VANCOUVER
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COURT OF APPEAL
REGISTRY

Form 21 (Rule 40(1)(a))

Court of Appeal File No. CA-47585

COURT OF APPEAL

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

BETWEEN:

PORT CAPITAL DEVELOPMENT (EV) INC. and
EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

Respondents
(Petitioners/Applicants)

AND:

1296371 B.C. LTD.

Appellant
(Respondent/Applicant)

AND:

CENTURA BUILDING SYSTEMS (2013) LTD. and
SOLTERRA ACQUISITIONS CORP.

Respondents
(Respondents)

JOINT BOOK OF AUTHORITIES

Filed by 1296371 B.C. Ltd.

Hearing date: September 21, 2021

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SUPREME COURT OF CANADA

2020 SCC 10 (CanLII)

CITATION: 9354-9186 Québec inc. *v.* Callidus Capital Corp., 2020 SCC 10

APPEALS HEARD AND JUDGMENT RENDERED: January 23, 2020
REASONS FOR JUDGMENT: May 8, 2020
DOCKET: 38594

BETWEEN:

9354-9186 Québec inc. and 9354-9178 Québec inc.
Appellants

and

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Respondents

- and -

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals
Interveners

AND BETWEEN:

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Appellants

and

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier

Respondents

- and -

Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc.,
Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals
Interveners

2020 SCC 10 (CanLII)

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 117)	Wagner C.J. and Moldaver J. (Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

9354-9186 Québec inc. and
9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc.,
IMF Bentham Limited (now known as Omni Bridgeway Limited),
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation,

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International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc., Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Indexed as: 9354-9186 Québec inc. *v.* Callidus Capital Corp.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.
Reasons delivered: May 8, 2020.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion

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to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As

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a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

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Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable

treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or

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bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* — that is, acting for an improper purpose — s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual

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circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the

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objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive. Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish

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the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

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By Wagner C.J. and Moldaver J.

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APPEALS from a judgment of the Quebec Court of Appeal (Dutil, Schrager and Dumas JJ.A.), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), setting aside a decision of Michaud J., 2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Appeals allowed.

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Joseph Reynaud and *Nathalie Nouvet*, for the intervener Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* and *Saam Pousht-Mashhad*, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

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The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

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I. Overview

[1] These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

[2] Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

[3] For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of

deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

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II. Facts

[4] In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

[5] In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

[6] Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. *Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets*

[7] On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

[8] Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

[9] Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1]

[1] Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

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Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

[10] The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

[11] Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. *The Initial Competing Plans of Arrangement*

[12] On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

[13] However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000;

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creditors with larger claims were to receive, on average, 31 percent of their respective claims.

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[14] The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. *Creditors' Vote on Callidus's First Plan*

[16] On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting

unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

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[17] Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] . . . the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. *Bluberi's Interim Financing Application and Callidus's New Plan*

[18] On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

[19] The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the

Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

[20] Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

[21] On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

[2] Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

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[22] The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

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III. Decisions Below

A. *Quebec Superior Court (2018 QCCS 1040) (Michaud J.)*

[23] The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

[24] With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when

> its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.
>
> As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.
>
> It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

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[25] The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

[26] Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

[27] With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3)

if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

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[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

[29] After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, at para. 41, and *Hayes v. The City of Saint John*, 2016 NBQB 125, at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, at para. 23).

[30] Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

[31] Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. *Quebec Court of Appeal (2019 QCCA 171) (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))*

[32] The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII)). In particular, the court identified two errors of relevance to these appeals.

[33] First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial

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discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

[34] Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

[35] In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

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[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

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IV. Issues

[37] These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. *Preliminary Considerations*

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of *CCAA* Proceedings

[39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

[40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*

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(2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

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[41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred

to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

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[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999

ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in

[3] We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167–68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

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Indalex, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

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[46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in *CCAA* Proceedings

[47] One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue!*

The Companies' Creditors Arrangement Act, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

[48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

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[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a

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diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

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[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp- 566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion

unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

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[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 305 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

B. *Callidus Should Not Be Permitted to Vote on Its New Plan*

[56] A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its

voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

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(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

[57] Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at N§149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan

(*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at N§45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

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[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

> **Related creditors**
>
> **(3)** A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that,

under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at N§33, *Red Cross*; *Re 1078385*

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Ontario Inc. (2004), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

[62] Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

[63] Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, developed by Industry Canada, last updated March 24, 2015 (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

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[64] Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the

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CCAA will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

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[66] Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

> **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.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring

jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

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[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

[70] Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

[72] While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

[73] First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with greater judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

[74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the

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BIA (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.

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> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

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In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

[77] In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so[4]. The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New

[4] It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

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Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

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[79] Indeed, as the Monitor observes, "Once a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

[80] We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

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[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the

New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

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C. *Bluberi's LFA Should Be Approved as Interim Financing*

[84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

[85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques*

San Francisco Inc. v. Richter & Associés Inc., 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

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[86] Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

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

[87] The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form

or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

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[88] The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

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

[89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate

[5] A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

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[90] Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

> **Factors to be considered**
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> **(a)** the period during which the company is expected to be subject to proceedings under this Act;
>
> **(b)** how the company's business and financial affairs are to be managed during the proceedings;

> **(c)** whether the company's management has the confidence of its major creditors;
>
> **(d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> **(e)** the nature and value of the company's property;
>
> **(f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> **(g)** the monitor's report referred to in paragraph 23(1)(b), if any.
>
> (*CCAA*, s. 11.2(4))

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[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

[92] As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

[93] Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs,

in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L. J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

[6] The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. National Bank of Canada*, 2006 QCCA 557 [2006] R.J.Q. 1009; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

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[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding

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furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

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[97] We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising

judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

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[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian*

> *Assur. Co.,* [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations,* [1935] A.C. 185 (P.C.).
>
> (Houlden, Morawetz and Sarra, at N§33)

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[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in C*rystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away . . . their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
>
> (*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It

follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

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[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped

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his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

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- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and

- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment

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on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

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[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise

will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

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[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
>
> . . .
>
> . . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the

mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

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[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was

unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

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VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

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Court of Queen's Bench of Alberta

Citation: Alberta Treasury Branches v Tallgrass Energy Corp, 2013 ABQB 432

2013 ABQB 432 (CanLII)

Date: 20130806
Docket: 1301 08759; 1301 08497
Registry: Calgary

Between:

Alberta Treasury Branches

Plaintiff

- and -

Tallgrass Energy Corp.

Defendant

1301 08497

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

And in the Matter of the *Alberta Business Corporation Act*, R.S.A. 2000, c. B-9, as amended

-and-

Tallgrass Energy Corp.

Defendant

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

2013 ABQB 432 (CanLII)

Introduction

[1] Tallgrass Energy Corp applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended. That application was opposed by its secured creditors, Alberta Treasury Branches and Toscana Capital Corporation, which prior to Tallgrass' application for CCAA protection had applied for an order appointing a receiver over the property and assets of the company. I dismissed Tallgrass' application for an initial CCAA order and allowed the receivership application. These are my reasons.

Facts

[2] In July, 2012, ATB extended a $12 million credit facility to Tallgrass, payable on demand and secured by a first charge on all of the company's assets. At about the same time, Toscana granted Tallgrass a bridge loan credit facility in the amount of $6 million secured by a second in priority charge against the assets. This bridge loan facility matured on April 30, 2013.

[3] In July, 2012, John McAdam, the CEO of Tallgrass, began the process of looking for traditional financing to replace the Toscana bridge financing. In early 2013, Mr. McAdam realized that no conventional financing was available, and Tallgrass began to explore the availability of non-traditional forms of financing.

[4] Tallgrass management decided to attempt to obtain $100 million of non-traditional financing, as there were no third parties willing to step into the shoes of Toscana's subordinate position. The company retained an advisor in March, 2013 to aid in the search.

[5] After the Toscana facility matured on April 30, 2013, Tallgrass acknowledged that the loan was in default. Toscana agreed to forbear enforcement until May 31, 2013 to provide Tallgrass with additional time to finalize certain financing alternatives that were being explored.

[6] On June 17, 2013, Toscana issued a demand to Tallgrass, and on June 25, 2013, ATB followed with its demand. There is no issue that Tallgrass is also in default of the ATB credit facility.

[7] On June 27, 2013, at the request of the secured lenders, Tallgrass retained Grant Thornton Limited as financial advisor, on the condition that Grant Thornton would provide financial information and reports to the secured lenders. Grant Thornton provided two reports to the lenders, on July 4 and on July 11, 2013. The lenders granted further forbearance during this period and continuing until July 17, 2013.

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[8] On about July 15, 2013, on the basis of the information and reports received from Grant Thornton, Toscana advised Tallgrass that it would not be prepared to grant further forbearance, and that it intended to bring an application to appoint a receiver on Wednesday, July 24, 2013. On July 16, 2013, ATB advised Tallgrass that it was taking the same position, and that after July 17, 2013, Tallgrass would have no further access to the remaining $100,000 available under the line of credit.

[9] Tallgrass sought an initial order under the CCAA on July 17, 2013. The application was put over to July 24, 2013 to be heard at the same time as the receivership application, with a temporary stay to preserve the status quo. ATB agreed to allow Tallgrass access to up to $50,000 of the line of credit to pay certain critical suppliers.

[10] In its application, Tallgrass represented that it currently has assets of $28,829,874 and liabilities of $28,896,371. The secured lenders are owed approximately $18 million and Tallgrass has unsecured accounts payable in the amount of roughly $3 million, decommissioning liabilities as of March 31, 2013 in the amount of approximately $7.4 million and a financing contract under which approximately $484,000 is outstanding as of March 31, 2013.

[11] The company values its property, plant and equipment, including undeveloped land, at approximately $21.6 million.

Analysis

[12] As a preliminary matter, it is clear that Tallgrass meets the technical requirements for protection under the CCAA. It is also clear and uncontested that Tallgrass has breached various provisions of the ATB credit facility and the Toscana bridge loan facility, and that the secured lenders are entitled to apply for a receivership order. In fact, there was no question that, if Tallgrass's application for an initial order under the CCAA did not succeed, a receivership would follow.

[13] As I indicated in *Matco Capital Ltd. v Interex Oilfield Services Ltd.*, (1 August 2006), Docket No. 060108395, a section 11 order under the CCAA is not granted merely upon the fact of its application. Tallgrass must satisfy the court that circumstances exist that make the order appropriate, and that it has acted and is acting in good faith and with due diligence. The CCAA therefore requires that the court hearing the application exercise discretion in making these determinations.

[14] A key issue here is whether Tallgrass can establish that there is any reasonable possibility that it will be able to restructure its affairs. The burden placed on an applicant for an initial CCAA order in this regard is not a very onerous one, in that it is not necessary for an applicant company to have a fully-developed plan or the support of its secured creditors, although either or both are desirable and helpful. However, there must be some evidence of what Farley J. in *Re*

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Inducon Development Corp., 1991 CarswellOnt 219 referred to as the outline of a plan, what he called the "germ of a plan": para 14. I would add a further gloss on that phrase: there should be a germ of a reasonable and realistic plan, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring. As noted in *Inducon* at para 13, the CCAA is remedial, not preventative, and it should not be the "last gasp of a dying company". Unfortunately, Tallgrass appears to be at that desperate stage.

[15] While it is certainly true that the fundamental purpose of the CCAA is to permit a company to carry on business and where possible avoid the social and economic costs of liquidating its assets, this is a company with very few employees, a handful of independent contractors, and relatively minor unsecured debt. Tallgrass does not carry on a business that has broader community or social implications that may require greater flexibility from creditors. The major stakeholders here are the secured lenders who oppose the application, and the equity holders.

[16] The secured lenders submit that the restructuring options presented by Tallgrass are commercially unrealistic and unlikely to come to fruitation, that it is obvious that a liquidation of the assets will be the end result for this company, and that they have lost confidence in the management of Tallgrass to effect such a liquidation. They submit that, as they are likely the only parties with any economic interest in the company, their preference for a receivership over what would ultimately be a liquidating CCAA should be taken into account.

[17] I must agree that the restructuring options proposed by Tallgrass, while more detailed than the kind of general good intentions offered by the applicant in *Matco*, are not realistic or commercially reasonable. Specifically:

> 1. Tallgrass concedes that it has exhausted any chance of conventional financing after nearly a year of attempting to find a conventional lender to take out its existing secured debt, turning in early 2013 to what it calls non-traditional sources;
>
> 2. Company management decided in March of this year to pursue $100 million in non-traditional debt rather than merely retiring existing secured debt of $18 million. As noted by the secured lenders, it is unrealistic for a small public company with a market capitalization of approximately $800,000 and existing assets worth roughly $29 million, which has already encountered difficulties finding sources of funding to take out Toscana's subordinate position, to attempt to obtain $100 million in financing within a reasonable time frame. The unsatisfactory and uncertain results of approximately six months of effort in that regard must be analyzed carefully;
>
> 3. Tallgrass has obtained no firm commitments for refinancing. What it has been able to obtain is the following:

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a) a letter dated July 23, 2013 from a financing broker that purports to be a "commitment letter". This "commitment" to lend $100 million states that the broker will source the finding through an unnamed "top 25 bank". It requires an upfront "bank guarantee fee" of $2 million. The letter provides that the broker shall have no liability to Tallgrass "under any theory of law or equity" for the failure of any transaction contemplated by the loan commitment letter . The secured lenders have pointed out the many unusual provisions of this letter, and ask, reasonably enough, why a "top 25 bank" would contemplate a loan of $100 million to Tallgrass in its present circumstances. Tallgrass management has had no direct discussion with any financial institution and is relying on assurances from the broker that the source of funding would be reputable.

This "commitment letter" lacks credibility. At any rate, Tallgrass is unable in its current financial state even to fund the $2 million bank guarantee fee necessary to take the proposal to a next step. This leads to the next proposal.

b) Tallgrass has obtained a letter from a friend of its CEO that indicates that he has obtained verbal commitments from Chinese investors in the amount of $10 million for the purpose of investing in the company, and that they are willing to fund the $2 million required by the above-noted proposal. The secured lenders note that this potential funding source has no track record or experience with respect to Canadian oil and gas assets, and that, even if the commitment became firm, the amount is insufficient to pay off existing indebtedness.

c) Tallgrass has identified a further option, a potential loan in the process of negotiations with a broker, not a source lender, that would involve the broker earning approximately $16 million in fees to find a source for a $100 million loan. This is an even softer proposal, with no real commitment. Tallgrass' CEO concedes in understatement that this would be "expensive funding".

[18] Given that these options are not commercially realistic, I must conclude that the secured lenders are correct in their view that this would likely be a liquidating CCAA. While this does not in itself preclude the use of the statute, the secured lenders object to Tallgrass management controlling the liquidation process under CCAA protection as they have lost faith in such management. The secured lenders have identified concerns about management's estimate of the value of Tallgrass' oil and gas assets, concerns about the effect of abandonment liabilities on realization values, and concerns about discrepancies between the Cost Flow Projections contained in the CCAA application as compared to those prepared by Grant Thornton. The secured lenders also have concerns with respect to how management is executing its alternate financing strategy, particularly its decision to pursue financing from the kind of sources it has identified, and what they feel is a lack of attention from senior management to realistic

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alternatives and options. They are critical of management's decisions with respect to covering short-term liabilities in the course of these applications.

[19] Tallgrass submits that the opinions given by an officer of Toscana, Dean Jensen, on behalf of the secured lenders with respect to the value of its oil and gas assets should be given little weight as Mr. Jensen does not have the proper expertise to comment on the reserve reports. I take Mr. Jensen's comments to be the opinions of a banker experienced with loans in the oil and gas sector and with familiarity with reserve reports. What Mr. Jensen is really questioning is whether Tallgrass would be able to achieve a price for these assets equal to management's projections, and whether such projections are reliable. He thus questions whether the secured lenders are assured of recovery or whether they are at risk.

[20] The concern expressed by Mr. Jensen with respect to cost flow projections relates to whether the costs of a CCAA proceeding will be as projected by Tallgrass, and, again, a lack of confidence with respect to management's projections in that regard. While it appears that Mr. Jensen may have misunderstood some of the calculations, there remain unanswered questions about the projections.

[21] This is not a case where the secured lenders have acted precipitously, or where the debtor has not had a more than adequate opportunity to canvass the market for refinancing and restructuring options. This process has been ongoing for more than a year under Tallgrass management, which was not able to obtain take-out financing for Toscana's bridge loan, nor obtain sufficient financing to satisfy its licensee liability rating report requirements and provide funding necessary for further development activities. It is also clear that Tallgrass and its major secured stakeholders are in an adversarial mode, which does not bode well for an efficient or relatively inexpensive CCAA restructuring. Tallgrass was most likely a liquidating CCAA, and given the lack of confidence and the adversarial relationship between the company and the secured lenders at risk, I was not satisfied that a CCAA order would be appropriate in the circumstances. I dismissed Tallgrass' application.

[22] It thus followed that the secured lenders' application for a receivership order must succeed.

Heard on the 24th day of July, 2013.
Dated at the City of Calgary, Alberta this 6th day of August, 2013.

B.E. Romaine
J.C.Q.B.A.

2013 ABQB 432 (CanLII)

Appearances:

Thomas Cumming and Jeffrey Oliver
for the Plaintiff Alberta Treasury Branches

Howard Gorman
for Toscana Capital Corporation

Ryan Zahara and Matthew Beavers
for the Defendant Tallgrass Energy Corp.

Court of Queen's Bench of Alberta

Citation: Alexis Paragon Limited Partnership (Re), 2014 ABQB 65

Date: 20140131
Docket: 24-1823083, 24-1823084
24-1823085, 24-1823086
Registry: Edmonton

In the matter of the *Bankruptcy and Insolvency Act*,
R.S.C. 1985, c. B-3, as amended ("*BIA*")
-and-
In the Matter of the *Companies' Creditors Arrangement Act,*
R.S.C. 1985, c. C-36, as amended ("*CCAA*")
-and-
In the matter of a Plan of Compromise or Arrangement and reorganization of Alexis Paragon Limited Partnership and the Petitioners Listed in Appendix "A"
(Collectively the "Company")
-and-
In the matter of applications by the Company for, *inter alia*, a continuation of proceedings under the *CCAA*, a stay and the addition of Alexis Casino LP as an applicant.

Between:

Silver Point Finance, LLP

Applicant (Respondent)

- and -

Paragon Canada Alexis, ULC; Alexis Paragon Limited Partnership; Paragon Tamarack Alexis General Partnership; and Paragon Alexis Holdings, Inc.

Respondents (Applicants)

- and -

Alexis Trustee Corporation, Alexis Nakoda Sioux Nation and Alexis Casino Limited Partnership

Respondents (Interveners)

Reasons for Judgment
of the
Honourable Mr. Justice D.R.G. Thomas

2014 ABQB 65 (CanLII)

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I. Introduction

[1] These are my decisions on the applications described in Schedule "A" argued in a common hearing on January 24, 2014 Terms used in this decision including 'Alberta Gaming Regulator', 'Alexis Group', 'Paragon Group' and 'Silver Point' are defined in Schedule "B". Relationships between Silver Point, the Paragon Group and the Alexis Group are shown in Schedule "C".

[2] The essence of the Paragon Group applications are for a stay pursuant to s. 11.02(3) of the *CCAA*, for a period of 30 days, to give it an opportunity to develop and file a plan of arrangement under the *CCAA*. Silver Point opposes the Paragon Group applications for a stay and continuation under the *CCAA* and ask instead, for a receiver/manager to be appointed. The Alexis Group also responds to the *CCAA* applications by the Paragon Group and intervenes to support Silver Point in its receivership application. The Paragon Group opposes the appointment of a receiver.

[3] The applications of the Paragon Group are dismissed and a receiver manager is appointed.

II. Background

[4] The Eagle River Casino and Travel Plaza (the "Casino") is located on a portion of the Alexis First Nation Reserve, near Whitecourt, Alberta. The Casino has been located on those lands to take advantage of policies established by the Government of Alberta in 2001 to facilitate development of gaming facilities on First Nations Reserves and to access grants made available from senior levels of Government through the FNDF.

[5] The portion of the Reserve land on which the Casino is built and operated is subject to a head lease from Her Majesty the Queen in Right of Canada and a number of sub-leases between corporate entities which are part of the Alexis Group.

[6] The license to operate the Casino is issued by the Alberta Gaming Regulator and is held by the Alexis Casino LLP, a limited partnership composed of Alexis Trustee Corporation and Alexis Casino Corporation. This structure appears to have been dictated by the Alberta Gaming Regulator so that the Casino operation will qualify under Alberta policies and regulations governing gaming on First Nations Reserves.

[7] Paragon borrowed money from Silver Point to construct and provide for ongoing operation of the Casino. The creditor Silver Point says that the indebtedness now amounts to approximately 82 million dollars. This debt was to be serviced by rents and profits from the gambling operation carried on in the Casino, and to a lesser extent from the related service station operation. By agreement between the Alexis Group and the Paragon Group, the latter is mandated as the manager of the Casino and as such, has day-to-day responsibility for running the gaming operation in the Casino.

[8] The Casino has struggled financially since it opened and on a number of occasions, various third parties have determined and declared the operation to be either insolvent, e.g. Grant Thornton, or noncompliant, e.g. audit by Alberta Aboriginal Relations.

[9] Revenues have never met the projections prepared by the operator, Paragon Group, with the result being that there has never been enough money generated in the Casino to pay rents.

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Some share of revenues have been passed back to a charity controlled by the Alexis First Nation. It is common ground that the Paragon Group has been default on its debt obligation to Silver Point for some time. Silver Point wants its money back and has commenced proceedings to have a receiver manager appointed to take over the operation of the Casino and restructure the debt. Paragon resists and claims that it has injected up to $20 million dollars into the operation of the Casino to keep it running and should be granted a stay to prepare a plan of arrangement under the CCAA.

[10] Over the years disagreements between the Alexis Group and the Paragon Group have escalated. There have been several attempts to work out solutions, but dialogue has come to an end and these legal proceedings have resulted.

[11] What is clear is that there are immense losses which are going to be incurred here, probably over $55 million dollars on the part of Silver Point and $20 million dollars on the part of the Paragon Group and an individual related thereto who has made secured advances but stands second to Silver Point.

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III. Issues

[12] Briefly stated, the issues are:

(1) Should a stay be granted to allow the Paragon Group an opportunity to file a plan of arrangement under the *CCAA*? and

(2) If a stay is not granted, should a receiver be appointed?

IV. Jurisdiction of this Court under the CCAA and to appoint a receiver

[13] There is no disagreement among the various participants in these hearings that the Paragon Group has met the technical requirements of the *CCAA*. The Paragon Group is indebted for more than $5 million dollars to Silver Point and the members of the Paragon Group appear to be affiliated under the relevant provisions of the *BIA*. The Casino is operated in Alberta and the Casino is the core business of the Paragon Group. This Court has jurisdiction to hear and decide the Paragon Group application for a stay and continuation under the *CCAA*.

[14] The participants accept that the Paragon Group and Paragon Canada, Alexis, ULC in particular, is in default under its financial arrangements with Silver Point and that the amount of the debt accrued is in the range of $82 million dollars. There is no dispute that the secured lender, Silver Point, is entitled to apply for a receivership order and the question is whether it should be granted given the allegations of breach of fiduciary duty and conspiracy which are made by Paragon Group against Silver Point and the Alexis Group.

V. Analysis – CCAA Application by Paragon Group

[15] Section 11.02 (3) of the *CCAA* prescribes that:

(3) The court shall not make the order unless

(a) the applicant satisfies the court that the circumstances exist that make the order appropriate; and

> (b) In the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Clearly, the burden of proof lies on Paragon Group, as the applicant.

[16] At para. 13 of ***Alberta Treasury Branches v. Tallgrass Energy Corp.***, 2013 ABQB 432, Romaine, J. stated the test for granting such an order under s. 11.02(3) of the *CCAA*. I adopt and restate the test as being that I must be satisfied:

(a) the circumstances exist that make the order, i.e. the continuation under the *CCAA*, appropriate;

(b) the applicant has acted and is acting in good faith; and

(c) the applicant has acted and is acting with due diligence.

[17] In considering whether this test has been met, I have considered the Supplemental Pre Filing Report prepared by the proposed Monitor PricewaterhouseCoopers Inc. ("PWC") which confirms the evidence in the affidavits of the parties that this is a financial mess.

(A) Appropriateness

[18] The Paragon Group must satisfy me that it will be able to restructure this complex set of entities and operations, some of which are limited partnerships, and still be able to carry on a viable business in the Casino (including the related service station).

[19] At para. 14 of ***Tallgrass****, supra*, Romaine, J. stated:

> ... there should be **a germ of a reasonable and realistic plan**, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring...
> [Emphasis added.]

[20] The question here is whether the Paragon Group have presented **a germ of a reasonable and realistic plan** given the very strong opposition to its proposal from the Alexis Group and Silver Point. This 'germ' of a plan must be found in the evidence before the Court.

[21] The Paragon Group argues that there is a 'germ' of a plan found in the Lavelle Affidavit filed in support of the Silver Point application. Specific reference is made to paras. 118 to 122 inclusive, which describes the 'Proposed Transaction', (the "Proposed Transaction") which is a conditional deal between a future nominee of the Alexis Group and Silver Point. The essence of the Proposed Transaction would see a reduction in the outstanding indebtedness currently owed by the Paragon Group to Silver Point achieved through a combination of write-downs of debt by Silver Point and a reduction in debt charges, the assumption of a reduced amount of debt by the Alexis Group and the further purchase of a portion of the existing debt by the Alexis Group or its nominee from Silver Point.

[22] The Paragon Group also suggests that as part of its plan, it would obtain accommodations from the Alberta Gaming Regulator and the Government of Alberta to somehow unblock funds held by the FNDF for the operation of the Casino and the payment of arrears of rent.

[23] Presumably these funds, if they could be made to flow, would be directed to pay down a portion of the indebtedness owing by the Paragon Group to Silver Point.

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[24] The Paragon Group proposes to flesh out this concept, which it says is an example of the germ of a plan, if 30 more days can be allowed for the delivery of a full blown plan.

[25] The Paragon Group argues further that there is also a 'germ' of a restructuring proposal set out in the Affidavit of Scott Menke, made on January 13. It appears that this is a reference to para. 47 of that deposition, which reads:

> In order to make the Project viable, it will be necessary to address the use of FNDF funds with Alberta, address the allocation of overheads to the Casino with Alberta and restructure the lease payment for the Casino space. At this time I have only a general idea as to the structure of the proposed Plan of Arrangement. I contemplate
>
> a. taking every reasonable step to reduce overhead;
>
> b. entering into discussions with Alberta to amend the structure of the Project to maximize the availability of FNDF Funds and the allocation of overheads;
>
> c. determining the amount of debt the operation can handle;
>
> d. making a proposition to the secured creditors for a rearrangement of the Applicants' obligations to those creditors to something the Applicants can support;
>
> e. obtaining a third party assessment as to fair market rent;
>
> f. amending the lease to reflect the restructured obligations to the secured creditors;
>
> g. entering into discussions with Alexis for an orderly transition of management duties from PCA to Alexis.

[26] In respect to the 'germ' of a plan represented by the 'Proposed Transaction' outlined in the Lavelle Affidavit, it is trite to observe that none of the entities making up the Paragon Group have been invited to participate in this restructuring scenario. While the scenario described in the 'Proposed Transaction' may provide a realistic template for a restructuring, it does not appear that there is any role for the Paragon Group, because the relationship between the Paragon Group and Silver Point and the Alexis Group is irretrievably broken. The parties involved appear to have agreed to go their separate ways some time ago and the opposition by the Alexis Group, in particular, to any ongoing role for the Paragon Group is to put it mildly "fierce".

[27] In the result, this particular template is neither a reasonable nor realistic 'germ' of a plan.

[28] In respect to the 'germ' of a plan said to be found in para. 47 of the Menke Affidavit, it is cast in terms of a 'contemplation' of a number of steps which might be taken to address issues such as the use of FNDF funds, the allocation of overheads etc. It does provide a logical catalogue of many of the business and regulatory issues which must be addressed.

[29] That said, I agree with counsel for the Alexis Group that this is more of a process to finalize a plan than an outline of a plan that contains details such as sources of new funding available on some limited conditional basis, specific examples of overheads which could be

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reduced, etc. Even in the second Menke Affidavit, made January 21, 2014, at para. 8 there are no specific overhead reductions provided.

[30] While the Court has the power under the CCAA to impose a stay and ultimately to approve a plan, it is my view that it is unrealistic to think that a plan which involves the ongoing involvement of the Paragon Group in the operation of the Casino facility will be acceptable to the Alexis Group and Silver Point. Both of these parties have expressed strenuous opposition, particularly based on a concern about the effect the continued involvement by the Paragon Group may have on the gaming license issued by the Alberta Gaming Regulator, which in turn has expressed discomfort with the ongoing failure of the Paragon Group to reduce overheads in the Casino operation. That said, I note this Regulator remains resolutely neutral in this dispute (see January 21, 2014 letter).

[31] However, I am not satisfied on the evidence before me that the Paragon Group can come up with a plan which will involve the ultimate endorsement by the Alberta Gaming Regulator of a scheme whereby the Paragon Group remains involved in the day-to-day operations of the Casino facility. In particular, it is not realistic to assume that this will happen in 30 days. I also note that while this Court may have the power to continue the gaming license under the CCAA this Court does not have the power to renew licenses if they expire on their own terms. I observe that the gaming worker supplier registrations enabling the Paragon Canada Alexis, ULC to provide workers to the Casino will expire on February 7, 2014.

[32] Before coming to a final conclusion on whether there is a 'germ of a reasonable and realistic plan' presented here, I consider at this stage of the analysis the appropriateness of the inclusion of the Alexis Casino Limited Partnership in the proposed plan of arrangement. This entity must be included in this restructuring because it is the holder of the critical gaming license granted by the Alberta Gaming Regulator. The asset represented by this license is at the very core of this dispute and any restructuring must preserve and continue that fundamentally important authorization.

[33] I find that the Paragon Group does not have any direct ownership interest of a legal nature in the Alexis Casino Limited Partnership, or the gaming license.

[34] There are relationships between the Paragon Group and some of the entities making up the Alexis Group, such as the limited partnership known as the Alexis Paragon Limited Partnership. There are also two operating agreements, including the Casino Management Agreement and the Alexis Paragon Limited Partnership Agreement. While the approval of a plan under the *CCAA* could perhaps preserve the limited partnership arrangements and the management agreement, I am still not convinced that Paragon has met the burden of demonstrating that the *CCAA* should be used to draw in the Alexis Casino Limited Partnership. It is neither an affiliated company, nor a subsidiary of the Paragon Group. It is a live issue as to whether the Alexis Casino LP is a 'related party' within the definition of that term found in the *BIA* but I do not decide this aspect of the application on that point. I mention it only because it was raised in the course of argument by the Paragon Group.

