Court Administration

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Halifax, N.S.

2019 Hfx No. 484742

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF: **Application by Miller Thomson LLP and Cox & Palmer LLP (collectively, "Representative Counsel") for the transferring of proceedings to Ontario pursuant to Section 187(7) of the *Bankruptcy and Insolvency Act* ("*BIA*")**

**BOOK OF AUTHORITIES
OF THE
REPRESENTATIVE
COUNSEL**

Motion Date – September 10, 2019 at 9:30 a.m.

September 3rd, 2019

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INDEX

TAB 1

2001 SCC 92, 2001 CSC 92
Supreme Court of Canada

Eagle River International Ltd, Re

2001 CarswellQue 2725, 2001 CarswellQue 2726, 2001 SCC 92, 2001 CSC 92, [2001] 3 S.C.R. 978, [2001] S.C.J. No. 90, 110 A.C.W.S. (3d) 596, 207 D.L.R. (4th) 385, 280 N.R. 155, 30 C.B.R. (4th) 105, J.E. 2002-93, REJB 2001-27203

Azco Mining Inc., Appellant v. Sam Lévy & Associés Inc., Respondent

McLachlin C.J.C., L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour, LeBel JJ.

Heard: May 15, 2001
Judgment: December 20, 2001
Docket: 27876

Proceedings: affirming [2000] R.J.Q. 392 (C.A. Que.); affirming [1999] R.J.Q. 1497 (C.S. Que.)

Counsel: *Yves Martineau*, for Appellant
Jean-Philippe Gervais, for Respondent

***Binnie J.*:**

1 The long arm of the Quebec Superior Court sitting in Bankruptcy reached out to the appellant in Vancouver, British Columbia, in respect of a claim for shares and warrants and other debts allegedly due to the bankrupt which the trustee in bankruptcy values in excess of $4.5 million. The appellant protested that the dispute, which involves the financing of an African gold mine, has nothing to do with Quebec. It argues that the claim of the respondent trustee in bankruptcy is an ordinary civil claim that rests entirely on agreements that are to be interpreted according to the laws of British Columbia. For this and other reasons of convenience and efficiency, the appellant says, the claim ought to proceed in British Columbia. The bankruptcy court and the Quebec Court of Appeal rejected these submissions and, in my view, the further appeal to this Court ought also to be dismissed.

I. Facts

2 The appellant Azco Mining Inc. ("Azco"), a company incorporated under the laws of Delaware, offered venture capital services from its office in Vancouver, British Columbia. In 1996 it was introduced to Eagle River International Limited and Eagle River Exchange and Financial Services Inc. (hereinafter collectively referred to as "Eagle"), with offices in Gatineau, Quebec. Eagle was in the process of trying to develop promising gold mining properties in a 500 square mile area of Mali, West Africa. A deal was struck whereby Eagle would continue to use its expertise to bring the mines to production through subsidiary companies in Mali, and Azco would provide the financing. The parties reduced their agreement to a series of documents, each of which contained what the appellant contends is a choice of forum clause and the respondent argues is no more than a choice of law clause, as follows:

> **June 7, 1996 financing agreement**
>
> 28. The agreement shall be governed by the law of British Columbia.
>
> **June 12, 1996 management agreement**

13. **Arbitration**: The Parties hereto agree that all questions or matters in dispute with respect to this Agreement shall be submitted to arbitration pursuant to the terms hereof.

. . . . .

20. **Applicable Law**: The situs of this Agreement is Vancouver, British Columbia, and, for all purposes this Agreement, will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia.

3 In addition, Azco relies on the terms of the debenture entered into by Azco with Eagle's subsidiary company in Mali (called West African Gold & Exploration S.A.), as follows:

West African Gold & Exploration S.A. Debenture dated August 9, 1996

17. [The] situs of this Debenture is Vancouver, British Columbia, and for all purposes this Debenture will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia. In addition, the Company hereby expressly acknowledges and agrees to forthwith execute any and all documentation which may be necessary in order to ensure both the enforceability of this Debenture and the valid registration thereof as against the Mortgaged Property under the laws prevailing in each of the Province of British Columbia and the Republic of Mali and, in addition, and without limiting the generality of the foregoing, to attorn, if required, to any courts of competent jurisdiction in the Province of British Columbia in order to either administer or interpret this Debenture in accordance with the laws prevailing in the Province of British Columbia.

4 It was envisaged that if the project were successful Azco would ultimately own a majority interest in what the trustee describes as a joint venture holding company, Sanou Mining Corporation ("Sanou"). Eagle was to be a minority partner.

5 During the period of May 16, 1996 and May 1, 1997, Azco paid Eagle a total of U.S.$3,844,858. For each payment, Eagle executed a promissory note, undertaking to repay Azco if it failed to fulfill its contractual obligations.

6 On September 12, 1997, Eagle was adjudged bankrupt. The respondent firm was appointed trustee in bankruptcy. Despite Eagle's bankruptcy, the Mali project proceeded and, according to Azco, it is still underway. The trustee says that the appellant now controls the holding company Sanou and continues to withhold, wrongfully, the 3.5 million shares and 4 million warrants to which Eagle was (and is) entitled.

7 On January 18, 1999, the respondent trustee presented a petition to the Quebec Superior Court sitting in Bankruptcy ("the bankruptcy court") seeking to "recuperate the assets" of Eagle, including the monetary value of what it considers the wrongfully withheld property of the debtor, namely 125,000 shares in Azco itself and 3.5 million shares and 4 million warrants of Sanou. The respondent trustee values the Azco shares at CAN $337,500 and the Sanou interest at U.S. $1,875,000. In addition the trustee advances some monetary claims for a variety of alleged debts.

8 On February 24, 1999, the appellant brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy Division of Vancouver". In support of its motion, the appellant stated that "it is a certainty that Azco will file a counterclaim for an amount in excess of $5,000,000 Cdn., principally" based on the financing agreements to recover about U.S. $3.85 million in the payments to Eagle mentioned above which, as stated, were secured by promissory notes. The contractual arrangement, says Azco, was that if certain conditions in the agreements were not met, the advances would be treated as a demand loan. Azco says the conditions were not met and that it is entitled to immediate repayment of all advances. Azco submitted that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco". Its position, as stated, was that the file should be transferred to the Bankruptcy Division of Vancouver.

9 Azco's Vice-President of Finance, Ryan Modesto, who lives in the United States, testified in support of the motion that Azco is a creditor in the bankruptcy:

Q. So is it Azco Mining's position that it is the creditor in that bankruptcy of Eagle River?

A. Yes, it is.

Q. For what amount?

A. For three million eight hundred forty-four thousand eight hundred and fifty-eight dollars ($3,844,858) plus accrued interest.

Q. That's U.S. currency?

A. That is U.S. currency.

Q. And you refer to interest. Are you referring to the interest referred to in the promissory note?

A. Exactly.

10 Azco's motion was dismissed by Isabelle J. of the Quebec Superior Court on May 6, 1999. That decision was upheld by the Quebec Court of Appeal on February 21, 2000.

II. Judicial History

A. Quebec Superior Court, [1999] R.J.Q. 1497 (C.S. Que.)

11 Isabelle J. held that the Quebec Superior Court sitting in Bankruptcy had jurisdiction to deal with the respondent's petition. The relevant provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), were clear and there was no need to refer to the *Civil Code of Québec*, S.Q. 1991, c. 64, or the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25.

12 Azco had not argued that the bankrupt's affairs could be more efficiently administered in British Columbia but rather that there were other "sufficient" reasons for transferring the proceeding to that province, including, in particular, certain clauses in the agreement (reproduced above) that Azco said required the dispute to be tried in British Columbia. Isabelle J. ruled that these clauses had to do with choice of law rather than choice of forum and in any event lacked an "imperative" character.

13 Isabelle J. accepted that he could transfer the proceeding to the Vancouver division of the Supreme Court of British Columbia sitting in Bankruptcy under s. 187(7) of the Act. There was no need to turn to the specific rules governing *forum non conveniens* set out in art. 3135 of the *Civil Code of Québec*. Having regard to all the circumstances, however, Isabelle J. did not think a transfer of proceedings would be justified. The legislator bestowed on the trustee the power to manage the affairs of the bankrupt in the most practical and economical manner possible. Vancouver may be convenient for the appellant, but the interests of all the creditors prevailed over the convenience of only one creditor. Accordingly, the appellant's motion was dismissed.

B. Quebec Court of Appeal, [2000] R.J.Q. 392 (C.A. Que.)

14 A unanimous Court of Appeal dismissed Azco's appeal. Robert J.A., concurred in by Proulx and Rousseau-Houle JJ.A., agreed that the Quebec Superior Court had jurisdiction over Eagle's bankruptcy, noting that the company was carrying on business in Quebec when the bankruptcy proceedings were initiated. The petition against Azco was authorized by s. 30(1)(d) of the Act which empowers a trustee to bring legal proceedings relating to the property of the bankrupt with the permission of the inspectors.

15 Robert J.A. agreed with the motions judge that it would be most efficient and equitable to have a single court oversee the administration of the bankrupt estate despite the fact that a centralized bankruptcy might present certain difficulties and inconveniences for parties residing in provinces far from the bankruptcy forum. However, like Isabelle J., he noted that the courts retain some discretion under s. 187(7) to transfer a case to another division where there is proof that the bankrupt's estate would be administered more economically or where some other sufficient reason exists. In the present case, Robert J.A. found that Azco had not demonstrated it would be more economical to proceed before the bankruptcy court in British Columbia. As to other circumstances, Robert J.A. ruled that the contractual terms that Azco characterized as choice of forum clauses did not bind

the trustee in bankruptcy, who represented and acted for the benefit of all creditors. The clauses in question were not exclusive jurisdiction clauses but even if they were, the Act is a law of public order and its provisions must be rigorously applied given the consequences for the rights of both debtors and creditors.

III. Relevant Statutory Provisions

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

2. (1) In this Act

"locality of a debtor" means the principal place

(*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

30. (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

. . . . .

(*d*) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

43. (5) The petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

. . . . .

(*b*) in the Province of Quebec, the Superior Court;

(*c*) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

187. (7) The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

188. (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

(2) All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

Bankruptcy and Insolvency General Rules, C.R.C., c. 368 (am. SOR/98-240)

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Civil Code of Québec, S.Q. 1991, c. 64

3135. Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

. . . . .

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

. . . . .

(5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Quebec authority.

IV. Analysis

17 Parliament has conferred on the bankruptcy court the capacity and authority to exercise "original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act" (s. 183(1)). On the face of it, the intent of this provision is to confer on the bankruptcy court powers and duties co-extensive with Parliament's jurisdiction over "Bankruptcy" under s. 91(21) of the *Constitution Act, 1867* except insofar as that jurisdiction has been limited or specifically assigned elsewhere by Parliament itself.

18 While the appellant's motion simply asked that the dispute be transferred to the Vancouver Division of the Supreme Court of British Columbia sitting in Bankruptcy (thereby appearing to concede that the dispute is properly dealt with as a bankruptcy matter), its motion also contended that the trustee's claims are "exclusively contractual" (para. 6) and that the "Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). Moreover, much of its oral argument suggested that the dispute ought to be tried in the ordinary civil courts. In addition the appellant takes the position that Quebec is not the convenient forum to deal with this dispute, and that the Quebec Superior Court sitting in Bankruptcy lacks a sufficiently long arm to require Azco to take its witnesses east to litigate. The proper forum, it says, is British Columbia because there is no substantial connection at all between this case and the Province of Quebec.

19 It is convenient to address the legal issues raised by the appellant in the following order:

1. Was the bankruptcy petition properly filed in the Hull Division of the Quebec Superior Court sitting in Bankruptcy?

2. If so, did that court thereby acquire jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia?

3. If so, are contract claims nevertheless excluded from federal bankruptcy jurisdiction?

4. If not, does this particular contract claim come within the bankruptcy court's jurisdiction?

5. Even if fully clothed with jurisdiction to hear this case, should the bankruptcy court in Hull nevertheless have transferred the file to the court exercising counterpart bankruptcy jurisdiction in Vancouver?

1. Was the Bankruptcy Petition Properly Filed in the Hull Division of the Quebec Superior Court Sitting in Bankruptcy?

20 Parliament decided to utilize the superior courts of the provinces and territories to exercise bankruptcy jurisdiction (s. 183). It has long been established that, with respect to matters coming within the enumerated heads of s. 91, "the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent": *Atlas Lumber*

Co. v. Winstanley (1940), [1941] S.C.R. 87 (S.C.C.), *per* Rinfret J., at p. 100. The courts mentioned in s. 183 retain their character as superior courts of inherent jurisdiction, but will be referred to here, perhaps with some imprecision of language, as the bankruptcy courts.

21 A creditor who wishes to obtain a receiving order against a debtor is required to file a bankruptcy petition "in the court having jurisdiction in the judicial district of the locality of the debtor" (s. 43(5)).

22 The "locality of the debtor" is defined under s. 2(1) as the "principal place"

(a) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(b) where the debtor has resided during the year immediately preceding his bankruptcy, or

(c) in cases not coming within paragraph (*a*) or (*b*) where the greater portion of the property of the debtor is situated;

23 Section 43(5) expresses a rule of jurisdiction that apportions among the courts named in s. 183(1) judicial power over the adjudication of bankruptcy petitions. The evidence was that Eagle carried on business in Quebec even though it had not obtained a licence to do so. The agreements between Azco and Eagle (and the promissory notes on which Azco's counterclaim is based) recite that Eagle has an office at 212 Labrosse Boulevard, Gatineau, Quebec. The same address appears on its corporate letterhead. Azco's Vice-President of Finance testified that his meetings with respect to the financing were held at that office. There is no suggestion that Eagle vacated the premises prior to its bankruptcy, or that it had any other offices in Canada.

24 It appears that Eagle's only connection to British Columbia is that the agreements mentioned above refer to the law of that province. It is clear that s. 43(5) would not have permitted the filing of the bankruptcy petition in British Columbia on such a ground. Nothing in the evidence, in my view, suggests that the bankruptcy court in Hull lacked subject matter jurisdiction over the petition and personal jurisdiction over Eagle when it made the receiving order on September 12, 1997.

2. Did the Bankruptcy Court Thereby Acquire Jurisdiction to Deal With Matters Affecting the Bankrupt Estate Arising in British Columbia?

25 The Act establishes a nationwide scheme for the adjudication of bankruptcy claims. As Rinfret J. pointed out in *Boily v. McNulty* (1927), [1928] S.C.R. 182 (S.C.C.), at p. 186: [translation] "This is a federal statute that concerns the whole country, and it considers territory from that point of view". The national implementation of bankruptcy decisions rendered by a court within a particular province is achieved through the cooperative network of superior courts of the provinces and territories under s. 188: *Mount Royal Lumber & Flooring Co., Re* (1926), 8 C.B.R. 240 (C.A. Que.), *per* Rivard J.A., at p. 246, [translation] "The *Bankruptcy Act* is federal and the orders of the Quebec Superior Court sitting as a bankruptcy court under that Act are enforceable in Ontario...". See also: *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311 (N.S. C.A.), at p. 314, and *Maska U.S. Inc. v. Alfieri (Liquidator of)*, [1998] R.J.Q. 1380 (C.A. Que.), at p. 1389.

26 The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337 (S.C.C.), at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation". *Stewart* dealt with the winding up of a federally incorporated trust company in British Columbia. As a result of the winding up, a client in Prince Edward Island instituted a proceeding in the superior court of that province for a declaration that certain moneys held by the bankrupt trust company were held in trust and that the bankrupt trust company should be removed as trustee. This Court held that the dispute, despite its strong connection to Prince Edward Island, could not be brought before the court of that province without leave of the Supreme Court of British Columbia. Anglin J. commented at p. 349:

> No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the

court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

27 *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Section 188(1) ensures that orders made by a bankruptcy court sitting in one province can and will be enforced across the country.

28 I have concluded that the jurisdiction of the Quebec Superior Court sitting in Bankruptcy was properly invoked by the petitioning creditors in this case but counsel for the appellant company says that his client, with its office in British Columbia, is not within its reach. The argument, in part, is that whatever the power of Parliament to confer national jurisdiction on a provincial superior court, that court is nevertheless provincially constituted, and for service of process its long arm statute must be complied with. The factual record does not show precisely how service of the trustee's petition was effected on the appellant, but if the appellant had any concerns regarding the proprieties of service of the petition to initiate proceedings against it, such concerns were waived when Azco did not raise them in its motion brought in Hull. A good deal of time was occupied on the appeal with arguments about how a Quebec court could acquire *in personam* jurisdiction over a corporation resident in British Columbia, and whether the Quebec rules for service *ex juris* applied. The argument that the Quebec Superior Court sitting in Bankruptcy cannot exercise *in personam* jurisdiction over creditors in another province under the Act is rejected for the reasons of national jurisdiction already mentioned. Any objections regarding service of process are answered by the fact that Azco not only appeared in Quebec but invoked the jurisdiction of the Quebec Superior Court sitting in Bankruptcy to transfer the proceedings pursuant to s. 187(7) of the Act to the bankruptcy court sitting in Vancouver. Any remaining issue with respect to *in personam* jurisdiction was thereby waived.

29 Azco did not, of course, waive its objection to jurisdiction over the subject matter of this particular dispute. That was a major point in its motion. I turn now to that issue.

3. Are Contract Claims Nevertheless Excluded From Federal Bankruptcy Jurisdiction?

30 The appellant's motion, as stated, argued that the trustee's claims against it are "exclusively contractual in nature" (para. 6) and that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). The theory underlying these contentions seems to be that contract claims relate to "Property and Civil Rights" within the meaning of s. 92(13) of the *Constitution Act, 1867* and on that account lie outside the jurisdiction of the bankruptcy court. At para. 42 of its factum, for example, the appellant argues:

> [TRANSLATION]
>
> Contrary to what the Court of Appeal affirms, the trustee's claim is therefore purely contractual in nature, under the civil law. It is not a remedy specifically provided for under the *BIA* such as the application to have preferential payments declared void (see sections 91 to 100 *BIA*). The mere fact that the plaintiff is a trustee does not alter the nature of the claim and does not turn it into a bankruptcy dispute.

31 Most bankruptcy issues, of course, present a property and civil rights aspect. It is true, however, that some of the decided cases which deny jurisdiction to the bankruptcy court do so on grounds that have a constitutional flavour, e.g., *Lofsky, Re* (1947), 28 C.B.R. 164 (Ont. C.A.), *per* Roach J.A., at p. 167; *Sigurdson v. Fidelity Insurance Co. of Canada* (1980), 35 C.B.R. (N.S.) 75 (B.C. C.A.), at p. 102; *Holley v. Gifford Smith Ltd.* (1986), 54 O.R. (2d) 225 (Ont. C.A.); *Ireland, Re* (1962), 5 C.B.R. (N.S.) 91 (C.S. Que.), *per* Bernier J., at p. 94, and *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (Ont. H.C.).

32 It is therefore necessary to come to an understanding of what is included in the subject matter of "bankruptcy" within the meaning of s. 91(21) of the *Constitution Act, 1867*.

33 In *Saskatchewan Moratorium Legislation, Re* (1955), [1956] S.C.R. 31 (S.C.C.), it was stated by Rand J., at p. 46, that:

> Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors.

34 The core concept of coercive administration appeared early in our bankruptcy jurisprudence. In *L'Union St-Jacques de Montréal v. Bélisle* (1874), L.R. 6 P.C. 31 (Quebec P.C.), Lord Selborne L.C., speaking at p. 36 of general laws governing bankruptcy and insolvency, said: "The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation".

35 More helpful still was Lord Selborne's description of bankruptcy in the context of the English Act in *Ellis v. Silber* (1872), 8 Ch. App. 83 (Eng. Ch. Div.), at p. 86:

> That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority. [Emphasis added.]

36 Despite the fact that England is a unitary state without the constitutional limitations imposed by our division of powers, the courts in Canada have generally hewn ever since 1874 to the basic dividing line between disputes related to the administration of the bankrupt estate and disputes with "strangers to the bankruptcy". The principle is that if the dispute relates to a matter that is outside even a generous interpretation of the administration of the bankruptcy, or the remedy is not one contemplated by the Act, the trustee must seek relief in the ordinary civil courts. Thus in the Quebec case of *Ireland, Re*, *supra*, the trustee brought proceedings to determine who had the right to proceeds of insurance policies taken out by the trustee on properties of the bankrupt estate. Bernier J. concluded that the Quebec Superior Court sitting in Bankruptcy lacked jurisdiction over the subject matter of the dispute. The controversy raised purely civil law questions and nothing in the Act conferred on the bankruptcy court a special jurisdiction to entertain these matters. Similar arguments prevailed in *Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustees of) v. Caisse populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (C.A. Que.); *Martin, Re* (1953), 33 C.B.R. 163 (Ont. S.C.), at p. 169; *Reynolds, Re* (1928), 10 C.B.R. 127 (Ont. S.C.), at p. 131; *Galaxy Interiors Ltd. (1971), Re* (1971), 15 C.B.R. (N.S.) 143 (Ont. S.C.); *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. (N.S.) 246 (Ont. S.C.), and *Lofsky, Re*, supra, at p. 169.

