongoing economic interest in the appeal, as suggested at paragraph 18(b) of Mr. French's Affidavit, is without merit and *res judicata* in any event by virtue of the Order directing payment of the DIP Financing dated March 28, 2018.

16. There is no doubt that the commitment letters (the "**Commitment Letters**") provided by BDC to CNC contemplate that BDC is to be indemnified for certain actions and costs incurred. However, the Commitment Letters do not contemplate that BDC is to be the lead respondent in the CRA Appeal nor that BDC will be indemnified for costs related thereto. It is significant that BDC, in drafting the amended commitment in December 2017, chose not to cover itself for the costs of fighting the appeal despite leave to appeal having already been granted and BDC being chosen as lead respondent.

17. The indemnity provisions provided for in the Commitment Letters are not triggered when BDC's general economic interests are engaged, but rather are there to protect and indemnify BDC for reasonable costs sustained or required to be paid by reason of or resulting from the CNC financing itself.

18. Assuming the costs claimed are properly covered by the indemnification agreement, which CWB submits they are not in this case, a Court will not enforce a fee indemnification where the indemnitee has acted unreasonably:

> 22 Costs are in the discretion of the Court. A court that concludes an indemnitee has acted unreasonably most likely will not exercise its discretion in the indemnitee's favour and award full indemnity costs.

Alberta Treasury Branches v 1401057 Alberta Ltd., 2015 ABQB 548 at para 22.

[Tab 1]

19. In this case, the indemnitee is taking steps to protect its interim lending business, thereby causing costs to be borne by the indemnitor, and CWB submits that the Court ought not to exercise its discretion in favour of the indemnitee.

PART 4 ARGUMENT WITH RESPECT TO WHETHER THERE EXISTS A MECHANISM TO PROTECT THE CNC ESTATE FROM THE COSTS OF THE CRA APPEAL TO THE COURT OF APPEAL AND ANY SUBSEQUENT APPEAL TO THE SUPREME COURT OF CANADA

20. In addition to the issues related to the request by BDC for $225,000 for legal fees, there are other issues on which CWB seeks the Court's advice and direction.

21. It is very likely that the panel on the Court of Appeal will make a decision regarding costs, which could impact all of CNC's creditors, without CNC's creditors being represented on appeal.

22. In fact, when the Application before Mr. Justice Slatter was being heard, CNC's creditors, other than BDC, were not present to make submissions. CWB had chosen not to participate at the Court of Appeal as it was clear that regardless of the outcome, the

CNC estate would make payment to both CRA and BDC in priority to CWB. CWB never anticipated that the estate would continue to fund a moot appeal once it was clear that BDC as interim lender and CRA were paid in full.

23. It is evident from the Slatter decision that the question of whether CRA should pay the costs of the respondents to the appeal, was raised, although to the best of CWB's knowledge no formal application was brought in that respect. Mr. Justice Slatter commented, *in obiter*, that the panel would be in the best position to deal with costs.

Order of Mr. Justice F. Slatter, dated November 3, 2017.

[Tab 2]

24. CWB respectfully submits that now is the time for CRA to "step to the plate" and fund the costs of the respondents, in the place of the CNC estate. The appeal is being brought solely for the benefit of CRA. There is no justification for the estate to pay the costs of defending a moot appeal.

25. There is precedent for the court directing that the proponent of a test case fund the costs of the respondent. In the decision of *Re Stelco Inc.*, an insurance premium financier, CAFO Inc. ("CAFO") appealed a decision with regards to whether it was required to register its security interest in the unearned insurance premiums. Before the appeal was heard, the underlying insurance policy had expired and CAFO could no longer make a claim against the unearned insurance and Stelco no longer had an interest in the litigation. As a result, the Court made representation Order which required CAFO to pay the costs of the appeal on a substantial indemnity basis and appointing counsel to oppose their arguments.

Stelco Inc., Re, 2005 CarswellOnt 1537, at paras 4-5.

[Tab 3]

26. CWB submits that the present circumstances cry out for the appointment of representation counsel to respond on behalf of the estate, at the expense of CRA, and recommends that that counsel be the Monitor's counsel.

a. Section 11 of the CCAA provides this Court with broad powers and jurisdiction to fashion a remedy which, although not expressly found in the Act, is a remedy which is consistent with the purposes of the Act:

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

CCAA s. 11.

[Tab 4]

Essar Steel Algoma Inc. (Re), 2017 ONSC 5710, 2017 CarswellOnt 15171, at para 17.

[Tab 5]

27. The appropriateness of an Order under section 11 is determined by assessing the policy objectives underlying the CCAA and whether the order will usefully achieve the remedial purpose of the CCAA:

> 48 Under section 11, the court may issue any order that it considers appropriate in the circumstances. Our Supreme Court addresses appropriateness in this context in Century Services at para 70:
>
> Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company.

Lightstream Resources Ltd., Re, 2016 ABQB 665, at para 48.

[Tab 6]

28. Although a CCAA Court should first rely upon its statutory authority under the CCAA before turning to its inherent jurisdiction, the language of the CCAA permits expansive interpretation and a wide range of orders to be granted:

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

Ted Leroy Trucking [Century Services] Ltd., Re., 2010 SCC 60, at para 66.

[Tab 7]

29. Beyond the scope of the CCAA, Section 8 of the *Judicature Act*, provides this Court with the power to grant any remedy so that any matters in controversy may be completely determined and all multiplicity of proceedings avoided:

> The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

Judicature Act, RSA 2000 c J-2, section 8.

[Tab 8]

30. Section 8 of the *Judicature Act* codifies the Court's inherent jurisdiction to uphold, protect and fulfil the judicial function of administering justice in an effective manner:

> 17 In R v Caron, 2011 SCC 5, [2011] 1 S.C.R. 78 at para. 24, the Supreme Court of Canada quoted with approval I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23, in describing inherent jurisdiction as:
>
> "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so" ... These

> powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" ... to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner". [citations omitted]
>
> ...
>
> 20 This Court's inherent jurisdiction and authority to grant equitable relief has been codified in the Alberta Judicature Act, R.S.A. 2000, c. J-2, ss. 8 and 13(2).[...]

P. (R.) v V. (R), 2012 ABQB 353, at paras 17 & 20.

[Tab 9]

31. Superior Courts have general jurisdiction to do whatever is necessary to ensure justice is done between the parties.

80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd, [1972] O.J. No. 1713 at para 9.

[Tab 10]

32. CWB recognizes that this Court has no jurisdiction to direct either the Court of Appeal or the Supreme Court of Canada on the question of costs. Nevertheless, this Court is charged with overseeing the CCAA proceedings and dealing with costs at the creditor level.

b. The Court's inherent jurisdiction combined with Rule 1.3 of the Alberta *Rules of Court*, permits a Court to grant a remedy whether or not it is claimed or sought.

Pyrrha Design Inc. v. Plum and Posey Inc., 2016 ABCA 12, at paras 8-10.

[Tab 11]

Alberta *Rules of Court*, Rule 1.3.

[Tab 12]

33. In the alternative, if this Honourable Court is not prepared to grant such an order, CWB seeks advice and direction as to how to deal with the possibility that either at the Court of Appeal level or the Supreme Court of Canada level, an award of costs is made as against the Monitor (or BDC if they are still participating in the appeal) for which those parties seek indemnity from the estate.

34. The options available to this Honourable Court, CWB submits, include:

(a) directing that CRA indemnify the estate for costs which may be levied as against a party that has a right of indemnity from the estate;

(b) directing any party that seeks to continue to participate in the appeal do so at their own cost and their own expense;

(c) in any event, an order directing that the estate will not indemnify any party for participating in proceedings before the Supreme Court of Canada.

35. There may be other options that this Court could entertain, so as to avoid the inequity of the estate's creditors bearing the cost of moot proceedings.

PART 5 REMEDY SOUGHT

36. CWB respectfully requests that BDC's application be dismissed, and for the other relief sought in CWB's application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 18th day of June, 2018.

McLENNAN ROSS LLP

for Per: ______________________________
Charles P. Russell, Q.C.
Solicitor for the Respondent

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2. Order of Mr. Justice F. Slatter, dated November 3, 2017.
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4. *CCAA* s. 11.
5. *Essar Steel Algoma Inc. (Re),* 2017 ONSC 5710, 2017 CarswellOnt 15171, at para 17.
6. *Lightstream Resources Ltd., Re*, 2016 ABQB 665, at para 48.
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8. *Judicature Act*, RSA 2000 c J-2, section 8.
9. *P. (R.) v V. (R)*, 2012 ABQB 353, at paras 17 & 20.
10. *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd*, [1972] O.J. No. 1713 at para 9.
11. *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2016 ABCA 12, at paras 8-10.
12. Alberta *Rules of Court*, Rule 1.3.

TAB 1

2015 ABQB 548
Alberta Court of Queen's Bench

Alberta Treasury Branches v. 1401057 Alberta Ltd.

2015 CarswellAlta 1586, 2015 ABQB 548, [2015] A.W.L.D. 4034, [2015] A.W.L.D. 4131, 21 Alta. L.R. (6th) 253, 257 A.C.W.S. (3d) 593, 29 C.B.R. (6th) 122, 76 C.P.C. (7th) 337

Alberta Treasury Branches, Appellant and 1401057 Alberta Ltd. operating as Katch 22 and Tomita Eleanor Walker also known as Tomita Dix, Respondents

Alberta Treasury Branches, Appellant and Tomita Eleanor Walker, Respondent

Thomas W. Wakeling J.

Heard: October 20, 2013

Judgment: September 2, 2015 *

Docket: Red Deer 1110-00801, 1110-00802

Counsel: Wesley M. Pedruski, Q.C. for Appellant
Christopher E. Forgues for Respondents

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

Related Abridgment Classifications

Civil practice and procedure

XXIV Costs

XXIV.15 Practice on taxation or assessment of costs

XXIV.15.h Costs of taxation or appeal

Real property

VII Mortgages

VII.9 Foreclosure

VII.9.h Practice and procedure

VII.9.h.xii Costs

VII.9.h.xii.C Costs of protecting security

Headnote

Real property --- Mortgages — Foreclosure — Practice and procedure — Costs — Costs of protecting security

Borrowers agreed in mortgages and consent redemption orders to fully indemnify lender for legal fees incurred to collect outstanding amounts under loan — Review officer certified amount of lender's legal fees that borrowers were obliged to pay — Lender's appeals of review officer's decisions were allowed — Parties made submissions to finalize terms of order, with lender seeking order directing borrowers to fully indemnify it for its legal services, including for appearance before review officer and appeal of review officer's decision — Lender's order was granted — Lender was entitled to costs award obliging borrowers to fully indemnify it for legal services paid for appearance before review officer and on appeal — Legal services provided by lender's lawyers in appearing before review officer and on appeal were covered by costs term of consent redemption orders and in loan instruments — Lender had not acted in unreasonable manner and its appeals were justified — Result was not unfair in that parties made promises under loan instruments and consented to redemption orders — If parties could not agree on amount of costs, assessment officer would have to determine amount.

Civil practice and procedure --- Costs — Practice on taxation or assessment of costs — Costs of taxation or appeal

Borrowers agreed in mortgages and consent redemption orders to fully indemnify lender for legal fees incurred to collect outstanding amounts under loan — Review officer certified amount of lender's legal fees that borrowers were obliged

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to pay — Lender's appeals of review officer's decisions were allowed — Parties made submissions to finalize terms of order, with lender seeking order directing borrowers to fully indemnify it for its legal services, including for appearance before review officer and appeal of review officer's decision — Lender's order was granted — Lender was entitled to costs award obliging borrowers to fully indemnify it for legal services paid for appearance before review officer and on appeal — Legal services provided by lender's lawyers in appearing before review officer and on appeal were covered by costs term of consent redemption orders and in loan instruments — Lender had not acted in unreasonable manner and its appeals were justified — If parties could not agree on amount of costs, assessment officer would have to determine amount based on principles as to whether cost of legal service was one that was promised to be covered, whether legal service increased likelihood that purpose of retainer would be achieved, whether service was necessary, and whether fees were reasonable in all circumstances.

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Court of Queen's Bench Act, R.S.A. 2000, c. C-31

s. 21 — referred to

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R. 10.1(b) — considered

R. 10.2(1) — considered

R. 10.3 — considered

R. 10.26(1) — referred to

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R. 10.30(1) — considered

R. 10.30(1)(a) — considered

R. 10.31(1) — considered

R. 10.31(2)(b) — considered

R. 10.34(1) — considered

R. 10.44(1) — referred to

HEARING to finalize terms of order, with lender seeking order directing borrowers to fully indemnify it for its legal services.

Thomas W. Wakeling J.:

I. Introduction

1 In *Alberta Treasury Branches v. 1401057 Alberta Ltd.* [1] this Court allowed ATB's appeals against two decisions of review officer Gorsalitz certifying the amount of the lender's legal fees that 1401057 Alberta Ltd. and Tomita Eleanor Walker were obliged to pay the lender as a result of consent redemption orders the terms of which awarded the lender "costs of this action on a solicitor and own client basis". The judgment set out the principles that a review or assessment officer [2] must apply when determining the nature of the indemnitor's obligation. [3]

2 The borrowers agreed in two mortgages and the consent redemption orders to fully indemnify ATB for legal fees the lender incurred to collect outstanding amounts under the loan instruments. They have already reimbursed ATB for legal costs it has incurred as of the close of business January 10, 2013.

3 The parties were unable to resolve the contents of the order and have asked the Court to finalize its terms. [4] The Court will do this. One other question needs to be resolved. It is set out in the next part.

II. Questions Presented

4 ATB seeks an order directing 1401057 Alberta Ltd. and Ms. Walker to fully indemnify it for the amount it has paid its counsel for legal services related to this matter after January 10, 2013. This includes an appearance before the review officer on February 26, 2013 and this Court on October 21, 2013 to appeal against the decisions of the review officer. ATB relies on the provisions in the loan instruments obliging the borrowers to fully indemnify the lender for the legal fees it incurred to collect outstanding amounts under the loan instruments and the costs term of the consent redemption orders. [5] The borrowers ask the Court to hold that no party is entitled to costs. They argue that the lender did not achieve substantial success in this Court.