[35] The Paragon Group points out that Romaine, J. had considered a complex set of limited partnerships in ***Re Calpine Canada Energy Limited***, 2006 ABQB 153 and therefore partnerships can be captured by the *CCAA* legislation. I note that ***Calpine*** was a completely different type of business and had many different types of relationships through complex limited partnership

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arrangements. These businesses were very different from this gaming operation located on First Nations Lands.

[36] In the result, given the serious questions about whether the Alexis Casino LP qualifies as a debtor under the CCAA in these circumstances and given the discretionary nature of my powers under this section of the CCAA, I am disinclined to force the heretofore independent Alexis Casino LP into a forced marriage with the Paragon Group. It would not be appropriate in these circumstances and for all these reasons the first limb of the ***Tallgrass*** test has not been met.

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(B) Good Faith

[37] The second part of the ***Tallgrass****, supra,* test requires that the Paragon Group, as applicant, establish that it has acted in good faith in the past and is acting currently acting in good faith. The Alexis Group takes particular issue with the conduct of the Paragon Group and its failure to move, in a timely way, to reduce overheads in the Casino operation and to address issues raised by the Alberta Gaming Regulator, despite many requests that it do so over the last several years. Further, the Alexis Group complains of the failure of the Paragon Group to maintain its debt obligations with Silver Point in good standing. The Alexis Group assert that the relief sought under the *CCAA* by the Paragon Group is more of a defensive tactic than a bona fide effort to restructure, as referred to in the case of ***Callidus Capital Corp. v. Carcap Inc.***, 2012 ONSC 163, at para. 58.

[38] I am not prepared to find that the Paragon Group is not acting in good faith here. There is evidence the Paragon Group and its principals have continued to inject capital into the operation of the Casino to keep it afloat and that is not disputed. The applications by the Paragon Group appears to be acts of desperation akin to 'Hail Mary' passes, rather than a series of activities demonstrating bad faith. I accept that the Paragon Group has established that it is acting in good faith in making these applications.

(C) Due Diligence

[39] Under the third limb of the ***Tallgrass*** test, the Paragon Group must show that it has acted at all times with due diligence. I take this to mean that the Applicants must have taken steps in a timely way to deal with the financial problems arising from its defaults under the borrowing arrangements with Silver Point and in addressing operational problems in the Casino, such as the continuing high overheads which have apparently upset the Alberta Gaming Regulator.

[40] The evidence shows that the problems of high overheads and the defaults on the Silver Point debt have been of longstanding. The Paragon Group has not been duly diligent in addressing and resolving the issues which have been raised by the Alexis Group, including the failure to reduce the overall indebtedness to a level which could be supported by revenues from the Casino operation, the making of satisfactory standstill arrangements with Silver Point and reducing, in a significant way, the overhead and operating costs in the Casino to levels consistent with other Alberta rural casinos and also in maintaining a robust relationship with the all-important Alberta Gaming Regulator and the departments of the Alberta Government responsible for aboriginal relations. I make no observation or comment in respect to the alleged failure by the Paragon Group to construct a hotel.

[41] In conclusion on the third limb of the test, I am not satisfied that the Paragon Group has been acting with due diligence in addressing the various issues which it faced with its major creditor, Silver Point, and in dealing with the operational issues which have apparently

constrained the revenues available to meet its debt obligations and profits which could go to the Alexis Group.

[42] For all these reasons, I find that the Paragon Group has not satisfied all aspects of the test outlined in s. 11.02(3) of the CCAA, a test which must be met before this Court can make the order applied for. The application for a stay is denied and all other applications by the Paragon Group are dismissed.

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VI. Decision on the Receivership Application by Silver Point

[43] Silver Point is the first-ranking secured creditor of the Paragon Group and as of December 31, 2013 the Paragon Group and each of the entities making up that group jointly and severally owed Silver Point approximately $82 million dollars. It is indicated that these amounts are owed pursuant to a first-ranking secured loan which matured over 15 months ago and remains unpaid.

[44] Under s. 243 of the *BIA* and s. 13(2) of the *Judicature Act*, this Court may appoint a receiver or a receiver and manager where it is just and convenient to do so on such terms as it may consider just. Under s. 65(7) of the *PPSA*, the Court may, on the application of an interested person, appoint a receiver and give directions on any matter relating to the duties of a receiver. I will deal with the objections by the Paragon Group to the appointment of the receiver/manager before dealing with the Silver Point application on the merits.

[45] In response to the Silver Point receivership application the Paragon Group raises an alleged breach of a fiduciary duty owed by the Alexis Group to the Paragon Group through the Alexis Paragon Limited Partnership and the contractual arrangements such as the Casino Management Agreement. This breach is said to be constituted by the involvement of the Alexis Group in developing the Proposed Transaction with Silver Point.

[46] It is not clear whether there is a fiduciary duty owed by any of the Alexis Group entities to the Paragon Group. The wording in the various agreements indicates that he parties did not intend to create partnerships so no duty could arise on that traditional basis. Further, it appears that the Paragon Canada Alexis, ULC entity is an agent of the Alexis Casino LP for the purposes of management. The Alexis Group argues that it is the subservient participant in these various arrangements and owes no fiduciary duty to the Paragon Group.

[47] Even if there is a fiduciary duty and the Proposed Transaction constitutes a breach thereof the Alexis Group is not the applicant on the receivership application which is made by Silver Point. The Alexis Group merely intervenes to support that application.

[48] The Paragon Group attempts to fill this gap by alleging a conspiracy between the Alexis Group and Silver Point which is the applicant for the appointment of a receiver/manager.

[49] While a theoretical tort of conspiracy may exist, it is not a cause of action which I am prepared to deal with and make findings on in this type of chambers application. A full trial would be needed to determine that type of claim.

[50] Further, the Paragon Group has been aware for some time that their relationship with the Alexis Group has come to an end. All participants were seeking solutions to their badly damaged business arrangements. I do not see anything illegal or improper on the part of Silver Point and

Alexis Group in discussing ways to cut their losses and preserve the Casino operation and move on. I see no misconduct on their part which would create an equity in favour of the Paragon Group which in turn would block the granting of the equitable remedy of imposing a receivership structure on this failed business arrangement. Accordingly, I reject this set of arguments from the Paragon Group and move on to deal with the merits of the Silver Point receivership application.

[51] The factors which I must consider to determine whether it is appropriate to appoint a receiver pursuant to either s. 243(1) of the *BIA*, or s. 13(2) of the *Judicature Act* include, *inter alia*, the following as customized to this case:

(a) Silver Point has a contractual right to appoint a receiver - the Paragon Group have committed contractually in the loan agreement to the appointment of a receiver on the application of Silver Point.

(b) Risk of harm to Silver Point if a receiver is not appointed – the preservation of the gaming license is critical and the renewal of the license to provide workers to the Casino is also on a short fuse. It is appropriate to appoint a receiver to preserve these critical assets of this business.

(c) Risk to Silver Point from a sizeable deficiency - Silver Point is prepared to accept a $48 million dollar loss as part of the Proposed Transaction referred to above. There is a sizeable deficiency and it is growing.

(d) The nature of the property – the Casino is located on the Alexis Reserve and the First Nation is prepared to allow a receiver to enter to manage the Casino and take possession of related property. There is evidence that the proposed receiver manager Alvarez & Marsal is in discussions with the Alberta Gaming Regulator and that it will be able to preserve the all important gaming licenses.

(e) Length of the receivership process – the operation of the Casino should be stabilized and the jobs of the 80+- employees must be preserved. It appears that the 'Proposed Transaction' can be closed within a very short timeframe following the appointment of a receiver manager and the operations can be put on a more stable footing and the 80+- jobs can be saved.

(f) Costs to the parties minimized if a receiver is appointed – the appointment of a receiver, as with the appointment of a monitor under the *CCAA*, can involve expending significant amounts on professional fees. Silver Point is prepared to absorb these costs and it appears the appointment of a receiver/manager and the closing of the Proposed Transaction will keep these types of expenses to a minimum.

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[52] In the result and for these reasons, I am satisfied on the materials put before me that the appointment of Alvarez & Marsal as the receiver manager is just and convenient and meets the requirements of s. 243 (1) of the *BIA* and s. 13(2) of the *Judicature Act*. Accordingly, all stays are lifted and Alvarez and Marsal shall be appointed as the receiver/manager in accordance with the modified template order provided.

Heard on the 24th day of January, 2014.
Dated at the City of Edmonton, Alberta this 31st day of January, 2014.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

Mr. Michael J. McCabe, QC
(Reynolds, Mirth, Richards and Farmer LLP)
for Paragon Group

Mr. Darren R. Bieganek, QC
(Duncan Craig LLP)
for Alexis Group

Mr. Charles P. Russell, QC
(McLennan Ross LLP)
for Silver Point

Mr. Logan Willis
(Goodmans LLP-Toronto)
for Silver Point

Mr. Kent Rowan, QC and
Ms. Stephanie Wanke
(Ogilvie LLP)
for PWC

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Schedule "A" – Summary of Applications

The applications by the Paragon Group are for:

1. An abridgment of time.

2. A direction that the proceedings commenced by the Paragon Group under Part III of the *BIA* through the filing of Notices of Intention ("NOI") shall be taken up and continued under the *CCAA*.

3. A stay of all proceedings taken or that might be taken against the Paragon Group.

4. Restraining any further proceedings in any action, suit or proceedings against the Paragon Group.

5. Prohibiting the commencement of or proceeding with any other action, suit or proceeding against the Paragon Group.

6. The adding of the Alexis Casino LP as an applicant to this matter or, alternatively, directing that Alexis Casino LP continue its operations in the ordinary course pending further order of this Court or expiry of the stay, if granted.

The applications by Silver Point are for:

1. Termination of the NOI Stay referred to in s. 50.4(8) of the *BIA* in respect of the Paragon Group.

2. Lifting the NOI Stay pursuant to section 69.4 of the BIA, if and to the extent necessary, to permit Silver Point to file a statement of claim and a receivership application.

3. Appointing Alvarez & Marsal Canada Inc. ("**Alvarez & Marsal**") as the receiver and manager (the "**Receiver**") over all of the undertakings, property and assets of some of the entities in the Paragon Group pursuant to section 243(1) of the BIA, section 13(2) of the *Judicature Act*, RSA 2000, c J-2 (the "**Judicature Act**"), and section 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7 (the "**PPSA**").

4. Appointing Alvarez & Marsal as trustee of the Paragon Group in lieu of PwC pursuant to s. 57.1 of the *BIA*

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Schedule "B" – Defined Terms

1. 'Alberta Gaming Regulator' means the Alberta Gaming and Liquor Commission.
2. 'Alexis Group' means Alexis Trustee Corporation, Alexis Nakota Sioux Nation, Alexis Casino Limited Partnership, Alexis Casino Corporation and Alexis Land Management Corp.
3. 'FNDF' means the First Nation's Development Fund.
4. 'Paragon Group' means Alexis Paragon Limited Partnership, Paragon Canada Alexis, ULC, Paragon Tamarack Alexis General Partnership and Paragon Alexis Holdings, Inc.
5. 'Silver Point' means Silver Point Finance, LLC.

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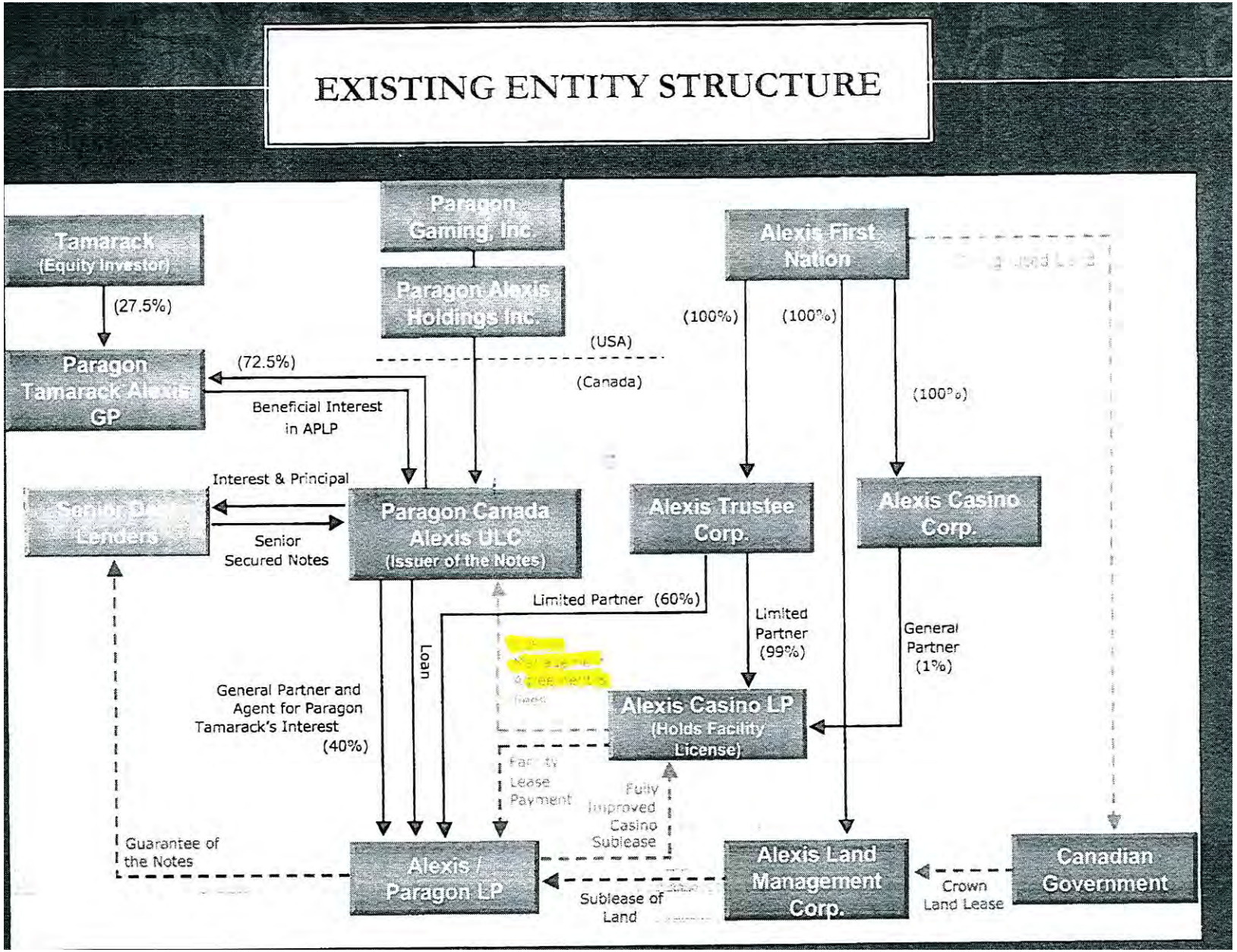
Schedule "C" – Existing Entity Structure



COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ascent Developments Corp. v. Stonehenge Projects Inc.,* 2016 BCCA 287

Date: 20160630
Docket: CA42233; CA42234

Docket: CA42233

Between:

Ascent Developments Corp., Vladimir Grebenyuk

Appellants
(Plaintiffs)

And

Stonehenge Projects Inc., 0895625 BC Ltd., Owen Wendel David Brown, Carly Jean Brown, and Derek Sanders

Respondents
(Defendants)

- and -

Docket: CA42234

Between:

Ascent Developments Corp., Vladimir Grebenyuk

Appellants
(Plaintiffs)

And

0895625 BC Ltd., Stonehenge Projects Inc.

Respondents
(Defendants)

Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated September 11, 2014 (*0895625 B.C. Ltd. v. Ascent Developments Corp.*, 2014 BCSC 1722, Kamloops Registry Docket 049271).

2016 BCCA 287 (CanLII)

Counsel for the Appellants:	D. Hughes
Counsel for the Respondent, 0895625 BC Ltd. and Derek Sanders:	D.J. Switzer
Place and Date of Hearing:	Kamloops, British Columbia March 23, 2016
Place and Date of Judgment:	Vancouver, British Columbia June 30, 2016

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Harris

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Summary:

The appellants appeal from an order dismissing their action against a corporation (the "Numbered Company") and an individual investor. The appellants also appeal from an order nisi for foreclosure and personal judgment. To fund the initial advance under the subject mortgage, the investor supplied $150,000; another $50,000 was allegedly supplied by the principal of a construction company and/or his wife. The principal's wife was a shareholder and director of the Numbered Company. The trial judge found that the Numbered Company advanced $200,000 under the mortgage. He also found no evidence to support the appellants' claims of fraud and conspiracy against the Numbered Company and the investor. In advance of trial, the appellants took default judgment against the construction company, its principal, and his wife.

On appeal, the appellants seek to adduce the construction company's bank records as fresh evidence. Held: appeal allowed in part. The fresh evidence satisfies the test for admission. Absent explanation, the fresh evidence gives rise to an inference that the $50,000 was in fact recycled from the $150,000 advanced by the investor. A new trial is warranted in respect of the foreclosure action and the appellants' claims against the Numbered Company; however, the appeal from the order dismissing the claims against the investor is dismissed.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

[1] This litigation arises out of the financing for a proposed development in Merritt, British Columbia. The appellants, Ascent Developments Corp. ("Ascent") and Vladimir Grebenyuk, brought an action seeking the discharge of a mortgage between Ascent and 0895625 BC Ltd. (the "Numbered Company") and for damages alleging conspiracy, fraud and theft (the "Discharge and Conspiracy Action"). The appellants were self-represented at trial.

[2] The defendants in the Discharge and Conspiracy Action were the Numbered Company, Derek Sanders, Stonehenge Projects Inc. ("Stonehenge"), Owen Brown and Carly Brown. The Numbered Company and Mr. Sanders were represented at trial by the same counsel. Stonehenge and the Browns were served with the notice of civil claim but did not file defences. A default judgment was entered against Stonehenge and the Browns in advance of trial.

[3] The Numbered Company was also the mortgagor and the petitioner in a foreclosure proceeding brought against the appellants (the "Foreclosure Action").

[4] The Discharge and Conspiracy Action and the Foreclosure Action were tried together. The trial judge, in reasons indexed at 2014 BCSC 1722, dismissed the appellants' claims in the Discharge and Conspiracy Action against the Numbered Company and Mr. Sanders. In the Foreclosure Action, he granted an *order nisi* of foreclosure and judgment against the appellants, in the amount of $312,796.24.

[5] The appellants now appeal. They seek a new trial. They submit that the judge erred in failing to grant an adjournment. Alternatively, they submit that fresh evidence has become available subsequent to the trial that requires the existing orders to be set aside in the interests of justice.

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BACKGROUND

A. Overview

[6] In order to put the issues on this appeal into context, it is first necessary to introduce the various parties to this proceeding and outline briefly their respective roles. I will then set out in some detail the evidence at trial before turning to the reasons of the trial judge and the issues on the appeal.

B. The Parties

i. *Ascent and Mr. Grebenyuk*

[7] At all material times, Ascent was the registered owner of two properties in downtown Merritt. Beginning in 2007, Ascent sought to develop a mixed residential commercial complex on these properties (the "Sunrise Development"). Mr. Grebenyuk is the principal of Ascent.

ii. *Stonehenge, Mr. Brown and Ms. Brown*

[8] Stonehenge is a construction company. Its principal is Mr. Brown. Mr. Brown is also a mortgage broker. Ms. Brown is Mr. Brown's spouse. In 2010, Mr. Brown proposed that Stonehenge complete the Sunrise Development in a joint venture with

Ascent. Counsel at the firm Doak Shirreff LLP ("Doak Shirreff") acted as solicitors for Stonehenge and Mr. Brown.

iii. *Mr. Sanders and 0895064 BC Ltd.*

[9] Mr. Sanders is a chartered accountant and a chartered business valuator. He was introduced to Mr. Brown, who was seeking private investors to assist in the re-financing of the Sunrise Development. 0895064 BC Ltd. (the "Sanders Holding Company") is the vehicle pursuant to which he made his investment. Mr. Sanders and his wife are the shareholders of the Sanders Holding Company. FH&P Lawyers LLP ("FH&P") acted as solicitors for Mr. Sanders and the Sanders Holding Company.

iv. *The Numbered Company*

[10] The Numbered Company was incorporated for the sole purpose of lending money by way of a mortgage to Ascent and Mr. Grebenyuk in relation to the Sunrise Development. It was incorporated by Mr. Brown's solicitors at Doak Shirreff. The Sanders Holding Company and Ms. Brown are equal shareholders in the Numbered Company. At all material times, Mr. Sanders and Ms. Brown were its directors. The question as to who was the directing mind of the Numbered Company at the time the mortgage was funded is a matter of crucial import in this litigation.

C. Evidence at Trial

[11] The only witnesses at trial were Mr. Grebenyuk and Mr. Sanders. Both testified in some detail concerning their respective dealings with Mr. Brown. Mr. Sanders and Mr. Grebenyuk had no dealings with each other.

[12] While Mr. Grebenyuk and Mr. Sanders were at the opposite ends of the transaction — Mr. Grebenyuk as the developer and Mr. Sanders as the investor — their evidence was, for the most part, consistent.

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i. *The Development*

[13] In 2007, Ascent commenced construction of the Sunrise Development. It was to consist of two commercial units on the street level and ten residential units above.

[14] By September 2008, construction of the Sunrise Development was well underway. The excavation was completed, the foundation was in place, there were underground services installed, and a ground-level concrete slab and bearing block walls had been built. However, in October 2008, development came to a halt when anticipated financing did not materialize. As a result, the Sunrise Development was in significant debt, and there were unpaid trades and loans in default.

[15] Between 2008 and 2010, Ascent unsuccessfully sought financing to finish the Sunrise Development. In March 2010, Mr. Grebenyuk first met Mr. Brown. He understood that Mr. Brown was a mortgage broker. Mr. Brown advised him of his extensive network of connections with various sources of financing. He indicated to Mr. Grebenyuk that he would be able to obtain financing for the project.

[16] In April 2010, Mr. Grebenyuk learned that Mr. Brown was not only a mortgage broker, but also an experienced builder. Mr. Brown proposed that his construction company, Stonehenge, would complete the Sunrise Development in a joint venture with Ascent. Mr. Brown advised that he would be able to obtain financing for the project in the total amount of $1.5 million dollars, secured by way of a mortgage against Ascent's two properties. The first mortgage advance was to be for $200,000. $200,000 was the minimum amount required to lay a suspended concrete slab above the first floor (the "Slab"). It was understood that completing the Slab was a pre-condition to obtaining the additional financing necessary to complete the project.

[17] On December 3, 2010, Stonehenge and Ascent entered into a joint venture agreement in relation to the Sunrise Development. The agreement was prepared by Mr. Brown's solicitors at Doak Shirreff. It is some 286 pages long and includes nine schedules. Under the agreement, Stonehenge was to take control of and manage the project through to completion. It anticipated that various mortgages would be

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registered against Ascent's properties to secure unpaid debts and to allow advances under a mortgage from the Numbered Company. The mortgage advances were to be paid by the Numbered Company directly to Stonehenge.

ii. *The Mortgage and the Loan Agreement*

[18] On December 3, 2010, Ascent (as mortgagor/borrower) and Mr. Grebenyuk (as covenantor) entered into a mortgage agreement with the Numbered Company (as mortgagee/lender). The agreement was prepared by Doak Shirreff. The face amount of the mortgage was $1,500,000, with interest payable at 12% per annum.

[19] To assist in financing the initial $200,000 advance under the mortgage, Mr. Brown looked to Mr. Sanders. Mr. Sanders understood that Mr. Brown was a mortgage broker and unconventional financier. He had been introduced to him by a colleague. This was the first time that Mr. Sanders had dealt with Mr. Brown.

[20] As the result of his discussions with Mr. Brown, Mr. Sanders agreed to fund $150,000 of the $200,000 needed to construct the Slab. Mr. Sanders understood from Mr. Brown that Ms. Brown would fund the remaining $50,000.

[21] Mr. Sanders intended to make a short-term investment. He understood that he would be paid out when the project was refinanced after construction of the Slab. For the purpose of making this investment, Mr. Sanders incorporated the Sanders Holding Company.

[22] A written agreement between the Sanders Holding Company and the Numbered Company set out the terms upon which Mr. Sanders would advance $150,000 to the Numbered Company (the "Loan Agreement"). The Loan Agreement was the culmination of an arms-length negotiation between Mr. Sanders and Mr. Brown in which Mr. Brown acted on behalf of the Numbered Company.

[23] The stated purpose of the loan was to "provide sufficient capital" to the Numbered Company to enable the Numbered Company to provide financing to

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Ascent for the Sunrise Development. The terms and conditions of the Loan Agreement included the following:

- interest equal to the prime bank rate of Toronto Dominion Bank plus 1%, payable by the Numbered Company to the Sanders Holding Company;
- an interest credit of $3,000, payable by the Numbered Company to the Sanders Holding Company upon receipt of the loan;
- a promise by the Numbered Company to repay the full amount of the loan ($150,000) within 12 months, or within seven days of the Sunrise Development's contemplated refinancing, whichever came first;
- a promise by the Numbered Company to redeem the interest paid on the mortgage between Ascent and the Numbered Company and to pay this interest, less the interest accrued on Ms. Brown's $50,000 contribution, to the Sanders Holding Company at the time of refinancing;
- if refinancing occurred, a promise by the Numbered Company to pay a $40,000 bonus to the Sanders Holding Company;
- in the event Ms. Brown contributed $50,000 to the Numbered Company, and if refinancing occurred, the Numbered Company agreed to pay an additional bonus of up to $25,000 to the Sanders Holding Company; and
- if refinancing did not occur and the Numbered Company foreclosed on its mortgage with Ascent, the Numbered Company agreed to pay 50% of any profits realized to the Sanders Holding Company.

[24] FH&P drafted the Loan Agreement. At the time the Loan Agreement was signed, it was known that the Numbered Company had no assets or ability to make interest payments to the Sanders Holding Company. It was understood between Mr. Sanders and Mr. Brown that Mr. Brown and/or Stonehenge would make those payments on behalf of the Numbered Company.

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iii. *Funding of the Mortgage*

[25] On December 1, 2010, Mr. Sanders funded his contribution to the Numbered Company by way of a bank draft payable to FH&P in the sum of $150,000. The funds came from his personal line of credit which was secured on the family home.

[26] On December 2, 2010, FH&P paid the sum of $150,000 to Doak Shirreff, in trust. The funds were provided on an undertaking that they would not be released until the mortgage between Ascent and the Numbered Company was registered.

[27] On December 6, 2010, Mr. Brown, as signatory for Stonehenge, gave written directions to Doak Shirreff to disburse the $150,000 as follows:

(a) payment of Doak Shirreff's legal account, in the sum of $18,772, for drawing up the joint venture agreement and the mortgage;

(b) payment of Doak Shirreff's legal account, in the sum of $1,500, for incorporation of the Numbered Company; and

(c) payment of the balance, in the sum of $129,728, to Stonehenge.

[28] Doak Shirreff registered the mortgage on December 8, 2010.

[29] On December 9, 2010, Doak Shirreff paid $129,796.25 to Stonehenge.

[30] There was no direct evidence that Ms. Brown had contributed $50,000. At trial, the Numbered Company sought to prove her contribution by relying on certain Doak Shirreff documents that had been prepared at the time of the transaction.

[31] One document is a receipt which indicates that, on December 10, 2010, Doak Shirreff received a $50,000 bank draft from the Royal Bank. The receipt is marked "195/Carly Brown/Merritt Inv.", and appears to be signed by Mr. Brown as payor.

[32] A second document entitled "Trust Reconciliation for File 195" indicates that Doak Shirreff received $150,000 from FH&P on December 6, 2010, and $50,000 from "Owen Brown" on December 10, 2010. It goes on to show the payment of Doak

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Shirreff's accounts for the mortgage ($18,772) and incorporation of the Numbered Company ($1,431.75), a payment of $129,796.25 to Stonehenge on December 9, 2010, and a further payment of $50,000 to Stonehenge on December 10, 2010:

	Funds In	Funds Out
Funds received from FH & P – Dec 6, 2010	$150,000.00	
Funds received from Owen Brown – Dec 10, 2010	$50,000.00	
Payment of Account of Doak Shirreff LLP – Mortgages		$18,772.00
Payment of Account for incorporation of 0895625 B.C. Ltd. Fees		$1,431.75
Funds paid to Stonehenge Projects Inc. – Dec 9, 2010		$129,796.25
Funds paid to Stonehenge Projects Inc. – Dec 10, 2010		$50,000.00
Totals	$200,000.00	$200,000.00

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[33] No witnesses were called to explain these documents. Mr. Sanders had no personal knowledge as to whether or how Ms. Brown had made her contribution.

[34] The Slab was never constructed. No visible work was done on the Sunrise Development after December 10, 2010. What Stonehenge and the Browns did with the funds advanced under the mortgage is unclear. The appellants submit that the funds were diverted by Mr. Brown and Stonehenge, and that this was done with the knowledge and consent of the Numbered Company and Mr. Sanders.

[35] For 17 months, until the spring of 2012, the Sanders Holding Company received the interest payments due under the Loan Agreement. The payments were made by Stonehenge or Mr. Brown. Mr. Sanders could not recall which.

HISTORY OF THE LITIGATION

[36] On October 18, 2012, the Numbered Company commenced the Foreclosure Action against the appellants. In the petition, the Numbered Company alleged that, as of September 2012, there was $249,761.62 due and owing under the mortgage. The petition was prepared by FH&P. In their response, the appellants alleged that the mortgage funds, in the amount of $200,000, had never been advanced.

[37] On May 21, 2013, Mr. Justice Dley refused an application by the Numbered Company for an *order nisi* of foreclosure and ordered that the parties attend for examination for discovery.

[38] On September 17, 2013, the appellants commenced the Discharge and Conspiracy Action, naming the Numbered Company, Mr. Sanders, Stonehenge, and the Browns as defendants.

[39] On October 15, 2013, the Numbered Company again applied for an *order nisi*. The application was refused by Madam Justice Donegan. She referred the Foreclosure Action to the trial list.

[40] On February 3, 2014, a master ordered that the two actions be tried together.

[41] On February 14, 2014, the appellants took default judgment against Stonehenge and the Browns in the Discharge and Conspiracy Action.

[42] In August 2014, just under one month before the trial was scheduled to begin, the appellants brought an application for further document disclosure. On August 25, 2014, Dley J. ordered that Stonehenge and the Royal Bank produce all bank records in relation to the Stonehenge account by August 29, 2014 (the "Disclosure Order").

THE TRIAL

[43] The trial commenced on September 8, 2014. Before his opening statement, Mr. Grebenyuk told the trial judge that he had yet to receive documents pursuant to the Disclosure Order. He indicated that the documents were important in the case and that he had been hoping to rely on them. The judge advised that the proper way to proceed when documents are outstanding is to apply for an adjournment. After some discussion, Mr. Grebenyuk advised the judge that he was not going to seek an adjournment. The trial then continued.