37 The Quebec Court of Appeal has perhaps led the argument for a more expansive interpretation of what disputes properly come under the bankruptcy umbrella and can therefore properly be litigated in the bankruptcy court: *Geoffrion c. Barnett*, [1970] C.A. 273 (C.A. Que.); *Arctic Gardens Inc., Re* (1989), [1990] R.J.Q. 6 (C.A. Que.); *Excavations Sanoduc Inc. c. Morency*, [1991] R.D.J. 423 (C.A. Que.). See also the dissenting judgment of LeBel J.A., as he then was, in *Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustees of)*, supra, and *Atlas Lumber Co., Re* (1922), 3 C.B.R. 226 (Que. Bktcy.); but the push is not confined to Quebec: *Maple Leaf Fruit Co., Re* (1949), 30 C.B.R. 23 (N.S. C.A.); *Westam Development Ltd., Re* (1967), 10 C.B.R. (N.S.) 61 (B.C. C.A.), at p. 65; *M. B. Greer & Co., Re* (1953), 33 C.B.R. 69 (Ont. S.C.), at p. 70; *M.P. Industrial Mills Ltd. v. Manitoba Development Corp.* (1972), 17 C.B.R. (N.S.) 226 (Man. Q.B.).

38 It seems to me that the decided cases recognize that the word "Bankruptcy" in s. 91(21) of the *Constitution Act, 1867* must be given a broad scope if it is to accomplish its purpose. Anything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs. Creation of a national jurisdiction in bankruptcy would be of little utility if its exercise were continually frustrated by a pinched and narrow construction of the constitutional head of

power. The broad scope of authority conferred on Parliament has been passed along to the bankruptcy court in s. 183(1) of the Act, which confers a correspondingly broad jurisdiction.

39 There are limits, of course. If the trustee's claim is in relation to a stranger to the bankruptcy, i.e. "persons or matters outside of [the] Act" (*Reynolds, Re*, supra, at p. 129) or lacks the "complexion of a matter in bankruptcy" (*Lofsky, Re*, supra, at p. 169) it should be brought in the ordinary civil courts and not the bankruptcy court. However, claims for specific property may clearly be advanced in the bankruptcy courts (*Galaxy Interiors Ltd. (1971), Re*, supra, and *Sigurdson*, supra), as can claims for relief specifically granted by the Act (*Ireland, Re*, supra, and *Atlas Lumber Co., Re*, *supra*). That said, it is sometimes difficult to discern the particular "golden thread" running through the cases. L.W. Houlden and L.B. Morawetz observe:

> There has been a great deal of litigation on this issue, and the cases are not always easy to reconcile. The difficulty flows from the division of constitutional powers in Canada, bankruptcy and insolvency being a federal power, and property and civil rights and the administration of justice being provincial powers.
>
> *Bankruptcy and Insolvency Law of Canada* (3rd ed. (looseleaf)), at I§4.

40 The short answer to the "property and civil rights" argument, however, is that the appellant poses the wrong question. The issue is whether the contractual dispute between it and the respondent trustee properly relates to the bankruptcy. If so, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction.

4. Does this Particular Contract Claim Come Within the Bankruptcy Court's Jurisdiction?

41 In this case, the respondent trustee, with the permission of the inspectors, is instituting a "legal proceeding" in the bankruptcy court under s. 30(1)(*d*) "relating to the property of the bankrupt". In addition to the Azco and Sanou shares, the trustee says the definition of "property" in s. 2 includes "things in action" which, it is argued, includes the trustee's monetary claims.

42 As to the shares and warrants, the trustee alleges in para. 108 of its petition that Azco is "acknowledged to be the nominal owner of 100% of Sanou Mining Corporation" which owns Western African Gold and Exploration Ltd., which in turn runs the mining concessions in Mali. The allegation, in effect, is that Azco holds the Sanou shares and warrants that rightfully belong to the bankrupt estate and is in a position to transfer them to the trustee if required to do so by the bankruptcy court.

43 As discussed above, it cannot plausibly be argued that the bankruptcy court lacks subject-matter jurisdiction over the dispute because it is a contract case. The objection, more narrowly defined, is whether the bankruptcy court lacks jurisdiction because (i) the appellant is properly considered a "stranger to the bankruptcy", or (ii) the bankruptcy court cannot award the remedy which the trustee seeks.

(i) Is the Appellant a "Stranger to the Bankruptcy"?

44 If a potential defendant is a "stranger" to the bankruptcy, the bankruptcy court may have no subject matter jurisdiction over the dispute (because it is not part of the bankruptcy) even though the "stranger" resides within the territorial jurisdiction of the court.

45 At the time of the trustee's petition, the appellant had filed no proof of claim in the bankruptcy. It seems to have adopted a "come and get me approach", that is to say, it would file a claim only if claimed against by the trustee. Eventually the trustee *did* claim against it by way of the January 18, 1999 petition and the appellant *did* give notice of its counterclaim in its February 24, 1999 motion, including the fact it held promissory notes for $3,844,858 signed by the bankrupt, payable on demand, constituting potential obligations now inherited by the trustee.

46 In a decision released concurrently, *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90 (S.C.C.), we uphold a decision of the Federal Court of Canada to dispose of the claims of maritime lienholders against a ship whose owner was adjudged bankrupt after the ship was arrested but before the *in rem* action had proceeded to judgment. We concluded that the Federal Court did not lose subject matter jurisdiction by virtue of the subsequent bankruptcy of the shipowner.

We held that the Federal Court *could* have stayed its proceedings in deference to the bankruptcy court but was not, in the circumstances, obliged to do so.

47 The issue here is somewhat different. The appellant is resisting a claim by the trustee in bankruptcy and threatening to bring a counterclaim against the bankrupt estate based on the same set of commercial agreements. The appellant sought only to have the proceedings transferred to a different division of the bankruptcy court within Canada.

48 In *Lofsky, Re*, supra, the Ontario Court of Appeal dealt with a case where the trustee sought a declaration that the transfer of an automobile from the bankrupt to his wife was fraudulent and void as against the trustee and that it formed part of the property of the bankrupt. The wife resisted the claim on the ground that the automobile never belonged to the bankrupt (even though it was registered in his name). Roach J.A., at p. 169, found the wife was a stranger to the bankruptcy:

> In my opinion, it must be concluded that the issue between the trustee and the appellant is not a matter in bankruptcy and that it is purely a matter of property and civil rights. It has none of the elements that would bring it within the former. No question as between debtor and creditor here arises in the distribution of a bankrupt estate. The appellant does not claim title to the automobile through the bankrupt. Indeed she says that the bankrupt never had title and that she was always the owner. I cannot think of any aspect of the issue that gives it the complexion of a matter in bankruptcy unless perhaps this, that the bankrupt pending the bankruptcy caused the new motor vehicle permit to be issued in her name. That does not make the issue one in bankruptcy when the sole question is who, as between the bankrupt and the appellant, was always the true owner.

49 See also *Reynolds, Re*, supra, at p. 131.

50 On the record before us, however, the appellant takes the position that it is the largest creditor of the bankrupt estate and that it will "with certainty" counterclaim in answer to the trustee's petition. The trustee, for its part, regards the appellant as the biggest debtor of the bankrupt estate. Far from being a "stranger" to the bankruptcy, Azco is potentially the most significant player in the role of either creditor or debtor, as the case may be.

(ii) Does the Bankruptcy Court Have Jurisdiction to Grant the Remedy Sought by the Trustee?

51 It is well established that the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases. It is restricted to the jurisdiction and remedies contemplated by the Act. *Sigurdson* , supra, the trustee in bankruptcy sued two former directors of the bankrupt for fraud in the Supreme Court of British Columbia. During the course of its reasons on another point, the Court of Appeal remarked that if the trustee had sued in the bankruptcy court "he would have been in the wrong court" as "[h]e must use the ordinary civil courts to sue for damages" (p. 102). See also *Ireland, Re*, supra.

52 In my view, however, the trustee's claim here is not properly characterized as a simple claim in damages, even though the trustee has attempted to place a monetary value on the shares which it says belong to the bankrupt estate but which the appellant, it says, wrongfully withholds. I do not think the bankruptcy court is precluded from considering an order that substitutes money for the claimed property in circumstances where the claimed property cannot be delivered up. The bulk of the trustee's claim, it will be recalled, is for 125,000 shares of Azco itself, plus 3.5 million shares of Sanou and 4 million warrants of Sanou, which the trustee says is wholly controlled by the appellant. The trustee's petition states in para. 65:

> The Debtor/Company is also entitled to receive 3,500,000 shares of Sanou and 4,000,000 warrants of said Sanou, as per the terms of the Agreement, the whole as it has been acknowledged by the Respondent itself in their annual report to United States Securities and Exchange commission for the fiscal year ending June 30, 1997, filed as Exhibit R-24;

53 As to the Azco shares, the trustee states in para. 101 of its petition that it claims "125,000 shares of Azco Mining Corporation which had a value at 2.70$ Cdn dollars per share".

54 Equally significantly, the appellant acknowledges that the gist of the action against it is the delivery up of the shares. It says at para. 25 of its factum:

[TRANSLATION]

> It seems that the trustee's claim is a real action rather than a personal one since the trustee is primarily seeking the rights to 125,000 shares of Azco and 3,500,000 shares and 4,000,000 warrants of Sanou (see in particular paragraphs 95, 98, 99 and 102 of the trustee's petition).

55 The parties therefore seem to agree, despite some obfuscating language in the trustee's petition, that the bulk of the trustee's claim is properly characterized as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant. As such, the trustee is entitled to claim the shares and warrants (s. 17(1)) and, with the permission of the inspectors (which it obtained) to bring a legal proceeding in relation thereto in the bankruptcy court (s. 30(1)(*d*)). The trustee, relying on these statutory provisions and remedies, clearly brings its claim within the Act. See *Galaxy Interiors Ltd. (1971), Re*, supra, per Houlden J. at p. 144, *Mancini (Trustee of)* , supra, per Catzman J. at pp. 250-51, *Atlas Lumber Co., Re*, supra, per Rinfret J., at p. 234.

56 It will be for the bankruptcy court in Hull to scrutinize the petition when the facts are known and the parties' positions on the issues are clarified to determine whether any particular element of the trustee's multiple claims falls outside its jurisdiction. For present purposes, it is sufficient to hold that the bulk of the trustee's claim is cognizable in bankruptcy for the reasons previously discussed. On the present state of the record (this being a preliminary motion), we can go no further.

5. Even if Fully Clothed with Jurisdiction to Hear this Case, Should the Bankruptcy Court in Hull Nevertheless Have Transferred the File to the Court Exercising Counterpart Bankruptcy Jurisdiction in Vancouver?

57 If persuaded that the affairs of the bankrupt could be (i) more economically administered in another bankruptcy district of division or (ii) for "other sufficient cause", the bankruptcy court is authorized to transfer "any proceedings" pending before it to the other bankruptcy district or division (s. 187(7)).

58 Section 187(7) provides a method for transferring proceedings between the various bankruptcy courts in Canada. As discussed below, it raises different issues than the specific international situation dealt with in *Holt Cargo Systems*, supra, released concurrently.

59 The motions judge exercised his discretion against making a transfer order in this case. The appellant must therefore show an error of law or principle or failure to take into consideration a major element in the determination of the case: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at p. 588. The scope of this discretion in bankruptcy cases was recognized in *Lions d'Or Ltée, Re* (1965), 8 C.B.R. (N.S.) 171 (C.S. Que.), and *Pollack Ltée c. Giroux* (1979), 30 C.B.R. (N.S.) 256 (C.S. Que.).

60 The appellant says the courts below erred in both law and principle. They erred in law, it argues, because art. 3148 of the *Québec Civil Code* required the bankruptcy court to decline jurisdiction in light of the "choice of forum" clauses, and they erred in principle because there is no substantial connection between the dispute and the Province of Quebec. In this regard, it relies on *Bourque Consumer Electronics Inc. (Syndic de), Re* (May 14, 1991), Doc. Montreal 500-11-001899-901 (C.S. Que.) and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.).

(i) Choice of Forum Clause

61 The appellant's point is that the applicable rules are found in the *Québec Civil Code*, and in particular art. 3148 which provides in part that:

> ... a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

62 The choice of forum objection fails, with respect, both on the facts and on the law. In terms of facts, the only relevant agreements are those to which Eagle was a party. Clause 28 in the June 7, 1996 financing agreement and clause 20 of the

management agreement are both no more than choice of law provisions. The Quebec courts are perfectly able to apply the law of British Columbia. The import of clause 17 of the West African Gold and Exploration S.A. debenture of August 9, 1996 is more obscure, but as Azco is not a party to the debenture and therefore cannot be sued upon it, its terms are irrelevant.

63 As to the legal issue, the question is whether arts. 3148 or 3135 of the *Québec Civil Code* have any application to this proceeding at all. These provisions will only apply in bankruptcy court "in cases not provided for in the Act or these Rules" (*Bankruptcy and Insolvency General Rules*, s. 3). The fact is that s. 187(7) specifically provides that a transfer will be ordered only where there is satisfactory proof that a proceeding will be "more economically administered" in another division or district, which the appellant did not allege, or "for other sufficient cause". The appellant argues that such general words need to be "supplemented" by the more specific provisions of the *Québec Civil Code*. But this is incorrect. Resort is to be had to the provincial rules only "in cases not provided for". Here, provision has been made. The door is therefore not open to these particular provisions of the *Québec Civil Code*. This interpretation of s. 3 is not only inevitable, it is desirable. The *Québec Civil Code* applies across a vast range of subjects. When s. 187(7) speaks of "sufficient cause", it does so in the specific context of bankruptcy.

64 Leaving aside, then, the inapplicable directives of the *Québec Civil Code*, the question is whether a choice of forum clause would amount to "sufficient cause" for the purpose of s. 187(7) to the extent that it would be an error of law for the motions judge to have declined to give it effect in the circumstances of this case. In my view a choice of forum clause (where there really is one) ought to be taken into careful consideration by a motions judge but it is not binding: J.-G. Castel, *Canadian Conflict of Laws*, (4th ed. 1997) pp. 262-63. See *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143 (B.C. C.A.), *per* Huddart J.A., at p. 153 (leave to appeal to S.C.C. refused [1997] 2 S.C.R. xiv (S.C.C.)); *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.* (1985), [1986] 1 W.W.R. 380 (Alta. C.A.), *per* Kerans J.A., at p. 381; *Ash v. Corp. of Lloyd's* (1991), 6 O.R. (3d) 235 (Ont. Gen. Div.); aff'd (1992), 9 O.R. (3d) 755 (Ont. C.A.), (leave to appeal to S.C.C. refused [1992] 3 S.C.R. v (S.C.C.)); *Maritime Telegraph & Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (N.S. C.A.).

(ii) Public Policy Considerations

65 It could be argued that the public policy favouring a "single control" of bankruptcy proceedings and opposition to their fragmentation demands that a choice of forum clause receive lesser effect in bankruptcy than in the context of ordinary commercial litigation: *Industrial Packaging Products Co. v. Fort Pitt International Inc.*, 161 A.2d 19 (U.S. Penn. S.C., 1960); *Treco, Re*, 239 B.R. 36 (U.S. Dist. Ct. S.D. N.Y., 1999), aff'd 240 F.3d 148 (U.S. C.A. 2nd Cir., 2001).

66 In *Saskatchewan Moratorium Legislation, Re*, supra, Rand J. discussed important "public policy" objectives of bankruptcy legislation, at p. 46:

> To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

See also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109 (S.C.C.), at p. 120.

67 In his treatise on bankruptcy, Professor Albert Bohémier states on the purpose of the Act:

> [TRANSLATION]
>
> The purpose of the *Bankruptcy Act* is to protect the debtor, his or her creditors and the public interest. These objectives have always been present but to varying degrees. It can be stated with certainty that the more a society promotes credit and therefore debt, the more the legislation will tend to give priority to alleviating the lot of honest and hapless debtors. A scheme based on debt must include a self-regulating system so that defaulting debtors may eventually be reintegrated into the system and become productive elements once again.
>
> (A. Bohémier, *Faillite et Insolvabilité*, Montréal, Les Éditions Thémis, Vol. 1, 1992, at p. 48)

68 The implementation of these public policies might be expected to take priority over private "choice of forum" agreements where the two come into conflict, as indeed Robert J.A. concluded in the Quebec Court of Appeal. A similar position is expressed in Fletcher, I.F., *Insolvency in Private International Law* (Oxford: Clarendon Press 1999) at p. 47, fn. 73:

> [P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public policy, serving a wider spread of interests including, ultimately, those of society at large.

In the United States, however, there is a competing body of judicial opinion that a trustee in bankruptcy who sues on an agreement containing a forum selection clause should, as a general rule, be bound by that clause to the same extent as the parties thereto: see *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (U.S. C.A. 3rd Cir., 1983); *Diaz Contracting Inc., Re*, 817 F.2d 1047 (U.S. C.A. 3rd Cir., 1987), and *Hays & Co. v. Merrill Lynch*, 885 F.2d 1149 (U.S. C.A. 3rd Cir., 1989).

69 In my view, for the reasons previously mentioned, the choice of forum clause would be a significant factor under s. 187(7) but not, in the context of the public policies expressed in the Act, a controlling factor.

70 In light of my conclusion that the appellant does not have the benefit of a "choice of forum" clause, I need not undertake the exercise of considering whether in this case there is any conflict between private choice and public interest, and if so, how "choice of forum" considerations should be balanced in this case against the *Amchem*, supra, and public interest factors within the framework of s. 187(7) of the Act.

71 The bottom line is that the appellant is unable to show that the motions judge committed any error of law in declining to transfer the proceeding to Vancouver.

(iii) Error of Principle

72 The appellant, relying on *Amchem*, supra, argues that this dispute has its most real and substantial connection to British Columbia, and that the motions judge erred in principle in ignoring relevant factors in coming to the opposite conclusion.

73 Again, with respect, I do not think this position is sustainable on the law or the facts.

74 In the first place, as stated, the *Amchem* approach has to be applied here with full regard to the context of Canadian bankruptcy legislation. This appeal involves the allocation of a particular bankruptcy matter within a single national bankruptcy scheme created by the Act. As shown in *Holt Cargo Systems*, supra, consideration of the allocation of a matter having different aspects (e.g. maritime law and bankruptcy law), as between Canadian courts and foreign courts operating under quite different legislative or other schemes, may raise different problems.

75 Secondly, *Amchem* and its progeny involved private litigation. Here, as explained in *Holt Cargo Systems*, supra, there is the important public interest aspect mentioned above. The Court looks not only at the *Amchem* factors, but must strive to give effect to Parliament's intent to create an economical and efficient national system for the administration of bankrupt estates, as evidenced in the Act.

76 It is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This, as noted in *Holt Cargo Systems* was not present in the *Amchem* fact situation. In fact, there are stronger policy considerations here than in *Holt Cargo Systems*. That case dealt with a choice between a maritime law action in Halifax for the determination of claims of *secured* creditors that had already proceeded to default judgment and, as an alternative, the exercise of jurisdiction by the Quebec Superior Court sitting in Bankruptcy acting at the behest of the bankruptcy court in Belgium in a matter that was still in its early stages of organization. In those circumstances the Federal Court of Canada declined to stay the maritime law action, and its exercise of discretion was upheld by the Federal Court of Appeal and by this Court.

77 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart* , supra, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings,

and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of the debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.

78 The "balancing test" advocated by the appellant based on the *Amchem* factors and general principles of private international law fails to take these important public policies into account. The Quebec Superior Court sitting in Bankruptcy is, in a very real sense, sitting as a national court.

79 Finally, in point of fact, even if the principles of private international law did apply without modification for the bankruptcy context, it is difficult to discern any connection at all between the dispute and Vancouver except that Eagle signed some agreements with a choice of law clause directed to the laws of that jurisdiction. The links between the appellant and Vancouver are not particularly strong. It has, amongst other offices, a Vancouver address, but the bulk of the activities at issue here occurred outside British Columbia. Its key employee, Mr. Ryan Modesto, resides in the United States. The management services agreement of June 12, 1996 recites that Azco's corporate office is in Arizona. Azco's press release of September 17, 1996, announcing this project to the world, was issued in Arizona. Moreover there is no juridical advantage to the appellant in proceeding under the same bankruptcy regime in Vancouver as in Hull. In either case, the law of British Columbia may be applied. Vancouver may be marginally more convenient for the appellant and some of its witnesses, but that is all that can be said for it. The trustee, for its part, complains that if the appeal succeeds, it would, on the same reasoning, be required to bring other actions (unrelated to Azco) in Chicoutimi, Toronto, Halifax, Winnipeg, Charlottetown and Calgary. The trial judge has much factual support for his decision to retain the case in Hull.