5 Do the costs term of the consent redemption orders and the full-indemnity provisions of the loan instruments apply to the legal services the cost of which ATB seeks reimbursement?

6 If so, should the borrowers be relieved of their obligation to fully indemnify the lender? Has the lender acted unreasonably?

7 If not, what principles should be utilized to calculate the amount due?

III. Brief Answers

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8 The borrowers do not argue that the legal services ATB's lawyers provided in appearing before the review officer and this Court to prosecute the lender's appeals against the decisions of the review officer are not covered by the costs term of the consent redemption orders or the indemnity provisions in the loan instruments. I hold that they do.

9 There is no reason why the borrowers should be relieved of their obligation to indemnify fully the lender for the amounts it has paid its lawyers after January 10, 2013 to protect its interests under the loan instruments. ATB has not acted in an unreasonable manner. The lender acted reasonably in instructing its counsel to appear before the review officer in response to the borrower's application and appealing to this Court decisions of the review officer that relieved the borrowers of the obligation to indemnify the lender for fifty-seven percent of the amount that ATB paid Reynolds Mirth Richards & Farmer LLP to enforce the loan instruments. The appeals were justified. This Court allowed them and set aside the decisions of the review officer.

10 This result is not unfair. The lender and the borrowers made promises under the loan instruments and consented to the redemption orders. ATB kept its end of the bargain. So must the borrowers.

11 The only issue which remains is whether the amount for which ATB seeks reimbursement passes the tests fashioned in *Alberta Treasury Branches v. 1401057 Alberta Ltd.* [6] and *Steinke v. Hajduk Gibbs LLP* [7] for the principled assessment of reimbursable legal costs. This question will have to be answered by an assessment officer in accordance with the principles discussed in this judgment if the parties cannot resolve this point themselves.

IV. Applicable Parts of the Alberta Rules of Court

12 Rules 10.30 and 10.31(1) of the *Alberta Rules of Court* are set out below:

> 10.30(1) Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made
>
> (a) in respect of an application or proceeding of which a party had notice, after the application has been decided ....
>
> 10.31(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:
>
> > (a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or
> >
> > (b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,
> >
> > > (i) an indemnity to a party for that party's lawyer's charges, or
> > >
> > > (ii) a lump sum instead of or in addition to assessed costs.
>
> (2) Reasonable and proper costs under subrule (1)(a)
>
> .....
>
> (b) unless the Court otherwise orders, include costs incurred by a party
>
> > (i) in an assessment of costs before the Court, or
> >
> > (ii) in an assessment of costs before an assessment officer.

V. Statement of Facts

13 Master Schlosser, on October 7, 2011, granted consent redemption orders in each action a term of which reads as follows:

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> 13. The Plaintiff is awarded costs of this action on a solicitor and own client basis which shall be assessed at the future date on an ex parte basis where the Defendant ... has approved the amount of costs ... otherwise the Plaintiff shall have such costs assessed pursuant to Rule 10.37.

14 In reliance on this provision, ATB asked the borrowers to pay it $16,342.64 (legal fees ($13,824.50), other charges ($929.64) and disbursements ($1,588.60)). This is the amount ATB had paid its lawyers to protect its security interest up to the close of business on January 10, 2013.

15 After paying this amount, and without ever having informed ATB that the borrowers took objection to any particular component of the amount demanded, [8] they obtained, filed and served an appointment for assessment of costs in each action.

16 At the hearing before review officer Gorsalitz, the borrowers argued that they should not have to pay the full amount sought for fees — $13,824.50 — and other charges — $929.64. They claimed that these were "too high". They advised the adjudicator that they took "no issue with the ... hard core disbursements which total $1,588.60".

17 Satisfied that a directive the masters had issued limited the amounts he could approve, the review officer allowed only fees of $6,000 in the two foreclosure actions. This amounted to a fifty-seven percent haircut for the lender.

18 ATB appealed [9]. This Court allowed the appeal: [10]

> The review officer based his decision on an incorrect principle. He applied a fee guideline the masters prepared to introduce consistency into decisions of assessment officers assessing costs in undefended and routine residential foreclosure actions. He did not consider the merits of Alberta Treasury Branches indemnification claim or apply the general principles governing court-ordered costs. He failed to appreciate that the Court of Queen's Bench ordered the defendants to indemnify fully Alberta Treasury Branches for the amounts it paid its lawyers to protect its security interest.

19 There was a dispute as to the form of the order. This Court will settle that controversy.

20 ATB now seeks a costs order [11] against 1401057 Alberta Ltd. and Ms. Walker obliging them to indemnify fully the lender for the legal fees and other costs it has incurred after January 10, 2013 in appearing before the review officer to respond to the application filed by the borrowers and prosecuting its appeals in the Court of Queen's Bench against the review officer's decisions.

VI. Analysis

A. A Court Will Enforce a Fee Indemnification Agreement or Order Unless the Indemnitee Has Acted Unreasonably

21 If A and B enter into an agreement whereby A promises to indemnify B for legal fees B pays to law firm C for the performance of stipulated legal services, a court determining A's costs obligations will enforce the fee indemnification agreement between A and B [12] unless there is a compelling reason not to. A compelling reason may exist if B has acted in an unreasonable manner. [13] The same principle applies if the indemnification obligation arises from a court order.

22 Costs are in the discretion of the Court. [14] A court that concludes an indemnitee has acted unreasonably most likely will not exercise its discretion in the indemnitee's favour and award full indemnity costs.

23 The borrowers do not argue that the legal services for which ATB seeks indemnification are not stipulated legal services under the loan instruments or that they are not covered by costs term of the consent redemption orders. I conclude that they are.

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24 ATB has not acted unreasonably. It has not engaged in any inappropriate acts. It acted properly in instructing counsel to appear before the review officer. One must remember that it was the borrowers who took out the appointment before the review officer. Given that the review officer awarded ATB only forty-three percent of the amount for which it sought indemnification from the borrowers, the lender had good reason to appeal.

25 There is no compelling reason not to enforce the fee indemnification provisions in the loan instruments or the costs term of the consent redemption orders. ATB is entitled to full indemnification in accordance with the costs term of the consent redemption order and the loan instruments.

26 The borrowers argue that ATB did not achieve substantial success before this Court. I disagree. This Court allowed the lender's appeals and directed that the assessment of the amount the indemnitee must pay the indemnitor be calculated in accordance with the principles set out in the reasons for decision. To my mind, this is complete success.

B. General Principles Governing the Determination of the Amount an Indemnitor Must Pay to an Indemnitee Under Part 10 of the Alberta Rules of Court

27 *Alberta Treasury Branches v. 1401057 Alberta Ltd.* [15] and *Steinke v. Hajduk Gibbs LLP* [16] discuss the principles which determine the amount an indemnitor must pay to an indemnitee under Part 10 of the *Alberta Rules of Court*. These principles shape the questions that an adjudicator must answer.

28 First, is the legal service the cost of which the indemnitee seeks reimbursement a legal service that the indemnitor has promised to cover the costs of or a legal service covered by a costs indemnification order? [17] "If A has promised to indemnify B for legal services provided by C to protect B's mortgage security, A is not bound to indemnify B for legal services C provided to B relating to employment matters in B's business" [18].

29 Second, if the legal service for which the indemnitee seeks reimbursement is one captured by the indemnification agreement or a costs indemnification order, is it "a legal service which increases the likelihood the purpose [of the retainer] will be achieved"? [19] *Steinke v. Hajduk Gibbs LLP* [20] gives an example of a legal service that would not pass this test:

> Suppose that a senior lawyer working on an important constitutional file directs a research lawyer to prepare a brief setting out the governing principles and leading cases regarding s. 6 of the *Canadian Charter of Rights and Freedoms*. This is the mobility provision. Suppose that the research lawyer delivers the requested brief to senior counsel. If the senior lawyer had meant to have his colleague review s. 7 of the *Charter*, and if the s. 6 brief provided no assistance to senior counsel, the firm could not charge the client for this work.

30 Third, if the adjudicator is satisfied that the performance of the contested legal service increases the likelihood that law firm C will be able to protect client B's interests, he or she must ask whether the service is necessary. [21] A legal service is necessary if the value derived from the step is greater than the cost of completing it. [22] This involves an assessment of the cost of the contested service and the nature of the benefit the contested service represents to the client and a determination that the cost associated with the contested service is justifiable under all the circumstances of the retainer. An adjudicator must not conclude that counsel preformed unnecessary work unless the decision to undertake it is clearly indefensible. [23] On occasion adjudicators will not have the expertise required to justify a determination that counsel undertook unnecessary work. [24] This may be because the adjudicator never dealt with the area of law the contested legal services relate to either while engaged in the practice of law or while serving as an adjudicator. In this scenario, an adjudicator, in the absence of expert evidence on the issue, [25] should be extremely reluctant to conclude that a contested service is unnecessary. [26]

31 In *Alberta Treasury Branches v. 1401057 Alberta Ltd.* [27] I provided a fact pattern [28] that presents the necessity issue:

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TAB 2

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER	1703-0237AC	Registrar's Stamp
TRIAL COURT FILE NUMBER	1703-12327	REGISTRAR FILED DEC 06 2017 AS Court of Appeal of Alberta
REGISTRY OFFICE	EDMONTON	
PLAINTIFF/APPLICANT	HER MAJESTY THE QUEEN IN RIGHT OF CANADA	
STATUS ON APPEAL	APPELLANT	
STATUS ON APPLICATION	APPLICANT	
DEFENDANT/RESPONDENT	CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES INC., D.J. CATERING LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD.	
STATUS ON APPEAL	RESPONDENT	
STATUS ON APPLICATION	RESPONDENT	
DEFENDANT/RESPONDENT	ERNST & YOUNG INC. (in its capacity as Monitor, and not in its personal capacity)	
STATUS ON APPEAL	RESPONDENT	
STATUS ON APPLICATION	RESPONDENT	
DEFENDANT/RESPONDENT	BUSINESS DEVELOPMENT BANK CANADA	
STATUS ON APPEAL	RESPONDENT	
STATUS ON APPLICATION	RESPONDENT	
DOCUMENT	ORDER GRANTING LEAVE TO APPEAL	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DEPARTMENT OF JUSTICE CANADA 300 EPCOR TOWER, 10423 -101 ST. NW EDMONTON AB T5H 0E7 COUNSEL: GEORGE F. BÓDY TEL: 780-495-7595 FAX: 780-495-3319 (FILE REF: 9329446)	

DATE ON WHICH ORDER WAS PRONOUNCED	FRIDAY NOVEMBER 3, 2017
LOCATION OF HEARING	EDMONTON
NAME OF JUDGE WHO GRANTED THIS ORDER	THE HONOURABLE JUSTICE F. SLATTER

I hereby certify this to be a true copy.

For Deputy Registrar
Court of Appeal of Alberta

UPON the application of the Attorney General of Canada on behalf of Her Majesty the Queen in right of Canada, as represented by the Minister of National Revenue;

AND UPON reading the submissions of the applicant and the respondents;

AND UPON hearing from counsel for Her Majesty the Queen in right of Canada, counsel for the Canada North Group, counsel for the Monitor, and counsel for the Business Development Bank of Canada;

It is hereby ordered that:

1. Leave to appeal is granted on the following issue:

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

2. Canada North Group will (subject to any contrary agreement by counsel) be the lead respondent, and will be entitled to file a full factum as provided for in the *Rules of Court*. Other interested parties may file respondents' factums, but they will not be due until 10 days after Canada North's factum is filed, they are not to be repetitive of arguments made by Canada North, and unless permitted by the Case Management Officer they are to be limited to 8 pages.

3. No party will receive costs of this application.

REGISTRAR, COURT OF APPEAL OF ALBERTA

APPROVED AS BEING THE ORDER GRANTED:

per: George F. Body
Counsel for the Applicant
Attorney General of Canada

per: Darren R. Bieganek, Q.C.
counsel for the Respondent,
Ernst & Young Inc.

Per: Stephanie A. Wanke
Counsel for the Respondents,
Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Inc., D.J. Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd.

Per: Jeffrey L. Oliver
Counsel for the Respondent,
Business Development Bank of Canada

TAB 3

2005 CarswellOnt 1537
Ontario Court of Appeal

Stelco Inc., Re

2005 CarswellOnt 1537, [2005] I.L.R. I-4430, [2005] O.J. No. 1575, 138 A.C.W.S. (3d) 949, 197 O.A.C. 1, 21 C.C.L.I. (4th) 1, 253 D.L.R. (4th) 524, 7 P.P.S.A.C. (3d) 281, 9 C.B.R. (5th) 307

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Weiler, Moldaver, MacFarland JJ.A.

Heard: March 24, 2005
Judgment: April 26, 2005
Docket: CA C42388

Proceedings: reversing *Stelco Inc., Re* (2004), 49 C.B.R. (4th) 283, 12 C.C.L.I. (4th) 26, 6 P.P.S.A.C. (3d) 268, 2004 CarswellOnt 1882 (Ont. S.C.J. [Commercial List])

Counsel: Robin B. Cumine, Q.C., Gustavo F. Camelino for Appellant, CAFO Inc.
Geoff R. Hall, Tom D. McKinlay for Respondent, Stelco Inc.

Subject: Corporate and Commercial; Insolvency; Insurance
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.f Lifting of stay
Personal property security
I Scope of legislation
I.5 Insurance and annuities
Headnote
Personal property security --- Scope of legislation — Insurance and annuities
C Inc. was insurance premium financier — Insured was in proceedings under Companies' Creditors Arrangement Act ("CCAA") — C Inc.'s motion to lift stay under CCAA to allow it to terminate insurance policy which insured had in place with insurance carrier and thereby have unearned premiums paid to C Inc. by carrier pursuant to s. 138 of Insurance Act was dismissed — C Inc. took position that because of s. 4(1)(c) of Personal Property Security Act ("PPSA"), it was not required to register security interest it claimed in unearned premiums — Trial judge found s. 4(1)(c) of PPSA, which provides that PPSA does not apply "to a transfer of an interest or claim in or under any policy of insurance", was not clearly intended to encompass return of unearned premiums — Trial judge found even if C Inc. did not have to register under PPSA, it would not be appropriate to lift stay under initial CCAA order to permit C Inc. to cancel insurance — C Inc. appealed — Appeal allowed — Wording of s. 4(1) of PPSA encompasses return of unearned premiums — Not requiring that C Inc. register its interest conformed with other jurisdictions in order to create certainty and uniformity.