[44] At trial, the appellants argued that the mortgage should be discharged. They submitted that Ms. Brown had not contributed her $50,000. They alleged that she or Mr. Brown had instead recycled a portion of the $150,000 originally advanced by

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Mr. Sanders in order to give the appearance that Ms. Brown had in fact contributed $50,000. They argued that the Numbered Company had conspired with Stonehenge and Mr. Brown to defraud Ascent of the amount alleged to have been advanced.

[45] The judge was of the view that there were two matters to decide: (1) whether there was proof that funds were advanced under the mortgage; and (2) whether there was any proof of a conspiracy or a fraud upon the appellants in which the Numbered Company and/or Mr. Sanders knowingly or recklessly participated.

[46] The evidence at trial in relation to the mortgage advance was limited to the evidence of Mr. Sanders and the documents from Doak Shirreff. There was no question that Mr. Sanders had advanced $150,000. The issue was whether the final $50,000 had in fact been advanced by Ms. Brown.

[47] The judge found that the $50,000 had been advanced by Ms. Brown. He reasoned as follows (at paras. 12-15):

> [12] The Numbered Company says there is due and owing the sum of $312,762.24 as of August 8, 2014 (the original trial date) and $102.83 per diem thereafter. The Numbered Company says the principal amount of the funds that were advanced is $200,000, as indicated in the solicitor's trust reconciliation prepared by [Doak] Shirreff LLP on December 10, 2010.
>
> [13] The solicitor's trust reconciliation indicates that funds were received on December 6, 2010 in the amount of $150,000 and December 10, 2010 in the amount of $50,000. There were two disbursements, one of $129,796.25 on December 9, 2010 and one of $50,000 on December 10, 2010. Both disbursements were paid to Stonehenge. In addition there were two disbursements deducted from the funds received and paid out for solicitors' accounts totalling $20,203.75.
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> [14] In addition to the solicitor's trust reconciliation the Numbered Company has produced solicitor's correspondence enclosing their trust cheques payable to Stonehenge. In this way the total amount advanced under the loan is accounted for. Mr. Sanders has testified that the deposit in the amount of $150,000 was made on his instructions on behalf of a holding company in which he and his wife were equal shareholders (the "Sanders Holding Company"). The funds came from a line of credit secured on the family home. He was also advised that a deposit was made in the amount of $50,000 on behalf of Ms. Brown, who is an equal shareholder in the Numbered Company.
>
> [15] I am satisfied, based on the evidence, that funds in the amount of $200,000 were advanced by the Numbered Company to Stonehenge in accordance with the Joint Venture agreement, and to pay the costs of

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> creating the securities, an expense of the Joint Venture. This is consistent with paragraphs 22 and 28 of Ascent's Notice of Civil Claim. In the result, I am satisfied that the Numbered Company has proven that it advanced the funds which are now claimed under the mortgage with interest.

[48] However, on the evidence, the judge found that he was unable to determine whether the money advanced by the Numbered Company to Stonehenge was expended by Stonehenge for the benefit of the joint venture.

[49] In regard to the fraud allegation, the judge found that there was no evidence that the Numbered Company or Mr. Sanders had made any representations to the appellants beyond what was said in the security instruments. He noted that the appellants' dealings were entirely with Mr. Brown, and that the documents had been executed after the appellants had received independent legal advice.

[50] The judge also found no evidence that the Numbered Company or Mr. Sanders had conspired to cause damage to the appellants (at para. 49):

> [49] There is no direct evidence of a conspiracy, nor, in my opinion, do the circumstances here give rise to an inference, on a balance of probabilities, that the Numbered Company and Mr. Sanders conspired to effect any purpose or result to cause damage to Ascent or Mr. Grebenyuk, or to do anything unlawful to it or his detriment or to benefit themselves at it or his expense. I accept that Mr. Sanders acted only as a lender and the Numbered Company was used only as a vehicle to make a loan to the Joint Venture, by advancing funds to Stonehenge which controlled the Joint Venture.

[51] In the result, the judge dismissed the Discharge and Conspiracy Action against the Numbered Company and Mr. Sanders. Because of the nature of the allegations, he awarded them special costs. He gave the appellants liberty to apply to have damages assessed against those defendants who did not appear at trial.

[52] In regard to the Foreclosure Action, the judge found that the Numbered Company had advanced $200,000 under the mortgage. He granted an *order nisi* with a seven-day redemption period, and he awarded personal judgment against the appellants in the amount of $312,796.24.

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ON APPEAL

[53] The appellants now seek a new trial. They submit that the judge should have adjourned the trial when he became aware at the outset that the appellants had not received certain bank records for which they had an outstanding court order. They submit that the judge should not have proceeded in the absence of those records.

[54] In the alternative, the appellants apply to have the bank records, which they received after the trial had ended, introduced as fresh evidence on the appeal. They say that those records undermine the foundation of the trial judgment and establish that the Numbered Company did not advance $200,000 as alleged. They submit that, in the circumstances, the interests of justice require a new trial.

[55] The Numbered Company and Mr. Sanders submit that the appellants cannot complain because they never formally applied for an adjournment. In regard to the fresh evidence application, the Numbered Company and Mr. Sanders submit that Stonehenge's bank records cannot be said to bear upon a potentially decisive issue at trial as it relates to Mr. Sanders and the Numbered Company. They say that, at its highest, the fresh evidence only puts in issue the amount owing under the mortgage.

DISCUSSION

[56] I am satisfied that the judge cannot be faulted for his failure to adjourn the trial. No application for an adjournment was made. The judge had no way of assessing the potential import of the outstanding documents. When Mr. Grebenyuk was pressed by the judge as to whether or not he wished to apply for an adjournment, he indicated that he did not. I would not accede to the first ground of appeal.

[57] The foundation of the second ground of appeal is the fresh evidence application. As set out above, the evidence at trial concerning the mortgage advance was limited to Mr. Sanders' evidence and documents obtained from Doak Shirreff. Those documents indicated that: Doak Shirreff paid $129,796.25 to Stonehenge on December 9, 2010; on December 10, 2010, Doak Shirreff received $50,000 by way

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of bank draft from the Royal Bank and, on that same day, Doak Shirreff paid out a further $50,000 to Stonehenge. There was no evidence at trial as to the source of the funds used to purchase the $50,000 bank draft.

[58] The documents that the appellants now seek to have admitted are a copy of Stonehenge's bank statement from the period November 30, 2010 to December 30, 2010, and a copy of a cheque written on the Stonehenge account ("Cheque 121").

[59] The bank statement shows that, prior to the deposit of $129,796.25 from Doak Shirreff on December 9, 2010, the Stonehenge account had a negative balance of -$41.49. The statement also shows that two transactions occurred on December 10, 2010:

(a) Cheque 121 was charged against the Stonehenge account, in the amount of $50,006.50; and,

(b) $50,000 was deposited into the Stonehenge account.

[60] The payee on Cheque 121 is "Doak Shirreff in trust". On the subject line is written "Merritt". The signature appears to be that of Mr. Brown. The back of Cheque 121 is stamped "Dec 10, 2010" and shows the words "purchase Draft".

[61] The appellants submit, and I agree, that the bank statement and Cheque 121 strongly support their argument at trial that the Numbered Company did not advance $200,000 on the mortgage. Absent any explanation, the inference to be drawn from the fresh evidence is that the $50,000 advanced by Doak Shirreff to Stonehenge on December 10, 2010, was paid from and formed part of Mr. Sanders' initial $150,000 contribution — it appears that, in reality, Ms. Brown never contributed her $50,000. The appellants submit that this evidence would have altered the outcome of the trial.

[62] The Numbered Company and Mr. Sanders submit that the fresh evidence should not be admitted. They say that this evidence could have been available at trial had the appellants acted with due diligence. They further submit that while the fresh evidence may be relevant to the appellants' claims against Stonehenge and

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the Browns, it does not substantiate the allegations made by the appellants against Mr. Sanders and the Numbered Company. Even if the fresh evidence had been adduced at trial, Mr. Sanders and the Numbered Company argue that, given the judge's findings of fact, the fresh evidence could not reasonably be expected to have affected the outcome. They submit that the interests of justice, the object of the *Supreme Court Civil Rules*, and the need for certainty and finality leave no room for the admission of the fresh evidence in this appeal.

[63] In *Albu v. The University of British Columbia*, 2015 BCCA 41, this Court endorsed the following summary of the law regarding admission of fresh evidence on appeal (at paras. 29-30):

> [29] In *Golder Associates Ltd. v. North Coast Wind Energy Corp.*, 2010 BCCA 263, Mr. Justice Chiasson set out the test for admitting fresh evidence in civil appeals:
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> > [33] The test for the admission of fresh evidence was stated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775:
> >
> > (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: [citation omitted].
> >
> > (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> > (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
> >
> > (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. …
> >
> > [34] …
> >
> > [35] This Court in *Spoor v. Nicholls*, 2001 BCCA 426, confirmed that the *Palmer* criteria apply in civil cases and observed in para. 16 that "in *Palmer* the court said that the due diligence test should be applied more strictly in civil than in criminal cases".
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> > [36] In *Scott v. Scott*, 2006 BCCA 504, Ryan J.A. observed in para. 21:
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> > > … the nature of an appeal is to examine the record and determine whether there has been an error of law or a palpable error of fact: it is not a continuation of a trial at a different stage. Thus, generally speaking, the need for certainty and finality leaves no room for the admission of fresh evidence on appeal …

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> [30] In *Jens v. Jens*, 2008 BCCA 392, at paras. 31-34, Madam Justice Levine explained new evidence is rarely admitted, but this Court will admit it where the failure to admit would result in a long-term injustice. …

[64] I am of the view that this is one of the rare situations where fresh evidence should be admitted. To not admit the evidence could well lead to an injustice.

[65] With regard to due diligence, while I am satisfied that the appellants could have taken steps earlier to obtain the documents in advance of trial, it is important to note that the documents go to an issue on which the Numbered Company had the onus of proof. In the Foreclosure Action, the Numbered Company had the onus to prove that it had advanced $200,000 under the mortgage. Given its proximity to the Browns and Stonehenge, the Numbered Company arguably should have obtained and produced the Stonehenge bank records long before trial. As the interests of justice are the overriding consideration, this Court retains the discretion to allow fresh evidence to be adduced even when the due diligence aspect of the *Palmer* test has not been met: *Cotter v. Point Grey Golf and Country Club*, 2016 BCCA 260 at para. 83. In the circumstances of this case, I would not reject the fresh evidence on due diligence grounds.

[66] The fresh evidence is clearly relevant and goes to a decisive or potentially decisive issue in the trial. As noted by the judge, the first issue he had to determine was whether there was proof that funds were advanced. I do not accept Mr. Sanders and the Numbered Company's submission that the fresh evidence does not impact the allegations made by the appellants against the Numbered Company.

[67] In my view, the fresh evidence could reasonably be expected to have affected the result in both the Foreclosure Action and the Discharge and Conspiracy Action. In the Foreclosure Action, the fresh evidence appears to establish that $200,000 was not advanced on the mortgage. This in turn impacts the amount necessary to redeem and the amount of the personal judgments entered against the appellants. In the Disclosure and Conspiracy Action, the fresh evidence calls into question the judge's finding that there was no evidence that the Numbered Company had in any way acted improperly. The judge appeared to understand that Mr. Sanders and the

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Numbered Company always acted as one. Given that both were represented at trial by the same counsel, the differences in their positions does not appear to have been explored. However, the fact of their separate legal identities may, in my view, be critical to a potential finding of liability in the Discharge and Conspiracy Action.

[68] While Mr. Sanders was a director of the Numbered Company (and is now apparently its operating mind), and the Sanders Holding Company owned half of the Numbered Company's shares, the evidence suggests that Mr. Sanders was not the Numbered Company's operating mind at the time of the impugned transactions.

[69] Instead, the evidence suggests that Mr. Brown was the operating mind of the Numbered Company at the relevant times. Mr. Brown instructed Doak Shirreff to incorporate the Numbered Company, Mr. Brown gave the instructions to prepare and register the mortgage, Mr. Brown acting on behalf of the Numbered Company negotiated the Loan Agreement with Mr. Sanders and Mr. Brown directed Doak Shirreff to pay out the mortgage funds to Stonehenge. Whether the Numbered Company may be liable for tortious conduct on the part of Mr. Brown (or Ms. Brown) was not explored at trial.

[70] On the evidence, it is impossible to make a final determination as to whether a fraud or a conspiracy occurred and, if so, what consequences should follow. While it is clear that the Slab was not constructed, it is not clear what happened to the funds that were advanced under the mortgage. Moreover, while the fresh evidence appears to lead to the inference that the Browns and Stonehenge deceived both Mr. Sanders and Mr. Grebenyuk, it is possible that additional evidence might refute that inference. Whether any wrongdoing occurred, whether the Numbered Company may be liable for that wrongdoing, and whether that wrongdoing should lead to the discharge of the mortgage are all matters for the new trial which I would order.

[71] As for Mr. Sanders, I see no basis to disturb the judge's decision to dismiss the Discharge and Conspiracy Action against him. The judge found that Mr. Sanders acted only as a lender, and that there was no evidence that he had conspired to cause damage to the appellants. There is nothing in the fresh evidence that puts

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those findings in doubt. The evidence suggests that Mr. Sanders was likely an innocent arms-length investor. He advanced $150,000 to the Numbered Company based on Mr. Brown's representations. It may be that he, as much as Mr. Grebenyuk, is a victim of Mr. Brown's machinations.

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CONCLUSION

[72] In my view, there must be a new trial. I would set aside the orders in the Foreclosure Action, along with the order dismissing the Discharge and Conspiracy Action as against the Numbered Company.

[73] In the circumstances of this case, I would also find that the special costs award made in Mr. Sanders' favour cannot survive. In the litigation, Mr. Sanders tossed his lot in with the Numbered Company and attempted to prove that $200,000 had in fact been advanced. The appellants cannot be faulted for joining him as a defendant in the Discharge and Conspiracy Action.

[74] In the result:

(a) I would dismiss, without costs, the appeal in the Discharge and Conspiracy Action as against Mr. Sanders, save and except that I would set aside the costs award in his favour and order that the Discharge and Conspiracy Action against him stand dismissed without costs;

(b) I would allow, with costs, the appeal of the dismissal of the Discharge and Conspiracy Action as against the Numbered Company;

(c) I would allow, with costs, the appeal of the Foreclosure Action and set aside the personal judgments and *order nisi*; and

(d) in relation to both the Foreclosure Action and the Discharge and Conspiracy Action, I would order a new trial.

[75] The remaining costs of the first trial will be for the judge in the second trial.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Harris"

2016 BCCA 287 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Asset Engineering LP v. Forest & Marine Financial Limited Partnership,* 2009 BCCA 319

Date: 2009/07/07

Dockets: CA037097; CA037098

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

and

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT,* S.B.C. 2002, c. 57

and

IN THE MATTER OF FOREST & MARINE FINANCIAL CORPORATION (in its own capacity, in its capacity as general partner of FOREST & MARINE FINANCIAL LIMITED PARTNERSHIP and its capacity as manager of FOREST & MARINE INVESTMENT TRUST), FOREST & MARINE INVESTMENTS LTD., FOREST & MARINE CAPITAL LTD., FOREST & MARINE INSURANCE SERVICES LTD. and TREESEA HOLDINGS INC.

Docket: CA037097

Between:

Asset Engineering LP

Appellant
(Plaintiff)

And:

Forest & Marine Financial Limited Partnership, Forest & Marine Financial Corporation, Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd., Treesea Holdings Inc.

Respondents
(Defendants)

– and –

2009 BCCA 319 (CanLII)

Docket: CA037098

Between:

Forest & Marine Financial Corporation (in its own capacity, in its capacity as general partner of Forest & Marine Financial Limited Partnership and in its capacity as manager of Forest & Marine Investment Trust), Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd. and Treesea Holdings Inc.

Respondents
(Petitioners)

And

Asset Engineering LP

Appellant
(Respondent)

And

Wolrige Mahon Limited, Ad Hoc Committee of Investment Receipt Holders, Barry Kenna, Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Financial Institutions Commission and Superintendent of Financial Institutions, Her Majesty the Queen in Right of the Province of British Columbia

Respondents
(Respondents)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson

On appeal from the Supreme Court of British Columbia, May 1, 2009,
Dockets S092160 and S092244

Counsel for the Appellant, Asset Engineering LLP:	R.A. Millar
Counsel for the Respondents, Forest & Marine Financial Limited Partnership, Forest & Marine Financial Corporation, Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd., and Treesea Holdings Inc.:	A.H. Brown

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Place and Date of Hearing:	Vancouver, British Columbia June 8, 2009
Place and Date of Judgment:	Vancouver, British Columbia July 7, 2009

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Chiasson

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Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] We heard this appeal on June 8, 2009 and advised counsel that it was dismissed, with reasons to follow.

[2] The appeal was taken by Asset Engineering LP ("AE"), a secured creditor of Forest & Marine Financial Limited Partnership, a limited partnership under the laws of British Columbia. Its general partner is Forest & Marine Financial Corp. (the "General Partner"). The Partnership is in the business of providing financing and investment services to companies engaged in the forest and marine industries in British Columbia and is part of a group of related investors and corporations referred to informally as the "F & M Group". The Partnership is the main operating entity of the Group, and (according to the petition) owns the operating assets of the Group, which consist largely of a loan portfolio and an office building in Nanaimo. The Partnership's main liabilities are the debt owing to AE in the amount of some $13 million and a series of "investment receipts" held by public investors in the total amount of some $10 million.

[3] The order appealed from was granted by Mr. Justice Masuhara on May 1, 2009. This was a "comeback" order that extended his initial order, made March 26, granting a stay of proceedings to the petitioners pursuant to s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") and to the Partnership pursuant to the court's inherent jurisdiction. (It will be noted that the petitioners include the General Partner but not the Partnership *per se*.) The initial order appointed Wolrige Mahon Ltd. as the monitor of the petitioners' property and the conduct of their business, and ordered that AE's consultant, Ernst & Young Inc., be given access to their property, books and records. The comeback order extended the initial order to July 31, 2009.

[4] AE acquired its loan position from the original lender, "CIT", which had entered into an agreement with the Partnership, represented by the General Partner, to provide up to $50 million in financing in 2004. The agreement established a revolving loan facility that was subject to margin requirements dependant on the

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value of unimpaired loans owing to the Partnership. The obligation to repay was secured by a general security agreement ("GSA") over the Partnership's loans and accounts receivable, and a second mortgage on the Nanaimo building, and was guaranteed by other members of the Group, who granted collateral security for their guarantees.

[5] Evidently, the Partnership soon went into default under some of the financial covenants in the financing agreement, and CIT and the Partnership entered into a series of forbearance agreements which were renewed, at considerable cost to the borrower, from time to time until September 2008. The final agreement expired on March 15, 2009. One of the terms of the agreements was that upon its expiration, CIT would be entitled to enforce its security immediately, without any further demand or notice, and that the Group would not oppose the appointment of a receiver. On the other hand, according to the affidavit of Mr. Hitchock, the president of the General Partner, CIT had assured the Group that once the loan was paid down to below $20 million, the lender would reduce the covenants to ones the Group "could live with." Mr. Hitchcock deposes that the Partnership paid the loan down from $35 million to $13 million by early 2009 and paid AE approximately $2.8 million between the initial hearing and the comeback order.

[6] Notwithstanding that the Partnership was in default in 2008, AE had begun to acquire "participation interests" in the credit facility from March of that year onwards. In March 2009, it acquired all of CIT's interest in the facility. A few days later, it demanded payment in full of the Partnership's indebtedness in the amount of $13,257,123.31 and delivered notices of its intention to enforce security as required under the *Bankruptcy and Insolvency Act*. When the General Partner advised AE that it would not adhere to a "blocked account" agreement, the lender advised that it intended to apply for the appointment of an interim receiver over the Partnership and the related guarantors – hence Supreme Court Docket S092160. The Group told AE that they opposed the liquidation of the Partnership's portfolio and that they would apply for *CCAA* protection – hence Supreme Court Docket S092244. The two proceedings were heard together, and although no order has been filed in the

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receivership action, counsel agreed in this court that we may assume the chambers judge intended to dismiss AE's application for the appointment of a receiver.

[7] In his reasons of May 1, Matsuhara J. noted that a report prepared by Ernst & Young indicated a "net equity deficiency in its high and low case of $7.7 million and $16.6 million, respectively, indicating the difficult circumstances in which the Group finds itself." Ernst & Young estimated the net realizable value of the Group's assets at between $13.2 million and $22 million, while the monitor estimated net realizable values to be between $22 million and $28.5 million respectively, on a going concern basis. Thus as the chambers judge noted, even on the low estimate suggested by Ernst & Young, AE's loan position was fully secured. (Counsel for AE told this court that his client disputes the assumptions underlying Ernst & Young's report.) The chambers judge also noted that the monitor's cash-flow analysis anticipated AE would receive payments totalling $5.5 million towards its loan by the end of August, with $2.56 million of that amount being paid in May. Ernst & Young estimated that AE would receive $3.3 million, and both consultants projected that AE would continue to receive its "significant charges under the facility in excess of $21,000 per month." (Para. 18.)

[8] The Court below had affidavit evidence of a "concerted effort" on the part of the Group to find refinancing to replace AE's position. Mr. Hitchcock deposed that an unnamed financial institution had carried out its due diligence in connection with a possible refinancing that would discharge AE's debt position completely. From what was said by counsel on the appeal hearing, the Group is still focussing on a possible refinancing that would either precede or take place at the same time as a simplification of the cumbersome corporate structure now in place. One suggestion was that the members of the Partnership would receive shares in the General Partner in return for their partnership interests, such that the Partnership would cease to exist. However, no specific "plan" in this regard was in evidence. One of the central arguments raised by counsel for AE in opposition to the stay is that the *CCAA* cannot be used simply to "buy time" for refinancing that will not involve a compromise or arrangement that would have to be voted on by creditors. In any

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case, AE says it would not vote in favour of any compromise or arrangement, so that any such plan would be doomed to fail.

[9] The first issue confronting the chambers judge, however, was the "jurisdictional" one of whether, in his words, a limited partnership qualifies for protection under the *CCAA*. The Act applies generally to debtor companies. In particular, s. 11 provides in material part:

> 11(1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.
>
> 11(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company. [Emphasis added.]

The Act defines "company" as "… any company, corporation or legal person incorporated by or under an Act of Parliament or the legislature of a province, and any incorporated company having assets or doing business in Canada wherever incorporated …".

[10] The chambers judge agreed with the holding of Farley J. in *Re Lehndorff General Partner Ltd.* (1993) 9 B.L.R. (2d) 275 (Ont. Gen.Div.) that a limited partnership is not a "qualifying entity" under the statute; but that it lay within the inherent jurisdiction of the court to 'sweep in' a partnership where the business of the corporate petitioners was closely connected to and intertwined with that of the partnership. On this point, Matsuhara J. stated:

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> ... in the absence of a jurisdiction under the *CCAA,* it is agreed by counsel that the court can exercise its inherent jurisdiction. The question that arises is then under what circumstances and to what extent can it do so. The limits have been reviewed, particularly where a *CCAA* proceeding is in effect. In cases such as *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.,* 2003 BCCA 344 and *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 C.A. which circumscribe the court's ability to rely upon inherent jurisdiction, it is obvious that these limits are even greater when a focus is on a non-qualifying party. However, nonetheless, the courts have exercised that inherent jurisdiction in a *CCAA* setting, dealing with non-qualifying entities, and have imposed stays of proceedings against related non-qualifying entities. In *Calpine Canada Energy Ltd. (Re)*, 2006 ABQB 153 the court stated that it had inherent jurisdiction against a non-corporate entity where it was just and convenient to do so. This case relied upon an earlier case of *Lehndorff,* which I have already mentioned. The court, in extending the stay, stated that:
>
> > It is clear that Calpine has a more than arguable case that a stay involving the Partnerships is necessary and appropriate. It is also likely, given the extremely complex corporate and debt structure of the Calpine group, the cross-border nature of these proceedings, and the evidence I have heard so far in the proceedings of the value of partnership assets, that irreparable harm may accrue to the Calpine group if the stay is not granted. The balance of convenience certainly favours a stay. I find that it is just, reasonable and appropriate in this case to exercise this court's inherent jurisdiction to stay proceedings against the Calpine partnerships. [At para. 12.]

[11] The chambers judge then turned to consider the various factors relating to the exercise of his discretion in this case, concluding that:

> In terms of refinancing, though Asset Engineering points out the lack of production of specifics indicating the potential for this occurring, there is evidence of a concerted effort to find refinancing in the materials. As well, Mr. Hitchcock, on the last day, in an affidavit, identified a recognized financial institution that has performed its due diligence over the course of two days over the FM group in furtherance of a potential financing, which Mr. Hitchcock says would satisfy the debt to Asset Engineering completely. He attached an email that supports a serious initiative by that institution to examine Forest & Marine. Moreover, it is now clear from the commentary from counsel that refinancing is the primary focus of the FM group.
>
> Given that there is a broad constituency of interest at play; that at this point the financial analysis supports the view that Asset Engineering's position is secured; that further payments to reduce the outstanding indebtedness to Asset Engineering are projected – and in this regard I would note that there appears to be government interest in FM's continued operation; that continued payments to Asset Engineering's significant monthly fees are projected to continue; that though Asset Engineering has forcefully

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> argued its right for the appointment of a receiver based on contractual and equitable considerations, there has been some indications of some flexibility, but not much, with respect to timing; that this would also equally be contained within the comments of the investment receipt holders; that there is also sufficient reality of the potential for refinancing from a recognized institution; that refinancing is a primary focus for the FM group; and that the imposition of a receiver would impair the ability of the *CCAA* eligible entities from restricting; in assessing the competing interests relative to the prejudice to each, I conclude that an extension of the stay of proceedings is in order. [At paras. 21-2.]

As I have already mentioned, the stay was extended by the comeback order to July 31, and it is from that second order that AE appeals.

On Appeal

[12] AE's grounds of appeal as stated in its factum are as follows:

> 1) "inherent jurisdiction" was not a proper basis upon which to found a stay of proceedings brought by AE against the [Partnership];
>
> 2) a stay of proceedings brought by AE against the [Partnership] is contrary to the principles set forth in this Court's judgment in *Cliffs*; and
>
> 3) a stay ought not to have been granted before permitting a vote by creditors on a process that would suspend AE's rights pending refinancing and where critical prerequisites to the formulation of a plan had to be fulfilled by the debtor companies.

The Inclusion of the Partnership in the Stay

[13] I must confess that I found counsel's submissions on the first ground difficult to follow. Mr. Millar submitted that the Partnership itself, rather than the General Partner, is the "primary business actor" and was the borrower from CIT. In his analysis, the assets which secure AE's position are assets of the Partnership and since the Partnership is not entitled to invoke the *CCAA*, it was an improper use of the court's inherent jurisdiction to grant a stay in the Partnership's favour. When we pressed counsel as to why it would be necessary to refer to the Partnership at all in the order, he responded that limited partners themselves do not own partnership assets directly, since they are not entitled to the return of their capital contributions unless all the liabilities of the partnership have been paid: see s. 62 of the

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Partnership Act, R.S.B.C. 1996, c. 348. If the partners do not own the assets (at least directly), he suggested, then it is the Partnership itself that owns them. Underlying his submission was the proposition that a limited partnership is a legal entity – as shown, for example, by the fact that it was the Partnership that issued a prospectus in connection with investment receipts "of the Partnership" in May 2008. But although it is, in counsel's view, an entity, it is not an entity entitled to invoke the *CCAA*. Instead, Mr. Millar said, a partnership must seek an "insolvency remedy" in the *Bankruptcy & Insolvency Act,* s. 85(1) of which states that when a general partner becomes bankrupt, the property of the partnership vests in the trustee.

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[14] Mr. Brown, counsel for the petitioners, did not take issue with the fact that a limited partnership does not *per se* come within the definition of "company" in the *CCAA*. He argued, however, that the Partnership is not a legal entity, and that "its" assets are in fact the assets of the partners themselves, although usually they are held in the name of the General Partner, which must manage the Partnership's business, and the partnership's debts must be paid before partners may share in its assets on a termination. He noted that the General Partner in this case executed the finance agreement with CIT and the forbearance and related agreements that are in evidence, on behalf of the Partnership. As well, he noted that the stay granted by Masuhara J. on March 26, 2009 prohibited the commencement or continuation of any action or proceeding against the petitioners or any of them, or affecting the Business or Property. The order defined "Property" to include all current and future assets, undertakings and properties of any kind in the possession and control of the petitioners, and "Business" to mean the business of the petitioners. The General Partner was one of the petitioners and thus, one assumes, the order applies to any assets it holds on behalf of the partners (or if Mr. Millar is correct, on behalf of the Partnership).

[15] Counsel for AE was not able to refer us to any authority for the proposition that a limited partnership is a legal entity, as opposed to "the relationship which subsists between persons carrying on business", as stated at s. 2 of the *Partnership Act*. The authorities I have located clearly point away from the notion that a limited

partnership is a legal entity. *Halsbury's Laws of England* (4th ed., 1994), for example, states that "A limited partnership, like an ordinary partnership, is not a legal entity." (Vol. 35, at 136). In R.C. Banks, *Lindley & Banks on Partnership* (18th ed., 2002), the author states that "A limited partnership is not a legal entity like a limited company or a limited liability partnership but a form of partnership with a number of special characteristics introduced by the Limited Partnerships Act, 1907." (At 847.) 'Non-personhood' is the reason why partnerships are useful for tax and corporate reasons: they permit investors, as partners, to claim losses, depreciation and other expenses of the partnership business without risking unlimited liability for partnership debts: see Lyle R. Hepburn, *Limited Partnerships* (2002) at 1-12 to 1-12.1; James P. Thomas and Elizabeth J. Johnson, *Understanding the Taxation of Partnerships* (5th ed., 2002) at para. 405.

[16] In *Re Lehndorff General Partner*, *supra*, Farley J. observed that the "case law supports the conclusion that a partnership, including a limited partnership, is not a separate legal entity." He quoted a passage suggesting that if the legislature had intended to create a new legal entity, it would have done so in the *Limited Partnerships Act* of Ontario, as Parliament had in s. 15 of the *Canada Business Corporations Act*. The latter statute provides that a corporation has the capacity and rights, powers and privileges of a natural person. (Para. 27.)

[17] The question of whether a limited partnership is a legal entity was considered at length by the Ontario Court of Appeal in *Kucor Construction & Associates v. Canada Life Assurance Co.* (1998) 167 D.L.R. (4th) 272, where a limited partnership sought to rely on a statutory right of prepayment under a mortgage purported to have been granted by the partnership. The trial judge held that since the partnership was not a legal entity capable of holding title to real property or transferring title under a mortgage, it was incapable of granting a mortgage. He interpreted the mortgage document in question, which had been entered into by the general partner on behalf of the limited partners, and concluded that since the general partner was a corporation, it was precluded by s. 18(2) of the *Mortgages Act,* R.S.O. 1990, c. M. 40, from prepaying under s. 18(1). (Section 18(2) denied the

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special right of prepayment under s. 18(1) to any mortgage "given by a joint stock company or other corporation".) The Court of Appeal agreed in the result, concluding in part that:

> (1) A limited partnership, because it is not a legal entity, carries on its business through a general partner which has the power to hold and convey title to real property on behalf of the members of the limited partnership.
>
> (2) A general partner which is a corporation and which gives a mortgage is precluded by s. 18(2) from the operation of s. 18(1) and, therefore, cannot prepay a long-term closed mortgage.
>
> (3) A general partner which is an individual and which gives a mortgage is not subject to the s. 18(2) exemption, and, therefore, is entitled to prepay the mortgage. ... [At para. 49; emphasis added.]