80 I do not wish to be taken, however, as squeezing the life out of s. 187(7). While the facts in this case do not show "sufficient cause" to make the transfer to British Columbia, other cases may arise of course where the transfer is justifiable. Even in *Stewart* , supra, which established the "single control" paradigm, Anglin J. went out of his way to say that the case probably should have been heard in P.E.I. The claimants' problem in that case is that they failed to seek leave from the court in British Columbia before launching their case in P.E.I. Just before the "single control" passage previously cited, Anglin J. says (at p. 349):

> I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island — as from what is now before us would seem to be the case — an order of transfer will not be made, preceded or accompanied by the necessary leave under s. 22.

And Brodeur J. said this (at p. 352):

> In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

81 The point is that it was up to Azco to demonstrate "sufficient cause" on the facts of *this* case, and it failed to do so.

V. Conclusion

82 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

TAB 2

1996 NSCA 30
Nova Scotia Court of Appeal

Hoque, Re

1996 CarswellNS 51, 1996 NSCA 30, [1996] N.S.J. No. 55, 148 N.S.R. (2d) 142, 38 C.B.R. (3d) 133, 429 A.P.R. 142, 61 A.C.W.S. (3d) 19

MONTREAL TRUST COMPANY OF CANADA v. COOPERS & LYBRAND LIMITED (trustee in bankruptcy of estate of DR. KHANDKER SHAMSUL HOQUE)

Hallett, Jones and Roscoe JJ.A.

Heard: January 17, 1996
Judgment: February 5, 1996
Docket: Doc. C.A. 119215, 119873

Counsel: *Alan V. Parish*, for appellant.
Victor J. Goldberg, for respondent.
D. Bruce Clarke, for Khandker S. Hoque.

The judgment of the court was delivered by *Hallett J.A.*:

1 This is an appeal by Montreal Trust Company of Canada from a decision of Justice Michael MacDonald dismissing Montreal Trust's application under s. 37 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 for an order that a right of action of Dr. Hoque, the bankrupt, against his secured creditors remained in his estate in bankruptcy and had not been transferred to him by Coopers & Lybrand Limited, the trustee in bankruptcy of the estate of Dr. Hoque. Alternatively, Montreal Trust sought an order that if the right of action had been transferred that the conveyance and assignment ought to be declared null and void and of no force and effect.

2 Section 37 of the *Bankruptcy and Insolvency Act* provides:

> Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

3 In short, Montreal Trust asserts that the trustee acted unreasonably by failing to offer to Montreal Trust an opportunity to either settle the claim Dr. Hoque proposed to make against Montreal Trust or offer to assign the cause of action to Montreal Trust for a price.

4 The facts disclose that the trustee agreed to assign the cause of action to Dr. Hoque without considering that Montreal Trust might have been a potential purchaser. Montreal Trust asserts that the trustee accordingly failed to perform the duties required of a trustee to realize on the assets in a way that would be most beneficial to the general body of creditors. Justice MacDonald found that the trustee, with the approval of the inspectors, acted reasonably in disposing of the cause of action by agreeing to transfer it to Dr. Hoque for valuable consideration.

5 There were several issues raised on the application to Justice MacDonald but this appeal has been narrowed to one issue and that is whether the trustee acted reasonably in failing to contact Montreal Trust as a potential purchaser of the cause of action.

The Facts

6 Dr. Hoque had very substantial real estate holdings. A number of buildings owned by his companies were mortgaged to Montreal Trust. Through one of his companies he became involved in the development of a condominium project which caused a considerable drain on his cash resources. There were problems with the construction and the condominiums were not selling due to a general down turn in the economy and in the real estate market in particular. Dr. Hoque had been a guarantor of loans made by Montreal Trust to his various companies. The mortgages went in arrears. Over a period of time Dr. Hoque attempted to refinance properties but eventually all avenues of refinancing seemed to be closed and in early 1993 he made an assignment in bankruptcy. Montreal Trust commenced foreclosure proceedings.

7 It is clear from the extensive affidavit evidence that was filed before Justice MacDonald that by November 1993 the trustee was preparing his formal Report to the Registrar in Bankruptcy in connec tion with Dr. Hoque's application for discharge. The trustee, with the approval of the inspectors, was recommending to the Registrar of Bankruptcy that Dr. Hoque only be discharged on the condition that, if he were to be successful in his lawsuits, particularly the one contemplated against Montreal Trust, he would be required to pay the lesser of 20% of his net recovery or $200,000 to the trustee for the benefit of the creditors. Dr. Hoque supported this recommendation. It is clear from the evidence that earlier in the year the trustee and the inspectors had given consideration to either defending the foreclosure proceedings that had been commenced by Montreal Trust or commencing a separate proceeding against Montreal Trust based on the allegations made by Dr. Hoque that Montreal Trust's manner of dealing with his mortgages was the cause of the collapse of his real estate ventures. The trustee and inspectors had taken advice from counsel; he advised them that the costs of pursuing the matter would be in the order of $200,000 to $250,000. There were no funds in the estate. None of the major creditors were prepared to fund the lawsuit and the decision was made that the best way to recover anything for the creditors would be to assign the causes of action to Dr. Hoque and to make the recommendation that was eventually made by the trustee to the Registrar.

8 On November 9th, 1993, the Registrar in Bankruptcy heard the application for discharge. It was opposed by Montreal Trust on the ground that there were missing funds which the police were investigating and, accordingly, Dr. Hoque should not be discharged. Alternatively, if he were to be discharged, Montreal Trust took the position that it should be conditional upon his being required to pay the lesser of 60% of recovery on potential lawsuits or $600,000.

9 The Registrar in Bankruptcy did not agree with the recommendation of either the trustee or Montreal Trust. He ordered that Dr. Hoque would be granted an absolute discharge provided he consented to judgment in the amount of $68,000 which was to be paid over a period of five years. Dr. Hoque agreed and on December 15, 1993, an absolute order of discharge was signed by the Registrar.

10 On March 29th, 1994, Mr. Bruce Clarke, the solicitor acting for Dr. Hoque with respect to the dealings with the trustee, wrote the trustee advising that if the trustee transferred the causes of action to Dr. Hoque he would agree to pay out the consent judgment as soon as he received funds from the litigation. Subsequent to this the trustee contacted the inspectors who authorized the trustee to agree to the assignment to Dr. Hoque. As a result the trustee requested from Mr. Clarke that he be provided with a letter signed by Dr. Hoque confirming his agreement that if he received funds from the litigation he would pay out the consent judgment prior to the expiry of the five year period.

11 In September of 1994, another solicitor acting for Dr. Hoque commenced an action on his behalf against Montreal Trust. Dr. Hoque had not provided the requested letter to the trustee and, accordingly, the formal assignment of the causes of action had not been executed.

12 On or about December 20th, 1994, Mr. Clarke advised the trustee that Dr. Hoque intended to bring an application under s. 172(3) of the *Act* for a modification of the discharge Order.

13 On February 9th, 1995, the trustee was asked by counsel for Montreal Trust to advise them of the status of the purported transfer to Dr. Hoque of the causes of action. The trustee advised counsel for Montreal Trust that, although a resolution had been passed authorizing the assignment to Dr. Hoque, the assignment documents had not been executed.

14 On March 1st, 1995, counsel for Montreal Trust requested the trustee to revoke what counsel referred to as the offer to assign the causes of action to Dr. Hoque. The letter also advised the trustee that Montreal Trust was prepared to pay an amount (to be negotiated) for any rights of action which were vested in the estate.

15 The trustee and the inspectors met and discussed the contents of this letter with the solicitor for the bankrupt estate. The solicitor was instructed to write Montreal Trust advising that the estate did not wish to become embroiled in a dispute between Montreal Trust and Dr. Hoque.

16 On March 7th Montreal Trust applied to the Registrar in Bankruptcy for an order declaring that the assignment and conveyance from the trustee to Dr. Hoque of certain causes of action was of no force and effect and requested that Dr. Hoque's application for variation of the order for discharge be moved to the Supreme Court of Nova Scotia. The Registrar refused to transfer the matter to the Supreme Court.

17 On March 8th the trustee received the letter from Dr. Hoque confirming his agreement with respect to the immediate payment of the net proceeds from the lawsuit.

18 On March 21st, Justice Bateman, then of the Supreme Court, refused Montreal Trust's application to determine the status and ownership of the causes of action and refused to grant an order that the variation hearing with respect to the earlier discharge Order be heard in the Supreme Court and refused to stay the application before the Registrar for a variation. The application by Dr. Hoque to vary the terms of the discharge Order was heard by the Registrar. Montreal Trust and the trustee successfully opposed the variation.

19 Montreal Trust continued to pursue its application in the Supreme Court to determine the status and ownership of the causes of action and the matter was set down for hearing.

20 On July 12th, 1995, Justice MacDonald heard the application. Extensive affidavit evidence was filed, in particular, the affidavits of the trustee representative, Mr. Mark Rosen, who was the chartered accountant administering the estate; the affidavits of counsel and associate counsel for Montreal Trust which set out relevant facts that were not in dispute; the affidavit of Dr. Hoque and the affidavit of Herb A. MacIntosh setting out that as of July 5th, 1995, Montreal Trust was owed $3,905,126 as a creditor of the estate in bankruptcy of Dr. Hoque. *Viva voce* evidence of Mr. Rosen and Dr. Hoque was heard by Justice MacDonald.

The Decision Appealed From

21 Justice MacDonald directed his mind to the issue raised by Montreal Trust that the trustee breached its duty to the creditors of the bankrupt estate by failing to contact Montreal Trust with respect to either settling the potential lawsuit or paying for an assignment of it before agreeing to assign the cause of action to Dr. Hoque. On the application, counsel for Montreal Trust argued that it was unreasonable for the trustee to have so acted. Justice MacDonald concluded that the decision of the trustee (with the approval of the inspectors) to assign the cause of action to Dr. Hoque was a legitimate business decision; that the trustee and the inspectors acted reasonably and that the sale was not contrary to the interests of the creditors generally. He dismissed the application and ordered that Montreal Trust pay to Dr. Hoque party and party costs which he fixed in the amount of $1,500 plus disbursements of $294.05 and that Montreal Trust pay the trustee's solicitor/client costs of $3,400 plus disbursements of $38. He did not agree that Montreal Trust should pay the trustee's fees of $3,043.08 but directed that they be paid from the estate.

The Position of the Appellant on the Appeal

22 On this appeal Montreal Trust asserts that Justice MacDonald erred in finding that the trustee had acted reasonably in the disposition of the cause of action to Dr. Hoque and erred in law when he found that the disposition was not contrary to the interests of the creditors generally. The notice of appeal further asserts that Justice MacDonald erred by failing to order that the trustee liquidate the cause of action and consider Montreal Trust as a potential purchaser when liquidating that asset. It is further asserted in the notice of appeal that Justice MacDonald erred in mixed law and fact in finding that the trustee and/or

the inspectors took into account business considerations in reaching their decision when the evidence disclosed that the cause of action was not offered to Montreal Trust because the trustee found such a proposition to be morally repugnant. Finally and alternatively, the notice of appeal asserts that Justice MacDonald erred in law in finding that the principles set out in *Re Katz* (1991), 6 C.B.R. (3d) 211 (Ont. Bktcy.) do not apply to the circumstances of the case.

23 Montreal Trust requests that the judgment of MacDonald J. be reversed and that this Court find that the causes of action which lay against the secured creditors of Dr. Hoque remain vested in Dr. Hoque's estate in bankruptcy and that the trustee conduct a sale of the cause of action against Montreal Trust and that each of Dr. Hoque and Montreal Trust shall be entitled to purchase the asset from the estate and further that the trustee have its costs paid out of the estate and Montreal Trust have its costs against Dr. Hoque.

24 Montreal Trust also appeals the manner in which Justice MacDonald decided the cost issues asserting that he erred in law in ordering Montreal Trust to pay the costs of the estate's solicitor on a solicitor/client basis and erred in law in awarding a fixed sum for solicitor/client costs rather than requiring the taxation of the account. Montreal Trust requests that this aspect of the judgment be reversed and that the Court order that the cost of the estate solicitor be paid out of the estate or, alternatively, that Montreal Trust pay the costs of the estate solicitor on a party and party basis in an amount to be fixed by taxation or otherwise agreed to by the parties.

25 In summary, counsel for Montreal Trust argues that the trustee ought to have realized that Montreal Trust might be interested in either settling the potential action or be prepared to pay for an assignment of it simply to avoid the cost of having to defend and, therefore, the trustee did not give careful consideration to the disposition of the cause of action. With respect to the award of costs, counsel argues that there was no basis for Justice MacDonald departing from the general principle that party and party costs be awarded as Montreal Trust had raised a legitimate issue that needed to be resolved.

The Position of the Respondent Trustee

26 Counsel for the trustee argues that Justice MacDonald gave careful consideration to the evidence and the law in finding that the trustee acted reasonably in disposing of the cause of action. Counsel asserts it was a legitimate business decision and considering all the circumstances there was no reason for the trustee to believe that Montreal Trust might be interested in paying for an assignment of the cause of action not having exhibited any interest in doing so until March 1st, 1995. He asserts that this Court should not interfere with the findings of the trial judge (*Stein v. "Kathy K" (The) ("Storm Point") (The)*), [1976] 2 S.C.R. 802). He also asserts that costs are in the discretion of the trial court and the exercise of that discretion should be left alone by an appeal court.

The Position of Dr. Hoque

27 On behalf of Dr. Hoque it is argued that this was a reasonable business decision and that the law dictates that a court, reviewing a decision made by a trustee in bankruptcy with the approval of the inspectors, should show deference to the business acumen of the trustees and the inspectors who are familiar with the practicalities of administering the bankrupt estate.

Disposition of the Appeal

28 As early as January 1993 Montreal Trust, as a result of having received correspondence from Dr. Hoque's Toronto solicitor, was well aware of the potential lawsuit against it by Dr. Hoque.

29 It is clear from the evidence that the trustee did not think of Montreal Trust as a potential purchaser of the lawsuit when, later in 1993, the trustee worked out the agreement with Dr. Hoque whereby the latter would obtain an assignment of the cause of action and would support the trustee's recommendation to the Registrar that he be discharged from bankruptcy on the condition that 20% of the proceeds of the litigation or $200,000, whichever was the lesser, would, if recovered by Dr. Hoque, be paid to the trustee.

30 There is no evidence that, at the time the decision was made to make a deal with Dr. Hoque, the trustee was influenced by his subsequently stated opinion that the sale of lawsuits to defendants was morally repugnant.

31 As noted in the recitation of the facts, Montreal Trust opposed the discharge but, as an alternate position, supported the concept that Dr. Hoque would be able to proceed with any potential lawsuits provided he pay 60% of any net recovery or $600,000 whichever was the lesser, to the trustee. Montreal Trust did not indicate any interest in acquiring the lawsuit at that time yet it was well aware of the intention of the trustee to assign the cause of action to Dr. Hoque.

32 The decision of the Registrar in Bankruptcy in December of 1993 impacted on the agreement between the trustee and Dr. Hoque. In March 1994 Dr. Hoque's solicitor wrote the trustee putting forward a proposition for earlier payment of the $68,000 provided the lawsuits were assigned to Dr. Hoque. This offer was eventually accepted by the trustee, with the authorization of the inspectors, in the latter part of the summer of 1994. After that, there only remained a matter of formalizing the agreement which required that Dr. Hoque provide the letter requested, evidencing his obligation, and upon receipt of that letter the trustee would execute the formal assignment. The trustee had not imposed a deadline on Dr. Hoque for delivery of the requested letter. It was not until the letter of March 1st, 1995, that Montreal Trust indicated any interest in purchasing the cause of action. When asked by Montreal Trust in this letter to revoke the offer to Dr. Hoque, an agreement had already been made, and the trustee was in no position to resile from that agreement. It must be remembered that Dr. Hoque supported the trustee's recommendation on the discharge hearing on the understanding the cause of action against Montreal Trust would be assigned to him. And that in 1993 the trustee had made a decision, in consultation with the inspectors and the solicitor, not to pursue the cause of action against Montreal Trust but to assign it to Dr. Hoque. While it is correct that once Dr. Hoque consented to the judgment in the amount of $68,000 the subsequently agreed upon consideration for the assignment (the possible acceleration of payment of the judgment) was not substantial. However, Dr. Hoque would not likely have consented to the judgment had he not the reasonable expectation that the trustee would assign the cause of action.

33 One must look at all of the foregoing in assessing the reasonableness or lack of the same of the decision of the trustee to conclude an agreement with Dr. Hoque in the summer of 1994.

34 There seemed to be an issue before Justice MacDonald as to whether the duties of a trustee in bankruptcy were as set out in *Katz* (supra) or those set out in *Re Keppoch Development Ltd.* (1992), 15 C.B.R. (3d) 228 (N.S. T.D.). It is my opinion this ought to have been a non-issue. The tests to be applied by a court reviewing the decision of a trustee appointed under the *Bankrupty and Insolvency Act* or a receiver appointed by the court respecting the sale of an asset are substantially the same. Both a trustee under the *Bankruptcy and Insolvency Act* and a receiver appointed by the court must act in a reasonable and competent manner in the performance of their duties to the creditors. A difference between a trustee acting under the provisions of the *Bankruptcy and Insolvency Act* and a receiver appointed pursuant to a court Order, is that the trustee is governed by the *Act* and the receiver by the common law and the terms of the court Order. In addition, the trustee has the benefit of a group of experienced creditors' representatives acting as inspectors who can bring their experience to bear on proposed dispositions of assets by the trustee. These differences do not alter the requirement that both trustees and receivers respectively act with integrity in a competent and reasonable manner.

35 When it comes to making business decisions relating to the sale of the bankrupt's assets, a trustee, with the authorization of the inspectors, must exercise reasonable business judgment. The trustee must provide advice to the inspectors equivalent to the advice one would expect from a reasonably competent trustee in the circumstances. Both the trustee and the inspectors are entitled to rely on legal advice from counsel for the estate. And, of course, a trustee must act with honesty and integrity. Finally, the courts should show deference to business decisions made by those entrusted by the creditors and authorized by the *Act* to make such decisions.

36 I agree with counsel for Montreal Trust that it had no obligation to indicate to the trustee it was interested in either paying a sum of money to acquire the causes of action or settling it. However, the fact that Montreal Trust was well aware of the intent of Dr. Hoque to commence action against it, yet it never exhibited any interest in acquiring the cause of action until March 1st, 1995, is a relevant consideration in reviewing the reasonableness of the trustee's action in failing to offer the cause

of action to Montreal Trust prior to concluding that it would be in the best interest of the creditors to assign the cause of action to Dr. Hoque and hopefully derive a benefit for the estate if he were to succeed in his potential action. Absent evidence that it is common place for the trustees to peddle potential lawsuits that a bankrupt may have to the defendants in those potential lawsuits, it is difficult to conclude that the failure of the trustee to consider Montreal Trust as a potential purchaser of the asset (particularly where the trustee considered it to be of nebulous value and Montreal Trust had shown no interest) was a failure to act reasonably in the circumtances.

37 It cannot be disputed that a defendant might be prepared to pay a sum of money to avoid even a lawsuit that the defendant is satisfied is without merit simply to save the costs of defending which would not likely be recovered from a discharged bankrupt if the trustee transferred the cause of action to the bankrupt or caused the right of action to be returned to the bankrupt as an unrealized asset. This would be particularly so where the costs of defending would be high.

38 The lawsuit which Dr. Hoque commenced against Montreal Trust in September of 1994, which blames Montreal Trust for the collapse of his real estate ventures is complex and will be expensive to defend. That trustees do sell lawsuits to the defendants in those suits is clear from *Re Katz* (supra). How prevalent this somewhat unseemly method of realizing on an asset of nebulous value is not disclosed in the evidence. Although a bare assignment of a right of action was at one time illegal, an assignment of a bare right of action by a trustee in bankruptcy was not (*Halsbury's Laws of England*, volume 9, (4th) at para. 401).

39 An advertisement by a trustee, for either a public auction or a call for the submission of tenders to purchase a potential claim against one of the bankrupt's creditors, while lawful, would be unusual in the absence of a situation such as confronted the trustee in *Re Katz* (supra) where the trustee had an expression of interest from more than one party. The nature of the asset does not lend itself to these traditional methods of realization by a trustee. The issue, however, is whether the trustee ought to have invited a bid from Montreal Trust. Even in hindsight it is not known whether Montreal Trust would have been prepared to pay anything for the lawsuit had an offer been made to Montreal Trust in 1993 or 1994.