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

C Inc. was insurance premium financier — Insured was in proceedings under Companies' Creditors Arrangement Act ("CCAA") — C Inc.'s motion to lift stay under CCAA to allow it to terminate insurance policy which insured had in place with insurance carrier and thereby have unearned premiums paid to C Inc. by carrier pursuant to s. 138 of Insurance Act was dismissed — C Inc. took position that because of s. 4(1)(c) of Personal Property Security Act ("PPSA"), it was not required to register security interest it claimed in unearned premiums — Trial judge found s. 4(1)(c) of PPSA, which provides that PPSA does not apply "to a transfer of an interest or claim in or under any policy of insurance", was not clearly intended to encompass return of unearned premiums — Trial judge found even if C Inc. did not have to register under PPSA, it would not be appropriate to lift stay under initial CCAA order to permit C Inc. to cancel insurance — C Inc. appealed — Appeal allowed — Wording of s. 4(1) of PPSA encompasses return of unearned premiums — Not requiring that C Inc. register its interest conformed with other jurisdictions in order to create certainty and uniformity.

Table of Authorities

Cases considered by *Weiler J.A.*:

Air Vermont., Re (1984), 40 B.R. 335 (U.S. Bankr. D. Vt.) — considered

Auto-Train Corp., Re (1981), 9 B.R. 159 (U.S. Bankr. Dist. Col.) — considered

Big Squaw Mountain Corp., Re (1990), 122 B.R. 831 (U.S. Bankr. D. Me.) — referred to

Gimli Auto Ltd. v. Canada Campers Inc. (Trustee of) (1998), (sub nom. *Gimli Auto Ltd. v. BDO Dunwoody Ltd.*) 160 D.L.R. (4th) 373, 1998 CarswellAlta 441, (sub nom. *Gimli Auto Ltd. v. Canada Campers Inc. (Bankrupt)*) 219 A.R. 166, (sub nom. *Gimli Auto Ltd. v. Canada Campers Inc. (Bankrupt)*) 179 W.A.C. 166, 62 Alta. L.R. (3d) 40, [1999] 1 W.W.R. 459, 4 C.B.R. (4th) 254, 13 P.P.S.A.C. (2d) 378 (Alta. C.A.) — referred to

GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc. (2004), (sub nom. *TCT Logistics Inc., Re*) 70 O.R. (3d) 321, 6 P.P.S.A.C. (3d) 163, 45 B.L.R. (3d) 68, 185 O.A.C. 181, 48 C.B.R. (4th) 246, 238 D.L.R. (4th) 487, 2004 CarswellOnt 1283 (Ont. C.A.) — referred to

Ivaco Inc., Re (2003), 1 C.B.R. (5th) 204, 6 P.P.S.A.C. (3d) 261, 2003 CarswellOnt 6097 (Ont. S.C.J. [Commercial List]) — considered

Matter of Maplewood Poultry Co., Re (1980), 2 B.R. 550 (U.S. Bankr. D. Me.) — considered

RBS Industries, Inc., Re (1986), 67 B.R. 946 (U.S. Bankr. D. Conn.) — considered

Redfeather Fast Freight, Inc., Re (1979), 1 B.R. 446 (U.S. Bankr. D. Neb.) — considered

U.S. Repeating Arms Co., Re (1986), 67 B.R. 990 (U.S. Bankr. D. Conn.) — considered

Statutes considered:

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

Generally — referred to

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

Generally — referred to

Insurance Act, R.S.O. 1990, c. I.8

s. 138 — considered

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

s. 1(1) "proceeds" — considered

s. 4(1) — referred to

s. 4(1)(c) — considered

Uniform Commercial Code

Generally — referred to

s. 9 — referred to

s. 9-104 — referred to

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s. 9-104(g) — referred to

APPEAL by insurer from judgment reported at *Stelco Inc., Re* (2004), 49 C.B.R. (4th) 283, 12 C.C.L.I. (4th) 26, 6 P.P.S.A.C. (3d) 268, 2004 CarswellOnt 1882 (Ont. S.C.J. [Commercial List]), dismissing insurer's motion to lift stay under *Companies Creditors' Arrangment Act* to permit cancellation of insurance policy.

***Weiler J.A.*:**

1 This appeal raises two issues. First, when an insured has fully paid for a policy of insurance and assigns its right to receive a refund of any unearned premiums, is this a *security interest* that is *transferred*? Second, is it necessary to file notice of the security interest under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("PPSA") or is the security interest exempt from registration by virtue of a combination of s. 4(1)(c) of the PPSA and s. 138 of the *Insurance Act*, R.S.O. 1990, c. I.8, or at common law?

Facts

2 CAFO Inc. ("CAFO") finances insurance premiums for businesses under a standard form Premium Instalment Contract (a "PIC"). A purchaser will give an insurance company a down payment on the premiums due to the insurer. Under the PIC, the purchaser agrees to pay the rest of the premiums to CAFO over time and CAFO pays the insurer that remaining sum up front in exchange for an assignment of the right to receive payment of any amounts due from the insurer, such as unearned premiums. This assignment functions as security for the total amount that CAFO pays to the insurer.

3 Stelco Inc. ("Stelco") and CAFO signed two PICs. The first concerned insurance for which the total premiums including taxes was $8.8 million. Stelco made all payments under this PIC. Stelco and CAFO also signed a PIC on June 11, 2003, under which funds were advanced for an insurance policy with Royal Sun Alliance Insurance. The premiums and taxes totalled $1.8 million; the down payment was $0.36 million and the balance plus service charge totalled $1.5 million. Stelco defaulted on this PIC in March 2004.

4 Before the default, on January 29, 2004, Farley J. made an order under the *Companies' Creditors Arrangement Act* ("CCAA") staying all actions by Stelco's creditors. Notice of the PIC was not registered under the PPSA because it was believed, based on the practice in the industry, that under s. 138 of the *Insurance Act* and s. 4(1)(c) of the PPSA, notice was not required to perfect the security. CAFO brought a motion asking Farley J. to permit it to enforce its security under the PIC. However, Farley J. refused, holding that the effect of s. 138 and s. 4(1)(c) did not create a perfected security interest in unearned insurance premiums unless notice of the PIC was filed under the PPSA. In holding that s. 4(1)(c) does not apply to exempt premium financing contracts, the motion judge essentially affirmed the opinion he had previously expressed in obiter in *Ivaco Inc., Re* (2003), 1 C.B.R. (5th) 204 (Ont. S.C.J. [Commercial List]). Farley J. also suggested that a security interest might not arise under the PIC until the underlying insurance policy is cancelled, calling the timing of the security into question.

5 Before this appeal was heard, the insurance policy underlying the PIC expired such that CAFO could no longer claim any unearned premiums and such that Stelco no longer had an interest in the litigation. Therefore, this court made a representation order requiring CAFO to pay the costs of the appeal on a substantial indemnity basis and appointing counsel to oppose CAFO's arguments.

Analysis

6 Section 4(1) of the PPSA provides:

This Act does not apply,

. . . . .

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(c) to a transfer of an interest or claim in or under any policy of insurance or contract of annuity.

7 CAFO submits that the insured's right to obtain a refund of any unearned premiums coupled with the transfer of the insured's right to cancel the insurance policy operate so as to "transfer" an "interest" "in or under" any policy. As a result, the exemption created by s. 4(1) applies and exempts CAFO from the need to register its interest under the PPSA.

8 Farley J. rejected this submission. His most important reason for holding that CAFO's security interest does not fall within the exemption is that the right to a potential refund of unearned premium arises under the premium instalment financing agreement. He concluded at para. 17 of his judgment:

> It would seem to me that one would need stronger and more specific language to reasonably conclude that the context of s. 4(1)(c) of the PPSA was intended to encompass the return of unearned premiums since what one is looking at is the enforcement of rights under a financing agreement — and in theory, such a financing agreement could be used for any other item of commerce.

9 CAFO submits that the insurance premium financing agreement is not like other items of commerce. In most financings, security is taken in a property, most often a property that already exists. Here, CAFO's advance of funds creates the property: a fully paid-up insurance policy. Yet CAFO takes no interest in the underlying property. Nor does CAFO take any security against other assets owned by the insured. CAFO's only security is in the remaining unearned premiums on the policy. Items of commerce such as tangible wasting assets can be sold so that their value is "frozen" or preserved for all secured creditors. The insurance policy continues to run so that the value of the unearned premiums continues to decline and cannot be frozen by a quick sale.

10 In any event, s. 4(1)(c) deals specifically with transfers of interests or claims in insurance policies. It does not deal with "other items of commerce" and these are not exempted.

11 Insofar as the language of s. 4(1) is concerned, I am of the opinion that the wording does encompass the return of unearned premiums. The word "transfer" in s. 4(1)(c) includes an assignment. Black's Law Dictionary defines the word transfer as embracing:

> [E]very method — direct or indirect, absolute or commercial, voluntary or involuntary — of disposing of or parting with...an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.
>
> . . . . .
>
> The four methods of transfer are by [e]ndorsement, by delivery, by assignment, and by operation of law.

12 The next question is whether assignments of unearned premiums create an "interest" in property. In the concluding line of para. 13, Farley J. observed, "one may reasonably question the proposition that 'the unearned premiums come into existence when the policy is funded, not when the policies are cancelled'."

13 It would be more accurate to say that a right to any unearned premiums is created when the policy is funded but the realization of that interest is contingent on the happening of a future event, namely, the non-payment of premiums and the cancellation of the policy. Nevertheless, the right is an "interest." For example, Black's Law Dictionary defines an interest as an aggregate of rights and further states that an interest "refers to any one right, privilege, power or immunity." Were it otherwise, even if CAFO was subject to the PPSA, CAFO would have nothing to register until a default occurred and by then it would likely be too late for CAFO to become a secured creditor.

14 With respect to whether the transfer of an interest is "in or under" the policy of insurance as opposed to the premium financing contract, Black's Law Dictionary indicates that the preposition "in" does not only mean "contained in". "In" also means "under or based upon the law of". The premium financing company's right to a refund is under the insurance

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contract in the sense that the premium financing agreement identifies the insurance contract giving rise to the buyer's right to a refund: See Jacob Ziegel, in *Unearned Insurance Premiums as Security Interests under The Canadian Personal Property Security Acts*, 1 C.B.R. (5th) 173 at 179.

15 The wording of the exclusion in s. 4(1)(c) is clear and should be read as including the assignment of unearned premium under a policy of insurance.

16 My conclusion is also consistent with American jurisprudence. Farley J. considered six American cases that were cited to him: *Redfeather Fast Freight, Inc., Re*, 1 B.R. 446 (U.S. Bankr. D. Neb. 1979); *Matter of Maplewood Poultry Co., Re*, 2 B.R. 550 (U.S. Bankr. D. Me. 1980); *Auto-Train Corp., Re*, 9 B.R. 159 (U.S. Bankr. Dist. Col. 1981); *Air Vermont., Re*, 40 B.R. 335 (U.S. Bankr. D. Vt. 1984); *RBS Industries, Inc., Re*, 67 B.R. 946 (U.S. Bankr. D. Conn. 1986); and *U.S. Repeating Arms Co., Re*, 67 B.R. 990 (U.S. Bankr. D. Conn. 1986). He distinguished or rejected each of them, either because the particular state in question had specific PIC financing legislation or because the case contained little or no analysis and simply followed other cases. He also noted that the wording in Article 9-104 of the *Uniform Commercial Code (U.C.C.)* is slightly different than s. 4(1)(c) of the PPSA.

17 I agree with the application judge that Canadian courts should not simply follow American courts when interpreting similar legislative provisions. That said, I do not agree with him that the difference in wording between s. 4(1)(c) and the corresponding language in the American *U.C.C.'s* article 9-104(g) is significant. Article 9-104(g) provides:

> 9-104 This Article does not apply
>
> . . . . .
>
> (g) to a transfer of an interest in a claim in or under any policy of insurance, except as provided with respect to proceeds (Section 9-306) and priorities in proceeds (Section 9-312).

The application judge observed that that the *U.C.C.* expressly excludes from the scope of s.9-104 an insurance claim as proceeds whereas s. 4(1)(c) does not. However, the difference in wording is not significant because the definition of "proceeds" in s. 1(1) of the PPSA accomplishes the same result: See Ziegel, *supra*, at p. 178 of his article on Unearned Premiums, *supra*.

18 There are two reasons why resort should be had to American jurisprudence in this case. The PPSA in Ontario and in other Canadian common law jurisdictions is closely patterned on Art. 9 of the *U.C.C.* and American jurisprudence should, therefore, provide helpful guidance. Secondly, the PPSA was enacted in the various common law jurisdictions to make the law uniform and to facilitate business in more than one jurisdiction: *Gimli Auto Ltd. v. Canada Campers Inc. (Trustee of)* (1998), 219 A.R. 166 (Alta. C.A.) at paras. 15-16.

19 The values of certainty, uniformity, and ease of commerce are promoted if s. 4(1) of the PPSA is construed so as to exempt CAFO from having to register its interest in any unearned premiums. Such an interpretation is consistent with the purpose and objective of the personal property security regimes enacted across the country and in the United States: *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.* (2004), 70 O.R. (3d) 321 (Ont. C.A.) at para. 20.

20 Further not all of the cases can be distinguished on this basis. Cases from states that do not have such legislation include *U.S. Repeating Arms Co., Re, supra, Big Squaw Mountain Corp., Re*, 122 B.R. 831 (U.S. Bankr. D. Me. 1990) at 9-10, *Matter of Maplewood Poultry Co., Re, supra*, at 4 and *Auto-Train Corp., Re, supra*, at 8. In those cases, the first step was to hold that the transaction was excluded from the operation of Art. 9 of the *U.C.C.* registration regime and then to look at the common law to determine the result.