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[18] In the course of reaching these conclusions, Borins J.A. for the Court observed that:

> Well respected authorities are uniform in the view that a limited partnership is not a legal entity. ... The concept that neither a general, nor a limited partnership, is a legal entity has been long accepted by Canadian and English law and, no doubt, is why a limited partnership is required by law to have a general partner through which it normally acts: *Limited Partnerships Act*, ss. 2(2), 8 and 13. As for a general partnership, s. 6 of the *Partnerships Act* describes through whom it may act. [At para. 26; emphasis added.]

He also quoted with approval the following passage from *Lehndorff, supra,* in which Farley J. had explained the features of a limited partnership and how its business is generally conducted:

> A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships*, (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12 ... A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: See Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to

> their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.
>
> ...
>
> It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an “ordinary” partnership vehicle) ... The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process ... [At paras. 17, 20; emphasis added.]

[19] Finally, the Court of Appeal noted at para. 33 of *Kucor* that title to real property owned by the partnership is generally registered in the name of the general partner rather than in the names of the partners themselves, who would thereby risk exposing themselves to unlimited liability. (See s. 64 of the *Partnership Act* of British Columbia.) Whether the general partner holds such property as a true “trustee” or in some lesser fiduciary capacity is another question: see, however, *Molchan v. Omega Oil & Gas Ltd*. [1988] 1 S.C.R. 348 at 368, and *337965 B.C. Ltd. v. Tackama Forest Products Ltd*. (1992) 67 B.C.L.R. (2d) 1, a decision of this court, at para. 77, *per* Southin J.A.; cf. in *King v. On-Stream Natural Gas Mgmt. Inc.* [1993] B.C.J. No. 1302 (S.C.), at para. 32, *per* Shaw J. That question need not be answered here, and I would expect that in most cases, it is addressed expressly in the partnership agreement. (The agreement in the case at bar was not in evidence.)

[20] If (as I believe) Farley J. was correct in *Lehndorff* that the “process of debtor and creditor relationships” associated with the business of a limited partnership is

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between the general partner and the creditors, it was unnecessary in my view in substantive terms for the Partnership or the limited partners in this case to be included in the *CCAA* order in order to stay proceedings affecting the Partnership assets or business. A valid charge had been granted on those assets by the General Partner. It was unnecessary for AE to proceed against the limited partners. Had it done so, it would have been met with the fact that under s. 57 of the *Partnership Act,* they are not liable for the obligations of the Partnership above and beyond their capital contributions unless they have participated in the management of the business. (There was no suggestion this has occurred in this case.) It would also have been unnecessary to proceed against the Partnership *per se*, since it is not a legal entity, and the partners are bound by the General Partner's actions on behalf of the Partnership (i.e., all the partners) in carrying on the business. Thus if the *CCAA* process had continued without the Partnership being named in the order, the effect would have been no different, in substantive terms, from what it is now.

[21] But there is a procedural difficulty: as Mr. Brown notes, R. 7 of the *Supreme Court Rules* allows a partnership or "firm" to be sued in its own name. Rule 7(6) provides that where an order is made against a firm, "execution to enforce the order may issue against the property of the firm", and R. 7(7) provides that execution to enforce the order may issue against any person who admitted in a pleading or affidavit that he or she was a partner or who was adjudged to be a partner. Rule 7 is procedural (see *Surrey Credit Union v. Willson* (1989) 41 B.C.L.R. (2d) 43), but the potential for a multiplicity of proceedings in apparent conflict with the *CCAA* order is obvious. Accordingly, to control its own process, the court below had an inherent discretion, confirmed by s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, to grant a stay in respect of proceedings against the Partnership. This is not the granting of a "freestanding remedy" under the *CCAA* (see *Lehndorff*, discussed below), nor an exercise of discretion under that Act to supplement perceived shortcomings in its application. Rather it is a purely procedural step to forestall a purely procedural problem.

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[22] Thus, for different reasons than those of the chambers judge, I concluded the first ground of appeal should be dismissed.

Should a Stay Have Been Granted?

[23] I turn next to AE's second ground of appeal – that no order should have been made in this case, whether under the *CCAA* or otherwise, because the intention of the Group is to refinance AE's loan rather than propose a compromise or arrangement, and in any event, AE "has unequivocally declared that it will oppose any arrangement. There is no utility in a stay where compromise is either futile or doomed to failure." (See also *Re Marine Drive Properties Ltd.* 2009 BCSC 145.) Mr. Millar relies strongly on this court's decision in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* 2008 BCCA 327, 296 D.L.R. (4th) 577, which he says signals a 'retrenchment' from past authorities that have taken a large and liberal view of the scope of the Act: see, e.g., *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada* (1990) 51 B.C.L.R. (2d) 84 (C.A.) at 92-3; *Campeau v. Olympia & York Developers Ltd.* (1992) 14 C.B.R. (3d) 303 (Ont. Gen. Div.), at paras. 17-22; *Re Royal Oak Mines Inc.* (1999) 6 C.B.R. (4th) 314 (Ont. Gen. Div.) at para. 7; *Elan Corp. v. Comiskey* (1990) 1 C.B.R. (3d) 101 (Ont. C.A.); and most recently, *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.) at para. 43, (lve. to app. refused [2008] S.C.C.A. No. 337).

[24] In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for *CCAA* protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to 'secure sufficient funds' to complete the stalled project. (Para. 34.) This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fairly straightforward and there will be little incentive for senior secured creditors to compromise their interests. (Para. 36.) Further, the Court stated, the granting of a stay under s. 11 is "not a free standing

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remedy that the court may grant whenever an insolvent company wishes to undertake a 'restructuring'. ... Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA's* fundamental purpose." That purpose had been described in *Meridian Developments Inc. v. Toronto-Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the *status quo* for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [At 580.]

[25] The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged. Similarly in this case, Mr. Millar submits that no compromise or arrangement is being proposed, and any compromise the Partnership might propose would be "doomed to failure."

[26] In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself, which fills a "niche" in the market, has been carried on in one form or another since 1983.) The *CCAA* is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the

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means contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary. If the Partnership is ultimately able to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better. At this point, however, it seems more likely a compromise will be necessary and the Partnership must move promptly to explore all realistic restructuring alternatives.

[27] As for AE's insistence that it will refuse to vote in favour of any plan brought to a meeting of creditors under s. 6 of the *CCAA*, I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner. When the Act is invoked, the court properly considers the interests of many stakeholders, not simply those of the creditor and debtor: see, e.g., *ATB Financial*, *supra*, at paras. 51-2; *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.* 2003 BCCA 344 at para. 39, quoting with approval from *Re Canadian Airlines Corp*. [2000] 10 W.W.R. 269 (Alta. Q.B.); *Re Marine Drive Properties, supra,* at para. 14. In this case, there are many customers of the Partnership in the coastal marine and forest industries who would be affected if the Group were put into liquidation. The chambers judge noted that the provincial government has expressed interest. Mr. Hitchcock deposes that the employees of various borrowers from the Group, investment receiptholders, unitholders of the investment trust and customers stand to lose a great deal. He acknowledges that refinancing is the "focus" of the Group's efforts and continues:

> The Petitioners have acted diligently and in good faith to put the Petitioners in a position where they can prepare a plan of arrangement for presentation to their creditors. I believe that, given an extension to July 31, 2009 F&M will be able to formulate and prepare a plan of arrangement. During this time F&M intends to:
>
> a) make payments to reduce its indebtedness to Asset Engineering;
>
> b) receive the most recent assessments of the value of its loan portfolio so it can consider presenting some of its loan portfolio to possible purchasers or lenders;

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c) receive the expected appraisal on the building so it can consider which alternative(s) outlined above can be implemented;

d) evaluate the current corporate/administrative structure to determine the most efficient structure going forward; and

e) refinance the remaining balance of its loan owed to Asset Engineering.

Mr. Hitchcock also deposes in his March 25 affidavit that the petitioners intend to "prepare a plan of arrangement or compromise and present the same to the creditors".

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[28] The chambers judge considered all the evidence before him, noting that there was a "broad constituency of interests at play", that the financial analysis supported the view that AE's position was secured, and that further payments in reduction of the indebtedness to AE were projected. In his words:

> ... I would note that there appears to be government interest in FM's continued operation; that continued payments to Asset Engineering's significant monthly fees are projected to continue; that though Asset Engineering has forcefully argued its right for the appointment of a receiver based on contractual and equitable considerations, there has been some indications of some flexibility, but not much, with respect to timing; that this would also equally be contained within the comments of the investment receipt holders, that there is also sufficient reality of the potential for refinancing from a recognized institution; that refinancing is a primary focus for the FM group; and that the imposition of a receiver would impair the ability of the *CCAA* eligible entities from restructuring; in assessing the competing interests relative to the prejudice to each, I conclude that an extension of the stay of proceedings is in order. [At para. 22.]

[29] I am not persuaded that he erred in law or applied a wrong principle in reaching this conclusion. Nor am I persuaded that as a matter of law, the chambers judge should not have granted a stay "without the immediate entitlement of a vote of creditors where the proposed plan involves the refinancing of a major secured creditor and where there is a critical and central, unfulfilled prerequisite to the proposed plan", as AE suggests in support of its third ground of appeal. As I understand AE's argument, the "prerequisite" being referred to is the alteration or simplification of the Group's corporate structure which the monitor suggested would

be necessary before a plan of arrangement could be presented. Paraphrasing *Cliffs Over Maple Bay*, AE submits that its enforcement proceedings should not be stayed "so as to compel AE to await the outcome of an unduly complex and expensive procedure .... [t]his is a key 'element of the debtor company's overall plan of arrangement' and creditors should be entitled to vote in the circumstances."

[30] I have already explained above that this case is very different from *Cliffs Over Maple Bay*. The Partnership is carrying on its business and hopes to simplify its corporate structure as part of or as a recondition to a refinancing. I know of no authority that suggests that such a restructuring cannot qualify as a "plan of arrangement" under the *CCAA*, or that a refinancing by itself cannot qualify ˜ provided in each case a compromise or arrangement between debtor and creditors is contemplated. Masuhara J. was aware of the monitor's advice and concluded that it was appropriate to extend the stay. Although AE objects to the prospect that its "rights would be frozen for such an indeterminate proposition", the chambers judge was not obliged to put the prospect of a refinancing to a vote at a creditors' meeting at this early stage. As the petitioners noted in their factum, if such a vote were insisted upon at this time, it would defeat the purpose of the legislation – "to facilitate the making of a compromise or arrangement between an insolvent company and its creditors to the end that the company is able to continue in business, with regard to the interest of a broad constituency extending beyond any single creditor or class of creditors". The Group now has until July 31 to put forward a workable plan.

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[31] For these reasons, I joined in the dismissal of the appeal.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Donald"

I Agree:

"The Honourable Mr. Justice Chiasson"

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Azure Dynamics Corporation (Re),* 2012 BCSC 781

Date: 20120413
Docket: S122223
Registry: Vancouver

2012 BCSC 781 (CanLII)

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

And In the Matter of a Plan of Compromise or Arrangement of Azure Dynamics Corporation, Azure Dynamics Inc., Azure Dynamics Incorporated and Azure Dynamics Limited

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	S. Brotman V. Tickle
Counsel for the Monitor, Ernst & Young Inc.:	G. Thompson
Counsel for the Board of Directors:	J.D. Schultz
Counsel for Johnson Controls Inc.:	D.P. Preger A.A. Frydenlund
Counsel for Johnson Controls Inc. by teleconference:	M. Weinczok L.S. Corne
Counsel for Residual Asset Management Inc.:	W.E.J. Skelly
Counsel for Silicon Valley Bank:	O.C. Hanson
Counsel for Via Motors Inc.:	E.J. Milton, Q.C.

Counsel for Ford Motor Company:	P.L. Rubin
Place and Date of Hearing:	Vancouver, B.C. April 13, 2012
Place and Date of Judgment:	Vancouver, B.C. April 13, 2012

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[1] **THE COURT:** This is a proceeding pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 commenced by the petitioners, known as the Azure Group. I granted an initial order on March 26, 2012. The stay of proceeding granted under that order expires on April 25, 2012.

[2] In the interim, the petitioners have found themselves without sufficient cash to continue their restructuring efforts. Accordingly, they have brought this application to approve certain debtor in possession or DIP financing in the amount of $4 million.

[3] The second application before me is an application by the creditor, Johnson Controls Inc., Johnson Controls Advance Power Solutions LLC, and Johnson Controls APS Production Inc. who I will collectively call, as the parties have, "JCI". JCI advises that they are owed approximately $13 million. They have security on certain battery systems that they have supplied to the Azure Group and, as such, they have purchase money security interests or PMSI security pursuant to the *Personal Property Security Act*, R.S.B.C. 1996, c. 359. I am told by JCI's counsel that while they are a secured creditor, they may also have an unsecured position in these proceedings. The application by JCI is to lift the stay of proceedings as granted in the initial order so that they can move to realize on their security.

[4] Having now heard the two applications, in my view it makes some sense to deal with the application of JCI in the first instance because if they are successful, a decision on the application for DIP financing will be unnecessary.

[5] JCI's counsel has referred me to the decision of Madam Justice Pepall (as she then was) in *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200 (Ont. Sup. Ct. J.). In that case, Pepall J. noted that while there are no statutory guidelines as to when and in what circumstances the stay should be lifted, the court should have regard to the objectives of the *CCAA*, the balance of convenience, the relative prejudice to the parties, and the actions of the debtor company:

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> [32] As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.
>
> [footnotes omitted]

[6] In addition, the Court in *Canwest* at para. 33 outlined various situations in which courts will lift a stay order:

> 1. When the plan is likely to fail.
>
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
>
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
>
> 4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
>
> 5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
>
> 6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
>
> 7. There is a real risk that a creditor's loan will become unsecured during the stay period.
>
> 8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
>
> 9. It is in the interests of justice to do so.

[7] As counsel for the Azure Group indicates, JCI is now making a classic "doomed to fail" argument in support of their application to lift the stay. This argument would arise from the first enumerated situation where the "plan is likely to fail".

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[8] Mr. Shemanski gave evidence on behalf of JCI that while JCI is a secured creditor, JCI will also have a controlling vote with respect to the unsecured class. It is unclear just what unsecured position JCI might hold since at one point, it was also submitted by JCI's counsel that if JCI obtains their secured assets back, JCI may be able to fully recoup their debt. In any event, I will consider this argument on the basis that JCI does hold an unsecured position. JCI then says that they hold a veto or blocking position with respect to the approval of any plan of arrangement or compromise and that they will not vote in favour of any plan unless any plan or compromise provides for full repayment to them.

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[9] This position is easily met by the comments of Madam Justice Newbury in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319:

> [27] As for AE's insistence that it will refuse to vote in favour of any plan brought to a meeting of creditors under s. 6 of the *CCAA*, I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner. When the Act is invoked, the court properly considers the interests of many stakeholders, not simply those of the creditor and debtor...

[10] I have recently rejected a similar argument in *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 41.

[11] The comments of the Court in *Asset Engineering* are also well taken in this situation. Here, as in that case, there are many other stakeholders beyond JCI. There are secured creditors such as Silicon Valley Bank, who is present on this application and who in essence supports these proceedings. Ford is also a significant stakeholder, who is not a creditor, but who has important contractual relationships with the Azure Group at this time. Ford is not actively supporting the restructuring, having reserved its rights in that respect. However, Ford is not supporting the position of JCI towards terminating the stay of proceedings.

[12] There are, needless to say, many other stakeholders who are not before the court such as employees, other unsecured creditors, trade creditors, landlords, and

the general community that the Azure Group is a part of. I conclude that the position of JCI as to how it may vote on any plan of arrangement is clearly not a controlling factor on this application and as such, it cannot be said that the plan is likely to fail for this reason.

[13] The next issue concerns whether or not the Azure Group has a "kernel of a plan". As counsel for JCI points out, it is generally considered to be a prerequisite that there must be some sense of what the petitioners intend to do so as to give the court and, obviously, the stakeholders, some comfort that there is some utility in continuing further with these proceedings. To that extent, this issue potentially involves both the first situation (whether the plan is likely to fail) and the sixth situation (whether the proceedings are showing some progress in the restructuring efforts).

[14] Counsel for JCI says that there is no viable business here. He readily concedes that JCI is very pessimistic about the chances of the Azure Group to reorganize themselves.

[15] However, in my view there was substantial evidence adduced on this application that, in fact, there is a kernel of a plan.

[16] I would note in particular Mr. Lee's evidence where he outlines the quite significant efforts that were made by the Azure Group to obtain further financing and also the other efforts that members of the Group were making as late as early to mid-March 2012, all just before the filing took place on March 26, 2012. It is clear that those efforts did not succeed at that time, but nevertheless those efforts continue to go forward at this time.

[17] Mr. Lee outlines continuing discussions with potential parties who might be interested in either refinancing the Azure Group or recapitalizing it. I accept JCI's counsel's comments that the reference in that portion of the affidavit does seem concentrated on certain Chinese interests and that is relevant because of JCI's position that they do not think those Chinese interests will be interested in this

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particular enterprise given some structural difficulties. However, I do not think it is appropriate at this time to prejudge whether or not that will be the decision of these clearly interested parties.

[18] I note the comments of the Monitor in its first report dated April 12, 2012. The Monitor comments favourably on the Azure Group's contact with various interested parties towards, as earlier stated, either a refinancing, recapitalization, or a sales process. I am told that the Azure Group will continue with its efforts in that respect and it intends to do so with some further rapidity if the DIP financing is approved. It bears noting that the proceedings were only commenced some three weeks ago and as such, it cannot be said that there has been any failure on the part of the Azure Group to show progress in its restructuring efforts.

[19] It is evident from this hearing itself that interest in the Azure Group has been generated through the process of canvassing the market for the DIP financing. In its report, the Monitor has outlined certain parties who came forward through that process. Two were financing partners and two were what could be called potential strategic partners and a significant portion of the latter group tied their DIP financing proposals to the sales effort. This indicates that there is some substance to the proposition that other parties see value in the Azure Group that could be explored through a sales or refinancing process.

[20] Via Motors Inc. was represented on this application and counsel indicated that it is interested in this sales or refinancing process. In fact, Via is in the midst of completing certain due diligence. Again, this indicates that the efforts of the Azure Group are garnering a reaction from the marketplace sufficient to indicate that progress is being made in that respect.

[21] Finally, Mr. Skelly on behalf of the proposed DIP lender, Residual Asset Management Inc. ("RAM"), indicates that his client is prepared to loan $4 million to the Azure Group behind the present secured creditors. This is a further indication that others see some value in the Azure Group that, as I said, the Azure Group seek to explore.

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[22] I conclude that there is the kernel of a plan. Although JCI pessimistically thinks otherwise, I conclude that the Azure Group should be given a reasonable chance to explore the formulation of a plan. The Monitor has been given oversight in respect of this process and will be commenting on the efficacy of the refinancing or sales process as the proceedings go forward. If, for example, there is any negativity coming out of the refinancing or sales process such that it appears that it is not going to be successful, then I would expect that the Monitor would report further to the court on those matters.

[23] The other factor discussed in *Canwest* is that of relative prejudice to the parties. In the fourth situation outlined above, Pepall J. refers to "significant" prejudice to the moving party if the stay is not lifted. In JCI's notice of application, the prejudice alleged is twofold. Firstly, JCI says that there is prejudice by the continued consumption by the Azure Group of products supplied by JCI. Secondly, JCI says that there is ongoing prejudice concerning the costs that are being incurred and, by that, I take JCI to mean the professional costs that are being incurred which are secured by the prior ranking Administration Charge and Director's Charge, as defined in the initial order.

[24] Dealing with the first alleged prejudice, I am of the view that the prejudice that JCI is speaking of is not unusual in the sense that there would inevitably be this sort of prejudice in a situation where, for example, there has been inventory supplied by a debtor company. In the normal course, where the debtor company continues to seek to operate during the restructuring period, there is typically a continued consumption of the product. That is a factor that applies not only to JCI, but also to many other creditors who have supplied product and have not been paid for it. JCI does not stand in any special or unique position in that respect.

[25] The same can be said in respect of the Administration Charge and Director's Charge. The fact of the matter is that these restructurings do not take place on their own and they require the oversight and assistance of counsel and parties like the Monitor to see these matters through. In addition, a restructuring cannot occur

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without proper management being in place and that will typically require that the directors and officers be protected from certain liabilities during the restructuring.

[26] The cost of these proceedings is essentially recognized as a prejudice to all parties in that these costs must be paid from the assets of the debtor company and will inevitably reduce the recovery to the creditors from what is already a financially stressed and in fact, insolvent, company. But that prejudice is balanced against what is seen as being a reasonable prospect that there will be a successful restructuring which will ultimately benefit all parties (or conversely, that the restructuring is not doomed to fail). As such, the cost of these professionals and the cost to maintain and protect management during the restructuring are seen simply as a requirement to take advantage of that opportunity.

[27] I cannot leave the topic of prejudice without dealing with the prejudice that would accrue to the Azure Group if the stay was lifted. JCI says that they want to take back their battery systems for which they have not received payment. Again, I note that the Azure Group is currently in a very delicate situation in terms of trying to find a strategic partner or financier or someone to buy the business of the Group. A lifting of the stay, even as it relates only to JCI, would result in great prejudice to the Azure Group in terms of its ongoing efforts. There are indications that there is enterprise value in this Group; that is part of the germ of the plan and that is the value which the Azure Group is trying to preserve. Any material change to the current situation would cause prejudice to those efforts, a matter that would accrue to all of the stakeholders in this case. I consider that JCI taking its secured assets back would be such a material change.

[28] The ninth situation set out in *Canwest* is whether it is in the interests of justice to lift the stay. This is an overarching consideration and, frankly, subsumes the other factors that I have already discussed above in more detail. I do not think the parties will be surprised to hear that, in my view, it is in the interests of justice that this restructuring be allowed to continue. I am satisfied that it is appropriate in this case and that the concerns of JCI cannot override the interests of all stakeholders in

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allowing this restructuring to continue at least to some extent to see whether this germ of a plan can be brought to fruition.

[29] I also note that the Monitor continues to affirm that the Azure Group is acting in good faith and with due diligence. This is a key consideration under the *CCAA*, and supports my decision that it is in the interests of justice that this restructuring be allowed to continue.

[30] Accordingly, the application of JCI to lift the stay is dismissed.

[31] I now turn to the application to approve the DIP financing. The application is to approve a DIP financing agreement between the Azure Group and RAM. The financing agreement is dated April 12, 2012 and the particulars of that financing have been summarized by the Monitor in its report. The financing is to a maximum amount of $4 million. It is not intended that that amount be taken out in one tranche at the very beginning, but it is intended that that be drawn upon as needed in accordance with the cash flow projections which have been prepared by the Azure Group and which have been commented on favourably by the Monitor.

[32] The cash flow produced on this application indicates that without this DIP financing, the current cash on hand, which is about $200,000, is intended to be down to $128,000 by April 15th and $657 by April 22nd. So the need for financing is obviously critical from the Azure Group's point of view in terms of continuing its business operations, *albeit* on a fairly limited basis given the restructuring that has already occurred, but also in terms of going forward with the restructuring plan.

[33] The proposal is that the DIP facility will be subordinate to the various charges that I granted in the initial order, being the Administrative Charge, the Director's Charge, and the inter-company charges.

[34] It is intended that RAM, the DIP lender, would rank subordinate to not only the major secured creditors, such as Silicon Valley Bank and JCI, but various other lenders with security who I presume are registered under the *Personal Property*

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Security Act or otherwise hold security. In any event, RAM is intended to take a fairly significant subordinate position.

[35] The DIP facility is to be repaid on the earlier of September 30, 2012, or the termination of the *CCAA* proceedings, or if there is an earlier event of default. The interest rate is somewhat modest for DIP financing, being 10.5%. There is a 1.5% commitment fee. There is also an exit fee which is the greater of $400,000 or 10% of the aggregate proceeds realized from a sale or the enterprise value if there is a refinancing. So while the exit fee, as it is called, will clearly put that beyond the 10.5% basic interest rate, I am also advised that the interest and the various fees will be effectively capped at 35%, excluding the commitment fee.

[36] While it is fairly expensive financing, it appears that this offer has resulted from a fairly rigorous process to test the market for DIP financing. The proposal of RAM has emerged as the best available in the circumstances. It should clearly be a preferable DIP financing proposal from the secured creditors' point of view given the relative priority position that RAM intends to take.

[37] The test to approve DIP financing is now codified in the *CCAA*, and in particular s. 11.2(4). That section sets out various factors that are to be considered by the court. I will deal with each of those in turn.

[38] The first factor is the period during which the Azure Group expects to be subject to proceedings under the *CCAA*. As I said, the stay of proceedings is currently effective until April 25, 2012, and I would expect that any further extensions that may be granted by the court will be in accordance with how the Azure Group is progressing in its refinancing or sales efforts and the Monitor's comments on those efforts. It is intended that the Azure Group will come back at some point with the results of the marketing process. Accordingly, there will be some continuing oversight by the court in respect of how that process is going forward so that the court can be satisfied that things are moving along as they should. I would also note that the cash flow in the Monitor's report indicates that it is intended that only $2.7 million of the $4 million will have been drawn by July 8, 2012.

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[39] The second factor is how the company's business and financial affairs are to be managed during the proceedings. Mr. Lee states in his affidavit that the current management would remain employed by the Azure Group and would continue with the restructuring efforts. I have not been advised that there is any change in that respect. It is to be noted that the management will be subject to the oversight of the Monitor going forward.

[40] The third factor is whether the company's management has the confidence of its major creditors. One of the major creditors, Silicon Valley Bank, supports the DIP financing. JCI's counsel says that the Azure Group's management does not have the confidence of JCI. There is, however, no evidence of that because Mr. Shemanski on behalf of JCI speaks of a loss of confidence in the ability of the Azure Group to survive, not a lack of confidence in the management. Accordingly, I do not see that that is an issue.

[41] The fourth factor is whether the loan will enhance the prospects of a viable compromise or arrangement being made in respect to the Azure Group. Consistent with my earlier comments in these reasons, I am satisfied that the loan would enhance the prospects of a viable compromise or arrangement. As I said, the Azure Group is essentially out of money and, if DIP financing is not obtained, the Monitor has indicated that that will be a material adverse change that will necessarily be reported. I do not think it takes much imagination to conclude that that would likely be followed very quickly by a receivership and/or bankruptcy. Again, DIP financing will enhance the prospects of a viable compromise as it allows the Azure Group to explore the market towards a restructuring plan.

[42] I turn to the fifth factor, the nature and value of the Azure Group's properties. No liquidation value has been provided on this application that would give the court a clear picture of the downside of a failure to fund the DIP financing or in other words, what a liquidation scenario would look like. JCI has stated in its submissions that even if there is a failure, then there would still be money for the unsecured creditors. However, it is apparent from a review of the types of assets owned by the Azure

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Group that there will be a significant negative effect by any liquidation. In fact, there are few companies that would not be negatively affected by a liquidation of their assets, as opposed to a going concern sale.

[43] The Monitor has filed a supplementary report to explain why there is no liquidation analysis before the court. In the first instance, the Monitor points out that the costs of obtaining liquidation values for the assets in Canada, the U.S. and the U.K. would likely exceed $100,000. For companies who are short of cash already, such as the Azure Group, that is an inordinate sum. In addition, the Monitor has analyzed the types of assets quite carefully in terms of pointing out certain negative factors that will be realized in respect of the various asset categories – those include relating to collection of accounts receivable, sale of the very specialized inventory and the very specialized property plant and equipment, and the realization of the intellectual property to the extent that it is said to be tied to the intellectual capital of the engineers of the Azure Group who are employees.

[44] I conclude that there would be a significant negative effect on the asset values in the event of a liquidation. It also bears pointing out that there would be significant professional costs incurred in the event of a liquidation and, to that extent, the professional costs that are being incurred in the restructuring may include costs that would inevitably be incurred even in a liquidation.

[45] The sixth factor is material prejudice to any creditor as a result of the granting of the DIP Charge. I think that factor is largely dealt with by the fact that the RAM DIP financing is not to take priority over that of any secured creditor. I appreciate that there may be some prejudice, *per se*, to the unsecured creditors in the sense that the cost of this DIP financing will inevitably reduce their recovery, but I am of the view that the DIP financing is a justifiable cost at this time given the circumstances that the Azure Group finds itself in and given its present plans to address its financial difficulties.

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[46] The seventh and final factor is the Monitor's report. The report indicates that the Monitor has reviewed the matter in some detail and conclusively recommends that the DIP financing be approved by the Court. In addition:

> The Monitor is of the view that the DIP Financing negotiated by the Azure Group is fair and reasonable in the circumstances and will stabilize the Applicants to allow management to focus its efforts on the sale and investment process with a view to maximizing value for all stakeholders.

The Monitor considers the DIP financing to be reasonable and necessary in the circumstances.

[47] The Monitor's supplementary report reconfirms the Monitor's earlier view that the DIP financing is fair and reasonable in the circumstances. At that time, the Monitor also stated that the realizable values of the Azure Group assets in a going concern sale are far superior to that achievable in a forced liquidation, bankruptcy, or receivership of the Azure Group.

[48] In conclusion, I am satisfied that DIP financing is appropriate in the circumstances and the order sought is granted.

[49] THE COURT: The Azure Group is also seeking a sealing order in respect of the affidavit of Mr. Brennan of the Monitor in relation to certain offers made in the process of seeking DIP financing. The test is as set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. The test was recently applied in the context of *CCAA* proceedings in *Hollinger Inc. (Re)*, 2011 ONCA 579, leave to appeal to SCC refused, 34506 (May 3, 2012). Can counsel address those issues, please?

[SUBMISSIONS RE SEALING ORDERS]

[50] THE COURT: Thank you. Does anyone support the position to seal the affidavit?

[51] MR. THOMPSON: I think obviously the Monitor would.

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[52] THE COURT: Does anyone oppose it?

[53] MR. PREGER: I am prepared at this stage, My Lady, to reserve my rights on that issue.

[54] THE COURT: Well, I am satisfied that it is appropriate to seal the affidavit. Now, *Hollinger* follows one of the aspects of the *Sierra Club* test in the sense that any sealing of the material should be as minimally restricted as possible. I note that in the paragraph we have since struck out you proposed added wording "... pending the conclusion of the *CCAA* proceedings or further order of the court." I think that type of wording is appropriate –

[55] MR. BROTMAN: I absolutely agree. That was absolutely the intention. A party can bring a motion to the court to have the document unsealed and, certainly, at the conclusion of the proceedings, it will be unsealed and further, to address the *Hollinger* aspect, I would note the Monitor has put certain terms in its publicly available report and more terms in the documents that it is asking be sealed and so I would submit the minimally invasive aspect addressed in *Hollinger* is equally addressed.