40 Mr. Rosen did not think of this method of disposing of this so-called asset; apparently it did not occur to him that he could more or less intimidate Montreal Trust into paying a substantial sum for what the trustee considered to be a lawsuit of questionable value. Had Montreal Trust ever indicated an interest before the agreement was made with Dr. Hoque, the trustee would have been in a very different situation.

41 I agree with the comments of Mcfarlane J. in *Re Groves-Raffin Construction Ltd. (No. 2)*, [1978] 4 W.W.R. 451, 28 C.B.R. (N.S.) 104 (B.C. S.C.) where he stated at (C.B.R.) 112:

> In considering the conduct of a trustee it is well to keep in mind that the scheme of the *Act* is to allow the trustee to administer the estate under the supervision of the inspectors without interference unless there has been an excess of power, fraud, a lack of bona fides, or unless the actions of the trustee and the inspectors are unreasonable from the standpoint of the good of the estate.

42 Justice MacDonald had before him all the affidavit evidence that is before us. In addition, he heard the *viva voce* testimony of the trustee and Dr. Hoque. Justice MacDonald clearly understood the issue and made a judgment call that the trustee, in the circumstances, acted reasonably and in the interest of the creditors generally, despite the trustee having failed to consider a sale of the cause of action to Montreal Trust.

43 The trial judge did not apply an incorrect test in assessing the conduct of the trustee and his decision is justified on the evidence. I would not interfere with his finding. In fact, I agree with his conclusion. (*Stein v. "Kathy K" (The)* (supra)).

44 I would make one further point, although it was not raised in argument. Having made an agreement with Dr. Hoque to assign the cause of action to him, the trustee's hands were tied when he received the March 1st, 1995, letter from counsel for Montreal Trust. A Court would be hard pressed to conclude that it ought to set aside the agreement made with Dr. Hoque on the ground that the trustee ought to have also offered to sell the lawsuit to Montreal Trust. Dr. Hoque was entitled to insist on the agreement being completed by the exchange of the documents contemplated. Section 37 of the *Bankruptcy Act*, while it gives the Court broad power to confirm, reverse or modify a decision complained of and make such order as it thinks just,

ought not to lightly set aside an agreement that the other party (in this case Dr. Hoque) was entitled to have performed. The only ground asserted in requesting this Court to declare the agreements null and void is that the trustee ought to have disposed of the asset in a different manner. While s. 37 of the *Act* gives the Supreme Court in Bankruptcy power to set aside the trustee's decision, it would only be in exceptional circumstances that the Court would set aside a valid and enforceable agreement. There is no evidence of what amount Montreal Trust was prepared to pay for the assignment of the cause of action. To set aside an agreement made by the trustee in good faith would, in the eyes of those persons acquiring assets from time to time from trustees, impinge on the integrity of the bankruptcy process.

45 In an article entitled "*Sale of Assets by a Trustee; The Fundamental Pragmatics*" by Al Lando, C.A., Senior Vice-President of Price Waterhouse Limited, Toronto published in (1991) 3 C.B.R. (3d) 179, the author draws a distinction between what might be a sharp but acceptable practice by businessmen to enhance their "bottom line" with the standard of conduct expected of a trustee in bankruptcy in realizing on assets of the bankrupt. The author states at p. 181:

> The trustee in bankruptcy, however, is governed by standards that go beyond those which determine the business behaviour of the entrepreneur. As an officer of the Court, the trustee must always be concerned about the integrity of the insolvency process. There are times when "reasonable" business principles are not easy to reconcile with the determinants for standards of behaviour that govern an officer of the Court. The businessman is playing in his own game, and must do what is fair and reasonable, no less, but not necessarily more. The stakes are greater for the trustee; his actions are measured against a higher test, a test of not only being right and fair but that of appearing to be right and fair. The dilemma arises when doing what is right, when conducting an administration from the "highest moral ground", does not necessarily produce the best commercial result.
>
> All of that said, the insolvency process (the *Bankruptcy Act*, the Courts, the office of the superintendent in bankruptcy, members of the Bar who specialize in bankruptcy law, and trustees) manages, for the most part, to satisfy its intended purposes in a practical sense. This paper will talk about basic principles, focusing on the practical considerations that influence the manner in which a trustee wheels and deals with the assets of a bankrupt.

46 The author then condemns the practice of trustees "wheeling and dealing" in assets to maximize recovery. He concludes his article by stating that there are certain assets that are difficult to deal with but the trustee should be governed by the same fundamental principles that govern the treatment of all assets and principles that will always enhance and never offend the integrity of the process. He concludes stating:

> What are these principles? Among those described or alluded to are: fairness, equity, good faith, order (as opposed to "chaos" referred to in the last case cited), honesty, integrity, due care, and sound commercial practice. Of equal importance, the trustee's actions must be perceived to be governed by these standards. That the process functions effectively, is a manifestation of the symbiosis between the practices and procedures as they are articulated in the *Act*, superintendent directives, and the case law, on the one hand, and their practical application in the business world, on the other hand.

47 A trustee in bankruptcy has a broader range of duties than simply getting the best possible price at any cost.

48 In *Re Pachal's Beverages Ltd.* (1969), 13 C.B.R. (N.S.) 160 the Saskatchewan Court of Appeal had to deal with the provisions of s. 15 of the *Bankruptcy Act*, R.S.C. 1952, c. 14. That section is essentially the same as the present s. 37 of the *Bankruptcy and Insolvency Act*. The Court stated at p. 163:

> While s. 15 gives to the court a wide discretionary power: *Imperial Bank of Canada v. Barber* (1921), 50 O.L.R. 380, 1 C.B.R. 485, 59 D.L.R. 523; and *Re Hancock; Ex part Spraggett*, [1952] O.R. 121, 32 C.B.R. 96, [1952] 1 D.L.R. 785; that power must be judicially exercised. To obtain relief under this section, the onus rests upon the applicant to show that it has been aggrieved by the decision of the trustee, or has suffered damage or prejudice as a result of the trustee's action: *Re Gareau (English and Scotch Woollen Company); Ex part Joseph Brothers Limited* (1922), 3 C.B.R. 76.

49 The only affidavit filed by Montreal Trust was that of Mr. MacIntosh setting out the amount owing to Montreal Trust. There is nothing stated to show that Montreal Trust has been aggrieved by the decision of the trustee to assign the lawsuit to

Dr. Hoque other than the argument by counsel that an action has been started and that Montreal Trust will incur costs to defend the action. Possibly it goes without saying that they are aggrieved and to that extent have or will suffer damages.

50 The decision in *Pachal's Beverages* (supra) is relevant as it makes clear that the burden of proof is on the applicant to show that the trustee's decision was unreasonable and not on the trustee to show that it was right. In the absence of evidence to prove that, as a general practice, trustees in bankruptcy offer to sell causes of action which the bankrupt may have to the potential defendants in those lawsuits who also happen to be creditors of the bankrupt, it is difficult to conclude that the trustee's conduct in this instance was a failure to meet the acceptable standards for a trustee in realizing on assets of the bankrupt.

51 In summary, on the principal issue, I would dismiss the appeal on two grounds. The trial judge did not err in concluding on the facts that the trustee acted reasonably, and in the interests of the creditors generally, notwithstanding the failure to ask Montreal Trust if it would like to bid to acquire the lawsuit; and, secondly, it would be unjust in the circumstances to grant the relief sought by Montreal Trust as Dr. Hoque was entitled to have the agreement he made with the trustee finalized; in short, it would not be a judicial exercise of the power given the court by s. 37 of the *Act*. To grant the relief sought, even if it were concluded that the trustee acted unreasonably, would also offend the integrity of the bankruptcy process.

The Costs Issue

52 We were advised at the hearing of this appeal that the estate in bankruptcy has no assets. I assume counsel meant no assets other than judgment against Dr. Hoque, the value of which is very dependent on Dr. Hoque succeeding in his action against Montreal Trust.

53 With one exception, I would not interfere with Justice MacDonald's decision on costs. I agree with counsel for Montreal Trust that the application was not frivolous; there were issues to be resolved and s. 37 is in the *Act* to allow decisions of the trustee to be reviewed by the Court. However, on the facts, Justice MacDonald, even if he had found that the trustee had not acted reasonably in failing to offer the lawsuit to Montreal Trust, would not likely have granted the relief sought by Montreal Trust. As already noted, it would not be just to declare the agreement with Dr. Hoque null and void. There is no allegation of fraud nor any reason to warrant depriving Dr. Hoque of the benefit, if any, of the agreement he made with the trustee to have the lawsuit assigned to him.

54 Under the circumstances, Justice MacDonald did not err in awarding solicitor and client costs to the trustee to be paid by Montreal Trust notwithstanding that an award of solicitor and client costs is only made in exceptional circumstances as is an order that such costs be paid other than out of the estate.

55 An award of solicitor and client costs should not be limited as was held in *Stiles v. British Columbia (Workers' Compensation Board)* (1989), 39 C.P.C. (2d) 74 (B.C. C.A.) to situations where the party ordered to pay the costs was guilty of reprehensible conduct. In this instance, the conduct of Montreal Trust could not be categorized as reprehensible.

56 Solicitor and client costs were awarded against the s. 37 applicant in *Re Groves-Raffin Construction Ltd. (No. 2)* (supra) where on the cost issue the Court concluded:

> There is no reason, in my opinion, why the trustee or the estate should bear any part of the costs of an application brought solely for *the benefit of one creditor*. The costs of the trustee are therefore awarded against Fred Welsh Ltd. on a solicitor and client basis. Different considerations apply with respect to Fidelity. In essence, this has been a dispute not between Fred Welsh Ltd. and the trustee, but with Fidelity. The latter will have its costs on a party and party basis against Fred Welsh Ltd.

57 The application of Montreal Trust is essentially for its sole benefit. There appears to be case law that the words of s. 37 are broad enough to permit the court to set aside a sale even if the sale has been completed (See *Houlden and Morawetz Bankruptcy and Insolvency Law of Canada*, 3rd Edition, Volume 1, p. 1-87. The authority cited for that statement is *Re H. Packer & Son Ltd.* (1936), 17 C.B.R. 207 (Que. S.C.). A review of that case shows a very different fact situation that we have under consideration. In *Re H. Packer* (supra) one of the inspectors of the estate was the president of a company which purchased the estate assets

without the prior approval of the Court to the sale. The Court declared the sale null and void; the prior approval of the Court being necessary in such a case under s. 103(6) of the *Bankruptcy Act* that was in force at the time. The Court stated at p. 208:

> ... There are now concerns [businesses] who make a business of buying bankrupt assets, and to allow insiders to take advantage of their knowledge to put in a bid at a few dollars more than the highest bidder is an unfair practice, which, if allowed to prevail, would discourage bidding by outsiders and militate against obtaining the best possible price, and, therefore, should not be countenanced:

58 The same reasoning dictates that on the facts we have under consideration the sale to Dr. Hoque should not be set aside; it would be unfair to do so in the circumstances of this case.

59 Costs are in the discretion of the Supreme Court in Bankruptcy. I would not interfere with the exercise by Justice MacDonald of his discretion to award solicitor and client costs but I am of the opinion that under the circumstances he ought to have ordered that the solicitor and client costs of the trustee be taxed so as to enable Montreal Trust to make representations as to the amount of the account.

60 Montreal Trust has not appealed the award of costs to Dr. Hoque.

61 On this appeal the trustee, by notice of contention, argues that Justice MacDonald ought to have ordered Montreal Trust to pay the trustee for its time in preparing for the application. I disagree. The time spent by the trustee in these circumstances was exactly the same as the time spent by any litigant who is unfortunately involved in legal proceedings. There is no legal basis for requiring the losing party to a lawsuit or legal proceeding to pay a sum of money to the other side to compensate the winning party for time spent in preparing for and attending the proceedings.

62 In summary, Montreal Trust's appeal ought to be dismissed other than requiring that the solicitor and client costs awarded to the trustee be taxed.

63 The trustee and Dr. Hoque shall each have costs of this appeal against Montreal Trust which I would fix at $1,000 each plus disbursements.

Appeal dismissed.

TAB 3

1924 CarswellAlta 69
Alberta Supreme Court, In Bankruptcy

McCoubrey, Re

1924 CarswellAlta 69, [1924] 3 W.W.R. 587, [1924] 4 D.L.R. 1227, 5 C.B.R. 248

In re McCoubrey

In re Stratton and Greenshields Limited

Tweedie, J.

Judgment: November 15, 1924

Counsel: *L. J. Clarke*, Official Receiver and chairman, in person.
C. J. Ford, K.C., for Stratton.
P. L. Sanford, for Greenshields Limited and W. R. Brock & Co., Limited.

Tweedie, J. **[after stating in above words the nature of the appeal]:**

1 Each appellant asks that the votes cast by the creditors whose proofs of claim or proxies were objected to on his or its behalf be disallowed, and that the Court make an order in regard to the election of the trustee in accordance therewith.

2 There were present or represented at the meeting thirty-six creditors of whom four had not proved their claims and were not entitled to vote (sec. 42(9) [1 C.B.R. 48, 4 C.B.R. 18]); the proofs of two were disallowed, from which disallowance no appeal was taken, while the remaining thirty with a voting power of forty votes proceeded to the election of a trustee, there being two nominees as herein indicated by the vote. Of the creditors voting, sixteen, all corporations, representing twenty-six votes, voted by proxy for the Canadian Credit Men's Trust Association, Limited, and fourteen, of whom only one was a corporation, representing fourteen votes, voted by proxy, for the Security Trust Co., Ltd. As a result of the vote the chairman declared the former, who will hereinafter be referred to as "the trustee", elected.

3 The objections of Stratton pertain to the votes cast in favour of the trustee, while those of Greenshields Limited pertain to those cast in favour of the Security Trust Co., Ltd.

4 Each notice of appeal sets forth, amongst others, many objections which are common to both, and the same objections, in many instances, are taken against each of the several proofs and proxies objected to. The objections in the aggregate number ninety-eight but by reason of repetition thereof in specific language, in many instances, and substance, in others, they may be severally allocated to some one or other of the twelve specific objections hereinafter enumerated, and which will be considered without reference to the particular appeal in which they are raised, or to the particular proof or proofs, proxy or proxies, in connection with which they may have been taken, except in so far as may be necessary for the purpose of giving effect to any objection which may be sustained.

5 [1] Before proceeding to consider the objections set forth in the notice of appeal, it will be necessary to dispose of two preliminary objections to the right of Greenshields Limited to appeal, and also an application made on behalf of a creditor, the W. R. Brock Co., Ltd., to become a party to the proceedings by being added as a party appellant along with, or being substituted for, Greenshields Limited.

6 Two preliminary objections were taken to the appeal of Greenshields Limited, viz.: (1) That it had no status to maintain the appeal as it had not filed a proper proof of claim; and (2) That none of the objections to the proofs of proxies set forth in its notice of appeal were taken before the chairman at the meeting.

7 As to the appellant's status: The right of appeal is not limited to a creditor who has proven his claim at the time of the first meeting. The decisions of the chairman in regard to proof for the purpose of voting is subject to appeal to the Court (sec. 42(12) [1 C.B.R. 48, 575]) and "any creditor" may appeal (sec. 42(5) [1 C.B.R. 47, 4 C.B.R. 18]). The creditors who may attend the first meeting are not limited to those who have proven their claims. The custodian must mail to "every creditor known to him a circular calling the first meeting of creditors," (sec. 42(2) [1 C.B.R. 47, 2 C.B.R. 614, 4 C.B.R. 18]) and at the same time "a proxy in the form prescribed by General Rules" (sec. 42(13) [1 C.B.R. 48, 4 C.B.R. 18]), but the rights of creditors at meetings are restricted in so far as their right to vote is concerned (sec. 42(9) [1 C.B.R. 48, 4 C.B.R. 18]). It is not the policy of the law to restrict the rights of a creditor to the enforcement of his claim against, or the protection of his interest in, the estate of an insolvent beyond that which is provided by statute either expressly or by implication (see *Bank of Hamilton v. Aitken* (1893), 20 O.A.R. 616). If a person is a creditor in fact, even though he has not filed a proof of claim, prior to, or at the time of the first meeting, he is, nevertheless, entitled to exercise his rights as such for the purpose of an appeal, provided that he has duly proven his claim in accordance with the provisions of *The Bankruptcy Act* and Rules thereunder prior to the hearing of the appeal and subject, of course, to the other provisions of the Act and Bankruptcy Rules governing appeals. The Court might, in its discretion, to permit of such proof, adjourn the hearing of the appeal provided that the creditor has not delayed unreasonably in making the necessary proof (see *Ex parte Ditton; In re Woods* (1879), 11 Ch. D. 56, 40 L.T. 297, 27 W. R. 401).

8 From the material before me I am satisfied that Greenshields Limited is not only a creditor in fact but also that its claim was duly proven at the time of the meeting and the objection must be overruled.

9 [2] As to the objections not having been taken before the chairman at the meeting: Generally speaking, the objections should be taken at the meeting. If not so taken and the ground is one of substance, the Court may, in its discretion, and under special circumstances, entertain the appeal. Where, however, an appellant intends to rely upon technical objections, he should specifically state his objections at the meeting to the chairman prior to the chairman rendering his decision and have them noted in the minutes of the meeting; unless he so objects, he will be deemed to have waived any irregularity or formal defect and an appeal will not lie from the chairman's decision in regard thereto. There is some dispute as to just what objections were taken in this case at the meeting. The arguments proceeded on the assumption that all those set out in the notices of appeal were taken and they will be so treated, and the objection overruled.

10 [3] At the hearing of the appeal, the W. R. Brock Co., Ltd., pursuant to notice served upon the Official Receiver (chairman) and Stratton's solicitors, applied to be added as a party appellant, along with, or in the alternative to be substituted for, Greenshields Limited, the alternative being due, no doubt, to the fact that the former's solicitor was aware that a preliminary objection was to be taken to Greenshield Limited's right of appeal. It is obvious that the application was made for the purpose of rendering effective an appeal which might prove abortive. The procedure to be followed in substituting or adding a party is that provided for in the Consolidated Rules of the Supreme Court in force in this province, the same having been made applicable by Bankruptcy Rule 152 [1 C.B.R. 225]. The proceeding, while technically termed an appeal, is really the commencement of a proceeding in Court and Rule 17 is the one applicable and reads as follows:

> **Rule 17.**
>
> Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, a judge may, if satisfied that it has been so commenced through a *bona fide* mistake, either of fact or law, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

11 Greenshields Limited as I have already indicated having a right of appeal, the proceeding cannot be said to have been "commenced in the name of the wrong" party, nor is it "doubtful whether it has been commenced in the name of the right" party, and, as it is not "necessary for the determination of the real matter in dispute" to add or substitute the applicant, as it relies wholly on the grounds set forth in the former's notice of appeal and its right will in no way be affected by its non-joinder or non-substitution, the application will be dismissed.

12 [4] Coming now to the various objections in regard to proofs of claim and proxies: In considering the objections, regard must be had to the provisions of the statutes and Rules in connection with which the objections are raised. If they are mandatory, it is the duty of the chairman to require strict compliance with them; if they are merely directory, he is entitled to exercise his discretion concerning them and if there are reasonable grounds for his exercising such discretion in the manner in which he does, his decision will not be interfered with.

13 It might also be pointed out that this is a commercial Act, the administration of which, in the first instance, is largely in the hands of business men and technical objections should not be given effect to beyond what is necessary for the interpretation of the Act according to the true meaning and intent thereof and to avoid an injustice (see sec. 84 of the Act [1 C.B.R. 83]).

14 The first objection is that certain proofs are defective, inasmuch as the declarations do not disclose, nor was any evidence adduced to show, the authority of the declarants to make the declarations in proof of the claims. The proofs of nine creditors, all corporations, are objected to on this ground.

15 In support of this contention, reliance was placed upon subsec. 3 of sec. 45 [1 C.B.R. 51] and sec. 85 [1 C.B.R. 581] of the Act which provide as follows:

> 45. (3) The statutory declaration may be made by the creditor himself or by some person authorized by or on behalf of the creditor. If made by a person so authorized, it shall state his authority and means of knowledge.
>
> 85. For all or any of the purposes of this Act, an incorporated company may act by any of its officers or employees authorized in that behalf.

16 These sections do not apply to proof of claims by corporations which are creditors, but must be read subject to the provisions of Bankruptcy Rule 32 [1 C.B.R. 187] which provides:

> 32. Where by this Act or in these Rules it is provided that an affidavit or declaration be made by *** or any other person and such *** person is a corporation, such affidavit or declaration may be made by the manager or by any officer or employee of the corporation, who has knowledge of the facts deposed to providing that he states therein that he has such knowledge.