21 In Ontario, interpreting s. 4(1) as exempting CAFO from registering its right to receive any unearned insurance premium leads one to s. 138 of the *Insurance Act*. It states:

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138.(1) Where an insured assigns the right to refund of premium that may accrue by reason of the cancellation or termination of a contract of insurance under the terms thereof and notice of the assignment is given by the assignee to the insurer, the insurer shall pay any such refund to the assignee despite any condition in the contract, whether prescribed under this Act or not, requiring the refund to be paid to the insured or to accompany any notice of cancellation or termination to the insured.

(2) Where the condition in the contract dealing with cancellation or termination by the insurer provides that the refund shall accompany the notice of cancellation or termination, the insurer shall include in the notice a statement that in lieu of payment of the refund in accordance with the condition the refund is being paid to the assignee under this section.

22 This is not to say that s. 138 gives CAFO the right to priority over other secured lenders. To determine priorities, resort to the common law or to the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, would be necessary and that issue awaits another day. I do note, however, that in *Matter of Maplewood Poultry Co.*, *supra*, the court held that a transfer of the insurance policies in question there could not be accomplished without placing the transferee on notice of the existence of a premium finance agreement because the policies contained explicit references to the premium finance agreements. Thus the exemption from registration under Art. 9 of the *U.C.C.* did no harm to public policy.

23 CAFO argues that no harm is done to public policy in any event because it is the proceeds of any insurance policy rather than the unearned premiums that form part of a lender's security. Clearly, however, the lender would have an interest in knowing if the insurance policy could be cancelled and unearned premiums remitted to the financier of a PIC. The exemption from the PPSA and its policy of providing notice to lenders about the state of the assets in which they will take security should not to be taken as a licence to keep lenders in the dark about the actual state of affairs. It behooves CAFO, and those who finance premium insurance contracts, to ensure that the policies contain explicit references to the insurance premium finance agreement itself and to the right of cancellation. In any event, when a judge decides whether to exercise his or her discretion to lift the stay under the CCAA and allow a premium financing company to obtain a refund of unearned premium, one consideration would be whether the policy clearly contained an explicit reference to the premium finance agreement.

24 Accordingly, I would allow the appeal and hold that CAFO has an interest in the unearned premiums that were transferred to it by virtue of the PICs and that that security interest was exempt from registration by virtue of a combination of s. 4(1)(c) of the PPSA and s. 138 of the *Insurance Act*.

25 By previous order of this court costs of this appeal are to the respondent on a substantial indemnity basis. I would fix those costs in the amount of $26,000, inclusive of GST and disbursements.

***Moldaver J.A.*:**

I agree.

***MacFarland J.A.*:**

I agree.

Appeal allowed.

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TAB 4

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

Most Recently Cited in: Poseidon Concepts Corp., Re , 2018 CarswellAlta 951 | (Alta. Q.B., May 4, 2018)

R.S.C. 1985, c. C-36, s. 11

s 11. General power of court

Currency

11.General power of court

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

Amendment History

1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

Currency

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

End of Document

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TAB 5

2017 ONSC 5710
Ontario Superior Court of Justice [Commercial List]

Essar Steel Algoma Inc. (Re)

2017 CarswellOnt 15171, 2017 ONSC 5710, 283 A.C.W.S. (3d) 695

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA ULC), CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA (Applicants)

Hainey J.

Heard: September 1, 2017
Judgment: September 26, 2017
Docket: CV-15-11169-00CL

Counsel: Ashley Taylor, Sanja Sopic, for Applicants
Jeffrey Levine, for Cliffs Mining Company
Shawn Irving, for Certain Term Lenders and DIP Lenders
Clifton Prophet, Delna Contractor, for Monitor
Jennifer Teskey, for Board of Directors of Essar Algoma
Jeremy Opolsky, Davida Shiff, for Essar Global Fund Limited
Massimo Starnino, for USW and Local 2724
L. Joseph Latham, for Ad Hoc Committee of Essar Algoma Noteholders

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.d Effect of arrangement
XIX.3.d.i General principles
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General principles
Board of directors — Company obtained initial order under Companies' Creditors Arrangement Act (CCAA) — Prior to and immediately after commencement of CCAA proceedings, company's board of directors was responsible for management of company's affairs, and had approved special committee to examine business and financial alternatives available to company — At time, parent was contemplating bidding on company, and July endorsement was made that directed company not to provide confidential information to board and special committee — Company relied on endorsement to stop providing information to board and special committee, discontinue all board meetings and cease paying board's counsel fees — Company and monitor had since put into place governance agreements under which company made and implemented all decisions — Parent was no longer potential bidder — Board brought motion for order directing company to resume reporting to board, all regular meetings, pay arrears of board and special committee fees and include board counsel in discussions and pay counsel's fees — Motion granted in part — Under s. 11 of CCAA, court had broad discretion to make any order that was appropriate and in best interests of company, so formal removal

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of directors was not necessary — In making most recent endorsement, judge was well aware that neither board nor special committee had been operating since July endorsement, and recent endorsement was implicit approval of current arrangements — Recent endorsement dismissed motion for establishment of restructuring committee on basis judge was satisfied with existing governance arrangements — While parent was no longer prospective bidder, re-engaging board and special committee could cause disruption and jeopardize restructuring — Board's counsel's fees and disbursements were to be paid, and board's counsel was to be involved in discussions on potential liability of directors.

Table of Authorities

Statutes considered:

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

Generally — referred to

s. 11 — considered

s. 11.5 [en. 1997, c. 12, s. 124] — considered

MOTION by board of directors for order directing company to resume reporting to board, regular meetings, payment of counsel fees and involvement of counsel in discussions.

Hainey J.:

Background

1 The Board of Directors of Essar Steel Algoma Inc. (the "Board") move for an order:

(a) directing Essar Steel Algoma Inc. (the "Company") to resume regular reporting to the Company's Board, composed of Kalyan Ghosh, Naresh Kothari, Jatinder Mehra, and Kishore Mirchandani (the "Directors"), and its committees, including the special committee of the Board, composed of Naresh Kishore and Kishore Mirchandani (the "Special Committee");

(b) directing the Company to resume the regular holding of meetings of the Board, and its committees, including the Special Committee, and to provide all support and information necessary for the Board or the Special Committee to perform their respective governance functions;

(c) directing the Company to pay outstanding arrears of Board and Special Committee fees to the independent members of the Board;

(d) directing the Company to include counsel for the Board in any discussions relating to environmental or other matters where liability issues have arisen or may arise;

(e) directing the Company to comply with prior orders of the court with respect to the payment of the fees and disbursements of independent counsel to the Board; and

(f) ancillary relief necessary to ensure that the Board and its committees, including the Special Committee, are once again able to provide corporate oversight and governance to the Company.

2 The grounds for the motion are as follows:

(a) The Company sought and obtained an initial order under the *Companies' Creditors Arrangement Act*, as amended (the "CCAA") on November 9, 2015 (the "Initial Order").

(b) Both prior to and immediately after the commencement of the CCAA proceedings, the Board was responsible for the management of the business and affairs of the Company.

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15 The Board submits that its authority should not be usurped because the test for the removal of directors pursuant to s. 11.5 of the CCAA has not been met. Further, it submits that the July Endorsement does not provide the basis for either the removal of any of the Company's Directors or the suspension of the Board's normal governance activities. The Board also submits that its counsel should be paid its outstanding fees and disbursements and should be included in any discussions that may involve possible liability on the part of the Directors.

16 The Company and the Monitor submit that the July Endorsement and Newbould J.'s subsequent rulings make it clear that the Court has approved the Existing Governance Arrangements and there has been no change in circumstances justifying a change to those governance arrangements. They do not oppose paying the Board's counsel's fees and disbursements with respect to their potential environmental liability.

Analysis

17 Section 11 of the CCAA gives the court broad power to "as it may see fit, make any order that it considers appropriate in the circumstances". In my view, this allows me to make an order maintaining the *status quo* with respect to the Company's governance arrangement if I am satisfied that it is in the best interests of the Company and its stakeholders to do so. It is not necessary to remove any of the Directors pursuant to s. 11.5 of the CCAA to accomplish this.

18 I agree with the submissions of the Company and the Monitor that Newbould J. was well aware that neither the Board nor the Special Committee had been operating since his July Endorsement. I interpret his endorsement dated May 30, 2017 as implicit approval of this governance arrangement. At paras. 27 — 32 of his endorsement, Newbould J. made it clear that he was well aware of the Existing Governance Arrangements and that he did not consider the establishment of the proposed Restructuring Committee to be necessary to assist with the management of the Company.

19 In dismissing the motion to establish a Restructuring Committee Newbould J. concluded that "it makes little or no sense to create another body of restructuring advisors that will likely create disruption."

20 I have concluded from the wording of his endorsement that Newbould J. was satisfied with the Existing Governance Arrangements and that was the main reason that he declined to order the establishment of a Restructuring Committee.

21 Although the Parent is no longer a bidder for the Company and the Directors agree that the Board and the Special Committee will continue to have no involvement in the sale of the Company or its assets, I am concerned about the Monitor's view that "Any reengagement of Algoma's Board of Directors at this juncture in the restructuring could create conflict, uncertainty, and disruption with corresponding detrimental effects on the completion of a restructuring transaction". In my view, events have overtaken the time when the major concern was that the Parent was a bidder for the Company. The current state of the restructuring transaction and the Monitor's views persuade me that the *status quo* should be maintained and the Board and the Special Committee should not be reengaged as this could disrupt and jeopardize the successful completion of the Company's restructuring.

22 For these reasons I intend to follow the admonition of counsel to the Monitor, Mr. Prophet, who submitted that, "If it is not broken, don't fix it". It is clear from Newbould J.'s endorsement and the evidentiary record before me that the Company's Existing Governance Arrangements are not broken.

23 The Board's motion to reengage the Board and the Special Committee is therefore dismissed.

24 I do, however, agree with the Board's submission that its counsel should be paid its fees and disbursements for representing the Directors in connection with their potential liability as members of the Board. This is not to be confined to only potential environmental liability but to any type of potential liability the Directors might face. Section 42 of the Initial Order mandates this in any event. Board counsel is also to be included in any discussions relating to any potential liability on the part of the Directors. The Board's motion with respect to this issue is therefore granted.

Conclusion

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25 The Board's motion to reengage the Board and Special Committee is dismissed and its motion to require payment of its counsel's fees and disbursements and to involve its counsel in discussions concerning the Directors' potential liability is granted

Costs

26 As there has been divided success on this motion, I make no order as to costs.

Order accordingly.

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TAB 6

2016 ABQB 665
Alberta Court of Queen's Bench

Lightstream Resources Ltd., Re

2016 CarswellAlta 2278, 2016 ABQB 665, [2017] A.W.L.D. 3, [2017] A.W.L.D. 5, 273 A.C.W.S. (3d) 474, 41 C.B.R. (6th) 204

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

And In the Matter of a Plan of Compromise or Arrangement of Lightstream Resources Ltd, 1863359 Alberta Ltd, LTS Resources Partnership, 1863360 Alberta Ltd and Bakken Resources Partnership

A.D. Macleod J.

Heard: November 15-16, 2016
Judgment: November 25, 2016
Docket: Calgary 1601-12571

Counsel: M. Barrack, R. Bell, K. Bourassa, for Lightstream
T. Pinos, C. Simard, S. Voudouris, S. Kerzne, for FrontFour & Mudrick
K. Kashuba, for First Lien Creditors
J. Wadden, D. Conklin, for Apollo Management LP & GSO Capital Partners

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.A General principles

Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court
Plaintiffs, two unsecured creditors of debtor company, made oppression claims under Alberta Business Corporations Act (ABCA) seeking order forcing exchange of securities with debtor on same terms previously afforded to two other creditors who had exchanged unsecured notes for secured notes (Secured Notes Transaction) — Debtor sought Companies' Creditors Arrangement Act (CCAA) protection — Plaintiffs applied for order to exclude their claims from CCAA stay and have them heard before any CCAA proceedings — Hearing was held to answer two preliminary questions — In context of CCAA proceedings, court has jurisdiction to recognize plaintiffs' claim as secured claim after granting of Initial Order and to make order varying Secured Notes Transaction and requiring debtor to issue additional Secured Notes to remedy alleged oppressive conduct, but that jurisdiction is limited by scheme of CCAA — Discretion to make order recognizing plaintiffs' claim as secured claim and varying Secured Notes Transaction not exercised on facts pleaded — Even if oppression claim was made out, appropriate remedy was damages and would not include equitable

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remedy sought — It would be contrary to purpose of CCAA to grant equitable remedy which would adversely affect other creditors — Plaintiffs were bound to fail and there was no issue to be tried — To grant remedy sought would be contrary to law.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — General principles

Plaintiffs, two unsecured creditors of debtor company, made oppression claims under Alberta Business Corporations Act (ABCA) seeking order forcing exchange of securities with debtor on same terms afforded by debtor to two other creditors who had previously exchanged unsecured notes for secured notes — Debtor sought Companies' Creditors Arrangement Act (CCAA) protection — Plaintiffs applied to exclude their claims from CCAA stay and have them heard before any CCAA proceedings — Hearing was held to answer two preliminary questions — In context of CCAA proceedings, court has jurisdiction to recognize plaintiffs' claims as secured claims and to make order varying Secured Notes Transaction and requiring debtor to issue additional Secured Notes to remedy alleged oppressive conduct, but that jurisdiction is limited by scheme of CCAA — Discretion to make order recognizing plaintiffs' claim as secured claim and varying Secured Notes Transaction not exercised on facts pleaded — Plaintiffs were bound to fail and there was no issue to be tried — While there were representations made by debtor to unsecured creditors that it would be fair business practice to offer exchange transaction to all unsecured noteholders, debtor ultimately concluded that there was no obligation to do so — Section 242(3)(e) of ABCA empowers court to order exchange of securities, but in doing so, court should consider all factors affecting fairness — Here, remedy would adversely affect other creditors because they insisted on exclusivity and insisted that others could participate only later and on less favourable terms — Granting remedy sought would adversely affect remaining unsecured note holders, would impose debt on debtor unilaterally and would be contrary to scheme and object of CCAA — Even if oppression claim was made out, appropriate remedy was damages and would not include equitable remedy sought.