[56] THE COURT: I think it also goes to the point where at the conclusion of the *CCAA* proceedings, there is no point – there is no business interest that is being – that should be protected by reason of the sealing. So if someone wanted to get it at that point, then they should be able to get that.

[57] MR. BROTMAN: I think that is fair, yes.

[58] THE COURT: All right. I will leave you to add that to the order.

"The Honourable Madam Justice S.C. Fitzpatrick"

2012 BCSC 781 (CanLII)

Citation: Bank of Montreal v. Hester Creek Estate Winery Ltd. et al 2004 BCSC 724

Date: 20040429
Docket: S036714
Registry: Vancouver

2004 BCSC 724 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Mr. Justice Tysoe
April 29, 2004

BETWEEN:

BANK OF MONTREAL

PLAINTIFF

AND:

HESTER CREEK ESTATE WINERY LTD.
CREEK INVESTMENTS LTD.
658302 B.C. LTD.
EUROPEAN & ALLIED COMMERCE LIMITED
ATTORNEY GENERAL OF CANADA, and
AS A REPRESENTATIVE OF HER MAJESTY THE QUEEN IN RIGHT OF CANADA

DEFENDANTS

Counsel for the Plaintiff:	B.C. Gibbons
Counsel for PricewaterhouseCoopers Inc.:	C.M. Emslie
Counsel for the Defendant, 658302 B.C. Ltd.:	J.I. McLean
Counsel for Valterra Wines Ltd.:	R.M. Patryluk
Counsel for the proposed purchaser, Quail's Gate Vineyards Estate Winery Ltd.:	D.M. Rush
Counsel for the Defendant, Trustee in Bankruptcy of Hester Creek Estate Winery Ltd.:	G. Thompson

[1] **THE COURT:** The Trustee in Bankruptcy of Hester Creek Estate Winery Ltd. (“Hester Creek”) appeals the decision of Master Scarth made on April 22, 2004 in which she refused the attempt of the Trustee in Bankruptcy to redeem the property charged in favour of the two secured creditors, the Bank of Montreal and 658302 B.C. Ltd. (“658302”), and then approved the sale of the bulk of the assets of Hester Creek to Quail’s Gate Vineyards Estate Winery Ltd. (“Quail’s Gate”) at a price of $5,155,000. No one has taken exception to the submission by counsel for the Trustee in Bankruptcy based on ***Abermin Corporation v. Granges Exploration Ltd.*** (1990), 45 B.C.L.R. (2d) 188 (S.C.) that, as the application represented a final disposition of the main issues in this proceeding, the appeal was to proceed as a rehearing and it was open to me to substitute my own view even where Master Scarth was exercising a discretion in making the decision.

[2] As a general comment on the background of this matter, I observe that the dealings between Hester Creek and the secured creditors have led to feelings of frustration and distrust. Hester Creek has broken promises to each of Bank of Montreal and 658302. Mr. Justice Burnyeat has found that Hester Creek misled the court.

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[3] Hester Creek has been in default of its obligations to Bank of Montreal since March 2001, and they have entered into four forbearance agreements.

[4] Orclann Investment Inc. (“Orclann”) provided financial assistance to Hester Creek in June 2002 at a time when it was in financial difficulty.

[5] The loan made by Orclann was not repaid when due and it commenced a foreclosure proceeding. On March 19, 2003, Orclann obtained an Order Nisi with a redemption period expiring on June 2, 2003. The security granted to Orclann was assigned by it to 658302 in June 2003.

[6] Bank of Montreal commenced its own foreclosure proceeding in June 2003, but it was put in abeyance when the Bank entered into the fourth forbearance agreement with Hester Creek.

[7] Hester Creek made default under the fourth forbearance agreement in December 2003, and Bank of Montreal commenced this proceeding on December 11, 2003 after its instrument-appointed receiver-manager was denied access to Hester Creek’s property despite the fact that Hester Creek had consented to the appointment of a receiver manager in the fourth forbearance agreement.

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[8] Bank of Montreal made application in this proceeding for the court appointment of a receiver-manager, but before the application could be heard, Hester Creek obtained a stay of proceedings by making application under the ***Farm Debt Mediation Act***. Bank of Montreal then applied for the appointment of an interim receiver under the ***Bankruptcy and Insolvency Act*** (the "***BIA***"). This application was adjourned when the parties agreed to a consent order on December 23, 2003 appointing PricewaterhouseCoopers Inc. as receiver-manager effective February 16, 2004, with Deloitte & Touche Inc. serving as monitor in the meantime.

[9] The stay under the ***Farm Debt Mediation Act*** was terminated in January 2004. On February 16, 2004, the day on which the court appointment of the Receiver-Manager was to become effective, Hester Creek commenced proceedings under the ***Company's Creditors Arrangement Act*** and obtained an *ex parte* stay of proceedings. On March 17, 2004, Mr. Justice Burnyeat set aside the stay of proceedings on the basis that Hester Creek did not make full and fair disclosure of all material facts when it obtained the stay. It was at this time that Mr. Justice Burnyeat found that Hester Creek misled the court when it made the *ex parte* application.

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[10] As a result of the setting aside of the stay of proceedings and a previous failure of Hester Creek to file a cash-flow statement, Hester Creek became bankrupt, retroactive to February 24, 2004. At the same time as the stay of proceedings was set aside, the appointment of the Receiver-Manager became activated, and it commenced efforts to sell the assets of Hester Creek.

[11] Although I have not been provided with all of the relevant documents, it is my understanding that the hearing before Master Scarth came about as a result of an application by the Receiver-Manager for approval of a sale of Hester Creek's assets to another party. Quail's Gate submitted a higher offer, and it was anticipated that sealed bids would be submitted to the court on April 22nd.

[12] As I understand it, counsel for the Trustee in Bankruptcy arrived in court prior to the hearing of the application on April 22nd, and presented a cheque from the Trustee in Bankruptcy payable to the Minister of Finance in a sum sufficient to pay the amounts claimed by Bank of Montreal and 658302. The Trustee's counsel offered to provide separate cheques to Bank of Montreal and 658302 for the amounts claimed by them in exchange for an assignment of their security. I gather that there may also have been some discussion about the

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payment by the Trustee in Bankruptcy being made subject to its right to challenge the amount of legal costs claimed by the secured creditors. The two counsel for the secured creditors refused to accept payment on this basis. Counsel for the Trustee in Bankruptcy then endeavoured to pay the monies into court, but the registry declined to accept the monies in the absence of an order authorizing payment into court.

[13] The application then came on for hearing before Master Scarth. As a preliminary matter, counsel for the Trustee in Bankruptcy sought an order permitting it to redeem the security of Bank of Montreal and 658302 and to have their security assigned to it or its nominee. In reply submissions, counsel for the Trustee in Bankruptcy indicated that it was not essential to have the assignment of the security.

[14] Master Scarth held that it was not appropriate to allow the relief sought by the Trustee in Bankruptcy. In her brief reasons, she stated that the Trustee had not complied with s. 128 of the ***BIA*** and that the Trustee was not entitled to an assignment of the security under s. 14 of the ***Law and Equity Act***. Master Scarth then proceeded to consider the application for approval of the sale and, as the initial offeror had withdrawn from the process, she approved the sale of the assets to Quail’s Gate.

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[15] On this appeal, counsel for the Trustee in Bankruptcy presented a cheque payable to the Minister of Finance in the amount of $4,381,082.45, which was the sum required to pay out the indebtedness and costs claimed by Bank of Montreal and 658302 as of April 22nd, and advised the court that the Trustee has a total of $5,250,000 in its trust account.

[16] The principal issues raised on the rehearing are as follows:

> 1. Whether the Trustee in Bankruptcy was required to serve notice under s. 128(1) of the ***BIA*** before it is entitled to redeem the mortgaged property by paying the amounts owed to the secured creditors?
>
> 2. Whether the integrity of the court-ordered sale process would be compromised by allowing the Trustee in Bankruptcy to redeem the mortgaged property in these circumstances?
>
> 3. Whether the Trustee in Bankruptcy should be permitted to redeem the mortgaged property in view of the fact that Hester Creek does not have clean hands? and
>
> 4. Whether the Trustee in Bankruptcy is entitled to make a redemption payment on the conditions that the security is to be assigned and that the payment is subject to a potential challenge of the legal costs claimed by the secured creditors?

[17] It appears that Master Scarth relied upon the decision of ***Banque Nationale du Canada v. Restaurant Ocean Drive Inc.*** (1998), 23 C.B.R. (4th) 26, (Q.C.A.) in holding that the Trustee in Bankruptcy was required to comply with s. 128(1) of

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the ***BIA*** before it could redeem the security of the secured creditors. Subsections (1) and (3) of s. 128 read as follows:

> (1) Where the trustee has knowledge of property that may be subject to a security, the trustee may, by serving notice in the prescribed form and manner, require any person to file, in the prescribed form and manner, a proof of the security that gives full particulars of the security, including the date on which the security was given and the value at which that person assesses it.
>
> …
>
> (3) The trustee may redeem a security on payment to the secured creditor of the debt or the value of the security as assessed, in the proof of security, by the secured creditor.

[18] On its face, s. 128(3) does require that the trustee receive the proof of security from the secured creditor before it can redeem the security by paying the value of the security because the value must be contained in the proof of security. On the other hand, there is nothing on the face of s. 128 that requires the trustee to have received the proof of security before redeeming the security by payment of the full amount of the debt. Although the secured creditor will set out the amount of the debt in its proof of security, the trustee will have access to the records of the bankrupt to determine the amount of the debt or the trustee may be satisfied with a pay-out statement provided by the secured creditor.

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[19] Time constraints do not allow for the luxury of a translation of the French language decision of ***Restaurant Ocean Drive***, but it appears from the English language headnote that the trustee in bankruptcy was attempting to force the secured creditor to sell the security to it by payment of an amount equal to the value of the security. Hence, this case did not involve a redemption through payment of the full amount of the debt, and it is distinguishable from the present case.

[20] In addition, two judges gave written reasons, and the third judge agreed with both of them. However, one of the two judges giving written reasons held that it was not necessary for the trustee to comply with s. 128(1) and decided the case on another basis. More importantly, however, the other judge relied upon the decision of ***Re F. Fiore & Son Ltd.*** (1983), 46 C.B.R. (N.S.) 316, (Ont. S.C.), in which it was stated that all of s. 99 of the ***Bankruptcy Act*** (the predecessor to s. 128 of the ***BIA***) must be read together and that the conditions precedent to redemption are set out in subsection (1). This judge also relied upon a statement in the then current edition of ***Houlden and Morawetz*** to the effect that it is only where the procedure of the section has been followed that the trustee has a right of redemption.

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[21] The current edition of ***Houlden and Morawetz*** comments on the decision in ***Re F. Fiore & Son Ltd.*** as follows at s. (G)51:

> The predecessor form to present Form 31 only required a secured creditor to give an estimated value of its security and what is now s. 128(3) did not require the secured creditor to value the security in the creditor's proof of claim. It was held in *Re F. Fiore & Son Ltd.* (1983), 46 C.B.R. (N.S.) 316, 1983 Carswell Ont 188 (Ont. S.C.) that to exercise the right of redemption, the trustee must follow the procedure prescribed by s. 128(1), since all subsections of s. 128 must be read together. Form 31, the Form presently in force contains a warning in a footnote that "A trustee may, pursuant to s. 128(3) of the Act, redeem a security on payment of the secured creditor of the debt or the value of the security as assessed, in a proof of security, by the secured creditor." The change in the wording of Form 31 and the amendment of s. 128(3) to read "as assessed, in the proof of security, by the secured creditor" would seem to have overcome the decision in *Re F. Fiore & Son Ltd.*, *supra*.

[22] In other words, ***Re F. Fiore & Son Ltd.*** was decided on the basis of a different wording of the statute and subsequent amendments have clarified that the trustee in bankruptcy is not required to comply with s. 128(1) in order to redeem security when the sum paid is the full amount owing under the security. I believe that the amendments to s. 128 were made in 1992 but I have not been able to ascertain in the short period of time available to me when the commentary in ***Houlden and Morawetz*** was revised, but it appears to have been after

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the Quebec Court of Appeal heard the appeal in ***Restaurant Ocean Drive***.

[23] Further, it is my view that the right for a trustee in bankruptcy to redeem mortgaged property does not arise solely from s. 128. Apart from the provisions of s. 128, a trustee has a right to mortgaged property upon payment of the full amount owing under the security as a result of s. 71(2) of the ***BIA***, which vests the property of the bankrupt in the trustee. Such property includes the equity of redemption in respect of mortgaged assets, and it also includes the rights of a bankrupt in contracts to which it was a party. The very essence of an equity of redemption is the right to redeem the mortgaged property. The circumstance in which a trustee in bankruptcy needs to rely on s. 128 is where the trustee wants to redeem the security by paying an amount less than the amount owing under the security or, as appears to have been the case in ***Banque Nationale du Canada v. Restaurant Ocean Drive Inc.***, the trustee wants to force the secured creditor to sell the security to it.

[24] If one were to accept the submission of the secured creditors in this case with respect to the interpretation of s. 128, the result would be that a trustee in bankruptcy is powerless to prevent a secured creditor from selling the

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assets covered by the security by redeeming the assets and preserving them for the benefit of the bankruptcy estate within the first 30 days of the bankruptcy, which is the time period a secured creditor has to file a proof of security after receiving a notice from the trustee in bankruptcy pursuant to s. 128. Such a result is perverse, and s. 128 should not be interpreted to create such a result.

[25] It may be that s. 128 is actually addressing a circumstance which is different from a redemption of a mortgaged property. The terms “redemption of mortgaged property” and “redemption of security” are often used interchangeably, but it could be that Parliament utilized the phrase “may redeem a security” in s. 128(3) to signify something different from the trustee in bankruptcy exercising a right of redemption vested in it by redeeming the property and being entitled to a reconveyance of the legal title to the property. If that were the case, there would be a stronger rationale for requiring the trustee in bankruptcy to first receive a proof of security from the secured creditor before being entitled to redeem the security.

[26] Accordingly, I hold that the failure of the Trustee in Bankruptcy to serve notice on the secured creditors pursuant to s. 128(1) does not preclude it from redeeming the mortgaged

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property by paying the full amounts owing to Bank of Montreal and 658302.

[27] I will deal with the next two issues very briefly. The integrity of the court process is not compromised by allowing a debtor or its trustee in bankruptcy to redeem the mortgaged property on the eve of an application to approve a sale of the property. Whenever there is a court-ordered-sale process, it is always implicit that the conduct of sale is subject to the debtor being able to pay off the secured creditor before a sale is approved by the court. I am aware of no authority to the effect that the granting of conduct of sale precludes the debtor from redeeming the property. Allowing a redemption of the mortgaged property in these circumstances does not blemish the integrity of the court process but, rather, it represents the court process at work.

[28] Although some counsel have characterized the endeavour of the Trustee in Bankruptcy to redeem the mortgaged property as a back-door attempt by the principals of Hester Creek to match the offer made by Quail’s Gate, there is no evidence, as opposed to speculation, that the Trustee in Bankruptcy is not acting in good faith and in the best interests of the unsecured creditors of Hester Creek. It is my view that the

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fact that Hester Creek may not have had clean hands cannot be visited on the Trustee in Bankruptcy.

[29] In my opinion, it will require truly extraordinary circumstances, which do not exist here, for the court to hold that a debtor or its trustee in bankruptcy should be prevented from redeeming mortgaged property upon payment in full of the amount owed to the secured creditor prior to the pronouncement of an order absolute or an order approving a sale.

[30] This court is frequently met with opposition to an application for an order absolute or an order approving a sale in the form of evidence that the debtor will be able to redeem the mortgaged property in the near future upon the fulfilment of certain conditions precedent. It is not unusual for the court to look with scepticism at such evidence and to exercise its discretion to grant the application in face of it. However, in the present case, there are no conditions precedent for the Trustee in Bankruptcy to satisfy before it can make the redemption payments. In my opinion, the right of redemption that can be exercised immediately should be given preference over an application to sell the assets.

[31] The final issue relates to the desire of the Trustee in Bankruptcy to pay the redemption amounts on the conditions that the security be assigned rather than discharged and that

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it have the right to challenge the legal costs claimed by the secured creditors. These aspects appear to be at least some of the reasons why the secured creditors are resisting the redemption attempts of the Trustee in Bankruptcy.

[32] In my view, these two aspects do not properly arise for determination on the application before the court. The application is for the approval of the sale of the assets and, provided the sale is otherwise provident, the court must decide whether to approve the sale or to grant a short adjournment in order to allow for redemption. There is no application before the court to determine issues ancillary to the proposed redemption.

[33] However, as these points are matters of contention between the parties, I will make some brief observations for the benefit of counsel. First, with respect to s. 14 of the ***Law and Equity Act***, I draw the attention of counsel to the statement in section F1 of ***Houlden and Morawetz*** to the effect that where a specific right is created by statute and is only expressed to be exercisable by the bankrupt, the right does not pass to the trustee in bankruptcy. In addition, s. 14 appears to be restricted to mortgages of land, and it is my understanding that the secured creditors hold security on other assets of Hester Creek as well.

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[34] Second, it seems to me that there is nothing to prevent the Trustee in Bankruptcy from reserving its right to challenge the legal fees incurred by a secured creditor when making the redemption payment. A secured creditor is not entitled to refuse payment in full of the amount claimed by it unless the debtor waives its right to challenge the amount of legal fees claimed by it. On the other hand, if a secured creditor is not legally obliged to assign its security upon payment of the redemption amount, the secured creditor could properly require the debtor to waive its right to challenge the legal fees in exchange for the secured creditor agreeing to assign its security, rather than simply discharging it.

[35] In the result, I allow the appeal and set aside the order of Master Scarth approving the sale to Quail's Gate. I propose to adjourn the sale application for a very short period of time in order to enable the Trustee in Bankruptcy to redeem the mortgaged property by paying the amounts owed to Bank of Montreal and 658302. My tentative view is that the sale application should be adjourned until two o'clock tomorrow afternoon, but I will hear from counsel if they wish to make submissions on the point.

"D.F. Tysoe, J."
The Honourable Mr. Justice D.F. Tysoe

2004 BCSC 724 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Barendregt v. Grebliunas,* 2021 BCCA 11

Date: 20210113
Docket: CA46634

Between:

Ashley Suzanne Barendregt

Respondent (Claimant)

And

Geoff Bradley Grebliunas

Appellant (Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated December 18, 2019 (*Barendregt v. Grebliunas*, 2019 BCSC 2192, Smithers Docket E18295).

Counsel for the Appellant (via videoconference):	G.A. Lang
Counsel for the Respondent (via videoconference):	G.E. Greene
Place and Date of Hearing:	Vancouver, British Columbia October 8, 2020
Place and Date of Judgment:	Vancouver, British Columbia January 13, 2021

Written Reasons by:
The Honourable Mr. Justice Voith

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice DeWitt-Van Oosten

2021 BCCA 11 (CanLII)

Summary:

The judge granted the respondent primary residence of the parties' two children and allowed her to relocate with the children from the Okanagan to the Bulkley Valley. The judge relied on two primary considerations in favour of the move: the financial situations of the parties and their relationship with each other. The appellant applies to adduce new evidence of his financial situation on appeal. Held: Appeal allowed. It is in the interests of justice to admit the new evidence as it displaces the trial judge's concerns about the parties' financial positions and the appellant's ability to remain in the family home in West Kelowna. The remaining circumstances indicate that the best interests of the children would be served by the children returning to the Okanagan under a shared parenting regime.

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Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] This appeal arises out of a family law action that addressed various issues. The only aspect of the order that is appealed granted the respondent primary residence of the parties' two children and allowed her to relocate with the children from West Kelowna to Telkwa in the Bulkley Valley of northern British Columbia. West Kelowna and Telkwa are approximately 1,000 kilometres apart. The outcome of this appeal turns on two questions: first, whether new evidence filed by the appellant should be admitted; second, with that new evidence, and accepting the trial judge's findings, what is in the best interests of the children.

Background

[2] The parties met in Smithers, British Columbia, in the summer of 2011. The appellant, Mr. Grebliunas, moved to Kelowna in early 2012. He was joined by the respondent, Ms. Barendregt, in December 2012. The parties married in March 2013. At the time, Mr. Grebliunas was 21 years old and Ms. Barendregt was 19 years old. Their first son, K., was born in May 2014. Their second son, M., was born in January 2016.

[3] Each of the parties was employed during the marriage and they had almost always shared parenting duties. Mr. Grebliunas was trained as a carpenter, but he had, some years prior to the trial, obtained employment at a local sawmill. Ms. Barendregt was employed in various janitorial positions.

[4] The parties separated on November 14, 2018. This was precipitated by an argument that, Ms. Barendregt alleged, escalated into Mr. Grebliunas assaulting her. Mr. Grebliunas denied any such assault. Ms. Barendregt took both her sons back to her parents' home in Telkwa. She commenced a family law action on November 26, 2018. The parties' pleadings, insofar as they related to custody or parenting issues, relied on both the *Divorce Act,* R.S.C. 1985 c. 3 and the *Family Law Act*, S.B.C. 2011, c. 25. Mr. Grebliunas continued to live in the family home that the parties had purchased in 2013 and that was located in West Kelowna ("the Family Home").

[5] As a result of an interim order made on December 18, 2018, Ms. Barendregt and Mr. Grebliunas began three-week periods of alternating parenting time between Telkwa and West Kelowna respectively. That order was varied on March 27, 2019, and provided for the children to be returned to the Okanagan area, with Mr. Grebliunas to have interim primary residence, and for the parties, once Ms. Barendregt returned to the Okanagan, to have alternating weekly custody. The order further provided that Mr. Grebliunas would subsidize Ms. Barendregt's rent for up to one year upon her making that move.

[6] The children returned to West Kelowna to live with their father in the Family Home on April 27, 2019. Mr. Grebliunas's mother moved down from Smithers to help him care for the children. Ms. Barendregt did not return to the Okanagan and she continued to live with her parents. She did, however, care for the children for the month of August 2019 in Telkwa.

The Trial

[7] The trial of the action was heard for nine days commencing in late October 2019. The central issue at trial was where the parties' two children would reside. The reasons of the trial judge also addressed issues of spousal and child support and property division. Those reasons for judgment are indexed at 2019 BCSC 2192.

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[8] The trial judge considered that a disproportionate amount of time at trial was spent hearing evidence concerning particular incidents during the marriage and post-separation. His impression was that "neither party was entirely honest and forthcoming as to these incidents." As to those specific matters of past conduct that were relevant, and where he was able to make findings in the face of conflicting testimony, he was "in general far more persuaded by the testimony of Ms. Barendregt." He considered that both parties were good parents. He further commented that he had "no expert opinion evidence as to the means and abilities of the parties to parent the children, nor as to the positive or negative consequences of the proposed relocation."

[9] After a review of the relevant authorities, he compared the relative advantages of the two scenarios that were advanced by the parties—"the children living primarily with their mother in Telkwa, or parenting being shared in the Okanagan".

[10] Notwithstanding the various constraints in the evidence he had identified, he concluded that "there are two issues arising from the evidence that significantly impact my analysis of the children's best interests. … The first, although the less significant of the two, is the parties' financial situation, particularly as it pertains to the house".

[11] The trial judge's concerns, in relation to the Family Home, were largely tied to the parties' finances. His comments and conclusions in relation to the Family Home are interspersed throughout the judgment and occupy a significant part of the judgment.

[12] The parties purchased the Family Home in June 2013. The house was in poor condition and the parties hoped that Mr. Grebliunas would be able to renovate it using his carpentry skills. Shortly after the parties moved into the Family Home, they had an electrical fire in an interior wall space. They also discovered an issue with a rodent infestation. As Mr. Grebliunas renovated the Family Home, they uncovered still further difficulties.

[13] The trial judge found that Mr. Grebliunas worked on various projects, often assisted by friends with carpentry and electrical skills, as he was able. He accepted that

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the renovation of the Family Home had been an “ongoing construction project”. The first project Mr. Grebliunas finished was the children’s bedroom, which was “clean, bright, and well insulated.” He renovated the upstairs bathroom over the course of several years. The kitchen had been torn out in 2015 and, at the time of the trial, it still did not have proper kitchen cupboards, sufficient counter space, or a functioning sink.

[14] The trial judge concluded that the parties had struggled to make ends meet. The Family Home had originally been purchased for $252,000 and had been financed with a mortgage of $238,750. By September 2019, on account of various reasons, including “much-needed renovation to the house” and the purchase of a new truck, the parties owed $260,100 on their mortgage and a further $73,500 on a line of credit, for a total of $333,600.

[15] At trial Mr. Grebliunas testified that he had, since the parties’ separation, been working on the renovations at an “accelerated pace,” using his credit cards and borrowing more on the line of credit. Importantly, he also gave evidence in relation to his future plans for the Family Home. This plan had two components.

[16] First, Mr. Grebliunas proposed to have his parents give him $152,000 for a half interest in the Family Home. He planned to use a part of those monies to pay contractors. He also accepted that he would have to obtain refinancing to pay out Ms. Barendregt’s interest in the Family Home.

[17] Mr. Grebliunas’s father, who also gave evidence, testified that he too was prepared to move from Smithers to the Okanagan to live with his wife, son, and grandsons. He had spoken to his banker in Smithers and to a bank in West Kelowna shortly before the trial about buying either a half interest in the Family Home or purchasing it outright. He said that he and his wife had equity of $387,000 in their home in Smithers and that they had a line of credit for $90,000.

[18] The trial judge also had an appraisal report and evidence of Mr. Roworth, an appraiser who was called by Mr. Grebliunas. Though the Family Home had a current

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assessed value of $490,000, Mr. Roworth fixed the value of the Family Home at $303,000. Mr. Roworth accepted that the renovation costs could be lower than his estimate. He also accepted that the work done to date by Mr. Grebliunas had added some value and, for the purposes of estimating depreciation, the work had lowered the Family Home's effective age to some extent.

[19] Mr. Roworth further expressed the opinion that obtaining financing in the current market would be difficult. He estimated that the Family Home had an effective remaining life of 24 years, and that in the current lending environment a bank would likely deduct five years from that figure, meaning that any mortgage loan could only be amortized over 19 years. This would, in turn, further limit the property's market value.

[20] The trial judge expressed concern that he had no evidence from any bank of a willingness to refinance given the current state of the Family Home. He expressed this concern in relation to the evidence given by both Mr. Grebliunas and by his father. He expressed a further concern about Mr. Grebliunas's father having waited until the eve of trial to make inquiries about financing. He noted that Mr. Grebliunas's father was equivocal about whether he was prepared to offer any more than the amount of the debt on the Family Home.

[21] The second component of Mr. Grebliunas's plan, which is somewhat related to the first component, had him hiring contractors to finish the work on the Family Home. He believed that that work would cost approximately $70,000. His father considered that a figure of $75,000 was likely "on the high side." Neither had prepared a detailed budget or had any written estimates for the work that remained outstanding.

[22] Based on the whole of this evidence the trial judge said:

> [39] Whether any of the financing options Mr. Grebliunas Sr. and his son have discussed are practicable is an open question. Mr. Grebliunas' plan to continue living in the house with the boys is, for all practical purposes, entirely dependent on the willingness and ability of his parents to pay off the mortgage and the debt on the line of credit secured by the home, and finance the remainder of the renovations. As of the date of trial, this all seemed uncertain. Absent such financial support from his parents, Mr. Grebliunas' does not have the means to

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> buy out Ms. Barendregt's interest in the family home and complete the renovations; it seems plain from the parties' testimony that they struggled to make ends meet while they were together, and Mr. Grebliunas offered no plan for how, were both parties to remain in the Okanagan, he could afford to take on additional debt while at the same time having obligations to pay spousal and child support.
>
> [40] In summary, the parties' financial position means that the possibility of Mr. Grebliunas being able to remain in the house, and possibly even being able to remain in West Kelowna, are less than certain.

[23] The trial judge described the second dominant issue that he identified as "the relationship between the parties, and the implications it has for the children". He further concluded:

> [42] There is therefore, I find, compelling evidence of Mr. Grebliunas' continuing animosity towards Ms. Barendregt. Three concerns arise from this evidence:
>
> a) First, I find it more likely that Ms. Barendregt will work to promote in the children a positive attitude toward their father, than the converse. This factor weighs strongly in favour of the children's best interests being promoted through Ms. Barendregt having primary residence;
>
> b) Second, if the parties remain in close proximity, there is a greater risk – difficult, if not impossible, to quantify, but still significant – of continuing conflict between the parties spilling over and directly impacting the children; and
>
> c) Third, even if the parties were never to engage in open conflict or derogatory behaviour in the presence of the children, I find it doubtful that they will be able, in the near future at least, to surmount the emotional issues between them and work co-operatively to promote the children's best interests, which optimally is one of the desired outcomes of a shared parenting structure.

[24] Finally, witnesses at trial had described Ms. Barendregt as "someone who needed to be taken care of" and as both "stressed" and "overwhelmed" when taking care of her children. The trial judge said:

> [44] … These glimpses seem consistent with Ms. Barendregt having a need for emotional supports that were not available to her during the marriage and would not be available to her in Kelowna. The emotional weight of having to establish a new life on her own, of learning to parent independently, and possibly of having to continue to cope with the emotional outfall of continuing close contact with Mr. Grebliunas should she remain in the Okanagan, all weigh in favour of a move. So does the factor of the support that will be available to her from the family should she further her education.

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> …
>
> [46] I find the present case is likely one where the children would at least indirectly benefit from their mother residing in Telkwa, in addition to directly benefiting from close contact with their maternal grandparents and Ms. Barendregt's siblings. It is also likely the case that they would at least suffer indirectly to some degree if their mother remained in the Okanagan.

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[25] The trial judge's ultimate conclusion was thus based on his concerns about the Family Home and other financial issues, together with his concern over Mr. Grebliunas's interactions with Ms. Barendregt and her need for some support. He ordered that Ms. Barendregt be awarded primary residence of the children in the Bulkley Valley. He granted Mr. Grebliunas parenting time at various specific times of the year.

The New Evidence

a) The Content of the New Evidence

[26] Mr. Grebliunas filed an appeal. That appeal was heard. At the conclusion of the hearing of the appeal, counsel for Mr. Grebliunas stated that she had just received material indicating that the Family Home had been refinanced by Mr. Grebliunas and that he had purchased Ms. Barendregt's interest in the Family Home. The Court permitted counsel for Mr. Grebliunas to file these materials and to make a new evidence application. It also permitted counsel for Ms. Barendregt the opportunity to respond to that application.