17 The proofs in question are declarations provided for by the Act as claims may be proved in that manner (sec. 45(2) [1 C.B.R. 51, 4 C.B.R. 19]) and the authority to a manager, officer or employee, to prove claims in that manner is expressly given by the Rules and no further proof of authority is necessary. It is not necessary that a declarant should describe himself in express words as one of those provided for in the Rules. Is the purpose for which the declarant is engaged or authorized such as to bring him within one or other of the enumerated classes? If so that will be sufficient. See *In re Tomkins & Co.*, [1901] 1 Q.B. 476, 8 Manson 132, 70 L.J.Q.B. 223, 84 L.T. 341, 49 W.R. 294, 17 T.L.R. 198.

18 [5] Is a person who is an agent, an "employee" within the meaning of the Rule? In the present instance none of the declarants make use of the word, "employee," but each states that he is the "authorized agent" or "duly authorized agent" as the case may be, using that description no doubt because of marginal instructions on the printed form of statutory declarations furnished to them. *Prima facie* they are employees. Commonly speaking, agents are appointed. They are none the less employed. An agent is an employee within the meaning of the Rule and as such is expressly authorized by the Rules to make the declaration. The objection cannot be sustained.

19 [6] The second objection is that the declarant does not, as required by Bankruptcy Rule 32, *supra*, state in his declaration that he has knowledge of the facts deposed to. The proofs of four creditors, all corporations, are objected to on this ground.

20 The declarations are made in one instance by the "manager," in another by the "assistant manager", while in each of the other two it was made by an "agent" whom I have already classed as an employee, but in none of the four declarations is it stated that the declarant "has knowledge of facts deposed to". The right of a corporation to prove its claim by the declaration of its manager, officer or employee is conditional under Rule 32, *supra*, upon the declarant stating in his declaration that he has such knowledge. The declarants not having so stated the objection to the proofs of the W. R. Brock Co., Ltd., one vote;

United Grain Growers Security Co., Ltd., two votes; and A. & F. Reid Co., Ltd., two votes, the votes of which were cast in favour of the trustee and of the Bank of Montreal, one vote which was cast in favour of the Security Trust Co., Ltd., will be sustained and the six votes disallowed.

21 [7] The third objection is that certain declarations do not contain or refer to a statement of account as required by sec. 45(4) of the Act [1 C.B.R. 51]. This objection applies to proofs of eight creditors.

22 Section 45(4) provides:

> The statutory declaration shall contain or refer to a statement of account showing the particulars of the debt ***

23 Bankruptcy Rule 3(1) and (2) [1 C.B.R. 159] provides that:

> The forms in the Appendix, where applicable, or forms to the like effect with such variations as circumstances may require shall be used ***
>
> (2) The provisions contained in the forms prescribed shall be deemed to be authorized by these rules.

24 The provision in regard to the manner in which reference "to a statement of account" as required by sec. 45(4) of the Act is to be made is contained in the form to be used in proof of debt (Form 47 [1 C.B.R. 259]) in which appears, after the space in which is to be inserted the total amount of the indebtedness, the following words: "as shown by the account hereto annexed and marked 'A,' " which indicated that when the particulars of the account are not set forth in the body of the proof that the statement containing them is to be identified by having it both annexed and marked. None of the proofs objected to contain "a statement of account" showing the particulars of the debt alleged to be owing. Each, however, refers to one by the use of the words, "as shown by the account hereto annexed and marked 'A,' " or words to like effect, but in fact no statement is annexed nor does any accompany the proof.

25 The provisions of sec. 45(4), *supra*, in regard to the proof are not merely directory, but are mandatory. The proof *"shall* contain or refer to a statement of account." Proofs of claim which did not contain, and in which the only reference to, an account, was to statements as "annexed and marked," and there were no statements accompanying the proofs, should have been rejected. For this reason the proofs of Cluett, Peabody & Co., Ltd., two votes which were cast in favour of the trustee and of Harper, Henderson, McCoubrey, Stevenson, Vickerson, Galloway and Barnes, one vote each, seven in all, should not have been admitted and the objection must be sustained and the votes, nine in all, disallowed.

26 [8] The fourth objection is that the statement submitted along with the declaration is not sufficiently identified to comply with the provisions of Form 47, *supra*, so as to constitute a proper reference within the meaning of sec. 45(4), *supra*, of the Act. This objection applies to proofs of fourteen creditors.

27 The declarations all referred to accounts as being "annexed and marked 'A.' " Statements were in fact annexed to all the declarations, some of which had marked on them the letter "A" without any words to indicate that the letter referred to the declaration while the remainder were not marked at all.

28 As already pointed out Form 47 indicates the method by which reference may be made, which must be deemed to be the manner in which the identification of statements is authorized by the Rules, and the statement of account is *prima facie* properly referred to in a declaration only when it is "annexed and marked 'A.' " Neither Form 47 nor the words in the Form, however, are exclusive. Some of them or others may be used subject to certain penalties, as to costs, for their use (Bankruptcy Rule 3, *supra*). What is meant by "refer" as used in sec. 45(4), *supra*? The purpose of this section is to compel a claimant to furnish a statement as part of the evidence by which the person authorized to make a decision must be guided in arriving at his decision, and the reference to it is sufficient if it is referred to with such particularity that it may be identified and become incorporated with and form part of the proof. If the statement is a proper one and it is annexed to the declaration though not marked and from an examination of the statement in conjunction with the declaration to which it is attached or from other circumstances, the person who has to decide in regard to the admissibility of the proof may reasonably conclude that the statement is the one

referred to, he is justified, in the exercise of his discretion, in receiving it and his decision should not be interfered with. I am satisfied, from an examination of the documents, that the statements in question were annexed and were the ones referred to and the objection cannot be sustained.

29 [9] The fifth objection is that various statements of account annexed do not sufficiently set forth the particulars of the debt as required by sec. 45(4) [1 C.B.R. 51]. Eight proofs are objected to on this ground.

30 In one statement the particulars set forth are "Oct. 13, 1923, Draft 77.46 4% disc. exchange $3.22, Total $80.68"; in another they refer to four notes unpaid, giving the dates on which they were charged to the claimant's account, and the amount of each; in another, the entry is "Oct. 4, to Dft. returned $142.84," while the remaining five statements are on cards and indicate a large number of monthly payments of $1 each. There is nothing in any of these five statements to indicate who is the debtor or who is the creditor or as to why the payments were made. A person examining them without the assistance of extrinsic evidence could only conclude that the payments were being made by the claimants on account of their indebtedness to the authorized assignor while in fact the reverse was the case. The claimants were each buying suits of clothes on the instalment plan and when an amount agreed upon was paid in, the person making such payments would be entitled to a suit. The statement of account should clearly indicate who is debtor and who is creditor and give such particulars, with dates, as are necessary to disclose the origin or nature of the liability, such as, "goods sold and delivered," "money lent," "services rendered," or, if there be particular circumstances which do not come within what are generally known as the common counts, the particular circumstances giving rise to the claim as well as all payments in cash or otherwise for which the debtor is entitled to credit. It is not necessary that the statement should contain in detail an itemized account of the goods sold and delivered, but it is sufficient if it shows goods sold on a certain date as is the practice in statements of commercial houses in connection with their monthly statements. If the claim is for money lent, the particulars of the loan should be given; if for services rendered, the extent thereof and the period within which they were rendered; if on a bill of exchange, sufficient particulars to identify the instrument, or in special cases sufficient particulars to acquaint the person whose duty it is to pass upon the proof with the nature of the particular transaction.

31 As to the three statements relating to notes and drafts, the particulars were sufficient and the objection as to them cannot be sustained. As to the other file, as already indicated, they were wholly unintelligible and the proof of claim should have been dealt with as one which was not accompanied by a statement and for the reasons already indicated in considering such proofs should have been rejected. The objections to the proofs of West, Hughes, Knudson, Veale and Elder, one each, five in all, will be sustained, and their votes, cast in favour of the Security Trust Co., Ltd., disallowed.

32 [10] The sixth objection is that the declarations do not contain the Christian names of the declarants in full, only the initials being given. This objection applies to seven proofs.

33 In support of this objection, the appellant relies upon Rule 413 of our own Rules of Court, which expressly provides for "stating the name of the deponent in full" and which he says is made applicable by Bankruptcy Rule 152 [1 C.B.R. 226]. That Rule, however, made the

> general practice of the Court in civil actions and matters before it, including the course of proceedings and practice in judges' chambers,

applicable only in cases not provided for in *The Bankruptcy Act* or Rules and our Rules of Court are not applicable.

34 Bankruptcy Rule 26 [1 C.B.R. 185] provides:

> Every affidavit shall be drawn up in the first person, and shall state the description and true place of abode of its deponent ***.

35 Affidavits under sec. 2(*a*) of the Act [1 C.B.R. 8] include declarations and affirmations.

36 The names in full would no doubt more particularly identify the declarant and would avoid confusion as between persons of similar initials. No confusion, however, is suggested here and under the Rules it is not necessary that the declarations should

contain the name in full and it is sufficient if the initials of the Christian names and the full surname, as is the case in the declarations objected to, be given. The objection cannot be sustained.

37 [11] The seventh objection is that three of the declarations are insufficient inasmuch as they do not set forth in the commencement a description of the declarant as required by Bankruptcy Rule 26, *supra*.

38 The description of the declarant appears in the first paragraph in the body of the declaration in which the declarant describes himself by the use of the words which indicate that he is in the employ of the "undermentioned creditor," giving the name of the creditor. The purpose of the description — as to occupation as well as name — is to identify the declarant, thus enabling the party, against whom the affidavit is made, to make all necessary enquiries respecting the deponent's character and position in life (see *Taylor on Evidence*, 8th ed. 1189, rule 8) and more particularly in the case of his occupation to determine the value of the evidence of the declarant in regard to the subject-matter concerning which he makes his declaration (see *In re Dodsworth; Spence v. Dodsworth*, [1891] 1 Ch. 657, 60 L.J. Ch. 798, 64 L.T. 282, 39 W.R. 362, per Chitty, J.). The Rule in question does not state that the description must be in the commencement of the affidavit, but no doubt that is the intention, and that is the proper place for it. If, however, the affidavit itself contains words setting forth the occupation or station in life of the declarant it is sufficient compliance with the Rule and the proof so far as that particular objection is concerned was properly received, and the objection cannot be sustained.

39 [12] The eighth objection is that certain declarations made outside of the province of Alberta, but within Canada, were not made before proper officers or persons inasmuch as they were not made before any one of the persons enumerated in sec. 79 of the Act [1 C.B.R. 81] or any of those authorized under *The Alberta Evidence Act*, R.S.A., 1922, ch. 87, sec. 42, made applicable, it is suggested, by Bankruptcy Rule 152 [1 C.B.R. 226]. This objection applies to the proofs of nine creditors.

40 Neither sec. 79 of *The Bankruptcy Act* nor sec. 42 of *The Alberta Evidence Act* are applicable. The provisions of sec. 79 are "Subject to General Rules" and relate only to "any affidavit to be used in a court exercising jurisdiction in bank ruptcy under the [this] Act." The same is true in regard to sec. 42 of *The Alberta Evidence Act*, the application by express provisions of that section being limited to civil proceedings in the Court of this province. The declarations in question are not for use in Court but are for use by a chairman of a meeting or a trustee for the purpose of determining who are entitled to vote or who may be entitled to a dividend and may never be before the Court. In this case they are for use at a creditors' meeting. A creditors' meeting is not a proceeding in Court, although the proceedings thereat are subject to review on appeal to (sec. 42(5)(*i*) [4 C.B.R. 18], sec. 42(12) [1 C.B.R. 575]), or confirmation by (sec. 13(5) [1 C.B.R. 21] the Court. It was so decided, as to a second meeting of creditors which was held to confirm a composition, in *Ex parte Board of Trade; In re Strand* (1884), 13 Q.B.D. 492, 53 L.J.Q.B. 563, 1 Morrell 196 (see judgment of Mathew, J., at p. 496). The wording itself of sec. 42 (5) refers to an "appeal to the Court" thereby implying that the creditors' meeting is not a proceeding in Court. A creditors' meeting is a proceeding under *The Bankruptcy Act* and it will be necessary to determine the points in issue as one relating to a matter not in Court. Section 36 of *The Canada Evidence Act*, R.S.C., 1906, ch. 145, provides that

> any *** commissioner authorized to take affidavits to be used either in the provincial or Dominion Courts *** may receive the solemn declaration of any person voluntarily making the same before him ***

41 This section being contained in Part 1 of that Act is, by sec. 2 thereof, made applicable to matters "respecting which the Parliament of Canada has jurisdiction." Bankruptcy is a matter over which the Parliament of Canada has jurisdiction (*The B.N.A. Act*, sec. 91(21)). The persons before whom these declarations were made were authorized to receive them and the objection cannot be sustained.

42 [13] The ninth objection is that the jurat in several declarations is defective inasmuch as the various persons who received the declaration do not sufficiently describe themselves as persons having authority to administer oaths. This objection applies to the proofs of seven creditors.

43 All the declarations were made in Canada. Two of them were received in the province of Ontario by a person who describes himself in one as "a commissioner in BR." and in the other as "a commissioner in Br. etc. for the Province of Ontario," while

the remaining five were received in the province of Quebec by persons each of whom describes himself, as the case may be, as "A Commissioner of the Superior Court of Quebec" or "Commissioner of the Superior Court for the Province of Quebec, District of Montreal" or "a Commissioner of the Superior Court for the District of Montreal."

44 [14] Impliedly, at least under the Bankruptcy Rules, the person receiving the declaration should describe himself in such terms as to indicate his authority to receive declarations. The description ought not to be omitted or if omitted and objection is taken to the declaration before it is accepted, should not be received without proof of authority.

45 As to the two declarations from Ontario, the same person received them both, and it is quite apparent that he was receiving them as commissioner authorized to administer oaths in that province. The use of the letters "B.R." is provided for in Form 47 [1 C.B.R. 258, at p. 259]. Just what they mean is not evident. It may be that they are the initial letters for *Banco* (*Bancus*) *Regis*, the name of a Court or a Division, the separate Courts in each of the provinces of Canada by legislation having been consolidated into one with various divisions, some of the provinces providing for a King's Bench Division.

46 The mere fact that the person receiving a declaration describes himself as "a Commissioner in BR. etc." and the description is that of a Division which at one time existed rather than of the Court of which it was a Division is at most misdescription, and the description as a commissioner being such as to indicate that such person had power to administer oaths, the proof should not be rejected on that account (*Cheney v. Courtois* (1863), 13 C.B. (N.S.) 634, 32 L.J.C.P. 116, 9 Jur. (N.S.) 1057). It is not necessary that the person receiving the declaration should describe himself in express words as one having authority to administer an oath. It is sufficient if he describes himself in the jurat in such a way as to indicate that he is one of that class designated by *The Canada Evidence Act, supra*. The words "a commissioner etc." or "a commissioner" or "a commr." have been held sufficient (*Ontario Judicature Act, Holmested & Langton*, 2nd ed., p. 686) while the words used by the commissioner receiving the declaration in the province of Quebec, are those authorized by statute (see *Weir's Code of Civil Procedure, Quebec*, (1903)). The objection to the seven proofs in question cannot be sustained.

47 [15] The tenth objection is that a declaration filed in proof of claim "contains interlineations and erasures not duly in itialed" as required by Bankruptcy Rule 28 [1 C.B.R. 186]. This objection applies to the proof of one creditor.

48 The Rule relied upon has to do with affidavits "to be read or made use of in any matter depending in Court" and even though there be an "interlineation, alteration or erasure", the affidavit may be used with "leave of the Court." The presumption where a change has been made in the manner suggested is that it was made after having been sworn to unless the change "is authenticated by the initials of the officer or person taking the affidavit." That, however, is merely a presumption. The Court, if satisfied from an examination of the document itself or by extrinsic evidence that the change was made before, will receive it. That is the practice which should be followed in connection with declarations filed in proof of claims, except that its admissibility instead of being in the discretion of the Court is in the discretion of the Official Receiver, chairman or trustee as the case may be. If there are reasonable grounds upon which the person whose duty it is in the first instance to decide may conclude, and he concludes, that the "interlineation, alteration or erasure" in a declaration was made before the declaration was received, he should receive it, and his decision in the exercise of his discretion will not be interfered with by the Court. As to the objection in the present instance: I am satisfied from an examination of the document itself that the interlineation, if such it can be called — it apparently being nothing more than an attempt to write in a space too limited in the printed form, the particulars of the debt, and thus give to it the appearance of an interlineation — and the erasure which is as to form and not substance — a line having been drawn through the printed words "as per statement annexed and marked Exhibit 'A,' " which were unnecessary as the particulars had already been given — were effected before the declaration was made, and the objection cannot be sustained.

49 [16] The eleventh objection is that there is a material variation in the forms of affidavits filed in proof of claims, from that sanctioned by the established procedure. This objection applies to fourteen proofs.

50 One of the affidavits after setting forth the name of the deponent proceeds to state the facts, the words "make oath and say" having been crossed out, and no words of like significance having been inserted in their place. Such an affidavit is bad and the objection to the proof of Elder whose one vote was cast in favour of the Security Trust Co., Ltd., will be sustained and the

vote is disallowed. The remaining thirteen affidavits contain after the introductory "I" followed by the name of the deponent, the words, "do solemnly swear" instead of the usual words, "make oath and say."

51 Upon the authority of *Phillips v. Prentice* (1843), 2 Hare 542, 12 L.J. Ch. 497, 7 Jur. 528, 67 E.R. 224, and *In re Newton* (1860), 2 DeG. F. & J. 3, 8 W.R. 425, 45 E.R. 522, in which the affidavits were held to be inadmissible, it is contended on behalf of the appellant setting up this objection, that the affidavits in question are inadmissible. Those cases, however, are not applicable. In the one the deponent "saith" while in the other the several deponents "say" the words "make oath and" having been omitted, and no other words of similar effect having been substituted in their place to indicate the solemnity of an oath. The omission of the usual words, or words to like effect, was a material variation. In the present case there is in the use of the words in question no material variation in the established procedure. They indicate that the conscience of the deponent is being bound and that he has knowledge that he is taking a solemn oath. They are words commonly used in administering oaths of office, and even though a person taking an oath of office might not be convicted of perjury, yet if one used such words in regard to a past transaction or a present circumstance, there is no doubt but that he could be so convicted. The words are sufficient and the objection as to thirteen of the proofs cannot be sustained.

52 [17] The twelfth objection is that certain proxies are improperly executed inasmuch as having been executed on behalf of corporations (a) they have not affixed to them the seal of the corporation, and (b) there is nothing to indicate that the person affixing the name of the corporation had authority to do so. This objection applies to the proxies of nine creditors, all corporations.

53 As to the necessity for a seal: "A corporation may vote at meetings of creditors as if a natural person, by an authorized agent" (sec. 42 (18) [1 C.B.R. 49]). The authorization of the agent is intended to be the same as in the case of a natural person who votes by proxy, that is, in writing and in the Form authorized by the Rules (Forms 45 and 46 [1 C.B.R. 257, 258]). There is nothing in the Act or Rules requiring a proxy to be under seal.

54 Originally an officer or employee of a company acting on its behalf for the purpose of the Act was required by sec. 85 of *The Bankruptcy Act*, 1919, ch. 36 [1 C.B.R. 83], to have his authority "under the seal of the corporation." That section, however, was repealed by sec. 48 of *The Bankruptcy Act Amendment Act, 1921*, ch. 17 [1 C.B.R. 581], and a new section enacted in which the words providing for the seal were omitted. Nowhere in the Act or Rules are there set forth any formal requisites which must be complied with to entitle an agent to act on behalf of a corporation in bankruptcy matters. All that is required is that he be an "authorized" agent that is, presumably, one who is authorized in conformity with the statutes and by-laws governing the corporation on behalf of which he purports to act in voting.

55 If a seal is necessary it must be by reason of special provision in some one or other of the various special or general Acts under which companies are incorporated or the by-laws or articles of association regulating them. The formal requirements under various Acts and regulations vary greatly. They mostly negative the necessity of affixing to a contract or commercial paper such as bills of exchange, the corporate seal. Unless it is expressly required by the Act under which the company is incorporated or by the by-laws or articles of association governing it, it would seem, as a general rule, that a seal is necessary for a corporation only when it is necessary for an individual (see vol. 1 *Morawetz on Private Corporations*, 2nd ed., sec. 338, p. 320). If it is required in the manner in which I have indicated, the burden of establishing the necessity of it is upon the person alleging it. There was nothing before the chairman nor the Court to indicate that any of the corporation on behalf of which the agents purported to vote must appoint or engage their agents under the seal of the corporation and in the absence of proof to that effect, the chairman in so far as the absence of a seal is concerned was justified in allowing the person named in the proxy to vote. The objection cannot be sustained.