Table of Authorities

Cases considered by *A.D. Macleod J.*:

BCE Inc., Re (2008), 2008 CarswellQue 12595, 2008 CarswellQue 12596, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 383 N.R. 119, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 301 D.L.R. (4th) 80, 2008 SCC 69, (sub nom. *BCE Inc. v. 1976 Debentureholders*) [2008] 3 S.C.R. 560 (S.C.C.) — followed

Barnabe v. Touhey (1995), 10 E.T.R. (2d) 68, 37 C.B.R. (3d) 73, 26 O.R. (3d) 477, 1995 CarswellOnt 1167 (Ont. C.A.) — followed

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — followed

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2008), 2008 SCC 14, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 86 Alta. L.R. (4th) 1, [2008] 5 W.W.R. 195, (sub nom. *Lameman v. Canada (Attorney General)*) 372 N.R. 239, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, [2008] 2 C.N.L.R. 295, (sub nom. *Lameman v. Canada (Attorney General)*) 429 A.R. 26, (sub nom. *Lameman v. Canada (Attorney General)*) 421 W.A.C. 26, (sub nom. *Canada (Attorney General) v. Lameman*) [2008] 1 S.C.R. 372 (S.C.C.) — referred to

Pembina Pipeline Corp. v. CCS Corp. (2014), 2014 ABCA 390, 2014 CarswellAlta 2106 (Alta. C.A.) — referred to

Shefsky v. California Gold Mining Inc. (2016), 2016 ABCA 103, 2016 CarswellAlta 649, 31 Alta. L.R. (6th) 1, [2016] 7 W.W.R. 423, 399 D.L.R. (4th) 290, 55 B.L.R. (5th) 198, 616 A.R. 290, 672 W.A.C. 290 (Alta. C.A.) — referred to

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

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

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U.S. Steel Canada Inc., Re (2016), 2016 ONCA 662, 2016 CarswellOnt 14104, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450 (Ont. C.A.) — considered

Windsor v. Canadian Pacific Railway (2014), 2014 ABCA 108, 2014 CarswellAlta 395, [2014] 5 W.W.R. 733, 94 Alta. L.R. (5th) 301, 371 D.L.R. (4th) 339, 56 C.P.C. (7th) 107, (sub nom. *Windsor v. Canadian Pacific Railway Ltd.*) 572 A.R. 317, (sub nom. *Windsor v. Canadian Pacific Railway Ltd.*) 609 W.A.C. 317 (Alta. C.A.) — referred to

Woodward's Ltd., Re (1993), 77 B.C.L.R. (2d) 332, 100 D.L.R. (4th) 133, 1993 CarswellBC 75 (B.C. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 242 — referred to

s. 242(3)(e) — considered

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

Generally — referred to

s. 11 — considered

s. 19(1) — considered

s. 42 — considered

RULING on preliminary questions regarding oppression claim against debtor company under *Alberta Business Corporations Act* and proceedings under *Companies' Creditors Arrangement Act*.

A.D. Macleod J.:

Introduction

Lightstream Resources Ltd and its subsidiaries ("Lightstream") are under creditor protection pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") by virtue of an Order of this Court dated September 26, 2016. Lightstream is an oil producer which sought creditor protection because of protracted low oil prices which it, like many others, has found financially challenging.

2 On October 11, 2016 a comeback hearing took place and with respect to claims by Mudrick Capital Management ("Mudrick") and FrontFour Capital Corp ("FrontFour") I directed that this hearing be held, the purpose of which is to answer two preliminary questions related to their claims. Mudrick and FrontFour are sophisticated investment firms.

3 Their oppression claims invoke Section 242 of the *Alberta Business Corporations Act*, RSA 2000, c B-9 (the "*ABCA*"). They are both asking this Court to order an exchange of securities with Lightstream as if they had participated in an earlier transaction with two other creditors who had exchanged unsecured notes for secured notes and provided $200 million US dollars to Lightstream in July 2015 (the "Secured Notes Transaction").

4 Mudrick and FrontFour seek the Order pursuant to subsection (3)(e) of section 242 which provides that, to rectify oppressive conduct, the Court may order an issue or exchange of securities.

5 The two questions are:

. In the context of CCAA proceedings is there jurisdiction in the Court to recognize the Plaintiffs' claim as secured claims after the granting of the Initial Order and to make an order varying the Secured Notes Transaction and requiring Lightstream to issue additional Secured Noted to remedy alleged oppressive conduct?

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4 While this was not framed as a summary dismissal application it proceeded like one. Lightstream, Mudrick and FrontFour along with Apollo and GSO put forward that part of the record upon which they rely. This included affidavits by representatives of Mudrick and FrontFour, excerpts from questioning, and documents produced as well as answers to undertakings. I received extensive briefs and was favored with oral presentations over two days.

42 I think it is appropriate to apply the same test with respect to the two questions as the Court would apply in a summary judgment application. That test has been variously described as whether there is a genuine issue to be tried or whether the plaintiffs are bound to fail. As was appropriate, I am confident that each side put its best foot forward with respect to the existence or non-existence of material issues to be tried. *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14 (S.C.C.) see also *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) and *Pembina Pipeline Corp. v. CCS Corp.*, 2014 ABCA 390 (Alta. C.A.).

43 I will outline the requirements necessary to apply the oppression remedy recognizing this Court is being asked to grant a particular remedy in the context of ongoing *CCAA* proceedings.

44 The function of the supervising judge in this context is to supervise matters during the course of the stay of proceedings and this includes adjudicating with respect to claims such as the ones advanced here by Mudrick and FrontFour. They argue that as of the date of the exchange transaction in July 2015 and before the *CCAA* proceedings they were entitled to the remedy sought, i.e. to participate in the secured notes transaction on the same basis as those which did. Implicit in their arguments is that, if successful on this application and the subsequent trial, their claims as secured creditors can be dealt with under section 19(1) of the *CCAA*.

CCAA Process

45 The *CCAA* is a broadly worded remedial piece of legislation. The Supreme Court in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) wrote about the broad scope of the *CCAA* at paragraph 59:

> The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

46 The *CCAA's* general language provides the Court with discretion to make orders to further the *CCAA's* purpose. The source of much of the Court's discretion originates from section 11 of the *CCAA* and is supplemented by other statutory powers that may be imported into the section 11 discretion by way of section 42: *Stelco Inc., Re*, [2005] O.J. No. 1171 (Ont. C.A.) at para 33.

47 Section 11 states:

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

48 Under section 11, the court may issue any order that it considers appropriate in the circumstances. Our Supreme Court addresses appropriateness in this context in *Century Services* at para 70:

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

49 The Ontario Court of Appeal addressed the scope of section 11 in *Stelco Inc., Re*, at para 44. The Court acts as a referee and maintains a level playing field while the company and its creditors attempt to achieve a compromise. While the Court has much discretion, it is limited by the remedial object of the *CCAA* and the Court must not usurp the roles of the directors or management.

50 The Ontario Court of Appeal revisited the discussion of the scope of section 11 in *U.S. Steel Canada Inc., Re*, 2016 ONCA 662 (Ont. C.A.) and made the following comment, at para 82:

> There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement.

5 An essential element of negotiating a compromise or arrangement is the stay of proceeding associated with the initiation of a *CCAA* proceeding. This allows for a status quo as between creditors so that the insolvent company has an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor: *Woodward's Ltd., Re*, [1993] B.C.W.L.D. 769 (B.C. S.C.) [1993 CarswellBC 75 (B.C. S.C.)] at para 17. Any order under section 11 should be made with the view to facilitating a fair compromise or an arrangement.

The Oppression Remedy under the CCAA

52 Section 42 of the *CCAA* allows for the import of remedies from other statutory schemes:

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

53 FrontFour and Mudrick take the position that the oppression remedy pursuant to section 242 of the *ABCA* may be imported into a *CCAA* proceeding by way of section 42 of the *CCAA*. *Stelco Inc., Re* describes this proposition in detail at paragraph 52:

> The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 [now s. 42] as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 [now s. 42] mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances. [emphasis added]

54 While the Ontario Court of Appeal in *Stelco Inc., Re* addresses the *CCAA* in the context of the *CBCA*, the same logic applies to the *ABCA*. I also agree that, while the oppression remedy *can* be a tool under the *CCAA*, it should be utilized in only the appropriate circumstances. Circumstances that qualify as appropriate will be those that accord with the purpose and objectives of the *CCAA* process. Thus, while this Court has jurisdiction to apply the oppression remedies the exercise of this discretion is limited to cases in which the remedy serves the purpose and scheme of the Court's function under the *CCAA*. This analysis will usually involve two questions. Was the conduct oppressive and, if so, what is the appropriate remedy in the context of the *CCAA*?

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TAB 7

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada v. Callidus Capital Corporation | 2017 FCA 162, 2017 CarswellNat 3599, 414 D.L.R. (4th) 132, 51 C.B.R. (6th) 15, 281 A.C.W.S. (3d) 209, [2017] G.S.T.C. 60 | (F.C.A., Jul 27, 2017)

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

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

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

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

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

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency
Related Abridgment Classifications
Tax
I General principles
  I.5 Priority of tax claims in bankruptcy proceedings
Tax
III Goods and Services Tax
  III.14 Collection and remittance
    III.14.b GST held in trust
Headnote
Tax --- Goods and Services Tax — Collection and remittance — GST held in trust
Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA

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when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

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

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

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

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

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naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

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

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

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

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

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

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

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

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being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

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

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

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

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

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

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

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

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

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

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

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes

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d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

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***Deschamps J.*:**

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

1. Facts and Decisions of the Courts Below

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

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

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking

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both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

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

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

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

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

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

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

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

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

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

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

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

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

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

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64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

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

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

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

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

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

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

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing*

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Ltd., Re (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

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

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

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

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

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

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

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent

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of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

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

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

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

3.4 Express Trust

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

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

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

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

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

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TAB 8

Alberta Statutes
Judicature Act
Part 1 — Jurisdiction of the Court (ss. 2-9)

R.S.A. 2000, c. J-2, s. 8

s 8. General jurisdiction

Currency

8.General jurisdiction

The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

Currency

Alberta Current to Gazette Vol. 113:18 (September 30, 2017)

End of Document

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TAB 9

2012 ABQB 353
Alberta Court of Queen's Bench

P. (R.) v. V. (R.)

2012 CarswellAlta 920, 2012 ABQB 353, [2012] A.W.L.D. 3488, [2012] A.W.L.D. 3539, [2012] W.D.F.L. 3739, 217 A.C.W.S. (3d) 644, 541 A.R. 207, 70 Alta. L.R. (5th) 173

R.P., Applicant (Defendant) and R.V., Respondent (Plaintiff)

E.A. Hughes J.

Heard: June 2, 24, 2011; July 12, 2011; October 27, 2011
Judgment: May 25, 2012
Docket: Calgary FL01-08934

Counsel: Bernadette L. Labrie for Applicant / Defendant
Mr. V., Respondent / Plaintiff for himself
D.K. Colborne for Child, M.

Subject: Family; Civil Practice and Procedure
Related Abridgment Classifications
Family law
XVIII Restraining orders
Remedies
II Injunctions
II.1 Rules governing injunctions
II.1.b Jurisdiction of court
II.1.b.i Whether court having jurisdiction
II.1.b.i.C Miscellaneous

Headnote

Family law --- Restraining orders

Parties lived together, had child in 1998 and separated in 2002 when mother and child left home — Mother alleged that father was verbally and physically abusive — Pursuant to 2004 court order child was in shared parenting, alternately between parties for months at time — Mother lived in Philippines several months of year — Child told mother that father caned him, threatened to cane him, and forced him to shower with father — Child did not want to have anything to do with father — Interim restraining order granted in March 2011 was extended — Mother applied for restraining order against father — Application granted — Father's method of discipline when he assisted child in studies included scolding, yelling, withholding privileges but also caning and threats of caning — Caning and threats of caning met test for granting of permanent restraining order — It was in child's best interests to have healthy relationship with both parties — Permanent restraining order was ordered to end July 31, 2012 but in light of father's caning and threats, shared parenting provision of 2004 court order was stayed until further court order.

Remedies --- Injunctions — Rules governing injunctions — Jurisdiction of court — Whether court having jurisdiction — Miscellaneous

Jurisdiction to grant restraining order — Parties lived together, had child in 1998 and separated in 2002 when mother and child left home — Mother alleged that father was verbally and physically abusive — Pursuant to 2004 court order child was in shared parenting, alternately between parties for months at time — Child told mother that father caned him and threatened to cane him, and forced him to shower with father — Child did not want to have anything to do with father — Interim restraining order granted in March 2011 was extended — Mother applied for restraining order against

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father, and issue arose as to court's jurisdiction to grant order — Court's inherent jurisdiction and authority to grant equitable relief was codified in Judicature Act — Test to grant restraining order under common law was broader — Test before granting restraining order was whether applicant sufficiently demonstrated reasonably held and legitimate fear for applicant's safety or safety of person under his or her care — Father's method of discipline when he assisted child in studies included scolding, yelling, withholding privileges but also caning and threats of caning — Caning and threats of caning met test for granting of permanent restraining order — Permanent restraining order was ordered to end July 31, 2012 but in light of father's caning and threats, shared parenting provision of 2004 court order was stayed until further court order.