[27] In his new evidence affidavit, Mr. Grebliunas deposes:

> 2. In order to comply with the order of the trial judge I took steps to pay out the respondent for her interest in the family property, including our former family home in West Kelowna.
>
> 3. I sold a one-half interest in the home to my parents, Kelly and Heather Grebliunas, who now hold one-half of the home in joint tenancy. The three of us refinanced the home and obtained a mortgage from the Royal Bank of Canada.
>
> 4. The completion and possession date for the transfer of the home was October 8, 2020.
>
> 5. As a result of the refinancing and thirty year amortization, my mortgage payment is reduced from $1,930 a month to $1,186 a month.

> 6. My parents also increased their personal line of credit by $100,000 to facilitate the completion of renovations on the home.
>
> 7. Since the trial date I have renovated the bathroom and the master bedroom. I've also contracted with Norelco to complete the kitchen renovation. Attached hereto and marked Exhibit A is a copy of the drawings from Norelco for the kitchen renovation.

[28] Mr. Grebliunas attached a number of further documents to his affidavit. This included a copy of the RBC line of credit facility that his parents had obtained, documents that were relevant to the transfer of the Family Home between Mr. Grebliunas and his parents, the mortgage that had been obtained by Mr. Grebliunas and his parents, and the relevant Statement of Adjustments and Property Transfer Tax Form. It also included correspondence between counsel representing Mr. Grebliunas and Ms. Barendregt with respect to the agreement of the parties on the terms of the purchase of Ms. Barendregt's interest in the Family Home, as well as payment to her on account of her interest in a truck the parties had owned.

b) The Relevant Legal Framework – Admissibility of the New Evidence

[29] There is a material difference between new evidence and fresh evidence. The former is evidence that was not in existence at the time of trial but has arisen as a result of events or matters that transpired subsequent to trial. The latter is evidence that existed at the time of the trial but was not adduced at that time: *Hellberg v. Netherclift*, 2017 BCCA 363 at para. 53 [*Hellberg No. 1*]; *Jens v. Jens*, 2008 BCCA 392 at para. 24; *Struck v. Struck*, 2003 BCCA 623 at para. 37; *Scott v. Scott*, 2006 BCCA 504 at para. 22.

[30] The admissibility of fresh evidence is subject to the well-established test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775. Notwithstanding some periodic imprecision in the use of language, this Court has on a number of occasions noted that new evidence is not subject to the *Palmer* test: see *Fotsch* at paras. 19–20; *Korol (Re)*, 2014 BCCA 380 at para. 36; *Jens* at para. 29.

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[31] Having said this, this Court has at times considered whether the new evidence would change the result at trial or could reasonably be expected to do so. This consideration is one of the factors in *Palmer*. The following are mobility cases where the Court applied this consideration to new evidence: *Hellberg No. 1* at para. 57; *Hellberg v. Nethercliff*, 2018 BCCA 404 at para. 36; *R.E.Q. v. G.J.K.*, 2012 BCCA 146 at para. 66.

[32] New evidence is admitted in "rare" or "exceptional" circumstances: see *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2015 BCCA 148 at para. 10 and *Fotsch* at para. 20, respectively. In *Jens* at para. 29, the Court used "rare" and "exceptional" interchangeably.

[33] This high standard is on account of the importance of certainty and finality in trial judgments: *Fotsch* at para. 21; *Struck* at para. 37. Nevertheless, it is contrary to the "interests of justice" to have a decision that is inconsistent with the known facts: *Jens* at para. 30; *Animal Welfare* at para. 12; *Island Savings Credit Union v. Brunner*, 2014 BCCA 449 at para. 25.

[34] One recognized "exceptional" circumstance, where new evidence may be admitted, was described by the Court in *Fotsch*:

> [21] Circumstances which might permit the admission of new evidence include where the judge made assumptions about future events but new evidence establishes those assumptions to be incorrect. See *North Vancouver (District) v. Lunde*, (1998), 60 B.C.L.R. (3d) 201 (C.A.) at paras. 25-26.

[35] In *United States of America v. Wilson*, 2010 BCCA 85 at para. 34, the Court described this "assumption" category as the "main exception" to the general inadmissibility of new evidence on appeal.

[36] The question becomes what the word "assumption," within this context, means. The primary meaning given to the word "assume" in the *Concise Oxford English Dictionary*, 11th ed, revised, is to "accept as true without proof."

[37] There are two difficulties with applying this lay, or dictionary, meaning to the test for admitting new evidence. First, a conclusion that is accepted by a trial judge as "true

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without proof" would in most instances be inherently problematic. It would not be necessary to adduce new evidence to address such a concern.

[38] Second, as a practical matter, this is not how the word "assumption" is generally used in the authorities that address this issue. In most cases, trial judges have made decisions based on the evidence before them. The new evidence, which is filed on appeal, reveals that there has been a change in circumstances. The judges, however, made no "assumptions," but rather based their decisions on the evidence before them. See, e.g., *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39; *Stav v. Stav*, 2012 BCCA 154.

[39] In *North Vancouver (District) v. Lunde* (1998), 60 B.C.L.R. (3d) 201 (C.A.), a decision that is often referred to, this Court limited the scope for admitting new evidence. It was in this case that the language of an "assumption," in the context of admitting new evidence, seems to have first emerged. Justice Lambert, for the Court, rejected the appellant's new evidence motion and said:

> 25 Of course, this evidence does not meet the usual rules for the introduction of fresh evidence. It was not in existence when the summary trial was held and so could not have affected the summary trial. However, it is sought to be admitted under the rule applied in *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 (B.C. C.A.) on the basis that the fresh evidence "falsified" the trial judgement.
>
> 26 In my opinion the rule in *Cory v. Marsh* applies only in relation to the situation where the trial judge made assumptions about future events in order to calculate damages or for some other reason, and then, before an appeal was heard, the trial judge's assumptions are shown by the course of events to be or to have become incorrect. See also *Knutson v. Farr* (1984), 55 B.C.L.R. 145 (B.C. C.A.) and *Christie (Guardian ad litem of) v. Insurance Corp. of British Columbia* (1993), 79 B.C.L.R. (2d) 370 (B.C. C.A.). I do not think it is a general rule that evidence of new events which change the factual circumstances is permitted to be given and permitted to have some kind of retroactive legal applicability requiring this Court to apply different laws to different facts than those which confronted the trial judge.

[40] The concept of an "assumption" having been rendered inaccurate has been expressed in various ways. In *Garcia*, the Court said that the "new evidence casts serious doubt" on the conclusion of the chambers judge, and that the facts relied on by the chambers judge had been "a significant, if not pivotal, point in the judge's decision to

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grant a stay": at para. 61. The Court commented that the "new evidence goes to the very underpinnings of the order under appeal and is likely to have affected the outcome": at para. 64. Because circumstances had not unfolded as expected, "contrary to the assumption made by the judge," the Court considered the evidence should be admitted: at para. 66.

[41] In *Animal Welfare* at para. 12, the Court said that the new evidence revealed that "the situation of the parties has been fundamentally altered since the hearing of the application" and concluded that it was in the interests of justice to admit the new evidence.

[42] In *Stav* at para. 103, the Court determined that the new evidence revealed the trial judge's understanding of the parties' financial situations "was unfounded, thus, significantly undermining the significance the trial judge placed on it in making her decision."

[43] Accordingly, depending on the circumstances, new evidence may be admitted if it establishes that a premise or underpinning or understanding of the trial judge that was significant or fundamental or pivotal has been undermined or altered.

[44] Apart from these descriptions of the threshold criteria that are pertinent, further considerations are relevant. New evidence has been admitted in different kinds of cases. Two sets of circumstances, which intersect in this case, are relevant.

[45] First, in *Animal Welfare*, the Court observed that "[e]vidence of material alterations in the parties' financial positions has occasionally been sufficient to meet" the test for the admissibility of new evidence: at para. 10. In that case, a justice of this Court, in chambers, had dismissed the appellant company's application for a stay of execution of the trial judgment pending appeal. The appellant had sought a stay to prevent the sale of the company's equipment on the basis that it required that equipment to continue operating. The appellant applied to a division of this Court to discharge or vary the chambers judge's order. On that application, the respondents

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sought, and were allowed, to adduce new evidence indicating that the preservation of the appellant's assets for use by a related third party had removed any threat of irreparable harm to the appellant. The Court accordingly dismissed the appellant's application.

[46] Similarly, in *Island Savings Credit Union*, a master had granted a one-month redemption period on an Order *Nisi* of foreclosure. This was "predicated on a lack of equity in the properties" based on appraisal evidence put before the master by the respondent: at para. 25. At the hearing of the petition, the master had denied the appellants an adjournment so that they might obtain further appraisal evidence. On appeal, the appellants sought, and were permitted, to adduce new appraisal evidence that established the properties were worth almost double the appraised value the respondent had proffered and that the master had relied on. The Court considered that it was in the interests of justice to allow the new evidence to be adduced, and it remitted the matter back to the Supreme Court: at paras. 25–26. See also *Korol (Re)* at paras. 38–39 for a further illustration of these principles in this context.

[47] Second, it is recognized that both new evidence and fresh evidence may be admitted more flexibly in family cases: *Stav* at para. 31; *Jens* at para. 30; *Luney v. Luney*, 2007 BCCA 567 at para. 31.

[48] The broad category of "family cases" has been further refined to cases where the best interests of children are concerned: *Stav* at para. 31; *Fotsch* at para. 20. And it has been further refined to include cases where the refusal to admit new evidence might lead to long-term injustice: *Jens* at para. 34; see also *Levin v. Levin* (1996), 84 B.C.A.C. 73 at para. 12 (C.A.); *Shabaga v. Shabaga* (1992), 75 B.C.L.R. (2d) 128 at para. 15 (C.A.). A relocation case is likely to engage each of these various considerations. Furthermore, the overarching consideration of what is in "the interests of justice" may have particular resonance in a relocation case.

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Standard of Review

[49] The standard of review applicable to the trial judge's findings and conclusions was addressed by Madam Justice D. Smith in *Fotsch v. Begin*, 2015 BCCA 403:

> [66] It is well established that an appellate court may not interfere with the exercise of discretion of a trial judge in the absence of a demonstrated material error of law or fact, a serious misapprehension of the evidence, or a decision that is "clearly wrong". See *Van De Perre v. Edwards*, 2001 SCC 60 at paras. 14-15; *Falvai v. Falvai*, 2008 BCCA 503 at para. 18; and *R.E.Q. v. G.J.K.*, 2012 BCCA 146 at para. 33. On appeal, "matters must be reviewed as they stood at the time of trial" (*Scott* at para. 25) or there would be no finality to the litigation. An appellate court is not a court of second instance.
>
> [67] The parameters of this Court's jurisdiction to interfere with an order in a family matter was helpfully summarized by Madam Justice Newbury in *R.E.Q. v. G.J.K.* at para. 33:
>
> > The Supreme Court of Canada has said that the standard of review is a high one, i.e., that in family cases as elsewhere, an appellate court may not interfere with the exercise of discretion of a trial judge in the absence of a material error (including a "significant misapprehension of the evidence", the trial judge's having "gone wrong in principle or [his] final award [being] … clearly wrong"): see *Moge v. Moge* [1992] 3 S.C.R. 813, at 832; and *R.M.S. v. F.P.C.S.* 2011 BCCA 53 at para. 43, citing *Hickey v. Hickey* [1999] 2 S.C.R. 518 at para. 12 and *Van de Perre v. Edwards* 2001 SCC 60 at paras. 14-5. In the latter case the Court wrote:
> >
> > > …Second, an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts. Custody and access decisions are inherently exercises in discretion. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process. This discretion vested in the trial judge enables a balanced evaluation of the best interests of the child and permits courts to respond to the spectrum of factors which can both positively and negatively affect a child. [At para. 13].
> >
> > Thus the authorities make it clear that <u>it is not for an appellate court to re-weigh the evidence or to interfere on the basis that the appellate court would give more weight than the trial judge did to one factor or another – or, in the words of the Court in *Hickey*, that it would have "balanced the factors differently."</u>
> >
> > [Emphasis added.]

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Analysis

[50] The foregoing legal framework supports the admission of the new evidence Mr. Grebliunas relies on. The evidence speaks to the financial circumstances of the parties and it arises in the context of a family case where the long-term best interests of the parties' two children are directly engaged.

[51] The new evidence that Mr. Grebliunas seeks to adduce is cogent and material. It directly addresses one of the two primary underpinnings of the trial decision and it goes to the core of the judge's analysis. Most of the critical "assumptions" on which this aspect of the trial judgment rests have been shown, by subsequent events, to be incorrect. Indeed, the new evidence establishes that Mr. Grebliunas has done almost exactly what he originally testified he intended to do. He has sold a half interest in the Family Home to his parents. He did so for the very price he had planned to. The Family Home has been refinanced with a bank. He has paid Ms. Barendregt her half interest in the Family Home. He has continued to renovate the Family Home, on an accelerated basis, and he has hired third party contractors to do aspects of that work. Finally, though this issue was not addressed in the trial judgment, refinancing the Family Home has increased the amount of disposable income that he has available to him on a monthly basis.

[52] Counsel for Ms. Barendregt raises two primary issues in opposing the admission of the new evidence. The first is that this new evidence might, with reasonable diligence, have been available to Mr. Grebliunas at trial. There are two difficulties with this submission. First, it relies on one of the conditions found in *Palmer*, that being the question of whether the evidence in question could, with reasonable diligence, have been made available at trial. Indeed, the written submissions of counsel for Ms. Barendregt expressly rely on the *Palmer* criteria. However, the *Palmer* conditions do not, as I said earlier, strictly govern the admission of new evidence.

[53] Second, this submission is only partly accurate. It may be that Mr. Grebliunas, or his father, could or should have secured some sort of commitment letter from a bank

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dictating the terms on which that bank would offer financing in relation to the Family Home. The reality, however, is that such a commitment letter would only govern one set of circumstances, and it would not have addressed other issues that were raised by the trial judge. For example, such a commitment letter would have addressed one set of values when it is clear that there were different possible fair market values for the Family Home, as well as for the cost of renovating that home. Similarly, it would not address other hypotheticals that were apparently put to Mr. Grebliunas's father, such as whether he was prepared to offer any more than the amount of the debt on the Family Home.

[54] The second issue raised on behalf of Ms. Barendregt is that the trial judge's concerns in relation to the viability of Mr. Grebliunas's renovating and remaining in the Family Home was the lesser of the two dominant considerations that were identified by the trial judge and that grounded his decision.

[55] In *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 46, Saunders J.A. emphasized the importance of considering the best interests of a child "in the round". Although that expression was used in a particular context in *Hejzlar,* it is a concept of general application and it simply means that a consideration of a child's best interests requires a fully rounded analysis that takes into account all relevant factors: *Hellberg No. 1* at para. 72.

[56] In this case there were several factors that were identified by the trial judge and that militated in favour of the children staying in Kelowna. It is not possible to glean or determine what the trial judge would have done had he not had the various concerns he expressed in relation to both the financial viability of Mr. Grebliunas being able to stay in the Family Home and the finances of the parties at large.

[57] The trial judge's concern, or expectation, or "assumption," that Mr. Grebliunas might not be able to remain in the Family Home and that he might not "possibly even [be] able to remain in West Kelowna" has been displaced. That concern was, in the trial

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judge's words, one of the "two issues … that significantly impact[ed his] analysis". It is in the interests of justice that this new evidence be admitted.

[58] A related consideration is pertinent. In keeping with the trial judge's concern over Mr. Grebliunas's ability to both hold and renovate the Family Home and to stay in West Kelowna, he expressed other concerns of a financial nature. He found that when the parties had lived together, they had struggled to make ends meet. He also gave some weight, "but only to a slight degree", to the relative expense of Ms. Barendregt living in the Okanagan, as opposed to her being able to live with her parents for a time and then finding her own accommodation in the Bulkley Valley.

[59] In this context it is relevant that the trial judge determined that Mr. Grebliunas's income pursuant to the *Federal Child Support Guidelines* was $65,270 and that he imputed income of $33,150 to Ms. Barendregt. Accordingly, the parties had income of nearly $100,000. There was also evidence before the trial judge that both sets of parents were prepared to help their children financially.

[60] In *Stav* at paras. 93–106, the Court addressed the various ways in which the trial judge had misapprehended the evidence relating to the financial positions of the parties. One aspect of this concern is described in the following paragraphs:

> [94] Mr. Stav also submits that the trial judge erred in finding that Mr. Stav's salary of $90,000 was not sufficient to support two households if the family remained in Vancouver following the divorce (and assuming that he continued to be unemployed). He submits that many families live in Vancouver on incomes of substantially less than $90,000 per year. Thus, he submits that not only did the trial judge err in her assessment of the financial circumstances of the parties, but that she further erred in drawing the inference from this evidence that his proposal to continue to live and support the family in Vancouver was not a viable option.
>
> [95] Mr. Stav says the extent to which the trial judge's misconception of the parties' financial circumstances unduly influenced her decision is particularly evident at paras. 53 and 56 of her reasons. At para. 53, the trial judge states that Mr. Stav's preferred option of shared parenting in Vancouver "fails to acknowledge that these parties do not have enough money to maintain two residences and a reasonable lifestyle in Vancouver." She reiterated this view at para. 56, where she stated:

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> The experience of the Stav family in Vancouver has not been entirely positive. They have lived beyond their means for significant periods since they have been here. They have been unable to purchase any assets beyond the family vehicle. Living apart in Vancouver will necessarily increase their expenses. I find that there is no realistic chance that the parties will be able to live within their means here.

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[61] In relation to this concern, the Court determined that the trial judge had "placed undue emphasis on her perception that the parties could not live reasonably in Vancouver if they were restricted only to Mr. Stav's salary" (at para. 101) and that she had made "unwarranted assumptions that the parties could not afford to continue to live in Vancouver" (at para. 106). The Court further said that "in the absence of circumstances in which the court will impute income to a parent who is failing to meet his or her obligations for child or spousal support, it is not for the courts to dictate the standards of living of the parties—these parties are not alone in living beyond their income" (at para. 102).

[62] In this case the trial judge similarly appears to have been influenced, "but only to a slight degree", by the concern that the parties' combined income, of nearly $100,000, was insufficient for them to both reside in West Kelowna. This issue appears to have been tied to and to have reinforced his concerns about whether Mr. Grebliunas would be able to renovate and stay in the Family Home. Neither of these concerns, particularly in light of the new evidence, appears to be properly grounded.

The Best Interests of the Children in Light of the New Evidence

[63] The introduction of new evidence and the ensuing reconsideration of the determination made by a trial judge is generally either based on the trial judge having misapprehended the evidence or because it is in the interests of justice to do so: see e.g. *Stav* at paras. 101–06, 119 and *Jens* at para. 34, respectively.

[64] In such circumstances, it is open to this Court to either make its own determination of the best interests of the children or to remit the matter to the trial court. To the extent it is possible to do so, it is generally preferable for the Court to make its

own determination. Remitting the matter to the trial court necessarily causes additional expense and delay and emotional uncertainty for the parties and their children.

[65] I have earlier said that the trial judge's ultimate conclusion was based on his concerns about the Family Home and other financial issues, together with his concerns over Mr. Grebliunas's interactions with Ms. Barendregt and her need for some support. The question becomes whether his findings continue to dictate a given result when one of two dominant considerations—albeit the lesser one—no longer applies to his analysis. This is not a question of reweighing the evidence that was before the trial judge. Rather it is a question of revisiting the parties' circumstances, bearing in mind the trial judge's remaining findings, and ascertaining what result would be in the best interests of the children.

[66] Several core findings made by the trial judge set the framework for this analysis. Both parents were custodial parents. Both were good parents. The trial judge found that Mr. Grebliunas was a good father, with a strong bond to his children, and who had taken "extraordinary steps" to manage his schedule so that he could be engaged with the children. The children, who had always lived in the Okanagan, had been with their father for most of the six months prior to trial. There is no suggestion in the trial judge's reasons that the children were struggling in any way or that Mr. Grebliunas had made disparaging comments to the children about Ms. Barendregt during this time, or indeed at any time.

[67] Unlike most child mobility cases, Ms. Barendregt did not move to Telkwa to advance her career, for better educational opportunities, or because she had a new partner there. It is such circumstances that are generally seen to advance the moving parent's ability to meet the best interests of the child.

[68] Similarly, there is no suggestion that the Bulkley Valley provided the children with any benefits that were unavailable to them in Kelowna. The trial judge allowed Ms. Barendregt to move to the Bulkley Valley with the children because he believed that

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she might require some assistance taking care of the children, because her parents were there, and because he was concerned about Mr. Grebliunas's past and future treatment of Ms. Barendregt.

[69] There are several reasons that these remaining considerations, standing alone, are problematic and no longer support the ultimate result arrived at by the trial judge.

[70] First, the trial judge's concerns about Mr. Grebliunas's behaviour towards Ms. Barendregt warrant some context. This context takes several forms. First, the proposition that Mr. Grebliunas's hostility towards Ms. Barendregt supported her moving to Telkwa was never argued by Ms. Barendregt at trial. Instead, her evidence was that the parties were getting along better than they had when they first separated. Even after the trial judge asked Mr. Grebliunas's counsel about this issue during his closing submissions, Ms. Barendregt's counsel, in his reply submissions, did not rely on the issue as a matter of any real concern.

[71] I do not say that it was not open to the trial judge to make the findings he did. But the seriousness of the circumstances he addressed are attenuated by these realities. In particular, it is relevant that his dominant concern in support of Ms. Barendregt's move to Telkwa with the children was simply not an issue that Ms. Barendregt or her counsel were significantly concerned about at trial.

[72] Furthermore, many of the issues the trial judge was concerned about had taken place in the past, and there was some support in the evidence for Ms. Barendregt's belief that the relationship between the parties was improving. The trial judge considered that Ms. Barendregt had been subject to Mr. Grebliunas's overbearing personality during the marriage and that there was "a significant possibility" that she had suffered from some degree of emotional abuse at that time. He referred to the alleged assault in November 2018, and he was inclined to accept Ms. Barendregt's evidence in relation to this issue. It was this alleged assault, a year before trial, that had caused the parties to separate. He referred to Mr. Grebliunas's false character statements made in

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late January 2019 and to the fact that an affidavit he made in June 2019 had included a nude selfie of Ms. Barendregt. He was also concerned about the continuing acrimony in Mr. Grebliunas's testimony during trial. I do not diminish the seriousness of these conclusions, but simply note that several of these events occurred at or around the time the parties separated. Furthermore, there was no evidence of any event involving the children, or taking place in the presence of the children, since the parties had separated a year earlier.

[73] Apart from these issues of context, it is significant that the conclusions arrived at by the trial judge of Ms. Barendregt's need for some emotional support and the concern over Mr. Grebliunas's behaviour have generally not, on their own, supported a relocation in the case law.

[74] There are virtually no decisions of this Court where a need, on the part of the moving parent, for emotional support, even with some friction between the parties, has justified a relocation.

[75] The one exception may be *K.W. v. L.H.*, 2018 BCCA 204, leave to appeal ref'd [2018] 3 S.C.R. vii. In that case, the mother, who had been her son's primary caregiver since birth, wanted to move with her child to Nova Scotia. She had a major depressive disorder that had kept her from working. Her physician had recommended that she move to Nova Scotia where she had family and other emotional support. There are some parallels to this case because the mother was concerned she would not be able to afford to live in the same area in Vancouver as the father. Furthermore the father had, in the past, drunk excessively, and he had been verbally abusive to the mother in front of the child. He apparently stopped drinking and had taken steps to reduce his abusive behaviour since the parties separated.

[76] Goepel J.A., at para. 135, emphasized, however, that the mother had been the child's "primary caregiver for almost all of his life" and that the child was a "troubled

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child" who would benefit from being surrounded by a loving extended family. Both of these factors are absent in this case.

[77] Similarly, in *McArthur v. Brown,* 2008 BCSC 1061 at paras. 150–62, the trial judge allowed a mother, who was the primary caregiver for her triplets and who suffered from depression, to relocate to where her family lived.

[78] A further concern, of a principled nature, arises. The relevant case law recognizes that litigation is adversarial, that it can lead to hostility and bitter feelings, and that this is particularly true in the case of matrimonial litigation: *Liedtke v. Liedtke*, 1999 BCCA 364 at para. 23. This Court has stated that "generally the animosity parents feel for each other must not be allowed to defeat either their obligation to do what is best for their children or to avoid arrangements that are in the best interests of their children": *Vincent v. Roche-Vincent*, 2013 BCCA 304 at para. 27.

[79] I do not say that there are not, or will not, be cases where the hostility between parents interferes with their ability to jointly parent a child. But this is not that case. This is apparent both because the trial judge did not suggest that these children were being negatively impacted in any way by the parties' ability to communicate, and because the issue of hostility was, again, not a significant concern to Ms. Barendregt or her counsel. At a minimum, this must speak to the severity of that issue.

[80] A survey of the jurisprudence of this Court indicates that, in the main, sole custody or parenting responsibility may be awarded to one parent due to an alienation of affection, conflict between the parties, or abuse by one or both parents in circumstances where there is evidence that the impugned conduct is directly harming the parties' children or where the conduct is much more egregious than the findings and circumstances in the present case.

[81] In *Bain v. Bain*, 2008 BCCA 49 at para. 18, the Court referred to "overwhelming" evidence that the parties could not communicate to co-parent their children. In this case, conversely, the record is replete with references to the parties continuing to

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communicate in a civil manner when discussing their children. In *A.A. v. S.N.A.*, 2007 BCCA 363 at para. 3, the Court stated that it was certain that the parties' child would suffer "serious psychological damage" if she remained in the care of the mother. In *Boynton v. Boynton*, 2014 BCCA 142 at paras. 9–20, 42, the Court detailed the lack of cooperation between the parents and the mother's history of alcohol abuse, abusing the father, and disregarding various court orders.

[82] Conversely there are numerous cases where joint custody or shared parenting has been ordered notwithstanding some history of acrimony or difficulty between the parents: see e.g. *L.M.T. v. R.S.T.*, 2008 BCSC 890 at paras. 215–21; *R.A.C. v. V.L.C.*, 2009 BCSC 825 at paras. 146–48; *M.J.T. v. D.M.D.*, 2012 BCSC 863 at paras. 150–54.

[83] The foregoing propositions are supported when viewed through a different lens. If Mr. Grebliunas had agreed to move to Telkwa, he and Ms. Barendregt would have continued to share custody and parenting responsibilities. There was no suggestion or argument from either party otherwise. This reality makes Ms. Barendregt's relocation to Telkwa with the children problematic. If the parties could both parent in Telkwa, notwithstanding some ongoing friction, it is hard to understand how that same friction would support a relocation order.

[84] Unfortunately, many parents interact poorly. This is usually dealt with through the assistance of a parenting coordinator or otherwise. But it does not, without more, normally warrant a change in custody or parenting responsibilities, absent extreme circumstances or absent evidence that the parties' children are being affected adversely.

[85] Still another issue arises. I have said that a significant reason that justified Ms. Barendregt moving to Telkwa was the concern about her need for emotional support that was not available to her during the marriage and that would not be available to her in the Okanagan. The trial judge considered the children "would at least

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indirectly benefit from their mother residing in Telkwa, in addition to directly benefiting from close contact with their maternal grandparents and Ms. Barendregt's siblings."

[86] With this conclusion in hand, it was necessary, however, for the trial judge to consider whether the children should stay in Kelowna with their father. His counsel had proposed this, albeit in passing. The trial judge's failure to do so, even while recognizing that Ms. Barendregt had said she would move back to Kelowna if she was not permitted to relocate with the children, was an error. This is because either custodial parent was, in concept, able to care for the children. The fact that Ms. Barendregt indicated she would return to the Okanagan, and that that might give rise to some conflict, is a curious basis to suggest that she should then be able to move to Telkwa with the children.

[87] A consideration of the children's best interests "in the round," and of the factors in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at paras. 49–50, suggests that the best interests of the children would be served by the children staying in Kelowna with their mother and father. Both parents were custodial parents. Both were good parents. The children had grown up in Kelowna. Their friends were there. Their paternal grandparents had moved there or were in the process of doing so. Permitting the relocation was inconsistent with the object of maximizing contact between the children and both their parents. Indeed the relocation was likely to permanently and profoundly alter the relationship of the children with their father.

[88] One last practical point is relevant. The trial judge considered that "[t]he emotional weight of having to establish a new life on her own, of learning to parent independently, and possibly of having to continue to cope with the emotional outfall of continuing close contact with Mr. Grebliunas" all militated in favour of Ms. Barendregt moving back to Telkwa. I leave aside that these considerations appear to be directed to Ms. Barendregt's well-being and not to the best interests of the children. The trial judge had earlier indicated that he believed the children would benefit from these factors, at least "indirectly."

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[89] If, however, one considers a normal case of shared parenting responsibilities, on a week-on, week-off basis, the children would have been with their father for a week. Ms. Barendregt would not need any assistance with the children during that period of time. During the week that the children were with their mother, they would be in school during the week and, if she required assistance in the evenings or on the weekend, it would be necessary for her, as is the case with many single parents, to find that help. The reality is that there would be relatively little need for the parties to interact. What is hoped for in the interactions of divorced parents is civility and respect. What is required is that those interactions not adversely affect the well-being and best interests of their children. Many parents in strained circumstances interact by text or email. In the event Mr. Grebliunas acted or expressed himself inappropriately, that could be addressed in any one of a number of ways.

[90] Accordingly, for the various principled reasons and practical considerations that I have described, I do not consider that the trial judge's concerns about the "relationship between the parties," or his concerns about Ms. Barendregt's need for some emotional support, outweigh the benefits to the children of remaining in Kelowna. Instead, I consider that the best interests of the children would be served with their primary residence being in Kelowna and with their being parented by both their parents.

[91] I would admit the new evidence, allow the appeal to the extent of setting aside paragraphs 1–6 of the order made at trial, which concern parenting, and order that the children be returned to Kelowna. I would further order that the parties enter into a shared parenting and shared guardianship regime. I am mindful that the impact of COVID-19 may impede the ability of the children to move back to Kelowna and the placement of the children in new schools. Accordingly this order is to take effect as soon as reasonably possible and, in any event, no later than three months from the date it is made. Until the children are moved to Kelowna, those terms of the existing order that grant Mr. Grebliunas parenting time are to remain in place.

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[92] One last matter arises. The trial judge, for reasons that were not developed, dismissed Ms. Barendregt's claim for spousal support. In light of the orders now being made, it may, or may not, be appropriate to revisit that issue.

[93] The parties are to bear their own costs of the appeal.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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CITATION: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. 2020 ONSC 3659
COURT FILE NO.: CV-20-00637301-00CL (Clover/Halo)
CV-20-00637297-00CL (Yorkville)
DATE: 20200615

2020 ONSC 3659 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BCIMC CONSTRUCTION FUND CORPORATION and BCIMC SPECIALTY FUND CORPORATION, Applicants

AND:

THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. and 480 YONGE STREET LIMITED PARTNERSHIP, Respondents

AND BETWEEN

BCIMC CONSTRUCTION FUND CORPORATION and OTERA CAPITAL INC., Applicants

AND

33 YORKVILLE RESIDENCES INC. and 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP, Respondents

BEFORE: Koehnen, J.