56 [18] As to the signature: Of the nine proxies, one, that of the Watson Manufacturing Co., Ltd., is signed by L. B. Brown, without anything in the proxy to indicate who he or she is, or that she is acting on behalf of the company. The person in question proved the claim and therein described herself as the authorized agent. What she now purports to do is to appoint some other person to act generally on behalf of the company, to delegate her authority, to do which there is no evidence that she has any authority. The proxy is bad and the vote cast thereunder in favour of the trustee must be disallowed. The remaining eight proxies each purports to be signed by the company, its name having been affixed by means of a rubber stamp. The name

of the person affixing the signature is sub scribed immediately underneath. One describes himself as "Atty.," one as "Credit Mgr.," one as "Director," two as "Secretary Treasurer," while three do not describe themselves at all, but in the proof of claim each has described himself as authorized agent.

57 Is a person designated in a proxy so executed "an authorized agent" within the meaning of sec. 42(18) [1 C.B.R. 49]? The method of appointing or employing an agent, where his authority to act is not implied, is generally determined by by-laws or articles of association and he is properly appointed or engaged only where their provisions are complied with. The contention of the appellant who objects to the proxies virtually is that the person named in the proxy must establish conclusively that he has been properly authorized. This would mean that the chairman of the meeting would be required to examine into the powers of a corporation to appoint or employ an agent, the procedure, as provided by articles of association or by-laws, to be followed in making such appointments and the regularity of the proceedings as disclosed by the minutes of the meeting. To require such strict proof would lead to confusion and in many instances deprive a creditor corporation of its rights in sharing in the administration of a bankrupt estate which can be done only by means of the voting power. A chairman would never know when the agent was authorized. What the chairman requires is evidence of the agent's authority which is the signed proxy itself. It is not for him to enquire into the authority of the person who affixes the signature of the corporation to it. *The Bankruptcy Act* under which the proceedings are being taken requires but slight evidence of the authorization. The necessity of a seal, as I have already indicated, has been dispensed with. No formalities other than those as to form, provided by the Rules, are laid down as a prerequisite to the validity of the document. A proxy, however, "shall not be invalid merely because it is in the form of a letter, telegram or cable." The chairman accepts the authority in any one of the forms just mentioned without further proof.

58 [19] A proxy which purports to be signed by the corporation underneath the name of which is subscribed the name of the person who affixes the signature of the company and who describes himself in such a manner that the chairman can conclude that he is an officer or employee of the company, is *prima facie* evidence of authority and the chairman should receive it and permit the person named therein to vote, unless it is established to his satisfaction that the appointment was not duly authorized, the burden of proving which is upon the person who objects. The objecting appellant having submitted no evidence to that effect, the objection to the eight proofs cannot be sustained.

59 The number of votes disallowed not having affected the result, the declaration of the chairman in regard to the election of a trustee will be confirmed. Each appellant having been successful in part in having his objections sustained there will be no costs to either party.

TAB 4

2005 BCCA 299
British Columbia Court of Appeal

Port Alice Specialty Cellulose Inc., Re

2005 CarswellBC 1280, 2005 BCCA 299, [2005] B.C.W.L.D. 4392, [2005] B.C.W.L.D. 4439, [2005] B.C.J. No. 1205, 11 C.B.R. (4th) 279, 11 C.B.R. (5th) 279, 139 A.C.W.S. (3d) 620, 212 B.C.A.C. 310, 254 D.L.R. (4th) 397, 350 W.A.C. 310, 41 B.C.L.R. (4th) 259

The Trustee of the Estate of Port Alice Specialty Cellulose Inc., a bankrupt (Appellant / Respondent by Cross Appeal) and ConocoPhillips Company (Respondent / Appellant by Cross Appeal)

Saunders, Low, Levine JJ.A.

Heard: May 11, 2005
Judgment: June 1, 2005
Docket: Vancouver CA032718

Proceedings: affirmed *Port Alice Specialty Cellulose Inc., Re* , 2005 CarswellBC 3596, 2005 BCSC 1887 ((B.C. S.C.))

Counsel: J.I. McLean for Appellant
M.I.A. Buttery for Respondent

***Levine J.A.*:**

Introduction

1 A supplier which has delivered goods for which it has not been fully paid may demand repossession of them from a person who has become bankrupt, provided the goods are "identifiable", pursuant to s. 81.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The question that arises in this case is whether goods that are commingled with other goods are "identifiable" for the purposes of this statutory provision.

2 A Supreme Court chambers judge determined that the respondent, ConocoPhillips Company, was entitled to recover fuel oil delivered to the pulp mill at Port Alice and not paid for, in spite of the fact that the fuel oil had been pumped into a storage tank in which there was a quantity of fuel oil remaining from previous deliveries.

3 The Trustee of the bankrupt company claims on appeal that the unpaid fuel oil was not "identifiable" and Conoco's demand for repossession must fail.

4 Conoco cross-appeals the chambers judge's determination of how much of the remaining oil it was entitled to repossess.

5 For the reasons that follow, I am of the opinion that the chambers judge adopted the proper approach to the interpretation of the statutory provision and the determination of how much oil Conoco was entitled to repossess. I would dismiss the appeal and the cross-appeal.

Background

6 Conoco was a supplier of fuel oil to the pulp mill at Port Alice. On October 6, 2004 it delivered 23,598 barrels of fuel oil (the "New Oil") to the mill. At the time, there were 18,801 barrels (the "Old Oil") in the storage tank. On November 17,

2004, there were 24,417 barrels of fuel oil remaining in the storage tank. Port Alice Specialty Cellulose Inc. became bankrupt on November 22, 2004.

7 It is common ground that Conoco had provided all fuel oil to Port Alice since June 2004; it had been the sole supplier of the last four of five deliveries before the bankruptcy. Conoco was not paid the invoiced amount of $749,102.82 for the last delivery.

8 Conoco made a demand for repossession of the fuel oil under s. 81.1(1) of the *BIA*, which provides:

> 81.1(1) Subject to this section, where a person (in this section referred to as the "supplier") has sold and delivered goods to another person (in this section referred to as the "purchaser") for use in relation to the purchaser's business, and the purchaser has not fully paid for the goods, the supplier may have access to and repossess the goods at the supplier's own expense, and the purchaser, trustee or receiver shall release the goods, if
>
> (a) the supplier presents a written demand for repossession to the purchaser, trustee or receiver, in prescribed form and containing the details of the transaction, within a period of thirty days after the delivery of the goods to the purchaser;
>
> (b) at the time when the demand referred to in paragraph (a) is presented,
>
> (i) the purchaser is bankrupt, or
>
> (ii) there is a receiver, within the meaning of subsection 243(2), in relation to the purchaser;
>
> (c) at the time when the demand referred to in paragraph (a) is presented, the goods
>
> (i) are in the possession of the purchaser, trustee or receiver,
>
> (ii) <u>are identifiable as the goods delivered by the supplier and not fully paid for</u>,
>
> (iii) are in the same state as they were on delivery,
>
> (iv) have not been resold at arms' length, and
>
> (v) are not subject to any agreement for sale at arms' length; and
>
> (d) the purchaser, trustee or receiver does not, forthwith after the demand referred to in paragraph (a) is presented, pay to the supplier the entire balance owing.
>
> [Underlining added.]

9 The Trustee in Bankruptcy sought directions from the Supreme Court as to Conoco's entitlement to repossess fuel oil in Port Alice's storage tank. The only issue in dispute was whether Conoco could satisfy the requirement of s. 81.1(1)(c)(ii) that "the goods are identifiable as the goods delivered by the supplier and not fully paid for". The Trustee took the position that the New Oil was commingled with and could not be separated from the Old Oil and therefore the oil remaining in the storage tank when Conoco demanded respossession could not be identified as oil delivered within the 30 days prior to the bankruptcy. (Conoco's demand was made on November 29, 2004, which was more than 30 days after delivery. There was an intervening proposal under the *BIA*, during which the 30 day period in s. 81.1(1) was suspended (by s. 81.1(4))

10 Mr. Justice Masuhara determined that s. 81.1 (which had not previously been subject to court review in British Columbia and had not been interpreted in relation to fungible goods in any jurisdiction) should not be interpreted narrowly, as sought by the Trustee, "but in such a way as to allow it to operate fairly and practically to protect the interest of a supplier who has delivered within the 30-day period having regard to the specific circumstances and the goods in question." He noted that "no particular type of good is excluded from the right of possession or repossession granted under Section 81.1 and that includes liquid hydrocarbons which are fungible goods", and that excluding fungible goods "would not be consistent with the intent

of this provision". (The chambers judge's oral reasons for judgment are unreported: (25 February 2005), Vancouver Registry, B041848 (B.C.S.C.). The quotes are from para. 11).

11 In determining the intent of s. 81.1, the chambers judge referred to the 2003 Report of the Senate Standing Committee on Bank, Trade and Commerce, "Debtors and Creditors: Sharing the Burden" (which may be found at http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/bank-e/rep-e/bankruptcy-e.pdf), where the intent of s. 81.1 was summarized as follows (at p. 106):

> The "30-day goods rule" was introduced to protect suppliers — who often lack a realistic ability to demand security for the transaction — from harm by insolvent debtors who ordered excessive amounts of inventory prior to bankruptcy as a means of increasing the assets available to satisfy secured creditors, a practice that is sometimes referred to as "juicing the trades." It also, however, can assist businesses in financial difficulty; because suppliers can recover their goods under certain circumstances, they may be willing to continue supplying to these businesses.

12 The chambers judge concluded that the New Oil was sufficiently identifiable on the basis of the following facts (para. 15):

> (a) The new fuel was delivered to a single tank and was stored there.
>
> (b) All of the previous deliveries since the previous June were made by Conoco and no deliveries of any further fuel subsequent to October have been made.
>
> (c) The qualities of the New and Old Oil are the same and the fuel in the Tank remains as such.
>
> (d) The volume of the fuel in the Tank before delivery of the New Oil into the Tank is known and ascertained.
>
> (e) The volume of the New Oil pumped into the Tank is known and ascertained.
>
> (f) The volume of fuel oil drawn down is known and ascertained.
>
> (g) The fuel in the Tank can be inferred to have been evenly drawn down.

13 He rejected Conoco's argument that its entitlement to fuel oil in the storage tank should be determined by applying the "first in, first out" principle. Instead, he found Conoco to be entitled to the same proportion of the remaining fuel oil that the New Oil was to the New Oil and Old Oil in the storage tank on October 6, 2004, the date of delivery of the New Oil. That proportion was found to be 56 per cent.

The Appeal

Inference that the Oil was Evenly Drawn Down

14 The Trustee's first ground of appeal is that the chambers judge erred in law and fact in drawing the inference that the fuel in the storage tank was evenly drawn down. He says that there was no evidence on which to base that inference and the only evidence on the issue of the identity of the oil in the tank was to the contrary. The Trustee referred to the evidence of Ormand Smith, the mill manager, who deposed:

> That I have no way of determining how much, if any, of the oil delivered by ConocoPhillips on October 6, 2004 remains in the storage tank. I also know of no way of determining which of the remaining oil in the tank is oil delivered on October 6, 2004 as opposed to oil delivered on September 16, 2004 or earlier.

15 The Trustee maintains that the chambers judge made a palpable and overriding error in drawing an inference that was contradicted by the only evidence on the issue, citing *Lee v. Jacobson* (1994), 99 B.C.L.R. (2d) 144 (B.C. C.A.), at 148-49.

16 In *Lee*, the plaintiff testified that the incident in issue, a "cough", occurred on a certain date. The trial judge found that the defendant was not at the location of the cough and therefore could not be the person who coughed on that date. He went on to

find, however, that the defendant was the cougher, but the cough occurred on a different date. This Court found that there was no evidence on which to base the inference that the cough had occurred on any date other than that testified to by the plaintiff, and that the trial judge had erred in law by speculating in arriving at his decision.

17 *Lee* is entirely consistent with the most recent directions of the Supreme Court of Canada regarding appellate review of findings and inferences of fact. In *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25 (S.C.C.), Fish J. for the majority said (at para. 89):

> Neither in Saskatchewan nor elsewhere in Canada may courts of appeal, absent an express legislative instruction to the contrary, disregard the governing principle of appellate intervention on questions of fact. They may indeed make their own findings and draw their own inferences, but <u>only where the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable, or unsupported by the evidence</u>.
>
> [Underlining added.]

18 In *Lee*, the trial judge made a palpable and overriding error by drawing an inference that was unsupported by the evidence. This case, however, is not like *Lee*.

19 The chambers judge's inference that the New Oil and Old Oil were evenly drawn down is a reasonable inference drawn from the undisputed fact that the New Oil and Old Oil had become commingled and could not be physically separated or measured. In my opinion, Mr. Smith's evidence, far from being contrary to that fact, confirms it.

Fresh Evidence

20 The Trustee sought to introduce fresh evidence to show that the New Oil and Old Oil were not of the same quality, to rebut the chambers judge's finding that there was no qualitative difference between the New Oil and the Old Oil.

21 According to an affidavit of an employee of the Trustee, tests of the sulphur content of the last seven deliveries of fuel oil showed a variation among the various deliveries.

22 The tests for the admissibility of fresh evidence on an appeal are well known. They were set out in *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 (B.C. C.A.) at para. 28:

1. That the evidence was not discoverable by reasonable diligence before the end of the trial.

2. That the evidence is wholly credible.

3. That the evidence will be practically conclusive of an issue before the court.

23 The fresh evidence was available to the Trustee, with due diligence, before the hearing in Supreme Court. It is not wholly credible, as much of it is based on hearsay and unidentified sources. Further, it does not assist in deciding the issue before the Court, as the Trustee does not dispute that the New Oil and Old Oil have been commingled and cannot be separated. I would not admit the fresh evidence.

Interpretation of s. 81.1

24 The Trustee's second ground of appeal is that the trial judge misinterpreted s. 81.1.

25 There is no dispute that the proper approach to the interpretation of s. 81.1 is that described in E.A. Driedger's *Construction of Statutes* (2nd ed. 1983), at p. 87:

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

26 This approach has been approved by the Supreme Court of Canada in numerous cases. The Supreme Court has also said that this approach is confirmed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": see *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 (S.C.C.) at para. 20; *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

27 In interpreting the *BIA*, courts have noted that it is a commercial statute used by business people and should not be given an overly narrow or legalistic approach: see *McCoubrey, Re*, [1924] 4 D.L.R. 1227 (Alta. T.D.), at 1231-32; *A. Marquette & fils Inc. v. Mercure* (1975), [1977] 1 S.C.R. 547 (S.C.C.), at 556; *Maple Homes Canada Ltd., Re*, 2000 BCSC 1443 (B.C. S.C.) at para. 21.

28 In my opinion, the chambers judge properly applied these principles to the interpretation of s. 81.1.

29 Firstly, he noted that the words of s. 81.1(1) did not exclude fungible goods such as fuel oil. An interpretation of "identifiable" that would have the effect of excluding a class of goods would narrow the application of the section in a manner that would be inconsistent with the "grammatical and ordinary sense" of the words.

30 In considering the context of the words of s. 81.1, the chambers judge noted (at para. 6) the argument of the Trustee that s. 81.1 should be construed narrowly because, in the context of the *BIA*, it is an exception to the general rule that unsecured creditors share *pro rata* in the property of the bankrupt. In this Court, the Trustee also argued that the context of s. 81.1 includes the provisions of s. 81.2, which provide additional security for farmers, fishers and agriculturalists who deliver their products to a person who becomes bankrupt within 15 days. The Trustee claims that s. 81.2 indicates that fungible goods are not included in s. 81.1.

31 As noted by the chambers judge (at para. 16), s. 81.1 provides special protection for unpaid suppliers and its interpretation should be approached by applying the principles applicable to all statutory provisions. Section 81.2 does not assist the Trustee in narrowing the interpretation of s. 81.1. It is not a complete code for the protection of suppliers of fungible goods. It provides additional protection for some suppliers of such goods in the form of security over the inventory of a bankrupt, but the security is expressly subject to a supplier's right to repossess goods under s. 81.1 (s. 81.2(1)) and it preserves the rights of farmers, fishers and agriculturalists under s. 81.1 (ss. 81.2(4) and (5)).

32 The chambers judge determined that the intent of s. 81.1, to protect unpaid suppliers, would be denied if it were not applicable to goods such as fuel oil in a tank. He considered such a result to be unfair. The Trustee points out that the result of the application of many of the provisions of the *BIA* may be unfair to particular creditors or classes of creditors because of the nature of the problem it addresses: the division of scarce resources among multiple claimants. The Trustee says that if a supplier is denied the special protection provided by s. 81.1 because it is unable to identify its goods, that is not unfair, but simply the result of the application of the statute.

33 I do not quarrel with the Trustee's submission that the effect of the *BIA* may be unfair in particular cases, but do not find his analysis of assistance in this case where the issue is whether commingled goods are excluded entirely from the protection of s. 81.1. In my opinion, there is nothing in the words of the section, in their context, read harmoniously with the scheme and object of the Act and the intention of Parliament, that leads to the conclusion that goods such as the fuel oil in this case are not capable of being identified, for the purposes of s. 81.1, in the manner determined by the trial judge.

34 Section 81.1 has been considered in three cases in other jurisdictions, where the courts have adopted a narrower interpretive approach, urged on the chambers judge and this Court by the Trustee.

35 In *Stokes Building Supplies Ltd., Re* (1994), 30 C.B.R. (3d) 36 (Nfld. T.D.), the Court found that the supplier of identical windows before and after the 30-day period could not identify which of the windows in the bankrupt's possession had been delivered within 30 days of the bankruptcy. In that case, the windows had no identifiable markings to distinguish old and new

stock. There was evidence that the stock was not rotated uniformly and that old stock was not sold first. The Court said (at para. 16):

> In my view section 81.1 does not confer a broad discretion on the Court to make a general equitable adjustment between the parties. I cannot allocate goods between the receiver and the supplier on the assumption that old stock was sold first. The items which are to be taken under repossession must themselves be identifiable.

36 In *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.), the issue was whether a claim for repossession (of orange juice) could be made against an interim receiver. Rejecting the claim, Farley J. said (at para. 5):

> The 30 days rights of section 81.1 are not triggered unless the purchaser (Everfresh here) is a bankrupt or there is a section 243(2)(b) receiver. While section 12 of the ***Interpretation Act***, R.S.C. 1985, Chapter I-21 provides that "every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects," this does not provide that proper regard not be paid to the canons of statutory interpretation and where the legislature confers a right or benefit on persons which they would not have had at common law, the conditions which the legislature prescribes for the acquisition of that right or benefit are mandatory: [citations omitted]

37 In *obiter*, Justice Farley commented (at para. 8):

> ...it was certainly more likely on the probabilities that the new shipment was pumped into a continuing mixture — thus destroying the identifiability of this most fungible good (as opposed to having been pumped into an empty vat).

38 In *Thomson Consumer Electronics Canada Inc. v. Consumers Distributing Inc. (Receiver of)* (1999), 5 C.B.R. (4th) 141 (Ont. C.A.), the issue was whether the goods were in the "possession" of the bankrupt, the trustee or the receiver. They were stored in a warehouse where they were subject to a warehouseman's lien claim as well as other security. The Court said, in regard to the application of s. 81.1 (at para. 22):

> Section 81.1 of the ***BIA***, which was first enacted in 1992, gives unpaid suppliers a right to repossess goods sold and delivered to a purchaser who has been adjudged bankrupt or who has been placed in receivership, provided the suppliers' claims meet the requirements set out in the section. This preferential claim for unpaid suppliers is an exception to the general rule in bankruptcy proceedings that unsecured creditors share equally in the bankrupt estate.

39 The chambers judge distinguished these cases, and they are not binding on this Court in any event: see *Wolf v. R.* (1974), [1975] 2 S.C.R. 107 (S.C.C.). In *Stokes Building Supplies Ltd.*, the windows were not commingled in the way the New Oil was commingled with the Old Oil in this case. It was possible to physically identify them, with serial numbers or other markings, as is the case for electronic goods such as DVD players or computers, referred to by the Trustee as also being "fungible goods". In *Everfresh*, Farley J.'s comments about whether the orange juice could be identified if it was not delivered to a clean vat were clearly *obiter*. And in *Thompson*, O'Connor J.A. for the Court observed, in *obiter*, that a narrow interpretation of s. 81.1 may be contrary to the intention of Parliament (at para. 51):

> Further, I would observe that a narrow interpretation of the meaning of "possession" in s. 81.1 that excludes all third party possessions ignores the commercial reality that some purchasers and certainly some trustees and receivers will take possession of goods and arrange to have the goods held on their behalf by third party warehouses. While I agree with Farley J. that s. 81.1 is an exception to the general rule that unsecured creditors share equally in the bankrupt estate, an interpretation of the meaning of "possession" in s. 81.1 which excludes possession in these types of circumstances may unnecessarily restrict the rights that parliament intended to confer on unpaid suppliers.