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A. (N.D.) v. A. (K.B.) (2009), (sub nom. *N.D.A. v. K.B.A.*) 467 A.R. 120, 2009 CarswellAlta 69, 2009 ABQB 26, 63 R.F.L. (6th) 343 (Alta. Q.B.) — considered

Alberta Soccer Assn. v. Charpentier (2010), 2011 ABQB 3, 2010 CarswellAlta 2550 (Alta. Q.B.) — referred to

B.M.W.E. v. Canadian Pacific Ltd. (1996), 50 C.P.C. (3d) 128, [1996] 2 S.C.R. 495, (sub nom. *Brotherhood of Maintenance of Way Employees v. Canadian Pacific Ltd.*) 78 B.C.A.C. 162, (sub nom. *Brotherhood of Maintenance of Way Employees v. Canadian Pacific Ltd.*) 128 W.A.C. 162, 21 B.C.L.R. (3d) 201, 136 D.L.R. (4th) 289, 198 N.R. 161, (sub nom. *Canadian Pacific Ltd. v. B.M.W.E.*) 96 C.L.L.C. 210-040, 45 Admin. L.R. (2d) 95, 1996 CarswellBC 1788, 1996 CarswellBC 1789 (S.C.C.) — considered

Bank of Montreal v. Valerio (2009), 480 A.R. 393, 2009 ABQB 578, 2009 CarswellAlta 1514 (Alta. Q.B.) — referred to

Fuda v. Fuda (2011), 2011 ONSC 154, 2011 CarswellOnt 146 (Ont. S.C.J.) — followed

Goebel v. Edmonton (City) (2004), 2004 CarswellAlta 187, 2004 ABCA 86, 346 A.R. 275, 320 W.A.C. 275, 41 C.L.R. (3d) 99 (Alta. C.A.) — referred to

Khara v. McManus (2007), 2007 CarswellOnt 3159, 2007 ONCJ 223 (Ont. C.J.) — considered

Qureshi v. Gooch (2005), 2005 BCSC 1584, 2005 CarswellBC 2707, 37 R.P.R. (4th) 262 (B.C. S.C.) — followed

R. c. Caron (2011), 2011 CarswellAlta 81, 2011 CarswellAlta 82, 2011 SCC 5, 14 Admin. L.R. (5th) 30, 97 C.P.C. (6th) 205, [2011] 4 W.W.R. 1, (sub nom. *R. v. Caron*) 499 A.R. 309, (sub nom. *R. v. Caron*) 514 W.A.C. 309, [2011] 1 S.C.R. 78, (sub nom. *R. v. Caron*) 264 C.C.C. (3d) 320, (sub nom. *R. v. Caron*) 411 N.R. 89, 37 Alta. L.R. (5th) 19, (sub nom. *R. v. Caron*) 329 D.L.R. (4th) 50 (S.C.C.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Sweiss v. Alberta Health Services (2009), 483 A.R. 340, 2009 ABQB 691, 2009 CarswellAlta 1925, 314 D.L.R. (4th) 474, 15 Alta. L.R. (5th) 283 (Alta. Q.B.) — referred to

Switzer v. Gruenewald (1997), 1997 CarswellAlta 688, [1998] 4 W.W.R. 158, 55 Alta. L.R. (3d) 117, 207 A.R. 391 (Alta. Q.B.) — referred to

Yaghi v. WMS Gaming Inc. (2003), 18 Alta. L.R. (4th) 280, 41 C.P.C. (5th) 274, [2004] 2 W.W.R. 657, 2003 ABQB 680, 2003 CarswellAlta 1150 (Alta. Q.B.) — referred to

Statutes considered:

Children's Law Reform Act, R.S.O. 1990, c. C.12

s. 35(1) — referred to

Domestic Violence and Stalking Act, S.M. 1998, c. 41

s. 2 — referred to

s. 12(1) — referred to

Family Law Act, R.S.O. 1990, c. F.3

s. 46(1) — referred to

Judicature Act, R.S.A. 2000, c. J-2

s. 8 — referred to

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s. 13(2) — referred to

Protection Against Family Violence Act, R.S.A. 2000, c. P-27

Generally — referred to

s. 1(1)(e) "family violence" — considered

s. 1(1)(e)(ii) — considered

s. 4 — referred to

Supreme Court of Judicature Act, 1873 (36 & 37 Vict.), c. 66

s. 25(8) — referred to

Victims of Domestic Violence Act, S.S. 1994, c. V-6.02

s. 2(d) — referred to

s. 7 — referred to

Victims of Family Violence Act, R.S.P.E.I. 1988, c. V-3.2

s. 2 — referred to

s. 6 — referred to

s. 7 — referred to

APPLICATION by mother for restraining order against father.

***E.A. Hughes J.*:**

Introduction

1 R. P. (Ms. P.), the Applicant, sought a Restraining Order Without Notice in a Family Law Situation on behalf of M.V. (M.), her son, against his father, R.V. (Mr. V.). An interim restraining order was granted on March 23, 2011 and was extended on a number of subsequent court dates. On May 11, a one day *viva voce* hearing was set for June 3, 2011 for the contested application for a permanent restraining order.

2 Prior to the hearing date, counsel was appointed by the Court to represent the interests of the child M..

3 On June 3, the hearing commenced and continued on June 24, July 12 and October 27 with the interim restraining order being extended on each date.

4 I find the applicant Ms. P. has established the necessity of a restraining order on behalf of M..

Background

5 Ms. P. and Mr. V. are the parents of M., a 13 year old boy born in 1998. Some background respecting the family relationship is necessary.

6 Ms. P., who was born and raised in the Philippines, met Mr. V. in 1990. Mr. V., a professional engineer who is now retired, was educated in England before coming to Canada. Mr. V., who is 66 years old, appears to be much older than Ms. P..

7 Mr. V. is a much physically larger individual than Ms. P.. Indeed Mr. V. would be a physically imposing individual to any person of Ms. P's height and build.

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8 The parties eventually lived together in an adult interdependent relationship but separated July 30, 2002 when Ms. P. and M. left the family home in the early morning hours while Mr. V. slept. Ms. P. had received counselling from the Sheriff King Centre prior to her deciding to leave. Ms. P. testified that from approximately 1994 and on, Mr. V. was controlling of her, verbally abusive and occasionally physically abusive. Mr. V. in his evidence acknowledged "yelling and scolding" Ms. P. during their relationship but denied physically assaulting Ms. P..

9 After Ms. P. left the home, an action was commenced in this Court respecting parenting of M.. Between 2002 - 2003 the court proceedings appear to have been acrimonious but, in June, 2003 an agreement was reached between the parties and confirmed in May 2004, that Ms. P. and Mr. V. would share parenting of M.. As time progressed, M. was parented for a number of months at a time by one of his parents, and then the other. This was the state of affairs in 2010.

10 That year, Ms. P. was in the Philippines at the beginning of the year and M. was parented by his father from January, 2010 to June 21, 2010. On June 21, M. went to live with his mother at her home after she returned to Canada. M. remained at his mother's home until January 11, 2011 when he returned to his father's home for approximately a month before returning again to his mother's home on February 17, 2011.

11 During the time period June 21, 2010 to January, 2011 M. is alleged to have told his mother, that Mr. V. caned him and threatened to cane him. These same allegations and others were made by M. to his mother and his mother's husband after February 17, 2011. All the allegations give rise to this application.

Restraining Orders at Common Law

12 In the case at bar Ms. P. seeks a permanent restraining order against Mr. V.. By way of clarity, when I use the term "permanent" I am referring to an order granted after the parties' legal rights have been fully determined by a court. In this Court, it is not uncommon to see permanent restraining orders granted for a one year time period.

13 As Ms. P. seeks a common law restraining order rather than a Queen's Bench protection order pursuant to the *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 4 (*PAFVA*), I will first set out the Court's authority to grant the relief requested, and then discuss the test an applicant must satisfy before the Court will grant a restraining order.

Source of Authority

14 A restraining order in the family law context is a form of injunction. See Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf edition, 2012, (Toronto, Ontario: Canada Law Book) at 5-26.

15 I.C.F. Spry in *Equitable Remedies*, 6th ed. (Agincourt, Ontario: Carswell, 2001) at 322 writes: "An injunction is an order, historically of an equitable nature, restraining the person to whom it is directed from performing a specified act..." Sharpe observes at 1-1 that "...the heart of the injunctive process is the prohibition, permanently or temporarily, of the wrongful conduct or conduct which would interfere with the rights of another."

16 The common law jurisdiction to grant a restraining order flows from the inherent jurisdiction of provincial superior courts to hear any matter properly coming before it, in combination with the general power of those courts to grant injunctive relief as an equitable remedy.

17 In *R. c. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 (S.C.C.) at para. 24, the Supreme Court of Canada quoted with approval I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, in describing inherent jurisdiction as:

> "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so" ... These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior

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> court of law" ... to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner". [citations omitted]

18 In *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.), at 499, the Supreme Court held that the authority to grant an injunction is based upon this inherent jurisdiction:

> The governing principle on this issue is ... the courts retain a residual discretionary power to grant interlocutory relief such as injunctions, a power which flows from the inherent jurisdiction of the court over interlocutory matters: *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, a p. 727.

19 While the above quotation expressly refers to interlocutory relief, the scope of inherent jurisdiction is broader than that. The discretionary power to grant all manner of injunctions is an equitable remedy that dates back to English law: Spry at 323 and 328-329.

20 This Court's inherent jurisdiction and authority to grant equitable relief has been codified in the Alberta *Judicature Act*, R.S.A. 2000, c. J-2, ss. 8 and 13(2). See *Goebel v. Edmonton (City)*, 2004 ABCA 86, 346 A.R. 275 (Alta. C.A.) at para. 9; *Alberta Soccer Assn. v. Charpentier*, 2011 ABQB 3 (Alta. Q.B.) at para. 9; *Bank of Montreal v. Valerio*, 2009 ABQB 578, 480 A.R. 393 (Alta. Q.B.) at para. 30; *Sweiss v. Alberta Health Services*, 2009 ABQB 691, 483 A.R. 340 (Alta. Q.B.) at para. 33; *Yaghi v. WMS Gaming Inc.*, 2003 ABQB 680 (Alta. Q.B.) at para. 21, (2003), [2004] 2 W.W.R. 657 (Alta. Q.B.); *Switzer v. Gruenewald* (1997), 207 A.R. 391 (Alta. Q.B.) at para. 8. See also *Caron, supra*, at para. 34. Notably, s. 13(2) specifically refers to injunctive powers in language that virtually repeats the equivalent provision in England's original *Supreme Court of Judicature Act*, 1873 (UK), 36 & 37 Vict., c. 66, s. 25(8).

The Test

21 The next question is what test must an applicant satisfy before a court should exercise its discretion to grant a restraining order? The general principle derived from ss. 8 and 13(2) of the *Judicature Act* is whether a court, after having considered all the circumstances, is satisfied that granting an injunction will do justice between the parties. However, little else has been written on the issue.

22 Within the ambit of doing justice between the parties, different considerations underlie a court's exercise of equitable discretion according to the nature of the remedy sought. For example, in the case of interlocutory stay or an interim injunction application, the tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at 334, will ordinarily apply. However, where as here an applicant seeks a permanent injunction, a court must first determine the entire extent of the parties' legal rights, which in turn informs the court's decision on whether to grant an equitable remedy.

23 In *Qureshi v. Gooch*, 2005 BCSC 1584 (B.C. S.C.) at paras. 28-29, the British Columbia Supreme Court set out a series of factors relevant to issuing a permanent injunction in the context of breach of contract. While the case at bar implicates a different legal right, i.e. the Applicant's freedom to remain unfettered by harassing, intimidating, threatening, or violent conduct, I accept the general principles in *Qureshi*:

> 28 The issuance of a permanent injunction is a discretionary order. In determining whether it is appropriate to grant a permanent injunction the court looks at the nature of the rights that the injunction is sought to protect and the surrounding circumstances, and attempts to balance the equities between the parties: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.).
>
> 29 In determining whether it is appropriate to order a permanent injunction courts have considered a number of factors including:

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TAB 10

1972 CarswellOnt 1010
Ontario Court of Appeal

80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.

1972 CarswellOnt 1010, [1972] 2 O.R. 280, [1972] O.J. No. 1713, 25 D.L.R. (3d) 386

80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et al.

MacKay, J.A., McGillivray, J.A., Brooke, J.A.

Oral reasons: February 25, 1972
Docket: None given.

Counsel: B. Chernos, for plaintiff, appellant
R.G. Lord, for defendants, respondents

Subject: Property; Insolvency; Contracts

Headnote

Sale of Land --- Agreement of purchase and sale — Assignment of rights and obligations under contract — By purchaser — Rights as between assignee and vendor

Purchaser assigning agreement — Registration of assignment on title to secure return of deposit — Application to expunge registration — Jurisdiction of Court — Judicature Act, R.S.O. 1970, c. 228, s. 19(1).

Plaintiff agreed to sell lands to F. but the transaction was not closed. F. assigned the agreement to C. and the assignment was registered on the title to the lands. Plaintiff subsequently agreed to sell the lands to another party and applied for an order expunging the assignment from the title. F. and C. counterclaimed asserting a lien against the property to secure return of the deposit paid to plaintiff. Plaintiff had offered adequate security for return of the deposit. Held, the application should be allowed. In view of the security offered, plaintiff had the right to have its title cleared. S. 19(1) of the Act gave the Court jurisdiction to make a mandatory order, even though interlocutory, directed to a party to the action, if it was just and convenient to do so, and in this way to require defendants to do such acts as might be necessary to effectively remove the assignment.

***Brooke, J.A.*:**

1 This is an appeal from the order of the Honourable Mr. Justice Wright dated January 26, 1972, whereby he dismissed the plaintiff's application for an order expunging or vacating the assignment in writing of an agreement of purchase and sale from the title to the plaintiff's lands upon the plaintiff furnishing adequate security in lieu of the interest in land, if any, created by the assignment.

2 The action arises out of an agreement of purchase and sale dated December 3, 1968, between the plaintiff and the defendant Fundy Bay Builders Limited of the plaintiff's lands which transaction was to close on June 30, 1970, but did not close. By assignment in writing dated December 30, 1968, the defendant Fundy Bay Builders Ltd. assigned the agreement to the defendant Cape Jones Securities Limited and this assignment was registered on the title to the plaintiff's lands on January 10, 1969, in the Registry Office for the Registry Division of the East and West Riding of the Country of York.