COUNSEL: *Geoff R. Hall, Heather Meredith and Alexander Steele* for the Receiver, PricewaterhouseCoopers Inc.

David Bish, Adam M. Slavens, Jeremy Opolsky, for the Applicants, BCMIC

Virginie Gauthier, for the Applicant Otera Capital Inc.

David Gruber for Concord Land Developments Limited

Steven Graff, Ian Aversa, Jeremy Nemers, for the Respondents

Jonathan Rosenstein for Aviva Insurance Company of Canada and Westmount Guarantee Services Inc.

Kenneth Kraft for certain Clover Purchasers

Dominique Michaud for a Group of Halo Unit Purchasers

Fred Tayar, Colby Linthwaite for OTB Capital Inc.

Ryan Hanna for 2379646 Ontario Inc.

Maria Konyukhova for PJD Developments

Christopher J. Henderson for City of Toronto

Haddon Murray for Tarion Warranty Corporation

Shara Roy, Sahar Talibi for Homelife New World Realty Inc., Paul Lam, Homelife Landmark Realty Inc., TradeWorld Realty Inc., Landpower Real Estate Ltd., Master's Choice Realty Inc., formerly known as Re/Max Master's Choice Realty Inc. and Michael Chen

Patricia Joseph for GFL Infrastructure Group Inc.

Ben Goodis for Quality Sterling Group

Rob Moubarak, Jonathan Frustaglio, Marissa Rebane for Strada Aggregates

Paul Guaragna for Global Precast Inc. and Affinity Aluminum Systems Ltd.

Nick Stanoulis for Stancorp Properties Inc.

HEARD: June 4, 2020

ENDORSEMENT

[1] At the request of BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation (collectively "BCIMC" or the "Applicants") I assigned three large condominium construction projects in Toronto into receivership at the end of March 2020, the reasons for which are indexed at 2020 ONSC 1953. More precisely put, each project is owned by a single purpose, project specific general partner on behalf of a limited partnership. The general partner and the limited partnership of each of the three projects were assigned into receivership.

[2] The Receiver of those projects now brings a motion to approve a Sale and Investor Solicitation Process ("SISP") for each of the projects. For the reasons set out below, I grant the SISP for the Yorkville project as requested, decline to approve the SISP for the Clover project and approve the SISP for the Halo project as amended.

[3] I heard the motions on Thursday June 4, 2020, and released a dispositive order on Sunday June 7 with reasons to follow. I set out my reasons below.

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The Yorkville Project

[4] The Yorkville project is located at 33 Yorkville Ave between Bay and Yonge Streets in Toronto. It was envisaged as two condominium towers, one 43 storeys, the other 69 storeys with 1,079 residential units. Excavation is well underway but no construction of the towers has begun.

[5] As of March 2, 2020, BCIMC had advanced $122,432,764.85 to the Yorkville Project under various loan facilities as well as $79,592,744.24 in letters of credit. In addition, a co-applicant in respect of Yorkville, Otera Capital, had also advanced funds to Yorkville.

[6] There are 918 purchasers of units in Yorkville who have paid a total of approximately $160 million in deposits.

[7] BCIMC has first ranking security. There are three other major secured creditors on the project. Aviva Insurance Company of Canada has second and fourth priority mortgages. KingSett Capital Inc. has third ranking mortgages. Construction liens have also been registered against the properties.

[8] Aviva, KingSett and a lawyer for a group of unitholders appeared on the motion. None opposed the relief sought. The debtor and titleholder of the Yorkville Project did not oppose the relief sought either. As a result, I granted the relief on June 4.

The Clover Project

[9] The relief sought with respect to Clover is more controversial.

[10] The Clover project is located at 595 Yonge St., north of Wellesley St. in Toronto. It comprises two towers; one 44 storeys, the other 18 storeys containing a total of 522 residential units. Clover is the most advanced of the three projects. Building is well underway with the higher floors now under construction.

[11] As of March 2, 2020, BCIMC had advanced over $143,000,000 on various loan facilities plus approximately $3,000,000 in letters of credit on Clover. In addition, BCIMC has advanced funding during the course of the receivership.

[12] BCIMC has both first and third ranking security against the Clover project.

[13] There are 499 purchasers of units in Clover who have paid a total of approximately $49 million in deposits.

[14] The proposed SISP in respect of Clover includes a stalking horse bid by a BCIMC fund other than the ones that have advanced money to date. The stalking horse bid includes a break fee of 1% and would take out all secured debt except that held by OTB Capital. The OTB Capital debt reflects a mortgage originally held by the developer, Cresford Group which it

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assigned to OTB after Clover was placed into receivership. The stalking horse bid does not address other debts such as those of suppliers to the project.

[15] The Receiver's SISP proposal is supported by BCIMC, counsel for the unitholders and counsel for one potential bidder apart from the stalking horse bidder.

[16] The Receiver's proposal is opposed by Cresford, Concord Land Developments, OTB capital and at least one unsecured creditor. Opposition to the SISP is based on a proposal by Concord to pay out immediately the BCIMC debt, all of its costs and all of the receivership costs.

[17] The Receiver and those who support the SISP object to the Concord proposal on three grounds: (i) Concord has no standing; (ii) the proposal is too unclear; and (iii) the proposal improperly interferes with the receivership process.

(i) Concord's Standing

[18] Proponents of the SISP submit that Concord has no standing to pay out the BCIMC debt because it is a stranger to the receivership. If Concord wants to acquire Clover, it should participate in the SISP like any other potential bidder.

[19] While it was referred to as the "Concord Proposal" during the hearing, it is more properly the debtor's proposal. Concord is proposing to lend money to the debtor to enable the debtor to pay out BCIMC. It matters little whether the funds are coming from the debtor directly or from a party financing the debtor, like a bank or Concord. The point is that the debtor, through whatever means, is ready willing and able to pay out the entirety of the BCIMC debt.

[20] Before the hearing, Concord had sent me banking information that demonstrated its ability to pay out the debt immediately.

[21] During the course of the initial receivership application in March, I was advised that Concord and Cresford were about to enter into a transaction at any moment that would see Concord assume ownership of all of the shares of the Clover debtor. At that time, there was, however, no consummated transaction nor was Concord then prepared to pay out the BCIMC debt.

[22] To the extent Concord's status is an issue, it changed approximately 10 minutes into the hearing when I was advised that Concord had completed a transaction pursuant to which it had become the sole shareholder of Clover.

(ii) Lack of Clarity in the Concord Proposal

[23] The Receiver opposes the Concord proposal because it is not sufficiently clear.

[24] Concord says that after paying off the BCIMC debt, it would move to convert the receivership into a CCAA proceeding. In the course of the CCAA proceeding, Concord would

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want to disclaim the unit purchasers' agreements and negotiate new agreements. Unit holders who did not want to renegotiate would recover their deposits in full.

[25] While a CCAA proceeding does pose some lack of clarity for the purchasers, any bidder in the SISP would also be looking to disclaim and renegotiate the unit purchase agreements. The Receiver submits that the SISP is likely to produce a better result for unit purchasers because it entails a competitive bidding process at the end of which the Receiver will select qualified bidders to participate in a further auction for the project. The Receiver says that the competitive nature of the bidding and auction process is likely to produce a better result for unit purchasers than would a two-party negotiation in a CCAA proceeding.

[26] Mr. Kraft acts for approximately 200 unit purchasers. He submits that the unitholders want to: have certainty, move forward and avoid further delay. In his view, the SISP currently offers more certainty than does a CCAA proceeding because the SISP is associated with tighter timelines. Mr. Kraft volunteers, however, that this might not be the case in a week from now if Concord is permitted to convert the receivership into a CCAA proceeding and moves promptly to renegotiate.

[27] The fact that the unitholders might obtain a better result in a competitive bidding and auction process is a fair one. There are however competing considerations to balance that potential benefit. By way of example, the bidding and auction process is likely to involve many moving parts. One readily foreseeable scenario is that the bids are relatively complex and that the process will not necessarily focus solely on the renegotiation of unitholder agreements. There are a significant number of other creditors involved who will need to be dealt with in the SISP. That would make choosing between bids potentially complex and would reduce the unitholders ability to negotiate. As noted, Concord envisages paying all creditors in full which may make renegotiation of purchase contracts a more central feature of the CCAA than it would be in the receivership.

[28] The unitholders have also expressed an interest in speed and certainty. The stalking horse bid would give the stalking horse bidder two years to decide whether it will complete the project as a condominium. If so, the stalking horse bidder will offer purchasers a discount of $100 per square foot from the market price at the time the units are resold as condominiums. While I appreciate that the stalking horse bid may not succeed (and indeed, if it works properly will not be the successful bid), the two years it contemplates nevertheless offers neither speed nor certainty. Having Concord assume carriage of the project can occur as soon Concord pays out the debt. A successful bidder under the SISP is not likely to assume carriage of the project before the middle or end of September at the earliest.

[29] Concord is one of Canada's largest and most experienced condominium developers and builders. It has developed over 150 condominium towers with over 39,000 units in Canada. It currently has more than 50 development projects at various stages of planning and development in Canada, the United States and the United Kingdom. If Concord is allowed to assume carriage of the project it will likely want to complete construction and sale of units as quickly as possible to avoid the cost of having large amounts of financing or capital locked up in the project.

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[30] The duration of the CCAA proceeding is one over which the court has some influence. The court can also assist in ensuring a level playing field for the renegotiation of purchase agreements. By way of example, counsel for the unit purchasers has asked the Receiver to produce information it has about costs of construction. The Receiver has declined to produce that information because of confidentiality concerns. That makes good sense in the context of a bidding process. If there is no bidding process for Clover, the Receiver may be more willing to share its cost information with counsel for the unit holders or it may be more appropriate to order that it be shared. I underscore, however, that I have made no decision on that issue and have not even heard argument on it. The possibility of sharing that information does, however, offer an opportunity to create a more level playing field in the renegotiation of the purchase contracts.

[31] Mr. Hanna appeared for an unsecured creditor owed approximately $3.5 million. He supports the Concord proposal because Concord intends to pay all construction suppliers fully in the course of completing Clover. Other bids may not necessarily do that. The stalking horse bid does not.

(iii) Interference with the Receivership Process

[32] The Receiver submits that it would create a dangerous precedent to give a debtor a preferential right to redeem property well into a receivership. Mr. Hall submits that the purpose of a receivership is to have the Receiver take control of the entire process and that it would be inappropriate to permit others to do an "end run around" the receivership.

[33] The Receiver's submission is in part, reflected in a standard provision in receivership orders which is found in paragraph 11 of the Clover order. It provides:

> 11. THIS COURT ORDERS that **all rights and remedies** against the Debtors, or any of them, the Receiver, or **affecting the Property**, including, without limitation, licences and permits, **are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court**, … (Emphasis added)

[34] On its face, the bolded language in paragraph 11 would appear to preclude the debtor's right to exercise its equity of redemption without leave of the court.

[35] The Receiver points to *B&M Handelman Investments Limited v. Mass Properties Inc*., 2009 CanLII 37930, where Pepall J. (as she then was) dealt with language similar to paragraph 11 and held:

> In the face of these provisions, Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A Receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by

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> a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

BDC v. Marlwood Golf & Country Club, 2015 ONSC 3909 and *Home Trust Company v. 2122775 Ontario Inc.* , 2014 ONSC 1039 are to similar effect.

[36] The Receiver fairly volunteers that the issue arose in *Handelman* and the cases that follow it at a much later stage than it does with respect to Clover. In *Handelman*, the Receiver had already run a bid process, had selected a purchaser and was moving to approve the purchase. Different considerations arise at that late a stage. Allowing debtors to redeem property on the sale approval motion would discourage potential purchasers from submitting bids in the first place and threaten the utility of the receivership process more generally. Here the debtor is seeking to redeem before a SISP is approved.

[37] A competing consideration to the concerns raised in *Handelman*, is the debtor's right to exercise its equity of redemption, that is to say to pay out the debt and retain its property.

[38] Numerous courts have commented on the importance of the equity of redemption. The contemporary starting point of the analysis is the Supreme Court of Canada's decision in *Petranik v. Dale*, 1976 CanLII 34 (SCC), [1977] 2 S.C.R. 959 where Chief Justice Laskin held at p. 969:

> What emerges from the *DeBeck* case is a reassertion of the well-established proposition that the equitable right to redeem is more than a mere equity but is, indeed, an interest in the mortgaged land which is not lightly to be put aside and which is enforceable by courts of equity: see Falconbridge, *Law of Mortgages* (3rd. ed. 1942), pp. 50-53. I question, therefore, whether it can be put aside by a rule of practice that would preclude a Court from considering all the circumstances that may support a discretion to allow redemption, albeit on terms.

[39] Dickson J. (as he then was) echoed similar sentiments at page 995:

> I conclude by reiterating that an equity of redemption is an interest in land, which the mortgagor can convey, devise, settle, lease or mortgage like any other interest in land (Megarry and Wade, *The Law of Real Property* (3rd ed.) at p. 885, and Cheshire's *Modern Real Property* (10th ed.) at p. 568) and that equity has always jealously guarded the mortgagor's right to redeem.

[40] An owner's right to redeem remains a core principle of real estate law. See for example: *30724453 Nova Scotia Company v. 1623242 Ontario Inc*., 2015 ONSC 2105 paras. 75, 98 – 100; *Textron Financial Canada Limited v. Chetwynd Motels Ltd*., 2010 BCSC 477 paras. 58 – 74.

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[41] How then should I balance these competing interests in this case and determine whether I should grant leave under paragraph 11 of the receivership order to allow the debtor to exercise its equity of redemption?

[42] Supporters of the Receiver's motion point to my findings about the debtor's misconduct in my reasons assigning the projects into receivership. They submit that a debtor who has misled its mortgagee should not be entitled to redeem.

[43] While I did make adverse findings against the debtor's conduct in those reasons, misconduct by a debtor gives rise to that degree of remedy necessary to correct the harm done by the misconduct. It does not necessarily mean that the debtor will be deprived of its property.

[44] While courts should be mindful of the clean hands principle when considering requests by the debtor in these circumstances, they should be equally mindful of a potentially underlying commercial reality: the possibility that the creditor may have an interest in structuring a receivership to allow it to acquire the property at an attractive price which would enable the creditor to make considerably more money by depriving the debtor of its property than the creditor would ever earn by way of interest under a mortgage.

[45] While I am not saying that this is occurring here, there are circumstances that give rise to the potential for it to occur. By way of example, although BCIMC stated on the receivership motion at it wanted nothing further to do with the project and just wanted its money back, it has put in a stalking horse bid on the Clover and Halo projects which would see it paid a break fee. The Receiver has acknowledged that the properties are well known to the most logical potential purchasers and that there is considerable interest in them. If there is considerable interest, one might ask whether a stalking horse bid is truly necessary. At the same time, the timelines in the SISP, 60 days to gather bids and conduct an auction, are those that one would see in usual times. These are not, however, usual times. The SISP arises in the midst of a worldwide pandemic which has seen many businesses, and particularly financial institutions, operating virtually. Most bank offices remain closed. Operating virtually makes it more time-consuming to conduct due diligence and obtain financing, especially given that financing for a project like this would likely be syndicated. BCIMC is unlikely, however, to require the same sort of time to conduct due diligence because it is already familiar with the project as its long-term financer. In addition, BCIMC, is a large government pension fund that does not require syndicated financing. It already has large pools of capital available for investment. These factors give BCIMC advantages over other bidders that translate into the potential to acquire the property in a receivership at an attractive price.

[46] In considering these factors, I am not saying that they are present here nor am I suggesting that it would be improper for BCIMC to try to acquire the property at an attractive price in the receivership. Those are commercial opportunities that BCIMC is fully entitled to pursue. I am simply saying that these factors are part of the equities to consider before depriving a debtor of title to its property in circumstances where it is ready willing and able to pay out the creditor entirely.

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[47] The history of the proceedings and prejudice to different stakeholders are two further factors to consider when determining whether the debtor should have the right to redeem.

[48] With respect to the history of the proceedings, on the initial receivership application, the debtor proposed a CCAA proceeding. BCIMC opposed because it would end up remaining in the project longer than it wanted to. At the time, BCIMC indicated that it simply wanted its money back and wanted nothing more to do with the project: see the receivership reasons 2020 ONSC 1953 at para. 56. The debtor now proposes to give BCIMC its money back pretty much immediately.

[49] My reasons for assigning the project into receivership were driven in large part by the right of BCIMC to be repaid, the absence of any concrete proposal to do so and the unfairness of tying BCIMC to a debtor in whom it no longer had confidence: see for example paras. 64 – 69, 89, 91. The thrust of my reasons, and in particular of the paragraphs just referred, to was to leave open the possibility of the debtor resuming carriage of the projects by paying out BCIMC. The debtor is now able to do so unconditionally with respect to Clover.

[50] Has anything occurred since assigning Clover into receivership on March 27, 2020 that would make it unfair to any other stakeholder to permit the debtor to exercise its equity of redemption?

[51] BCIMC submits that it has funded the receivership and has spent time, money and energy into submitting a stalking horse bid.

[52] In the circumstances of this case, those factors do not outweigh the debtor's equity of redemption. In addition to paying out the original BCIMC debt, the debtor has offered to pay out the entire receivership debt, interest on the receivership debt, the costs of the receivership and the costs of BCIMC. This includes reasonable costs that BCIMC has incurred to prepare the stalking horse bid. I have made myself available for a speedy determination of what those costs should be in the event the parties disagree.

[53] Ms. Konyakhova appeared on behalf of PJD Developments, a potential bidder. She submits that Concord should not be given any privileges over other bidders who have waited patiently for the bidding process to occur. She underscores forcefully that bidding is the way to obtain the best offer.

[54] The concern that Concord receive no privileges over other bidders misconceives Concord's role. As noted earlier, Concord is not a bidder, it is the debtor's source of financing and is now the debtor's sole shareholder. While I can understand a potential bidder's frustration at being deprived of the opportunity to bid on a project, that is not enough to quash a debtor's right to redeem. There is no evidence before me that it would be prejudicial to receivership processes at large to allow the Clover debtor to redeem. I appreciate that the possibility of a pay out arose at the last moment but no one sought an adjournment to file evidence to respond to the proposed redemption.

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[55] PJD had hoped to be able to bid on the property and has been denied that chance. That puts PJD and other potential bidders into a significantly less prejudicial position than if they had spent the time and money to submit a compliant bid only to lose out to another bidder in the competitive process.

[56] The parties most likely to suffer prejudice by allowing the debtor to redeem are the unit purchasers. They believe they can achieve a better result in the competitive bidding process of a SISP than they can in a CCAA proceeding. To my mind that, however, is not, the real question.

[57] There is no doubt that the debtor would have had the right to pay out BCIMC on the initial receivership application. Had it done so, the debtor would have had relatively free rein to bring a CCAA proceeding. In those circumstances it is unlikely that unit purchasers could have prevented a CCAA process by arguing that a receivership sale was preferable to CCAA. The unit purchasers have suffered no change of position since March 27 that would make the analysis any different today. To the extent they have, they can still raise those arguments if the debtor moves to convert the receivership into a CCAA proceeding.

[58] As a result of the foregoing, I decline to approve the SISP for Clover and order that the debtor should have the opportunity to pay out the BCIMC debt, the receivership debt, and interest on both within 72 hours of receiving a pay out statement in respect of those debts.

Halo Project

[59] The Halo project is located at 480 Yonge St. south of Wellesley St. in Toronto. Its plans call for a 39-storey tower with 413 residential units. Halo is in early stages of construction.

[60] As of March 2, 2020, BCIMC had advanced approximately $73,000,000 in financing and $1,500,000 in letters of credit to the Halo project.

[61] BCIMC has first and third-ranking charges/mortgages in respect of real property.

[62] There are 388 purchasers of units in Halo who have paid a total of approximately $43 million in deposits.

[63] The Receiver proposes a SISP for Halo that mirrors the proposal for Clover. Mr. Michaud appeared to make submissions on behalf of the 140 purchasers of Halo units who have retained him. They support the SISP.

[64] The debtor seeks a four-week adjournment of the Halo SISP motion to allow it to finalize financing. During the hearing, Concord offered to finance the receivership during the adjournment period if BCIMC declined to do so. Concord's financing would be on the same terms as that of BCIMC. If the debtor does not come up with financing during the four week adjournment, Concord and the debtor agree that the SISP should proceed as presented.

[65] I declined to grant the adjournment and authorized the SISP to proceed in respect of Halo.

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[66] The distinguishing feature between Halo and Clover is that the debtor and Concord are not presently prepared to or able to pay out the BCIMC debt on Halo.

[67] The animating principle behind my reasons for assigning the projects into receivership was that BCIMC had advanced money, had been misled about the risk profile of the projects, had been misled, in part, about the use of funds, and, having been misled, should have the right to take control of the projects to protect its interests. That was subject to the debtor's right to pay out BCIMC in full if it were able to do so before any other party had relied on the receivership to an extent that would make it inequitable for the debtor to end the receivership by paying out BCIMC's debt.

[68] The debtor is still not in a position to pay out the debt on Halo. Concord clearly has the financial resources to do so but has chosen not to. This means that, for whatever reason, Concord prefers not to expose itself to the risk of the Halo in the present circumstances. Concord is fully entitled to make that choice. Concord is entirely at liberty to use or not use its assets for whatever purpose it wants.

[69] However, in the absence of assuming any of the risk, Concord is not in a position to direct the terms that govern the administration of Halo either through receivership or otherwise. Given that BCIMC continues to bear the risk of Halo, the process that it has chosen to manage that risk, the Receivership, should continue to govern.

[70] Nothing in the equities between the parties has changed with respect to the Halo project since it was assigned into receivership on March 27, 2020. BCIMC continues to hold a significant debt, indeed the debt is larger now than it was on March 27. For all the reasons that I articulated in my judgment with respect to the receivership order, BCIMC continues to have the right to enforce its debt as it sees fit. It has chosen to do so by way of receivership. Nothing has changed to make that inappropriate.

[71] The SISP does not preclude the debtor or Concord from participating in the project going forward. It can participate as a bidder as can any other party.

[72] The Clover and Halo bids were initially accompanied by a stalking horse bid by BCIMC with a break fee of 1%. During argument, the Receiver and BCIMC indicated that the stalking horse bid was a package deal, that is to say it was a bid on both projects or none. As counsel for BCIMC put it, Clover was the more desirable asset. If BCIMC could not maintain the stalking horse bid on Clover, it had no interest in continuing a standalone stalking horse bid on Halo. Given that the SISP on Clover will not proceed, the stalking horse bid on Halo has disappeared as a result of which I need not address the objections that certain parties raised about the break fee.

Communications

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[73] The Receiver seeks to include a provision in the Halo order that precludes communications between bidders and other stakeholders without the Receiver's consent. I have declined to include such a provision in the Halo SISP.

[74] The unit purchasers represented at the hearing oppose the provision as do Concord and the debtor. They submit that a key component of any workout is the ability of stakeholders to reach agreements with each other. That is best achieved with unfettered communication.

[75] The Receiver justifies the request by submitting that it is important that the Receiver have visibility into conversations between stakeholders and that it is problematic if the Receiver is not aware of the contents of those communications. The Receiver provided no detail about why it was problematic for discussions to occur without the Receiver knowing about the contents or the fact of those discussions. The Receiver offered no authority in support of its position apart from stating that a similar provision had been included in an order of this court in another proceeding. In the absence of reasons for that order I cannot determine whether it was on consent, unopposed or whether the circumstances in that case made the order otherwise appropriate.

[76] Although the Yorkville order contains a restriction on communication, that provision was unopposed, including by counsel for the purchasers of Yorkville units.

Disposition

[77] For the reasons set out above, I dispose of the motions as follows:

(a) With respect to Yorkville, the SISP order is approved as requested.

(b) With respect to Clover:

(i) The debtor or anyone acting on its behalf shall have the right within 72 hours of receiving a statement of the amount owing, pay-out the BCIMC, debt, including receivership lending plus interest. (I have been advised that the debtor paid out the debt in full since the hearing but before these reasons were issued.)

(ii) In addition, the debtor will be liable for the applicants' costs including receivership costs. I assume it may take more than 72 hours for BCIMC and the receiver to present their costs breakdown to the debtor, as a result of which the costs need not be paid within 72 hours of receiving the statement of the amount owing on the debt. If there is a dispute about costs, I will resolve the dispute and determine the amount of costs payable. The debtor shall pay the applicants' costs within 72 hours of my determining the amount payable.

(iii) If the debtor pays the amounts set out in sub-paragraph (i) within 72 hours then the debtor may move to dissolve the receivership or for any other relief it seeks with respect to Clover.

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(c) With respect to Halo:

(i) The SISP is approved but, given that BCIMC has advised that there will be no stalking horse bid on Halo if the debtor pays out the Clover debt, the Halo SISP will proceed without the stalking horse bid.

(ii) Communication amongst bidders and stakeholders (including unit purchasers) will not require the consent of or notice to the Receiver.

(iii) The disposition in the preceding paragraph may raise privacy or fairness issues with respect to communications with unit holders. By way of example, it might not be appropriate to allow bidders to contact unrepresented unitholders without having unitholders provide consent in advance. Similarly, it might not be fair to the bidding process to allow the debtor, who presumably has contact information for unitholders, to contact them while other bidders without contact information have no ability to contact unit holders. If there are concerns about the logistics of such communication, I will make myself available to resolve those during a case conference.

Koehnen, J.

Date: June 15, 2020

2020 ONSC 3659 (CanLII)

CITATION: BDC v. Marlwood Golf & Country Club, 2015 ONSC 3909
COURT FILE NO.: CV-15-10878-00CL
DATE: 20150622

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

AND:

MARLWOOD GOLF & COUNTRY CLUB INC.

Respondent

BEFORE: Newbould J.

COUNSEL: *Wojtek Jaskiewicz and Bobby H. Sachdeva,*, for the Receiver BDO Canada Limited

Anthony O'Brien, for the Applicant

R. Graham Phoenix, for T.P.C.@Marlwood Inc.

Tony N. Nguyen, for the Respondent

HEARD: June 15, 2015

ENDORSEMENT

[1] The receiver moved for approval of a sale transaction in which an 18 hole golf course property in Wasaga Beach was sold to a purchaser named the Smardenka Group and then assigned to T.P.C.@Marlwood Inc. The approval was opposed by the respondent, the first mortgagee of the property, who now wishes to redeem the first mortgage and has brought a motion for that relief. At the conclusion of the hearing I granted the motion of the receiver

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approving the sale and dismissed the motion by the respondent, with reasons to follow. These are my reasons.

[2] Marlwood was operated by Trilinks Golf Limited in conjunction with another golf course in Wasaga Beach called the Links at New England Village. Marlwood, Trilinks and the Links are all related and owned by Baywood Homes Partnership. The receiver was advised that Trilinks and Baywood were experiencing cash flow difficulties in 2014. Baywood entered into an agreement under which a third party named Simmons took possession of Marlwood late in the 2014 golf season and operated the golf course. During the winter of 2014-15 Marlwood and Simmons had a falling out and no utilities were paid.

[3] The first mortgage by Marlwood to BDC was made in 2007 for $2.6 million. It went into default on July 31, 2014. Demand by BDC on the first mortgage was made on October 9, 2014.

[4] On February 17, 2015 BDC applied for the appointment of a receiver of the property of Marlwood. By that date there were no services to the Marlwood clubhouse and all leased golf carts and turf equipment had been removed by the lessors as payments for leased equipment and utilities had not been made. The golf course superintendent had also not been paid. Simmonds had offered memberships for 2015 to the members of Marlwood and money from the members who accepted had been deposited into a Marlwood account.

[5] On February 17, 2015 Justice Spence adjourned the BDC application for the appointment of a receiver to March 3, 2015 and appointed BDO as a monitor of the property of Marlwood. On March 3, 2015 Justice McEwen continued the appointment of BDO as monitor, ordered a $25,000 forbearance fee to be paid by Marlwood and ordered that Marlwood sign a consent to the appointment of a receiver to be held in escrow until March 31, 2015 subject to terms including the right of BDC to act on the consent if the second mortgagee failed to consent by May 6, 2015 to the terms of a refinancing of the first mortgage proposed by Toronto Capital Corp.

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[6] The second mortgagee is Romspen Investment Corporation which holds a mortgage for $55 million registered on July 9, 2014. It is a collateral mortgage and part of a larger security package in which Romspen has first mortgage security over several other pieces of land including adjacent development land and another golf course. Romspen failed to consent to the refinancing of the BDC first mortgage by May 6, 2015. Accordingly BDO was appointed receiver of the property on May 12, 2015. Marlwood did not oppose the appointment of BDO as receiver. In its motion material before me, Marlwood requested an order setting aside the receivership order, but this was abandoned at the hearing.

[7] The order appointing BDO as receiver authorized it to market the property. BDO determined that if it marketed the property quickly, it might be able to complete a sale of the assets by early June allowing a purchaser to operate the course during the busiest summer months of July and August. While it would have been possible for the receiver to operate the course for play during the sales process, it believed that the costs of doing so would not be recovered by income taken in before a sale could be achieved.

[8] The receiver undertook a sales process. It is described in detail in the receiver's report at paras. 29 to 36. I am satisfied that it was a reasonable sales process and that the property was sufficiently exposed to the market for a reasonable period of time to enable prospective bidders to assess the property and bid for it. Marlwood contends that the property was not listed through a "real estate agent experienced in golf courses". There is no evidence that such a real estate agent exists in the market or that such an agent would have achieved any better result than the receiver did. The receiver advertised twice in the Globe and Mail, local newspapers and online. It also engaged a Canadian firm with expertise in the golf industry which provided an electronic notice of the sale to approximately 4,000 industry parties drawn from its own data base. The sales process resulted in 60 enquiries. Twenty-two persons signed confidentiality agreements and obtained access to the receiver's data room. Two offers were received.

[9] Marlwood contends that the sale was an improvident sale. I cannot so find based on the evidence. BDC obtained an appraisal from an accredited appraiser with an effective date of

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February 9, 2015. BDO obtained its own appraisal from an accredited appraiser with an effective date of February 24, 2015. The bid from the successful purchaser is very favourable compared to the appraisals. The appraisals appear to be thorough and well supported. The appraisers each opined that the highest and best use of the property was as a golf course.

[10] Marlwood complains that it did not have access to the sale agreement or to the appraisals obtained by BDC and BDO. The sale agreement and appraisals have been filed under seal, as is usual in the Commercial List, in case any approved sale fails to close and the property must be again exposed to the market place. The integrity of any future sales process would be jeopardized if these documents were available to any future bidders. Marlwood had no special right to these documents. The receiver declined to provide these documents to Marlwood and I cannot quarrel with that decision. Indeed, Mr. Ralph Canonaco, a director of Marlwood and together with his brother Tony Canonaco the two principals of Marlwood, filed an affidavit in which he referred to the down payment on the sale and had no concern estimating the purchase price based on the amount of the deposit. This was not helpful to the process in the event that the sale were to fall through. In my view, the *Sierra Club* test has been met to require the documents to be filed under seal until the sales process has been completed and a sale to the successful purchaser has been completed.