40 In my opinion, the chambers judge properly interpreted s. 81.1 of the BIA.

41 It follows that I would dismiss the appeal.

The Cross-Appeal

42 The chambers judge concluded that Conoco should be allowed to respossess a *pro rata* share of the oil in the storage tank: that is, the proportion that the New Oil was to the total oil in the tank before any was drawn down, 56 per cent or 13,674 barrels. He rejected Conoco's argument that the "first in, first out" ("FIFO") principle should be applied to determine Conoco's share, stating that it "does not reflect the operational or process reality of how fuel is drawn from the Tank," which is "uniformly".

43 Conoco cross-appealed, claiming that the application of the FIFO principle would be consistent with a liberal approach to the interpretation of s. 81.1 to allow an unpaid supplier in its circumstances to recover goods for which it is unpaid.

44 The FIFO principle was discussed extensively, in the context of a dispute over moneys commingled in a trust account, in *Ontario (Securities Commission) v. Greymac Credit Corp.* (1986), 30 D.L.R. (4th) 1 (Ont. C.A.) aff'd [1988] 2 S.C.R. 172 (S.C.C.). It was decided that it was not appropriately applied where the dispute was not between a debtor and creditor but among competing equal claimants to a trust fund. Conoco distinguishes *Greymac* on the basis that in this case there are no competing claimants for the fuel oil.

45 In my view, that is an overly simplistic view of this case. Conoco, as an unsecured creditor, competes with the other unsecured creditors for a *pro rata* share of the property of the bankrupt Port Alice. Conoco has not offered any principled reason why FIFO is more appropriate than the *pro rata* method chosen by the chambers judge to balance the rights of Conoco and the other unsecured creditors, in the circumstances of this case.

46 I would dismiss the cross-appeal.

***Saunders J.A.*:**

I agree.

***Low J.A.*:**

I agree.

Appeal and cross-appeal dismissed.

TAB 5

2019 NSSC 65
Nova Scotia Supreme Court

Quadriga Fintech Solutions Corp. (Re)

2019 CarswellNS 101, 2019 NSSC 65, 302 A.C.W.S. (3d) 21, 67 C.B.R. (6th) 272

The Application of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "Companies" and the "Applicant"), for relief under the Companies' Creditors Arrangement Act

Michael J. Wood J.

Heard: February 14, 2019
Judgment: February 19, 2019
Docket: HFX484742

Counsel: Maurice Chiasson, Q.C., Sara Scott, for Applicants
Elizabeth Pillon, Lee Nicholson, Sharon Hamilton, for Monitor
Raj Sahni, Ben Durnford, John Stringer, Jeremy Dacks, Evan Thomas, Robert Purdy, Q.C., Michael Scott, for An informal committee of users of the Quadriga platform
Gregory Azeff, Gavin MacDonald, for Parham Pakjou
Brendan O'Neill, for Goodmans LLP

Table of Authorities
Cases considered by *Michael J. Wood J.*:

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 1328, 2010 CarswellOnt 1344, 65 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — considered

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 3028, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

Generally — referred to

s. 11 — considered

***Michael J. Wood J.*:**

1 On February 5, 2019, the Court granted the application of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. ("the Applicants") for an initial order and stay under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("*CCAA*"). Ernest & Young Inc. was appointed as Monitor.

2 The Applicants operated a platform to facilitate the purchase and sale of cryptocurrencies. As set out in the materials filed in support of the initial application, users of the platform are owed approximately $250,000,000. The total number of users was estimated to be 115,000.

3 The sole officer and director of the Applicants passed away in December 2018 and, as of the end of January 2019, the majority of the Applicants' cryptocurrency assets had not been located. The resulting insolvency lead to the granting of the initial order on February 5, 2019.

4 The Court has received competing motions by or on behalf of users of the Applicants' platform. They all seek essentially the same relief, which is:

1. appointment of a representative creditors committee of users;

2. appointment of representative legal counsel to act on behalf of affected users on the instructions of the representative committee; and

3. providing access to the existing administrative charge over the assets of the Applicants to secure payment of the reasonable fees and disbursements of the representative counsel.

5 Appointment of representative counsel and stakeholder representative committees are not unusual in complex *CCAA* proceedings. The authority for doing so is found in s. 11 of the Act which reads as follows:

General power of court

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.

6 As stated in *Nortel Networks Corp., Re* [2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List])], 2009 ONSC 3028, the Court has a wide discretion to appoint representatives under this provision. It is usually done where the affected group of stakeholders is large and, without representation, most members would be unable to effectively participate in the *CCAA* proceeding. Representative counsel can make the proceeding more efficient and cost effective for all parties by providing a clear mechanism for communicating with the stakeholders and avoiding a multiplicity of potentially conflicting retainers.

7 In *Fraser Papers Inc., Re* [2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List])], 2009 ONSC 6169, the Court described why it was prepared to appoint representative counsel for retirees and employees:

19 The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. ...

8 In *Nortel Networks*, the Court appointed representative counsel for employees and retirees because that vulnerable group had little means to pursue a claim in the complex *CCAA* proceedings. The Court described the benefit of such an order as follows:

13 ... In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

9 There are two primary rationales given for the appointment of representatives and representative counsel in *CCAA* proceedings. The first is to provide effective communication with stakeholders and ensure that their interests are brought to the attention of the Court and other *CCAA* participants. The second is to bring increased efficiency and cost effectiveness to the proceeding as a whole. This latter objective can be attainted by streamlining notification to stakeholders through their representatives and eliminating the need for multiple counsel to be retained by individual stakeholders to represent their interests. The following judicial comments illustrate these principles:

53 ... It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

(*Nortel Networks*)

24 ... It would be of considerable benefit to both the Applicants and the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.

(*Re Canwest Publishing Inc.*, 2010 ONSC 1328)

38 Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.

(*Re U.S. Steel Canada Inc.*, 2014 ONSC 6145)

10 Representatives and representative counsel should not have an open-ended retainer to undertake any inquiry or investigation they may wish, particularly where the fees are to be paid out of the assets of the applicant company. The appointment is specifically for purposes of the *CCAA* proceeding and to ensure that the stakeholders' interests are effectively taken into account by the decision makers. In some cases there are specific limitations placed on the scope of the representative counsel appointment. For example, in *Canwest Publishing Inc. / Publications Canwest Inc., Re* [2010 CarswellOnt 1344 (Ont. S.C.J. [Commercial List])] the funding approved for representative counsel excluded any investigation of claims against the corporate directors of the applicant company.

11 In cases, such as here, where there are competing applications for appointment of representatives, the Court must evaluate the proposals to determine which will best achieve the objectives described above. In *Fraser Papers* the Court considered factors such as proposed breadth of representation, the extent of counsel's mandate to act, their legal expertise, jurisdiction of practice, facility in French and English and estimated costs (see para. 12).

12 In this case all counsel are members of local and national law firms, with extensive insolvency experience. Each has been contacted by a significant number of users who support their appointment as representative counsel. All seek to be appointed on behalf of all affected users. In my view, what will determine who should be appointed as representative counsel is the manner in which they propose to approach their role and how that accords with the objectives of effective communication and efficiency.

13 The role of representative counsel will differ depending upon the nature of the applicant company and the characteristics of the group of stakeholders to be represented. For example, acting on behalf of employees and retirees for large manufacturers such as Fraser Papers or U.S. Steel, would be very different than the affected users in this case. The Applicants have no physical office, no employees and the trading platform was run by one individual who engaged a handful of third party contractors. The business is currently suspended, and may never resume, although that remains to be determined. The biggest task for the Monitor will be to locate and recover the Applicants' assets.

14 There are more than 100,000 affected users. They range from small creditors who are owed $100, to others who are owed many millions. Privacy is a great concern and many users do not wish to be publicly identified in any fashion. If the affidavits filed in support of the representation motions are indicative, a number of users profess to have technical expertise in cryptocurrencies and are interested in offering their services to the Monitor to assist in the asset investigation process.

15 Perhaps because of the nature of the cryptocurrency world, there has apparently been a great deal of discussion in various social media and online forums about the Applicants and their difficulties. The affidavits filed in this proceeding, refer to speculation about what may have happened with the Applicants' assets.

16 All of this leads me to conclude that the most important role for representative counsel is to provide accurate information and advice about the *CCAA* proceeding to all users, and to ensure that their legitimate interests are taken into account throughout the proceeding. It is not to undertake their own investigation with respect to the Applicants and their assets, that is the responsibility of the court appointed Monitor, who is required to provide written reports on the results of their work.

Nature of the Motions

17 The three motions were brought on behalf of affected users and supported by individual affidavits. I will identify the motions by the law firms they nominate to act as representative counsel.

Bennett Jones/McInnes Cooper

18 Bennett Jones would act as lead counsel and McInnes Cooper as local counsel to the committee of affected users, the members of which are to be identified by representative counsel. The committee and counsel were proposed to act as a "check and balance" on the companies activities and provide a mechanism to "develop restructuring alternatives and solutions".

19 The initial brief filed in support of the motion describes the role of representative counsel as follows:

> 34. The participation of the Representative Counsel will be critical to ensure that the interests of the Affected Users are represented in the Companies' *CCAA* proceedings, and as described previously, will facilitate the restructuring of the Companies under the *CCAA*. As descried in the Robertson Affidavit, there are several complex factual, legal and financial issues that must be addressed in order to successfully restructure the business of the Companies. The knowledge and the essential legal services provided by the proposed Representative Counsel and other professionals that are the beneficiaries of the Administration Charge will be necessary in order to, among other things, properly investigate the operation and current state of Companies' assets, verify relevant legal and financial information, adequately represent (without an unwarranted duplication of roles) the interests of the Affected Users, and otherwise navigate these *CCAA* proceedings to completion.

Miller Thomson/Cox & Palmer

20 The motion proposes to appoint Miller Thomson as lead counsel with Cox & Palmer as local counsel, to represent the proposed representative committee of users. The membership of that committee would include the moving party, Mr. Pakjou and additional members selected by him and representative counsel.

21 The motion brief proposes that representative counsel perform the following functions:

- managing communications with users;
- acting as user liaison for the Monitor;
- advocating for user interests before the Court;
- identify potential conflicting interest amongst users; and
- advocating for user privacy.

22 With respect to the fees of representative counsel, the brief says:

30. The Moving Party proposes that Representative Counsel Fees be subject to approval by this Honourable Court, having regard to the reasonableness of same in the performance of the mandate prescribed by this Honourable Court. As such, it is respectfully submitted that the most effective manner in which to minimize Representative Counsel Fees will be for this Honourable Court to carefully prescribe the duties and responsibilities of representative counsel in an Order.

Osler, Hoskin & Harcourt/Patterson Law

23 Osler, Hoskin & Harcourt LLP would be lead counsel with Patterson Law as local counsel acting on behalf of a representative committee of users. That committee would be composed of the three users who filed affidavits in the motion and two others selected by them in consultation with the Applicants and the Monitor.

24 The initial brief describes their proposed approach to the case as follows:

30(d) <u>Approach to Case</u>

(i) The proposed committee members emphasize the importance of communication with Affected Users to dispel misinformation, reduce anxiety, and permit the proceedings to advance in an orderly and efficient manner. They have identified communication channels most likely to reach the Affected Users, and Osler and Patterson have the resources to ensure that accurate information is disseminated effectively and that Affected Users can easily communicate their views. This emphasis on communication, combined with the committee's and Osler's knowledge of cryptocurrency and blockchain technology, would assist the Monitor in communicating complex technical information to a disparate group of individuals.

(ii) The proposed committee members have considerable technical expertise and relationships that may be of assistance to the Monitor and the Applicants. There are many others who wish to help. The proposed committee and its representative counsel can organize and focus any such assistance to ensure it is provided efficiently.

Positions of the Parties

Bennett Jones/McInnes Cooper

25 At the hearing counsel indicated that they were supported by 181 users, whose claims totaled approximately $22,000,000. Both firms have significant *CCAA* experience and have already been working to advance the interests of the affected users, including appearing at the initial hearing.

26 They have experience in communicating with diverse groups of stakeholders and disagree with the approach of some other counsel who suggest that applications such as Reddit and Telegram, should be used to provide information to users. They propose to use web sites and third party communication firms as they have in other large insolvencies.

27 Counsel suggests that members of the users committee be identified by representative counsel in consultation with the Monitor.

28 They agree with avoiding duplication of work already being done by the Monitor. It would not be their role to act as an "armchair quarterback" overlooking the Monitor's activities. They do not think it is appropriate to have an initial cap on fees of representative counsel because the scope of work is uncertain and the costs of returning to amend the cap in the future would not be warranted. Representative counsel has accountability to the Court and members of the user group.

Miller Thomson/Cox & Palmer

29 This group has the support of 252 creditors with claims of approximately $15,000,000. They believe that representative counsel should be selected based upon a role that reflects efficiency, collaboration and cost effectiveness.

30 The two firms both have extensive insolvency experience and will divide work based upon expertise with Cox & Palmer taking the lead on civil procedure and court appearances, and Miller Thomson on project management, communication and cryptocurrencies. The work would be organized to minimize the number of lawyers and Toronto counsel would only appear in court in Halifax if their expertise were required.

31 Counsel observed that all of the professional fees being incurred were likely coming out of funds that would otherwise be available to the affected users and as a result should be minimized to the extent possible.

32 Their communication plan includes, posting information in chat rooms and on social media. The rationale is that users are already discussing the Quadriga issue in those places, and it is important to have accurate information available to them. With respect to fees, they propose specific limits on the scope of representative counsel's mandate and an initial cap on fees of $250,000 with an ongoing budget process.

Osler, Hoskin & Harcourt/Patterson Law

33 Osler, Hoskin & Harcourt would be the lead firm, with Patterson Law providing local input with respect to civil procedure and litigation in Nova Scotia. Osler has significant experience in legal issues related to cryptocurrency and blockchains. They are supported by 134 users with claims in excess of $19,000,000.

34 Their approach would be complimentary to, and not duplicative of, the work done by the Monitor, recognizing that the users would ultimately be responsible for the expenses. They would have no objection to a defined mandate for representative counsel, nor a cap on fees with the ability to seek modification. With the firm's existing expertise in technical issues, there would be no need to incur costs in familiarizing themselves with those matters.

35 They believe communication through social media is necessary because that is the location where members of the users group can be found. They would use their experience in communicating with large investor groups in other cases.

Goodmans LLP

36 Goodmans did not bring forward a motion, although Mr. O'Neill, on their behalf, provided written submissions and appeared at the hearing. He proposed a mechanism whereby the representative committee be established by the Court and Monitor after soliciting expressions of interest in membership. That committee should then have the responsibility of selecting representative counsel. The theory is that the users ought to have a say in which law firm will represent them.

The Applicants

37 Mr. Chiasson emphasized the importance of having representative counsel appointed quickly and prior to the comeback hearing on March 5, 2019. He believed it was important to have input from the affected users in that process and advocated for immediate appointment of the representative committee using the individuals who had filed affidavits in support of the three motions before the Court. That committee could then have input into the selection of representative counsel.

38 The Applicants' also emphasized the financial considerations and in particular, the importance of limiting expenses, which will ultimately be borne by users. They advocate a restriction on the scope of the representative counsel's mandate.

The Monitor

39 Ms. Pillon pointed out that a number of firms had contacted her prior to the initial application, expressing interest in appointment as representative counsel. She asked them to delay those motions in order to allow the Applicants to bring the initial application before the Court. For this reason she did not believe there should be any consideration given to the fact that Bennett Jones/McInnes Cooper had been in attendance on February 5, 2019, seeking to be appointed as representative counsel and the other firms were not.

40 The Monitor emphasized the importance of having a representative committee that reflects the diversity of users and that it may take some time to determine what this would require. They were not opposed to appointing a preliminary committee with the possibility of substitution of members at a future point in time. That preliminary group could make recommendations about representative counsel.

41 The Monitor is concerned with ensuring that there is no duplication of work between representative counsel and counsel to the Monitor and Applicants. For this reason they recommend that consideration be given to a limited scope of mandate in the appointment order. It was suggested that there should be a cap on representative counsel fees of $100,000 to be applied to work going forward, but not in relation to the preparation of the appointment motion. The amount of the cap could be revisited as the *CCAA* process unfolds.

Analysis

42 All counsel acknowledged that the three proposed counsel groups are well qualified and have the necessary experience to carry out the mandate of representative counsel. They each have the support of many users with millions of dollars in outstanding claims.

43 This *CCAA* proceeding is unique in the sense that there is no operating business of any significant size in terms of physical assets, employees, third party suppliers or secured creditors. There is, however, a very large group of diverse users who have no access to many millions of dollars in assets which they had given to the Applicants. The anecdotal evidence at the hearing is that many people are extremely upset, angry and concerned about dishonest and fraudulent activity. There are reports of death threats being made to people associated with the Applicants. All parties agree that this user group needs representation as soon as possible. That representation will give them accurate information and the knowledge that their interests are being properly represented throughout this process.

44 Another unusual feature is that the only creditors of any significance are the users. The one secured creditor agreed to advance $300,000 in order to get the *CCAA* process underway. The plan is to repay the money as soon as assets become available. The lack of any secured creditors means that the users' money is effectively funding all of the professional fees being incurred. It is extremely important to manage those, in order to maximize recovery for the users. This requires a commitment on all parties to have this issue front and centre while, at the same time, not compromising on the work necessary to advance the interests of the users and recover assets for their benefit.

45 In my view, the criteria to be used in assessing which of the groups should be representative counsel, is somewhat subjective. It requires a consideration of their approach to the issues of efficiency, communication and cost effectiveness. I am satisfied that the submissions of counsel have allowed me to gain insight into the approaches which each group proposes to undertake. There are strengths and weaknesses in each and legitimate debates about which communication strategies might be most effective in the circumstances.

46 A number of counsel suggested that the final selection of representative counsel should be deferred until the users committee is in place so that they can offer their opinion on the issue. Competing with that philosophy is the sense of urgency conveyed by all in having the committee and counsel appointed as soon as possible. I am not satisfied that delaying selection of representative counsel until the committee is in place is reasonable. I agree with the Monitor that the committee needs to reflect the diversity of the user group and should only be appointed after soliciting expressions of interest from the users. I also believe that having input from representative counsel on behalf of the users would be important in the selection of committee members. That decision should not be left to the Monitor and the Court alone.

47 There are three legal teams, who are obviously qualified and capable of doing the work who are supported by many users, and I am not sure on what basis members of the representative committee could chose among them. It is unrealistic to think that these individuals would have a real appreciation of the issues of efficiency and cost effectiveness in a *CCAA* proceeding. At a minimum, it would seem that they would have to be educated about these matters before they could engage in a meaningful consideration of the somewhat subtle differences between the competing firms.

48 When I consider all of these factors I believe it is in the best interests of all of the users that the issue of representative counsel be decided now and that I am in the best position to do so. Any of the proposed counsel teams have the capability of performing the work required.

49 Having assessed all of the information provided on the motions and considering the issues of efficiency, communication and cost effectiveness I believe that the Miller Thomson/Cox & Palmer team is the best choice, and I would appoint them as representative counsel. My reasons for selecting them are as follows:

1. Both the local and national firms have extensive insolvency and *CCAA* experience. Miller Thomson has additional depth in certain areas, including larger *CCAA* proceedings and cryptocurrency.

2. The relationship between the two firms has been thought out carefully with a view to minimizing costs. Cox & Palmer will deal with their areas of expertise, including local litigation practice and court appearances. Miller Thomson will provide expertise in dealing with large creditor groups and cryptocurrency technology.

3. The communication strategy proposed is reasonable, including the idea that some presence in social media and online discussion groups is necessary in order to reach the user group members.

4. The understanding of the financial implications for users has permeated their submissions from the beginning. They propose a limited initial mandate and a cap on counsel fees in recognition of the reality that it is the users who will ultimately be paying.

5. They recognize the efficiency to be gained by working collaboratively with the Monitor and demonstrated this by respecting the request that they defer their motion for appointment as representative counsel until after the initial order was dealt with.

50 Many of these same factors apply to one or more of the other legal teams, however, on balance, the combination of all of these characteristics in the Miller Thomson/Cox & Palmer presentation, makes them the best choice.

Appointment of Representative Committee

51 With the selection of representative counsel, the appointment of members of the representative committee should proceed expeditiously. The Monitor suggested that notice be given inviting expressions of interest for membership to the user group and that, once received, the Monitor and representative counsel could review these with the view to making a recommendation on membership to the Court. I agree with that procedure, and would direct that it commence without delay.