3 On October 2, 1970, the plaintiff commenced this action and the defendants served their defence and counterclaim on March 14, 1971. By an agreement in writing dated both February 25, 1971, and March 1, 1971, the plaintiff agreed to sell the lands in question for $415,000. The lands are subject to a first mortgage in the sum of $205,000 and this was so

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at the time of the proposed sale to the defendant Fundy Bay Builders Ltd. As a part of the purchase price in the pending transaction the plaintiff has agreed to take back a second mortgage of $130,000 (a sum which is $30,000 in excess of the amount claimed by the defendant in the pending action as a return of its deposit).

4 The material before Wright, J., made it clear that if the assignment in question is not removed from the title to the plaintiff's lands, the pending transaction will abort. The plaintiff proposes then that the second mortgage in the sum of $130,000 which bears interest at the rate of 8 $^{1}/_{2}$% per annum and matures on June 30, 1975, be held in trust pending the determination of the action in place of, and as security for, the lien which the defendants contend they are entitled to in the sum of $100,000 to secure the return of the deposit moneys which they have paid. It is significant that the lien, if it exists, was subsequent to the first mortgage above referred to.

5 Briefly, the action can be described as an action in which the plaintiff claims for an order to expunge the assignment of the agreement of purchase and sale from its title and for a judgment declaring that the defendants have no interest in the land. The plaintiff claims that the defendants were in default under the agreement and not entitled to the return of the deposit moneys and that the plaintiff terminated the contract. The defendants defend alleging the agreement of purchase and sale was unenforceable as it was void for uncertainty and, alternatively, that the plaintiff had failed to fulfill certain of its covenants in the agreement and, finally, that the defendants were ready, willing and able to carry out the transaction but that the plaintiff elected to terminate it and the defendants are therefore entitled to be repaid the deposit moneys together with interest.

6 The defendants assert a lien against the property to secure the return of the deposit moneys. By way of counterclaim the defendants claim for the lien and the return of the deposit moneys and interest and damages.

7 It appears Wright, J., believed that the security which was proposed was adequate but found that he had no jurisdiction to require the defendants to look to such security for satisfaction of their claim in lieu of the assignment. His brief reasons for judgment are as follows:

> Although I agree with Mr. Teplitsky that what he offers is reasonably better than what the defendants now have, I consider that I have no power to force it on an unwilling defendant as trustee.

8 The plaintiff sought and obtained leave from the Honourable Mr. Justice Lerner to appeal to this Court, who, in his reasons expressly agreed with the view of Wright, J., with respect to the adequacy of the security proposed and after considering some of the authorities, concluded that there was good reason to doubt that there was an absence of jurisdiction to make the order sought.

9 In our view, Wright, J., was in error. As a superior Court of general jurisdiction, the Supreme Court of Ontario has all of the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters. In *Re Michie Estate and City of Toronto et al.*, [1968] 1 O.R. 266 at pp. 268-9, 66 D.L.R. (2d) 213 at pp. 215-6, Stark, J., after considering the relevant provisions of the *Judicature Act* and the authorities, said:

> It appears clear that the Supreme Court of Ontario has broad universal jurisdiction over all matters of substantive law unless the Legislature divests from this universal jurisdiction by legislation in unequivocal terms. The rule of law relating to the jurisdiction of superior Courts was laid down at least as early as 1667 in the case of *Peacock v. Bell and Kendall* (1667), 1 Wms. Saund. 73at p. 74, 85 E.R. 84:
>
>> ...And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.

In *Board v. Board* (1919), 48 D.L.R. 13 at pp. 17-8, [1919] A.C. 956, [1919] 2 W.W.R. 940, Viscount Haldane for the Privy Council in dealing with the question of the nature of jurisdiction of a superior Court said:

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> If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court. This is the effect of authorities, such as the well-known judgment of Lord Mansfield in *Mostyn v. Fabrigas* (1774), 1 Cowp. 161, 98 E.R. 1021, and the judgment of Lord Hardwicke in *Earl of Derby v. Duke of Athol* (1749), 1 Ves.Sen.201, 27 E.R.982. They are collected in the admirable opinion of Stuart, J., in the Supreme Court in the present case, from whose reasoning, as well as from the arguments employed by the other learned Judges there, their Lordships have derived much assistance. They only desire to add that independently of the rule just referred to, there is another principle of construction which would in their opinion have been by itself sufficient to dispose of the question whether the words of the Act of 1907 excluded matrimonial jurisdiction. That Act set up a superior Court, and it is the rule as regards presumption of jurisdiction in such a Court that, as stated by Willes, J., in *Mayor of London v. Cox* (1867) 2 E. & I. App. 239, at p. 259, nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so.

10 In addition, and of importance, is that the justice of the situation requires a cause such as this will not fail for want of a remedy. In *Williams and Rees v. Local Union No. 1562 of United Mine Workers of America* (1919), 45 D.L.R. 150 at p. 178, [1919] 1 W.W.R. 217, 14 Alta. L.R. 251 [reversed on other grounds 59 S.C.R. 240, 49 D.L.R. 578, [1919] 3 W.W.R. 828], Beck, J., said, and I agree with his view:

> I believe my brother judges accept the opinion I expressed some time ago as follows: —
>
> > That every superior court is the master of its own practice is a proposition laid down by Tindal, C.J., in *Scales v. Cheese* (1844), 12 M. & W. 685, 152 E.R. 1374, and adopting this, I think that, without any statutory rules of practice, the court can, should a case arise, even though the law be fixed as to the substantial rights of the parties, award such remedies, though they be new, as may appear to be necessary to work out justice between the parties.

Where the plaintiff is desirous of selling its land and provides adequate security to meet its possible obligations to the defendants, surely it has a right to have its title cleared and proceed, and this Court has the power to make any order necessary in the circumstances. In my opinion, then, the Court had jurisdiction at law to deal with this matter in addition to its powers by reason of its equitable jurisdiction.

11 In my view, s. 19(1) of the *Judicature Act*, R.S.O. 1970, c. 228, gives to the Court jurisdiction to make a mandatory order, even though interlocutory, directed to a party to the action if it is just and convenient to do so and in this way to require the defendants here to do such acts as may be necessary as to effectively remove the assignment in question from the title to the lands. Here the defendants seek to invoke the Court's equitable jurisdiction by asserting a claim for lien against the lands to secure the return of the moneys which they have paid.

12 While I have some doubts that the defendants are able to assert such a claim in these circumstances, conceding for the moment that they are entitled to do so and will succeed, if they seek equity — they must do equity. The security offered by the plaintiff is more than adequate and the defendants ought to be required to accept that security in lieu of the lien which they claim. The result to them is the same but the continuation of the registration of the assignment is a cause of loss to the plaintiff which ought to be avoided, if possible. On the face of it, it therefore appears just and convenient that the order sought should be made.

13 In all the circumstances, then, we think that Mr. Justice Wright was in error — that he had jurisdiction to make the order sought before him and an order should go that upon the providing of the security proposed, which is a second mortgage on the property which matures June 30, 1975, in the sum of $130,000 bearing interest at the rate of 8 $^{1}/_{2}$% payable to the defendants and assigned to a trustee, to be agreed upon, to abide the outcome of this action, the defendants should remove from the title to the lands the assignment of the agreement of purchase and sale here in question.

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14 The plaintiff is entitled to its costs of the motion before Wright, J., the application for leave to appeal and its costs in this Court.

15 *Appeal allowed.*

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TAB 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Parmar v. Royal Bank of Canada | 2016 ABQB 439, 2016 CarswellAlta 1503, [2016] A.W.L.D. 3578, [2016] A.W.L.D. 3659, 269 A.C.W.S. (3d) 561 | (Alta. Q.B., Aug 9, 2016)

2016 ABCA 12
Alberta Court of Appeal

Pyrrha Design Inc. v. Plum and Posey Inc.

2016 CarswellAlta 165, 2016 ABCA 12, [2016] A.W.L.D. 972, [2016] A.J. No. 129, 263 A.C.W.S. (3d) 633

Pyrrha Design Inc., Appellant (Plaintiff/Applicant) and Plum and Posey Inc. and Adrinna M. Hardy, Respondents (Defendants/Respondents)

Ronald Berger, J.D. Bruce McDonald, Frederica Schutz JJ.A.

Heard: November 13, 2015
Judgment: February 9, 2016
Docket: 1301 14850 - lower level on order.

Counsel: N.M. Ramessar, T.P. Lo, for Appellant / Plaintiff / Applicant
R.A. Smith, for Respondents / Defendants / Respondents

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XVIII Summary judgment
XVIII.3 Availability of summary judgment
XVIII.3.b Miscellaneous
Headnote
Civil practice and procedure --- Summary judgment — Availability of summary judgment — Miscellaneous
Parties were separately involved in creation and distribution by sale of synthetic jewelry that gave appearance of antique wax seal impressions — Parties entered into settlement agreement which required that respondent, PP Inc., cease creating and selling jewelry that had specific characteristics, these characteristics being claimed as unique and protected characteristics of jewelry created and distributed for sale by appellant, PD Inc — PD Inc. sued PP Inc., claiming that PP Inc. had breached terms of settlement contract, and applied for summary judgment — PP Inc. did not formally cross-apply for summary dismissal, although they requested this relief in their written brief filed in response to PD Inc.'s application — Chambers judge concluded that matter could be dismissed on summary basis because this was most efficient and proportionate way to proceed, and that it was fair and just to proceed on existing record — PD Inc. appealed decision, dismissing case on summary basis — Appeal dismissed — PD Inc. was not prejudiced by PP Inc.'s failure to file and serve formal notice of application for summary dismissal — Chambers judge did not err in granting summary dismissal in absence of formal application by PP Inc. — Chambers judge was required to interpret settlement contract made between parties and view photographs of PP Inc.'s impugned jewelry and decide whether jewelry showed features that were prohibited by settlement contract — Both settlement contract and photographs of impugned jewelry were admitted before chambers judge as being material evidence for consideration — Chambers judge interpreted contract in accordance with contractual interpretation principles, and she viewed with her own eyes photographic evidence proffered by PD Inc. in support of its assertion that PP Inc. had breached settlement contract — Chambers judge did not err in granting summary dismissal — Chambers judge carefully detailed five main categories of alleged breaches of settlement agreement, and thoroughly assessed photographic evidence to determine whether alleged breaches had been established.

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The parties were separately involved in the creation and distribution by sale of synthetic jewelry that gave the appearance of antique wax seal impressions. The parties entered into a settlement agreement which required that the respondent, PP Inc., cease creating and selling jewelry that had specific characteristics, these characteristics being claimed as unique and protected characteristics of the jewelry created and distributed for sale by the appellant, PD Inc. PD Inc. sued PP Inc., claiming that PP Inc. had breached the terms of the settlement contract, and applied for summary judgment. PP Inc. did not formally cross-apply for summary dismissal, although they requested this relief in their written brief filed in response to PD Inc.'s application. The chambers judge concluded that the matter could be dismissed on summary basis because this was the most efficient and proportionate way to proceed, and that it was fair and just to proceed on the existing record. PD Inc. appealed the decision, dismissing the case on a summary basis.
Held: The appeal was dismissed.
Table of Authorities
Cases considered by *Ronald Berger, Frederica Schutz JJ.A.*:

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd. (2015), 2015 ABQB 120, 2015 CarswellAlta 287, 40 C.L.R. (4th) 187 (Alta. Q.B.) — considered

Bank of Montreal v. Valerio (2009), 2009 ABQB 578, 2009 CarswellAlta 1514, 480 A.R. 393 (Alta. Q.B.) — referred to

Bighorn No. 8 (Municipal District) v. Bow Valley Waste Management Commission (2015), 2015 ABCA 127, 2015 CarswellAlta 575, 90 C.E.L.R. (3d) 203, 599 A.R. 395, 643 W.A.C. 395, 13 Alta. L.R. (6th) 342 (Alta. C.A.) — considered

Condominium Corp. No. 0321365 v. 970365 Alberta Ltd. (2012), 2012 ABCA 26, 2012 CarswellAlta 58, 15 C.P.C. (7th) 297, 57 Alta. L.R. (5th) 1, 14 R.P.R. (5th) 184, [2012] 6 W.W.R. 42, 10 C.L.R. (4th) 229, 346 D.L.R. (4th) 291, 519 A.R. 322, 539 W.A.C. 322 (Alta. C.A.) — referred to

De Shazo v. Nations Energy Co. (2006), 2006 ABCA 400, 2006 CarswellAlta 1716, 68 Alta. L.R. (4th) 57, 36 C.P.C. (6th) 190, 276 D.L.R. (4th) 559, 391 W.A.C. 142, 401 A.R. 142, 36 C.P.C. (6th) 185 (Alta. C.A.) — referred to

Dingwall v. Foster (2014), 2014 ABCA 89, 2014 CarswellAlta 327, 10 C.B.R. (6th) 103, 93 Alta. L.R. (5th) 80, 50 C.P.C. (7th) 219, 572 A.R. 106, 609 W.A.C. 106 (Alta. C.A.) — referred to

Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd. (2010), 2010 ABCA 126, 2010 CarswellAlta 746, 477 A.R. 112, 483 W.A.C. 112, 25 Alta. L.R. (5th) 221 (Alta. C.A.) — referred to

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — followed

MacMillan Bloedel Ltd. v. Simpson (1995), [1995] 4 S.C.R. 725, [1996] 2 W.W.R. 1, 14 B.C.L.R. (3d) 122, 44 C.R. (4th) 277, 130 D.L.R. (4th) 385, 103 C.C.C. (3d) 225, 191 N.R. 260, 33 C.R.R. (2d) 123, 68 B.C.A.C. 161, 112 W.A.C. 161, 1995 CarswellBC 974, 1995 CarswellBC 1153 (S.C.C.) — referred to

Nafie v. Badawy (2015), 2015 ABCA 36, 2015 CarswellAlta 106, 381 D.L.R. (4th) 208, [2015] 4 W.W.R. 498, 56 R.F.L. (7th) 28, 599 A.R. 1, 643 W.A.C. 1, 11 Alta. L.R. (6th) 1 (Alta. C.A.) — referred to