Conclusion

52 Having selected representative counsel and given directions for appointment of the representative committee, the formal order reflecting these decisions can be finalized. I would expect that representative counsel, the Monitor and the Applicants should be able to come to an agreement on most, if not all, of the terms of the order which could then be presented to the Court for consideration. In the event that there remains some disagreement between the parties, those matters can be dealt with by the Court at or before the comeback hearing on March 5, 2019.

Order accordingly.

TAB 6

SUPREME COURT OF NOVA SCOTIA
FEB 28 2019
HALIFAX, N.S.

2019 Hfx No. 484742

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF: Application by Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. d/b/a Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "**Companies**" and the "**Applicants**"), for relief under the *Companies' Creditors Arrangement Act*

SUPREME COURT NOVA SCOTIA • FORIS ARMADOMI CONSILIUM

Sgd.
MJW, J.

ORDER
(Representative Counsel Appointment Order)

BEFORE THE HONOURABLE JUSTICE MICHAEL J. WOOD

UPON MOTION, in the proceedings of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation, and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively, the "**Applicants**"), under the *Companies' Creditors Arrangement Act* (the "**CCAA Proceedings**"), by certain of the users of the Quadriga platform holding significant balances in their personal accounts, representing obligations payable in the form of: (i) cash obligations; and (ii) obligations to hold cryptocurrency coins (the "**Affected Users**") for an order, among other things, appointing counsel to represent the interests of the Affected Users and establishing an official committee of Affected Users;

UPON READING the Affidavit of Xitong Zou sworn February 4, 2019, the Affidavit of Amanda McLachlan sworn February 11, 2019, the Affidavit of Parham Pakjou sworn February 7, 2019, the Affidavit of Giuseppe Burtini sworn February 8, 2019, the Affidavit of Ryan Kneer sworn February 8, 2019, the Affidavit of Richard Kagerer sworn February 11, 2019, and the First Report of Ernst & Young Inc., in its capacity as Court-appointed Monitor of the Applicants (the "**Monitor**");

AND UPON HEARING counsel to the Applicants, counsel for the Monitor, Bennett Jones LLP and McInnes Cooper, Miller Thomson LLP and Cox & Palmer, and Osler, Hoskin & Harcourt LLP and Patterson Law, each as proposed representative counsel for the Affected Users and such other individuals who appeared and were heard on the Motion;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. If necessary, the service of the Notice of Motion, the Motion Record and supporting documents are hereby abridged and service is hereby deemed adequate notice so that the Motion is properly returnable today and further service thereof is hereby dispensed with.

2. Miller Thomson LLP, as lead counsel, and Cox & Palmer, as local counsel, are hereby appointed as representative counsel (collectively, "**Representative Counsel**") to represent the interests of the Affected Users (the "**Purpose**") by discharging the following duties and activities:

   (a) communicating with the Official Committee of Affected Users and the Affected Users regarding the CCAA Proceedings through any medium of communication in Representative Counsel's discretion, including, the establishment of a website located at www.millerthomson.com/en/quadriga (the "**Representative Counsel's Website**"), conference calls, email, Reddit, or other form of electronic communication;

   (b) communicating and liasing with the Applicants, the Monitor or other third parties (as the case may be) in respect of the CCAA Proceedings and the interests of Affected Users therein;

   (c) representing and advocating for the interests of Affected Users (other than Opt-out Individuals), including, Affected Users' privacy interests, preparing court materials and attending any court hearings in respect of these CCAA Proceedings, negotiating and commenting on behalf of Affected Users on any plan of arrangement of the Applicants, and representing and assisting Affected Users (other than Opt-out Individuals) in any claims process commenced by the Applicants;

   (d) identifying potential conflicts of interest among Affected Users and taking any steps necessary to address such conflicts of interest; and

   (e) such other activities and duties that ancillary to the Purpose, with the consent of the Monitor or as otherwise ordered by this Court.

3. Without a further Order of this Court, the following activities are not consistent with the Purpose:

   (a) undertaking an independent investigation with respect to the Applicants and their assets; and

   (b) commencing legal proceedings against the Applicants' directors and officers. For greater certainty, Representative Counsel may, subject to receiving instructions from the Official Committee of Affected Users and the appropriateness thereof, oppose any relief sought within these CCAA Proceedings.

4. Representative Counsel shall not be required to perform or complete any instruction, activity or duty unless, in the Representative Counsel's view, such activity or duty is consistent with or ancillary to the Purpose. Representative Counsel shall have no obligation to consult with, follow the instructions of, or provide an opinion to any individual Affected User in connection with the discharge of its mandate under this Order.

5. A committee of Affected Users (the "**Official Committee of Affected Users**"), comprised of a minimum of five (5), and no more than seven (7), individuals holding claims against the Applicants (the "**Committee Members**") shall be determined by Representative Counsel, in consultation with the Monitor, to act as representatives of all Affected Users (excluding Opt-Out Individuals (as defined below), if any) in the CCAA Proceedings, to act in the overall best interests of the Affected Users, and to advise and where appropriate instruct Representative Counsel. Representative Counsel may rely upon the advice and instructions received from the Official Committee of Affected Users in carrying out the mandate of the Representative Counsel without further communication with or instructions from Affected Users, except as may be recommended by Representative Counsel or ordered by this Court.

6. The Representative Counsel and Monitor are directed to make best efforts to appoint at least five (5) Committee Members to the Official Committee of Affected Users without delay. Prior to the appointment of the Official Committee of Affected Users, Representative Counsel is hereby authorized to take steps or actions on behalf of the Affected Users consistent with the Purpose in their sole discretion and without instruction from the Official Committee of Affected Users or any Committee Members.

7. The Committee Members shall be identified to the Court by the Monitor as soon as practicable following the selection of the Committee Members by Representative Counsel, in consultation with the Monitor, and such report shall be posted on the Monitor's case website located at www.ey.com/ca/quadriga (the "**Monitor's Website**").

8. Any Committee Member may resign from the Official Committee of Affected Users by giving seven (7) calendar days' notice to Representative Counsel. In consultation with the Monitor, Representative Counsel shall select a replacement Committee Member following any such resignation. If the number of Committee Members falls below five (5) due to resignations or otherwise, Representative Counsel may continue to receive instruction from the remaining Committee Members.

9. Subject to the provisions of this Order or any further Order of this Court, the Official Committee of Affected Users shall establish procedures with Representative Counsel for its own governance, including, procedures for instructing Representative Counsel and for the removal and addition of Committee Members provided that any addition of new Committee Members shall be determined in consultation with the Monitor.

10. With the exception of Opt-Out Individuals, (a) the Official Committee of Affected Users and Representative Counsel shall represent all Affected Users in the CCAA Proceedings; (b) the Affected Users shall be bound by the actions of the Official Committee of

Affected Users and Representative Counsel in the CCAA Proceedings; and (c) the Official Committee of Affected Users shall be entitled, on advice of Representative Counsel, to reach any settlement agreements, advocate on behalf of the Affected Users and compromise any rights, entitlements or claims of the Affected Users, subject to approval of the Court.

11. The Applicants shall provide to Representative Counsel, subject to confidentiality arrangements satisfactory to the Applicants and the Monitor, each acting reasonably, without charge, in machine-readable format, the names, last known addresses and last known email addresses (if any) of all the Affected Users (the "**Affected User Information**"), excluding Opt-Out Individuals, if any, who have opted out prior to delivery of the Affected User Information. The Affected User Information shall be kept confidential by Representative Counsel and shall not be disclosed to any other person, including the Official Committee of Affected Users and the Committee Members, unless ordered otherwise by the Court.

12. Subject to confidentiality arrangements satisfactory to the Applicants and the Monitor, each acting reasonably, and any claim of privilege by the Applicants or the Monitor, the Applicants and the Monitor have the obligation to provide Representative Counsel with such documents and data as may be reasonably relevant to matters relating to the issues affecting the Affected Users in the CCAA Proceedings (the "**Information**"), without charge.

13. The provision of the Information to the Representative Counsel pursuant to paragraph 12 of this Order constitutes a limited waiver of any applicable privilege which may attach to the Information in respect of the Representative Counsel only (the "**Limited Waiver**").

14. The Limited Waiver is solely for the purpose of permitting the Representative Counsel to access the Information and for no other purpose.

15. The Limited Waiver applies only in respect of the Representative Counsel and shall under no circumstances be extended to, or apply to any other person or for any other purpose, and any privilege of the Monitor and any persons attaching to the Information is expressly confirmed and preserved as against any other persons and for any other purpose.

16. In providing the Affected User Information and the Information, the Applicants are not required to obtain express consent from such Affected Users authorizing disclosure of the Affected User Information or the Information to Representative Counsel and, further, in accordance with section 7(3) of the *Personal Information Protection and Electronic Documents Act,* this Order shall be sufficient to authorize the disclosure of the Affected User Information or the Information, without knowledge or consent of the individual Affected Users. The Affected User Information and Information shall only be used for the Purpose in the CCAA Proceedings and for no other or improper purpose.

17. Notice of the granting of this Order substantially in the form attached hereto as Schedule "A" ("**Notice**") shall hereby be:

(a) posted by the Monitor or the Applicants on (i) the Monitor's Website; (ii) the Applicants' website located at www.quadrigacx.com; and (iii) the Applicants' subreddit located at www.reddit.com/r/quadrigacx, in each case, within two (2) business days of the date of this Order;

(b) published by the Monitor, in the Globe and Mail, within seven (7) calendar days of the date of this Order; and

(c) sent by the Monitor to Affected Users who have claims against the Applicants in excess of $1,000 according to the Applicants' books and records via email at the last known email addresses for such Affected Users in the Applicants' books and records, within seven (7) calendar days of the date of this Order.

18. Any individual Affected User who does not wish to be represented by Representative Counsel and the Official Committee of Affected Users shall, within sixty (60) calendar days of the date of this Order, notify the Monitor, in writing, that he or she is opting out of representation by the Official Committee of Affected Users and Representative Counsel by delivering to the Monitor an English or French opt-out notice substantially in the form attached hereto as Schedule "B" (each an "**Opt-Out Notice**"), and shall thereafter not be bound by the actions of the Official Committee of Affected Users or Representative Counsel and shall represent himself of herself or be represented by any counsel that he or she may retain exclusively at his or her own expense in the CCAA Proceedings (any such persons who deliver an Opt-Out Notice in compliance with the terms of this paragraph, "**Opt-Out Individuals**"). The Monitor shall keep confidential the identity of the Opt-Out Individuals but shall deliver copies of all Opt-Out Notices received to counsel for the Applicants and Representative Counsel as soon as practicable following receipt of the Opt-Out Notices. In accordance with section 7(3) of the *Personal Information Protection and Electronic Documents Act,* this Order shall be sufficient to authorize the disclosure of the Opt-Out Notices to counsel for the Applicants and Representative Counsel, without knowledge or consent of the Opt-Out Individuals. For greater certainty, the Official Committee of Affected Users and Representative Counsel have no obligation to represent the interests of the Opt-Out Individuals.

19. The form of Opt-Out Notice shall be posted by the Monitor or the Applicants on (i) the Monitor's Website; (ii) the Applicants' website located at www.quadrigacx.com; (iii) the Representative Counsel's Website located at www.millerthomson.com/en/quadrigacx and (iii) Applicants' subreddit located at www.reddit.com/r/quadrigacx, in each case, within two (2) business days of the date of this Order.

20. All written notices required to be given to the Monitor and/or Representative Counsel shall be given by hand delivery, courier or email as follows:

(b) to the Monitor:

Ernst & Young Inc.
Court-appointed Monitor of the Applicants
RBC Waterside Centre

1871 Hollis Street Suite 500
Halifax, Nova Scotia B3J 0C3
Attn: George Kinsman
Email: george.c.kinsman@ca.ey.com

with a copy to:

Stikeman Elliot LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Attn: Liz Pillon / Lee Nicholson
Email: lpillon@stikeman.com / leenicholson@stikeman.com

(c) to Representative Counsel:

Miller Thomson LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON M5H 3S1

Attn: Asim Iqbal / Greg Azeff
Email: aiqbal@millerthomson.com / gazeff@millerthomson.com

21. Representative Counsel shall be given notice of all motions in these CCAA Proceedings and notice of any motion provided to Representative Counsel shall be deemed to be notice to all of the Affected Users except for the Opt-Out Individuals.

22. With the consent of the Monitor or further order of the Court, the Official Committee of Affected Users and Representative Counsel may retain advisors, experts and consultants ("**Advisors**") to provide advice to and to assist the Official Committee of Affected Users and Representative Counsel in the exercise of their duties in relation to the Purpose.

23. Subject to funding being available in the Disbursement Account (as defined in the Initial Order of Justice Wood dated February 5, 2019 (the "**Initial Order**")), and without prejudice to any claim of Representative Counsel against the Applicants and their property for unpaid fees and disbursements, Representative Counsel shall be paid its reasonable and documented fees and disbursements (including disbursements relating to Advisors retained by Representative Counsel) by the Applicants to an aggregate maximum of $250,000, excluding disbursements (the "**Initial Fee Cap**"), which shall subject to adjustments in accordance with paragraph 24 of this Order. Representative Counsel shall be paid on a weekly or bi-weekly basis upon rendering its accounts to the Monitor for fulfilling its mandate in accordance with this Order, and subject to such redactions to the invoices as are necessary to maintain solicitor-client privilege between Representative Counsel and the Official Committee of Affected Users. Representative Counsel or the Monitor are at liberty to bring another motion before the Court at any time

to seek any amendment or modification to the funding arrangements set forth in this Order. In the event of any disagreement with respect to such fees and disbursements, such disagreement may be remitted to this Court for determination.

24. In consultation with the Monitor, Representative Counsel shall prepare a budget from time to time (or as requested by the Monitor or directed by this Court) for anticipated fees and disbursements (the "**Budget**"), and, as necessary or desirable, the Budget shall be provided to the Monitor and the Court for the purpose of determining whether the Initial Fee Cap or other funding arrangements should be amended or modified. A motion for the modification of the Initial Fee Cap may be conducted by way of teleconference on seven (7) calendar days' notice to the Service List.

25. Nothing contained in this Order shall require Representative Counsel to incur any disbursement unless Representative Counsel is satisfied that funds are available for reimbursement of the same.

26. Representative Counsel shall pass their accounts from time to time before a judge of the Court or a referee appointed by a judge of the Court.

27. Representative Counsel shall be entitled to the benefit of the Administration Charge (as defined in the Initial Order) and shall rank *pro-rata* with the other beneficiaries of the Administrative Charge.

28. Payments made by the Applicants pursuant to this Order do not and will not constitute preferences, fraudulent conveyances, transfers of undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable laws.

29. Representative Counsel and the Official Committee of Affected Users are hereby authorized to take all steps and do all acts necessary or desirable to carry out the terms of this Order, including, posting relevant non-confidential information and documents to the Representative Counsel's Website for the Affected Users.

30. The Applicants, the Monitor and Representative Counsel shall be at liberty, and are hereby authorized, at any time, to apply to this Court for advice and directions in respect of the fulfillment and scope of the duties of Representative Counsel under the provisions of this Order or any variation of the powers and duties of Representative Counsel under this Order, which shall be brought on notice to the Applicants, the Monitor, Representative Counsel and other interested parties listed on the service list posted on the Monitor's Website, unless this Court orders otherwise.

31. Representative Counsel and the Committee Members shall have no personal liability or obligations as a result of the performance of their duties in carrying out the provisions of this Order and any subsequent orders of the Court in the CCAA Proceedings, save and except for liability arising out of negligence or actionable misconduct.

32. No action or other proceeding may be commenced against Representative Counsel or the Official Committee of Affected Users in respect of the performance of their duties under this Order without leave of this Court on seven (7) calendar days' notice to the

Applicants, the Monitor, Representative Counsel and the Official Committee of Affected Users.

33. The aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States is requested to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

34. Costs to the Representative Counsel for the motion to appoint representative counsel shall be fixed at $25,000 plus disbursements and applicable taxes and shall not form part of the fees and disbursements addressed under the Initial Fee Cap.

35. This Order and all of its provisions are effective as of 12:01 a.m. Atlantic Standard Time on the 19th day of February, 2019. For greater certainty, any timelines set out in this Order by when actions or notices must be performed or delivered shall commence from the date that this Order is issued.

Issued at Halifax, Province of Nova Scotia, this 28 day of February, 2019.

AHawboldt

AMANDA HAWBOLDT
Deputy Prothonotary

SCHEDULE "A"

NOTICE OF REPRESENTATIVE COUNSEL ORDER

QUADRIGA FINTECH SOLUTIONS CORP., WHITESIDE CAPITAL CORPORATION, AND 0984750 B.C. LTD. D/B/A QUADRIGA CX AND QUADRIGA COIN EXCHANGE (COLLECTIVELY, THE "**APPLICANTS**")

NOTICE TO AFFECTED USERS:

On February 5, 2019, the Applicants commenced proceedings under the *Companies' Creditors Arrangement Act* ("**CCAA**") pursuant to an Order (the "**Initial Order**") of the Supreme Court of Nova Scotia (the "**Court**"). Ernst & Young Inc. has been appointed by the Court as monitor in the Applicants' CCAA proceedings (the "**Monitor**").

TAKE NOTICE THAT, pursuant to an Order of the Court, Miller Thomson LLP, as lead counsel, and Cox & Palmer, as local counsel (collectively, "**Representative Counsel**"), were appointed as representative counsel to represent the interests of users of the Applicants' cryptocurrency exchange platform (the "**Affected Users**") in the CCAA proceedings.

IF YOU WISH TO SERVE on the committee of Affected Users (the "**Official Committee of Affected Users**") which will provide information to and instruct Representative Counsel in connection with the CCAA proceedings, please deliver a package containing (i) your name and address; (ii) your client-ID for the Applicants' cryptocurrency exchange platform (iii) the amount of your claim against the Applicants, (iv) the nature of such claim (fiat currency, cryptocurrency, "pending" withdrawal and/or "completed" withdrawal) owed to you by the Applicants; (v) a statement of no more than 200 words expressing your interest in becoming a Committee Member and summarizing your qualifications; and (v) your resume or PDF copy of your LinkedIn profile, and (vi) such other information or documentation as may be requested by Representative Counsel or the Monitor, to Representative Counsel by email at CommitteeApplications@millerthomson.com by ●, 2019. **IF YOU SERVE ON THE OFFICIAL COMMITTEE OF AFFECTED USERS YOUR NAME WILL BE PUBLICALLY IDENTIFIED TO THE COURT AND OTHER AFFECTED USERS.** Service on the Official Committee of Affected Users will also be a significant time commitment.

IF YOU DO NOT WISH TO BE REPRESENTED by Representative Counsel and the Official Committee of Affected Users, you must, before ●, 2019, provide an Opt-Out Notice (a copy of which can be obtained from the Monitor's website located at www.ey.com/ca/quadriga) indicating that you wish to opt-out of such representation and send the completed Opt-Out Notice to:

To the Monitor:

Ernst & Young Inc. acting in its capacity as Court-appointed Monitor of the Applicants

RBC Waterside Centre
1871 Hollis Street Suite 500
Halifax, Nova Scotia B3J 0C3

Fax: 902-420-0503

With a copy to Representative Counsel:

Miller Thomson LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON M5H 3S1

Attn: Asim Iqbal / Greg Azeff
Email: quadrigaCX@millerthomson.com

Email: quadriga.monitor@ca.ey.com

Persons requiring further information should review the website established by the Monitor at www.ey.com/ca/quadriga or email the Monitor at quadriga.monitor@ca.ey.com.

SCHEDULE "B"

OPT-OUT NOTICE

QUADRIGA FINTECH SOLUTIONS CORP., WHITESIDE CAPITAL CORPORATION, AND 0984750 B.C. LTD. D/B/A QUADRIGA CX AND QUADRIGA COIN EXCHANGE (COLLECTIVELY, THE "**APPLICANTS**")

TO: Ernst & Young Inc. acting in its capacity as Court-appointed Monitor of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd.
RBC Waterside Centre
1871 Hollis Street Suite 500
Halifax, Nova Scotia B3J 0C3

Fax: 902-420-0503
Email: quadriga.monitor@ca.ey.com

I hereby provide written notice that I do not wish to be represented by Miller Thomson LLP and Cox & Palmer, representative counsel ("**Representative Counsel**") for users of the Applicants' cryptocurrency exchange platform (the "**Affected Users**") in their proceedings under the *Companies' Creditors Arrangement Act* before the Supreme Court of Nova Scotia (the "**CCAA Proceedings**"). I understand that, by opting out of representation, if I wish to take part in the CCAA Proceedings, I would need to do so as an independent party. I am responsible for retaining my own legal counsel should I choose to do so, and that I would be personally liable for the costs of my own legal representation.

I understand that a copy of this Opt-Out Notice will be provided to the Representative Counsel and to the Applicants.

____________________ ____________________
Date Signature

Name (please print): ____________________

Address: ____________________

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Telephone: ____________________

E-mail ____________________