P. (W.) v. Alberta (2014), 2014 ABCA 404, 2014 CarswellAlta 2152, 378 D.L.R. (4th) 629, 62 C.P.C. (7th) 111, [2015] 5 W.W.R. 430, 588 A.R. 110, 626 W.A.C. 110, 7 Alta. L.R. (6th) 319 (Alta. C.A.) — referred to

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2008), 2008 SCC 14, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 86 Alta. L.R. (4th) 1, [2008] 5 W.W.R. 195, (sub nom. *Lameman v. Canada (Attorney General)*) 372 N.R. 239, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, [2008] 2 C.N.L.R. 295, (sub nom. *Lameman v. Canada (Attorney General)*) 429 A.R. 26, (sub nom. *Lameman v. Canada (Attorney General)*) 421 W.A.C. 26, (sub nom. *Canada (Attorney General) v. Lameman*) [2008] 1 S.C.R. 372 (S.C.C.) — referred to

Tottrup v. Clearwater (Municipal District) No. 99 (2006), 2006 ABCA 380, 2006 CarswellAlta 1627, 68 Alta. L.R. (4th) 237, 391 W.A.C. 88, 401 A.R. 88 (Alta. C.A.) — considered

Windsor v. Canadian Pacific Railway (2014), 2014 ABCA 108, 2014 CarswellAlta 395, [2014] 5 W.W.R. 733, 94 Alta. L.R. (5th) 301, 371 D.L.R. (4th) 339, 56 C.P.C. (7th) 107, (sub nom. *Windsor v. Canadian Pacific Railway Ltd.*) 572 A.R. 317, (sub nom. *Windsor v. Canadian Pacific Railway Ltd.*) 609 W.A.C. 317 (Alta. C.A.) — referred to

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776826 Alberta Ltd. v. Ostrowercha (2015), 2015 ABCA 49, 2015 CarswellAlta 155, (sub nom. *Ostrowercha v. 776826 Alberta Ltd.*) 593 A.R. 391, (sub nom. *Ostrowercha v. 776826 Alberta Ltd.*) 637 W.A.C. 391 (Alta. C.A.) — referred to

1214777 Alberta Ltd. v. 480955 Alberta Ltd. (2014), 2014 ABQB 301, 2014 CarswellAlta 821 (Alta. Q.B.) — referred to

Cases considered by *J.D. Bruce McDonald J.A.* (dissenting):

Alberta (Securities Commission) v. Workum (2010), 2010 ABCA 405, 2010 CarswellAlta 2478, 327 D.L.R. (4th) 383, 493 A.R. 1, 41 Alta. L.R. (5th) 48, 502 W.A.C. 1, [2011] 7 W.W.R. 492, 21 Admin. L.R. (5th) 12 (Alta. C.A.) — refered to in a minority or dissenting opinion

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — considered in a minority or dissenting opinion

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — considered in a minority or dissenting opinion

McLeod v. Alberta (Securities Commission) (2006), 2006 ABCA 231, 2006 CarswellAlta 993, 61 Alta. L.R. (4th) 201, 391 A.R. 121, 377 W.A.C. 121, 272 D.L.R. (4th) 94 (Alta. C.A.) — considered in a minority or dissenting opinion

Statutes considered by *Ronald Berger J.A., Frederica Schutz J.A.*:

Judicature Act, R.S.A. 2000, c. J-2

s. 8 — considered

Rules considered by *Ronald Berger J.A., Frederica Schutz J.A.*:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 1.3 — considered

R. 1.3(1) — considered

R. 1.3(2) — considered

R. 7.3(2) — considered

Rules considered by *J.D. Bruce McDonald J.A.* (dissenting):

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

R. 1.2(1) — considered

R. 1.2(3)(a) — considered

R. 1.3 — considered

R. 7.3 — considered

R. 7.3(3) — considered

APPEAL from case dismissing case on summary basis.

***Ronald Berger, Frederica Schutz JJ.A.*:**

Introduction

1 This is an appeal from a chambers judge's summary dismissal of a claim involving the interpretation of a settlement agreement between the parties. For the reasons that follow, the appeal is dismissed.

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Background and Decision Below

2 A detailed review of the evidence and background facts is clearly set out in the decision below, delivered orally on June 30, 2014, and will only be briefly summarized here.

3 The parties were separately involved in the creation and distribution by sale of synthetic jewellery that gave the appearance of antique wax seal impressions. The parties entered into a settlement agreement which required that the respondents cease creating and selling jewellery that had specific characteristics, these characteristics being claimed as unique and protected characteristics of the jewellery created and distributed for sale by the appellant.

4 The appellant sued the respondents, claiming that the respondents had breached the terms of the settlement contract, and applied for summary judgment. The respondents did not formally cross-apply for summary dismissal, although they requested this relief in their written brief filed in response to the appellant's application. The chambers judge concluded that the matter could be dismissed on a summary basis because this was the most efficient and proportionate way to proceed, and that it was fair and just to proceed on the existing record.

Issues

5 There are three issues raised by this appeal:

1. Did the chambers judge err in granting summary dismissal of the appellant's claim in the absence of a formal application by the respondents?

2. Did the chambers judge err in granting summary dismissal of the appellant's claim on the record that was before the Court?

3. Did the chambers judge err in interpreting the settlement contract?

Standard of Review

6 Decisions regarding summary disposition are discretionary and, absent an error of law, are reviewed for reasonableness: *Dingwall v. Foster*, 2014 ABCA 89 (Alta. C.A.) at para 19, (2014), 572 A.R. 106 (Alta. C.A.); *Condominium Corp. No. 0321365 v. 970365 Alberta Ltd.*, 2012 ABCA 26 (Alta. C.A.) at para 39, (2012), 519 A.R. 322 (Alta. C.A.). Put another way, absent palpable and overriding error, the chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination as to whether summary dismissal was appropriate is entitled to deference: *P. (W.) v. Alberta*, 2014 ABCA 404 (Alta. C.A.) at para 16, (2014), 588 A.R. 110 (Alta. C.A.); *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) at para 10, (2014), 572 A.R. 317 (Alta. C.A.).

7 The appropriate standard of review for the contractual interpretation is, in this case, palpable and overriding error because this case does not involve a standard form contract and we identify no extricable error of law. In that respect, this case is on all fours with *Bighorn No. 8 (Municipal District) v. Bow Valley Waste Management Commission*, 2015 ABCA 127 (Alta. C.A.) at paras 5-8, (2015), 13 Alta. L.R. (6th) 342 (Alta. C.A.):

> [5] Although contractual interpretation was historically considered a question of law, the Supreme Court of Canada recently confirmed that the historical approach should be abandoned. Contractual interpretation is a question of mixed fact and law that involves the application of interpretative principles to the words of the written contract, considered in light of the factual matrix: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 (CanLII) at para 50. Unless a pure question of law can be readily extricated, questions of mixed fact and law are reviewed for palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 (CanLII) at paras 36-37, [2002] 2 SCR 235. Because the goal of contractual interpretation is inherently fact specific, the circumstances in which a question of law can be readily extricated from the interpretation process are rare: *Sattva* at paras 54-55.

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> . . .
>
> [7] This Court has also concluded that correctness remains the appropriate standard of review when interpreting standard form contracts since the results would be expected to have an impact beyond the parties to a particular dispute and be of precedential value: *Sattva* at para 51; *Vallieres* at para 13.
>
> [8] This case does not involve a standard form contract, nor has the MD identified any extricable errors of law. The appropriate standard of review is therefore palpable and overriding error.

Analysis

Issue 1: Did the chambers judge err in granting summary dismissal of the appellant's claim in the absence of a formal application by the respondents?

8 It is incontestable that a chambers judge possesses inherent jurisdiction to control its process: *De Shazo v. Nations Energy Co.*, 2006 ABCA 400 (Alta. C.A.) at para 12, (2006), 401 A.R. 142 (Alta. C.A.); *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.) at para 33, (1995), 130 D.L.R. (4th) 385 (S.C.C.). This jurisdiction is also expressly granted by s 8 of the *Judicature Act*, RSA 2000, c J-2, which provides the court with power to grant any appropriate remedy that is appropriate in the discrete circumstances of a case: *Nafie v. Badawy*, 2015 ABCA 36 (Alta. C.A.) at paras 97-98, (2015), 11 Alta. L.R. (6th) 1 (Alta. C.A.); *Bank of Montreal v. Valerio*, 2009 ABQB 578 (Alta. Q.B.) at para 30, (2009), 480 A.R. 393 (Alta. Q.B.).

9 Rule 1.3(1) of the *Alberta Rules of Court* is to like effect when it states that the Court may do either or both of:

> (a) give any relief or remedy described or referred to in the *Judicature Act*; or
>
> (b) give any relief or remedy described or referred to in or under these Rules or any enactment.

Rule 1.3(2) specifically states that a "remedy may be granted by the Court whether or not it is claimed or sought in an action."

10 And, quite apart from avoiding the multiplicity of actions — the mischief sought to be avoided by s 8 of the *Judicature Act* and R 1.3 of the *Alberta Rules of Court*, a proposition for which there is also ample case authority — the chambers judge properly adhered to the urging of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.) to the effect that courts are obliged to resolve legal disputes in the most cost-effective and timely method available, provided the process selected ensures fairness between the parties. Here, the chambers judge is to be commended, not criticized, for pursuing a cost-effective, timely *final* resolution to this litigation which was fair and just to the parties, as it simply serves no one's interest to permit continuation of protracted and costly litigation when it can be properly disposed of summarily and entirely.

11 This Court has expressly advocated a modern approach, involving the broad interpretation of summary judgment rules, in order to comply with the Supreme Court's recognition in *Hryniak* at para 2 that "a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system": *Windsor* at para 13. The motions court must determine "whether the issue of law can fairly be decided on the record before the court": *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380 (Alta. C.A.) at para 11, (2006), 401 A.R. 88 (Alta. C.A.).

12 The respondents concede that it would have been preferable to file and serve a formal application for summary dismissal. However, having reviewed the record in these proceedings, we agree with the respondents that the appellant had sufficient notice of the respondents' position with respect to the merits of the appellant's claim and, further, that there is no suggestion that the appellant was taken by surprise or that any prejudice resulted from the procedure followed, because:

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• In its statement of defence, the respondents expressly plead that the allegations made against them by the appellant were "entirely without merit".

• The respondents filed written submissions 11 days in advance of the special chambers application in which they specifically asserted that they had not breached the terms of the settlement contract and in those submissions, twice expressly requested that the action be dismissed in its entirety, on a summary basis.

• After receiving the written submissions and notice of the respondents' intention to seek summary dismissal, the appellant did not object in any fashion to this informal demand for summary dismissal although it conceded that the submissions were read, and recognized that these materials would also be read, in advance of the special hearing date, by the assigned chambers judge.

• Additionally, the respondents had signed a consent order which allowed the appellant to file a surrebuttal brief for the application, which was in fact filed and which specifically responded to the respondents' written submissions, including addressing the evidence given by Ms. Hardy at the comprehensive cross-examination on her affidavit.

13 The appellant fairly concedes that it did put its "best foot forward" before the chambers judge and did argue that its interpretation of the contract, when compared to the photographic evidence proffered at the special hearing, rendered unassailable the conclusion that the respondents had breached the settlement contract.

14 The chambers judge reached an opposite conclusion and found that on the same evidence and having regard to her "interpretation of the settlement contract", there was no merit to the appellant's claim. The gravamen of the appellant's summary judgment claim was that the photographs proved breaches of the settlement agreement. In turn, the essence of the respondents' summary dismissal argument was that the photographs did not support this claim and there had been no breach of the settlement agreement. The outcome either way depended on the chambers judge's assessment of the settlement agreement and whether the photographs proved that the agreement had been breached. If the appellant put its "best foot forward" on its summary judgment application, as it was required to do, we are not persuaded that it could have proffered any additional evidence or made any different arguments had the respondents formally applied for summary dismissal.

15 Nor do we see any merit to the appellant's objection that the respondents failed to formally comply with R 7.3(2), which dictates that an application for summary dismissal must be supported by an affidavit swearing positively that one or more of the grounds for summary dismissal have been met, or by other evidence to the effect that the grounds for summary dismissal have been met.

16 In the present case, Ms. Hardy's affidavit sworn on May 30, 2014 and filed on June 2, 2014 satisfies the substance of R 7.3(2) in that it contained the evidence upon which the respondents relied in seeking summary dismissal. In essence, the appellant's submissions in this regard are a complaint of form over substance. We find that the respondents met the substance of R 7.3(2) and the underlying basis for it.

17 In our view, the appellant was not prejudiced by the respondents' failure to file and serve a formal notice of application for summary dismissal. The appellant urged the chambers judge to do exactly that which was done, but clearly does not agree with the result and now complains that it was an unfair process. The failure to file and serve a formal notice of application may, in some circumstances, prejudice the opposite party. The essence of the Rule is to protect litigants from ambush or litigation surprise. On the record before us, there was neither. Accordingly, we conclude that the chambers judge did not err in granting summary dismissal in the absence of a formal application by the respondents.

Issue 2: Did the chambers judge err in granting summary dismissal of the appellant's claim on the record that was before the Court?

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TAB 12

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 1 — Foundational Rules
Division 2 — Authority of the Court

Alta. Reg. 124/2010, s. 1.3

s 1.3 General authority of the Court to provide remedies

Currency

1.3General authority of the Court to provide remedies
1.3(1) The Court may do either or both of the following:

(a) give any relief or remedy described or referred to in the *Judicature Act*;

(b) give any relief or remedy described or referred to in or under these rules or any enactment.

1.3(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

Currency
Alberta Current to Gazette Vol. 113:18 (September 30, 2017)

Concordance References
Rules Concordance 77, Writs of delivery & sequestration
Rules Concordance 78, Enforcement of order to do or abstain
Rules Concordance 87, Interlocutory injunction
Rules Concordance 99, Mandamus, interlocutory injunction or mandatory order
Rules Concordance 100, Interlocutory injunction
Rules Concordance 101, Prohibition

End of Document

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