[11] Mr. Canonaco asserted in his affidavit that the Marlwood assets should be valued at approximately $2 million, much higher than his estimate of the sale price. There is no cogent evidence from him as to how he arrived at a $2 million value, nor have any appraisals been provided on behalf of Marlwood to support it. I do not accept his assertions of value as being in any way reliable.

[12] I am satisfied that the sales process carried out by BDO in the circumstances was reasonable and appropriate and meets the test of the *Soundair* principles in *Royal Bank of Canada v. Soundair Corp*. (1991), 4 O.R. (3d) 1 (C.A.).

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[13] Marlwood moved for an order permitting it to redeem the first mortgage. On June 9, 2015 BDC provided a mortgage discharge statement stating that the amount outstanding was $2,129,477, inclusive of principal, interest and costs of BDC incurred in enforcing its mortgage, including expected receiver costs. At the hearing, counsel for Marlwood stated that he had a certified cheque in hand to pay that amount. In all of the circumstances, I declined to permit the first mortgage to be redeemed. The essential reason is that it would upset the integrity of sales process undertaken by the receiver.

[14] In its affidavit material sworn June 15, 2015, BDC takes the position that it supports the sale to the Smardenka Group. In argument, counsel for BDC said BDC believes in the court sales process but took no position on whether Marlwood should be entitled to redeem its mortgage. While it was not said, the fact that BDC would get less on the sale of the property than if its mortgage were immediately redeemed, may mean that BDC is satisfied that Marlwood and any guarantors would be good for the shortfall on the mortgage covenant.

[15] Immediately after the appointment of the receiver, the principals of Marlwood told the receiver that it wished to redeem the BDC mortgage. The earlier proceedings in which the application to appoint a receiver had been adjourned featured some offer of financing from Toronto Capital Corp. that Romspen had not consented to. In mid-March, Marlwood advised it was in the process of arranging financing and the receiver provided an estimate of the amount required to redeem. However no redemption at that time took place.

[16] During the currency of the sales process, the receiver was advised that the principals of Marlwood had reached a conditional agreement with BDC for an assignment of the BDC security. The receiver understood that this information had been communicated as fact within the local community by the principals of Marlwood and the receiver received many inquiries regarding the return of the golf course to Marlwood. Some parties interested in the assets of Marlwood asked the receiver about the rumours that Marlwood was going to take back its assets and what effect that would have on the sale process. The receiver believes that based on conversations with interested parties, a number of potential purchasers did not make bids because

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of the rumours of redemption and the activities of the principals of Marlwood. An e-mail from one interested party to the receiver of May 6, 2015 is troubling. It refers to threats from Mr. Ralph Canonaco that led to the third party backing away from a bid as he viewed the sales process as tainted. Mr. Canonaco did not deny this in his affidavit.

[17] The receiver established May 8, 2015 as the deadline for bids to be submitted. On that day, just prior to the bid deadline of 12:00 noon, the receiver was advised by counsel for BDC that they had been contacted by counsel for Toronto Capital Corp., Marlwood's mortgage consultant, that funds were in place to redeem the mortgage. By this date the bid from both bidders, including the winning bid from the Smardenka Group, had been received. The bids were irrevocable until 5 p.m. on May 13, 2015 and after acceptance of the winning bidder, that bidder had 15 days to complete due diligence.

[18] On May 13, 2015 at 10:45 am counsel for BDC advised the receiver that the deal with Toronto Capital Corp. was officially dead and that the solicitor for the investor group had been directed to return the funds to his clients. On that day the receiver contacted the two bidders and requested improved bids. The improved bids were received and on May 15, 2015 the bid by the Smardenka Group was accepted.

[19] Mr. Alex Smardenka received what he described as two unsolicited visits. The first was from an Eva Ricci and Ralph Canonaco on May 31, 2015. Mr. Smardenka said that Mr. Canonaco strongly suggested that it was in their best interest to forge a partnership with him for the golf course or that Mr. Canonaco and his legal team would put a swift end to the Smardenka purchase of the golf course and that Mr. Canonaco would again be the owner. Mr. Smardenka took this as a threat. The second was the next day on June 1, 2015 from a Michael Sannella and a person named Frank who said they were from Toronto Capital Corp. working on behalf of Mr. Canonaco. They insisted that Mr. Smardenka enter into a partnership with Mr. Canonaco or that the Smardenka purchase of the golf course would not happen. Mr. Smardenka said he was rattled by their threats and so suggested they put their offer on paper for his lawyer to review. They said that this would not be proper in the eyes of the court and so refused to provide any offer. Mr.

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Sannella also said that for the deal to work Mr. Smardenka must hire his son for $150,000 per year and that his job would be to redevelop the golf course into residential. Mr. Sannella said that Baywood was not in the golf course business but in the land development business and that they would reclaim Marlwood with or without Mr. Smardenka. Mr. Smardenka recorded the visits in an e-mail to the receiver on June 1, 2015.

[20] On June 2, 2015 the solicitors for BDO wrote by e-mail to Mr. Canonaco and Mr. Sannella of Toronto Capital Corp. and advised that the visits to Mr. Smardenka were a deliberate interference with the receiver's mandate and were designed to disrupt the receiver's intended action to sell the golf course. They suggested that the recipients of the e-mail feel free to have their lawyers get in touch if they wished to discuss the matter. No response to the e-mail was received back.

[21] Mr. Canonaco admits he called and met with Mr. Smardenka. He puts a different light on it. He says that he presented Mr. Smardenka with an opportunity of a joint venture. He said at no material time was it his intention to undermine the receiver's efforts. He says that at the time, he disagreed with the receiver's plans to sell Marlwood to a third party and he believed that by working together with the purchaser, the affected stakeholders, being BDC, the receiver, Mr. Smardenka and Marlwood's shareholders and guarantors could benefit. He denies threatening Mr. Smardenka.

[22] There has been no cross-examination on the affidavits of Mr. Smardenka or Mr. Canonaco and I hesitate to say too much about the evidence of the visit from Mr. Canonaco to Mr. Smardenka. I note, however, that no evidence from Eva Ricci was provided about that meeting to deny what Mr. Smardenka has stated took place. Even on Mr. Canonaco's version of his visit to Mr. Smardenka, it is an indication that Mr. Canonaco was prepared to interfere in the sales process. He could have waited until the sale closed and then approached Mr. Smardenka. It is clear from his affidavit that Mr. Canonaco was against the receiver selling the property to a third party.

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[23] I accept the evidence of Mr. Smardenka as to what took place on June 1, 2015 in the visit from Mr. Sannella of Toronto Capital Corp. Neither Mr. Sannella nor Frank Mondelli of Toronto Capital Corp. gave any evidence denying what Mr. Smardenka says happened, and Mr. Canonaco did not say anything in his affidavit about the visit by Mr. Sannella or deny that Mr. Sannella was speaking for him. In his affidavit, Mr. Canonaco just said that when he met with Mr. Smardenka, he told him that Michael Sannella and Frank Mondelli of Toronto Capital Corp. would be calling to discuss the matter further. I take it from the evidence that Messrs Sannella and Mondelli were speaking on behalf of Mr. Canonaco. The threats made by them to Mr. Smardenka indicate a complete interference with the sales process undertaken by the receiver and indicate a lack of good faith on the part of Mr. Canonaco and Toronto Capital Corp.

[24] At the hearing, counsel for Marlwood said that he had in his possession a certified cheque signed by the solicitors of Toronto Capital Corp. for the amount to redeem the BDO mortgage. He said that Romspen, the second mortgage, now was prepared to consent to the new financing. What caused the change from May 13, 2015 when Toronto Capital Corp. had said that the deal was dead was not explained by any evidence, nor was any evidence provided as to why any problems with the earlier Toronto Capital Corp. endeavours to provide financing to redeem the mortgage could not have been solved before the sales process was to be completed. The mortgage had been in default for nearly one year and, when Toronto Capital Corp. announced on May 13, 2015 that the refinancing was dead, the receiver was justified in completing the sales process and selling the property.

[25] A mortgagee has no automatic right to redeem in these circumstances. In another case involving a mortgagee who on a motion to approve a receiver's sale applied for the right to redeem the mortgage in default, *B&M Handelman Investments Limited v. Mass Properties Inc.,* Pepall J. (as she then was) denied the request to redeem. Her statements in that case are completely apt to the present situation. After referring to the terms of the receivership order, which were the same as in this case, she stated:

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> **22** In the face of these provisions, Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[26] While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. See Galligan J.A. in *Soundair.* Moreover, the interests of a purchaser in a property run sales process by a receiver are to be considered. In *B&M Handelman* Pepall J. also stated:

> **27** The Receiver considered the interests of all parties. As Galligan J.A. stated in *Soundair*, it is well established that the primary interest is that of the creditors of the debtor but other persons' interests require consideration as well. This may include the interests of a purchaser such as Mr. Bharwalia who has negotiated an agreement with a Court appointed receiver.

[27] In this case, the sales process was properly run. Redemption of its mortgage by Marlwood in these circumstances would interfere with the integrity of that process. I also find that the respondent has not established that it has come to court with clean hands entitling it to the order sought permitting it to redeem its mortgage. The respondent has not acted in good faith.

[28] In the circumstances, it is appropriate that the sale to the Smardenka Group and assigned to T.P.C.@Marlwood Inc. be approved and that the motion by the respondent Marlwood to redeem the first mortgage be dismissed.

Newbould J.

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Date: June 22, 2015

2015 ONSC 3909 (CanLII)

COURT FILE NO.: 09-CL-7995
DATE: 2009-07-14

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

2009 CanLII 37930 (ON SC)

RE: B&M HANDELMAN INVESTMENTS LIMITED et al v. MASS PROPERTIES INC. AND MASS BANQUET HALLS INC.

BEFORE: PEPALL, J.

COUNSEL: *David Preger*, for the Receiver, Harris and Partners Inc.

Allan V. Mills, for Mass Properties Inc. and Mass Banquet Halls Inc.

James S.G. Macdonald, for Samra Singh

Satwant Merwar, for 2205884 Ontario Limited

S. Sood, for Castimis Inc. and Manjit Kaur Sidhu

S. Schneiderman, for Tara Singh

Pepall J.

ENDORSEMENT

Relief Requested

[1] Harris and Partners Inc., the Receiver of the debtor respondent companies, Mass Properties Inc. ("MPI") and Mass Banquet Halls Inc.("MBHI") (the "Receiver"), seeks an order approving a sale transaction contemplated by an agreement of purchase and sale between the Receiver and Balbir Bharwalia dated May 8, 2009. It also seeks a vesting order. The Receiver's motion is supported by the Applicant mortgagees and the purchaser, Mr. Bharwalia.

[2] There is opposition to the motion. There are two cross-motions. Tara Singh is a 50% owner of the subject real estate. She seeks a discharge of the Applicants' mortgage and a discharge of the Receiver. The debtors, Mass Properties Inc. and Mass Banquet Halls Inc., seek declaratory relief, an order withholding approval of Mr. Bharwalia's agreement of purchase and

sale and directing the Receiver to accept any counter-offer proposed by the Respondents. Others opposing the motion consist of Daljit Samra and Sukhvinder Singh, plaintiffs in an action against the debtors commenced in September, 2007 in which they claim a 50% interest in the subject real estate, and Castimis Inc., a lien claimant owed approximately $16,271 and the principal of whom, Manjit Kaur Sidhu, also wishes to purchase the property.

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Facts

[3] The relevant facts are as follows. On March 31, 2009, Hoy J. appointed Harris and Partners Inc. as Receiver of all of the assets of the debtor Respondent companies. The appointment order was made after four adjournments of the application to appoint the Receiver were granted by Hoy J. According to the Receiver, these were at the request of the debtor Respondent companies and the premise of the adjournments was imminent refinancing that did not materialize.

[4] The assets under the Receiver's administration consist of real property known as 75 Hedgedale Road, Brampton and personal property (the “Property”). The former is a 2.478 acre parcel of land with a one storey, 12,603 sq foot building which is used as a banquet hall. The latter consists of chattels in connection with the banquet hall, the liquidation value of which was appraised as being $17,900.

[5] The Applicants hold a first mortgage over the real property that was registered on September 26, 2005. As at June 24, 2009 the Applicants state that $2,259,498.31 is due and owing to them by the debtors pursuant to the mortgage. There is a second mortgage in the amount of $184,882.00 that is registered against the real property but the Receiver has been unable to locate the second mortgagee, Kishor Kamal. The City of Brampton is owed $265,076.68 on account of realty taxes as of January 22, 2009 and there are construction liens of approximately $100,000 registered against the real property along with a tax lien registered in the amount of $94,538.67 pursuant to the *Excise Tax Act*.

[6] The registered owner of the real property is the debtor Respondent, MPI. Manjit Singh Saini ("Manjit") is the principal of MPI. He is also the principal of the other debtor Respondent, MBHI, which owns the personal property.

[7] On January 13, 2009, Klowak J. granted a judgment in favour of Tara Singh in an action she brought against Manjit, the debtor Respondent companies and certain others. On consent of Manjit and the debtor Respondent companies, Klowak J. granted Ms. Singh a 50% interest in the real property subject to encumbrances registered between August 2, 2002 and October 4, 2005. Her interest was therefore subject to the Applicants' mortgage. Klowak J. ordered that the real property immediately be listed for sale at a price to be determined by Ms. Singh and MPI. According to the Receiver, Ms. Singh through her counsel has had notice of each Court appearance in this proceeding and did not oppose the appointment of the Receiver.

[8] Upon the granting of the appointment order, the Receiver negotiated an arrangement with Manjit to permit him to remain in occupation and continue to operate the banquet hall business. In return, he agreed to pay ongoing expenses and occupation rent. The Receiver was of the view that a better realization would result if the banquet hall business continued to operate.

[9] The Receiver also engaged Chris Kelos of Coldwell Banker Case Realty, an agent with significant experience selling commercial real estate on behalf of secured lenders and secured creditors. The Receiver set May 7, 2009 as a deadline for submission of offers. The Property was listed for $3,690,000 pursuant to a listing agreement dated April 8, 2009. The listing price was higher than the appraised value of the Property. The Property was listed on MLS and 1,573 hits were received on the MLS listing. In addition, advertisements for the Property were placed in the Globe and Mail on April 23 and 28, 2009. The Receiver sent 49 detailed information packages to prospective purchasers, select real estate agents and persons who responded to the advertisements. 97 showings of the Property were conducted and the Receiver received 9 offers to purchase the Property ranging from a high of $3,750,000 to a low of $2,400,000.

[10] On May 8, 2009, the Receiver accepted an unconditional offer of $3,735,000 from Mr. Bharwalia who paid a deposit of $500,000. The purchase agreement imposed an obligation on the Receiver to apply for court approval of the purchase agreement and a vesting order. The

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allocation of the purchase price as between the real and personal property was to be determined at a later date and on June 4, 2009, the purchaser and the Receiver agreed to allocate $18,000 towards the personal property and $3,717,000 towards the real property. Mr. Bharwalia secured private financing for the purchase. He has had to pay both lenders' fees and legal fees in that regard. The price offered was the second highest offer received by the Receiver prior to the May 7, 2009 deadline. The highest offer received was for $3,750,000 but it was conditional on obtaining financing. Due to market volatility, uncertain market conditions, the difficult credit environment, and the $15,000 price differential, the Receiver was of the view that acceptance of the higher offer presented significant downside risk and for those reasons, did not accept it. The Receiver was and remains of the view that Mr. Bharwalia's terms including the price represent the best offer in the circumstances. Acceptance of his offer avoided the downside risk of accepting a slightly higher conditional offer and/or engaging in a longer sales process. The price proposed is both higher than the appraised value and the listing price and the offer is unconditional. The Receiver entered into an agreement of purchase and sale with Mr. Bharwalia that is subject to Court approval. The Receiver now recommends that the Court approve that purchase agreement and grant a vesting order.

[11] Turning to those opposing the order requested, on June, 9, 2009, the Receiver received an agreement of purchase and sale dated May 29, 2009 between Manjit Kaur Sidhu as purchaser and MPI as vendor. Manjit purported to bind MPI even though only the Receiver had power to do so and the listing agent was described as Homelife/Miracle Realty Ltd. even though the property had been listed with Coldwell Banker. The purchase price was $4,200,000 which is $465,000 more than the price offered by Mr. Bharwalia. No deposit was paid but the agreement stated that a deposit of $600,000 would be payable upon acceptance. There are various purchaser's conditions contained in the offer. Ultimately Manjit Kaur Sidhu provided the Receiver with an unconditional offer to purchase the real and personal property for $4,300,000 however, the closing date is 50 days following court approval in contrast with the 10 days provided for in Mr. Bharwalia's offer. The Receiver has asked but received no explanation as to why the offer of Manjit Kaur Sidhu was outside the May 7, 2009 deadline; why 50 days are required for closing; why Manjit purported to bind MPI and why Homelife Miracle Realty Ltd.

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was described as the agent; and why, according to the Receiver, there is an apparent proximity of relationship between Manjit and Manjit Kaur Sidhu. In addition, although requested by the Receiver, no information on Manjit Kaur Sidhu's creditworthiness has been forthcoming.

[12] MPI and MBHI bring a cross motion for a declaration that the mode of advertising was inadequate as the Receiver failed to advertise in any national paper or any Indian or South Indian paper thereby limiting the prospects of yielding maximum returns. They ask that approval of Mr. Bharwalia's offer be refused and that I grant an order directing the Receiver to accept a counter offer proposed by them. They also seek a declaration that they are entitled to a sale process that would yield maximum returns to creditors and that would guarantee a viable continuation of the debtors' business activities. Manjit states that it would have been far more productive to have enlisted the aid of a real estate agent of his ethnic backround and experience who might better understand the intrinsic value of the hall, the facilities and the nature of the events that take place at the premises. He does not take exception with the listing agent but does take exception to the mode of advertising chosen. The facility was not advertised in any Indian or South Asian paper or in any national publication that might be specifically seen and reviewed by persons of an Indian or South Asian backround. The advertisement, according to Manjit, did not include the correct size of the real property and the parking lot, understated the value of the chattels and failed to indicate that bookings were available as was the cooperation of the existing operators (being the debtors). He provided no particulars with respect to these complaints about the advertisement. He also notes that the equipment appraisers have the same address as Mr. Bharwalia. He says that he is familiar with the other offeror, Manjit Kaur Sidhu, and his group.

[13] Daljit Samra and Sukhvinder Singh commenced their action in September, 2007 but have not obtained a judgment against the debtors. They state that they advanced funds to Manjit and MPI that were used to buy the 75 Hedgedale property. They learnt of the Receivership on March 31, 2009. They complain, amongst other things, that the Receiver's plan of action was to list the Property for sale but there was no mention of any sale of the on going banquet hall business. They state that the total claims amount to over $5,000,000 and question whether the Receiver's lack of knowledge of the quantum of debts caused it to assume that a sale of $3,500,000 would satisfy all of the creditors. They also complain that the marketing and sale process was without

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any consultation with creditors other then the Applicants. In addition, the Receiver should have retained a business valuator. They also complain that the one month listing was too short a time period. They say that the Sidhu offer indicates that the Receiver's sales and marketing process did not attract the attention of at least one serious buyer. They ask the Court to refuse the approval of the Bharwalia agreement of purchase and sale and accept submissions from other interested parties. They state that the Court should be concerned as to how the Receiver came to determine a list price, the listing period and the deadline for submission of offers. The failure of the Receiver to consider the value of the business was a glaring omission. They further state that there was a lack of consideration of the interests of all parties.

[14] In response, the Receiver states that it did not disregard their interests and the Property was appraised on the basis of its continued use as a banquet hall which the appraiser considered to be the highest and best used for the real property. The appraiser used a direct sales approach to value in part because although requested by the Receiver, no income and expense statements were forthcoming from Manjit and it appeared likely that none existed. The appraiser did prepare a reconstructed income and expenses statement based on industry norms but the income approach yielded a considerably lower value.

[15] As to the one month time period, no prospective purchasers or agents suggested that they would have submitted an offer have they had more time.

[16] Turning to Tara Singh, she states that she advanced $946,000 for the purchase of the Property of which she has been repaid $427,000. She wishes to discharge the mortgage of the Applicants. Her position is that there is no binding agreement of purchase and sale in that Mr. Bharwalia’s has been terminated and she therefore retains the right to redeem. As mentioned, she had commenced an action against the debtors and Manjit. The parties to that action signed minutes of settlement in which the defendants were to pay Tara Singh $600,000 within 120 days during which time she was not to act upon a consent judgment given to her as part of the settlement and she also was not to have any dealings with mortgagees of the Property. The 120 days expired on May 13, 2009. Meanwhile, on May 8, 2009, the Receiver had entered into an agreement to sell the Property. Section 6 of Mr. Bharwalia’s purchase agreement states that

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there is no agreement of purchase and sale until the offer has been accepted by the vendor and approved by the Court. As such, Ms. Singh maintains that she is still entitled to redeem. Alternatively, she states that if Court approval has not been granted within 21 days of waiver of the purchaser's conditions, the agreement automatically terminates. Ms. Singh submits that 21 days had elapsed and therefore there is no agreement. Ms. Singh wishes to discharge the mortgage or failing same, she is prepared to purchase the Property for $4,220,000, closing to occur within 14 days of June 29, 2009 with no conditions for financing. This is $485,000 higher than Mr. Bharwalia's offer and $20,000 higher than that of Manjit Kaur Sidhu but with an early closing date. There is no evidence of any deposit having been paid.

[17] The Receiver states that before the Receivership proceeding was launched, the option of obtaining an assignment of the Applicants' security was canvassed with Ms. Singh's counsel on January 22, 2009. On February 5, 2009, the option of purchasing the Property was also canvassed with her counsel. The Receiver states that the sale process would be undermined if stakeholders were permitted to wait by the sidelines until an offer is accepted before acting to protect their equity.

Issues

[18] The issues to consider are:

(i) Does Manjit Kaur Sandu have standing?

(ii) May Tara Singh redeem the Applicants' mortgage?

(iii) Should the agreement of purchase and sale between the Receiver and Mr. Bharwalia be approved as recommended by the Receiver?

Discussion

(a) Standing

[19] Manjit Kaur Sandu does not have standing in his capacity as a prospective purchaser. In contrast to a successful purchaser, an unsuccessful prospective purchaser has no standing on a

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sale approval motion: *Skyepharma PLC v. Hyal Pharmaceutical Corp.*[1] and *Winick v. 1305067 Ontario Ltd.*[2]

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(b) Redemption

[20] The Receiver accepts that Ms. Singh is a mortgagor but states that she is not entitled to redeem at this stage of the proceedings. I agree.

[21] The Receiver was appointed pursuant to section 47(1) of the BIA and section 101 of the Courts of Justice Act on March 31, 2009. The Court order empowered the Receiver to market the Property and to sell it out of the ordinary course of business with the approval of the Court if the purchase price exceeded $250,000. It was ordered that notices under section 63(4) of the Personal Property Security Act and section 31 of the Mortgages Act were not required. In each case where the Receiver took such steps, it was exclusively authorized and empowered to do so, to the exclusion of all other persons including the debtors and without interference from any other person. The order also provided that proceedings against the debtor, Mass Properties Inc., or its property were stayed. The order specifically addressed the exercise of rights and remedies against the debtor as follows:

> THIS COURT ORDERS that all rights and remedies against the Debtor, Mass Properties Inc., the Receiver or affecting Mass Property Inc.'s property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

[22] In the face of these provisions, Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a

[1] (2000), 47 O.R. (3d) 234 (Ont. C.A.)
[2] (2008), 41 C.B.R. (5th) 81.

mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[23] Secondly, I do not accept that the agreement of purchase and sale has been terminated. As in *Winick v. 1305067 Ontario Ltd.*[3], it is clear from the parties' position in Court and from their conduct that they both relinquished their right to insist on and rely on the 21 day time requirement and waived any rights in that regard. This was a mutual, not a unilateral waiver. In any event, subject to my discussion of the principles associated with sale approval, I would approve the agreement of purchase and sale nunc pro tunc.

(c) Approval of Mr. Bharwalia's Agreement

[24] The leading case on approval of receiver sales is *Royal Bank v. Soundair Corp.*[4] In deciding whether a receiver has acted properly in the sale of property, the Court must consider:

(i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(ii) the interests of all parties;

(iii) the efficacy and integrity of the process by which offers are obtained; and

(iv) whether there has been unfairness in the working out of the process.

[25] While it would have been preferable had the Receiver advertised in the Indian and South Indian newspapers, it did not act improvidently and it certainly made sufficient effort to get the best price. It placed the property on MLS where there were 1573 hits, advertised twice in the Globe and Mail and contacted 49 prospects. The Property was shown 97 times and was on the market for a month. As to the listing of one month, there was never any suggestion made to the agent, Mr. Kelos, by any prospective purchaser or agent that an additional offer would have been submitted had there been more time. Nine offers were received and the Property sold for more than both the appraised value and the listing price. Mr. Bharwalia is a serious buyer as evidenced by the deposit of $600,000 that was paid and the absence of conditions to the offer.

[3] Ibid, at paras. 7 and 8.
[4] (1991) 7 C.B.R. (3d) 1 (Ont.C.A.).

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[26] The appraisal that was done by Lebow, Hicks Ltd., described the highest and best use of 75 Hedgedale Road as being continuation of its use as a banquet hall. The appraiser used a direct sales approach. Contrary to the submissions of the debtor corporations, an income approach was also used. Income approach indicates value based on the potential income stream that can reasonably be expected to result from the operation of the property. The validity of the income approach depends on the reliability of the underlying data. In that regard, the appraiser noted that no income or expense statements or operational information were supplied. A cursory income approach based on comparable lease rates and industry performance levels was included in the appraisal. The Receiver indicated that he sought information from the debtors but it was not forthcoming. The Receiver was of the view that it likely did not exist. The income approach used by the appraiser yielded a considerably lower value and was therefore dismissed as a proper approach to market value. As is customary in sale approval motions, the Receiver seeks an order sealing the appraisal until the transaction is completed. This ensures the integrity of the process and avoids any prejudice to stakeholders in the event that the transaction does not close and a new purchaser must be sought.

[27] The Receiver considered the interests of all parties. As Galligan J.A. stated in *Soundair*[5], it is well established that the primary interest is that of the creditors of the debtor but other persons' interests require consideration as well. This may include the interests of a purchaser such as Mr. Bharwalia who has negotiated an agreement with a Court appointed receiver. In this case, it is clear that the Receiver considered the interests of all relevant parties. It contacted Ms. Singh well before it entered into any agreement. Indeed, she was unopposed to the appointment of the Receiver. The Receiver also was in discussions with others including the debtors.

[28] As to the efficacy and integrity of the process by which the offer was obtained, Macdonald J.A.'s commentary in *Cameron v. Bank of N.S.*[6] continues to be apropos:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply

[5] Ibid, at paras. 39 – 40.
[6] (1981), 38 C.B.R. (N.S.) 1 (N.S.C.A.)at p.11.

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> because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard---this would be an intolerable situation.

[29] There is nothing in the evidence that causes me to question the efficacy and integrity of the process by which offers were obtained. Furthermore, there was no unfairness in the process. In my view, the Receiver's recommendation that the purchase agreement with Mr. Bharwalia be approved should be accepted.

[30] The proposed order is largely similar to the Commercial List Users' Committee model approval and vesting order and should be granted with the exception of paragraph 11 for which there is no compelling evidentiary support. The remaining provisions are reasonable in the circumstances.

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Pepall J.

Released: July 14, 2009

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CITATION: Callidus v. Carcap, 2012 ONSC 163
COURT FILE NO.: CV-11-00009498-OOCL
DATE: 20120105

2012 ONSC 163 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

RE: CALLIDUS CAPITAL CORPORATION, Applicant/Respondent by cross-application

A N D:

CARCAP INC. and CAR EQUITY LOANS CORP., Respondents/Applicants by cross-application

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 and Section 101 of the *Courts of Justice Act,* R.S.O. 1990 c. C.43

AND RE: KAPTOR FINANCIAL INC. and CARCAP AUTO FINANCING, Applicants by cross-application

AND:

CALLIDUS CAPITAL CORPORATION, Respondent by cross-application

BEFORE: MESBUR J.

COUNSEL: Harvey G. Chaiton and George Benchetrit for the applicant/respondent by cross-application

Mel Solmon, Fred Tayar and Colby Linthwaite for the respondents and applicants by cross-application

Robb English for the Toronto Dominion Bank

A. Kaufman for proposed Receiver, BDO Canada Ltd.

Jennifer Imrie for Third Eye Capital

HEARD: December 14, 2011

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E N D O R S E M E N T

Introduction:

[1] I heard this application for the appointment of a receiver and the debtors' cross application for an initial order under the *Companies' Creditors Arrangement Act* [1](*CCAA*) on December 14, 2011. At the end of the hearing I made the following endorsement:

> For reasons to follow, an order will go in the following terms:
>
> a) The debtors' cross application for an initial order under the CCAA is dismissed.
>
> b) The application to appoint a Receiver is granted, but will not take effect until 5:00 p.m. on December 20, 2011.
>
> c) If the debtor has obtained alternate financing & has paid the applicant in full by 5:00 p.m. December 20, 2011 then the Receivership Order will not take effect.
>
> d) If the terms of paragraph (3) [i.e. paragraph (c)] above have not occurred then the Receivership order will be with effect as of 5:01 pm December 20/11.
>
> e) If the parties cannot agree on the terms of the Receivership order (following the terms of the Model Order) they may make an appointment to settle the terms of the order.
>
> f) Even if the Receivership Order takes effect on December 20/11 at 5:00 pm nothing prohibits the Debtor from continuing its efforts to refinance.

[2] Counsel tell me the debtor was unable to obtain financing to pay the applicant in full by December 20, 2011. Accordingly, the Receivership Order is now in effect, and it is necessary for me to deliver the reasons for my decision to appoint a receiver and decline to make an initial order under the *CCAA*.

[3] These are those reasons.

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[1] R.S.C. 1985 c. C-36

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The application and cross-application:

[4] The applicant, Callidus, is the respondents' first secured lender. On this application, it sought the appointment of a Receiver under both the *Bankruptcy and Insolvency Act*[2] and section 101 of the *Courts of Justice Act.*[3] The TD Bank, who is the respondents' second secured lender, supported the receivership application. It pointed out none of the respondents' refinancing proposals included sufficient financing to retire the respondents' debt to the TD Bank. Accordingly, the TD Bank took the position that even if the respondents were able to find alternate financing sufficient to pay out Callidus, the TD Bank would bring its own application to appoint a receiver under the terms of its own security.

[5] The respondents brought a cross-application for relief under the *CCAA.* Both Callidus and TD Bank opposed the cross-application.

Facts:

[6] The respondent CarCap is in the business of sub-prime car lease financing. The respondent Cashland provides sub-prime equity car loans. Both companies are subsidiaries of CarCap Auto Finance Inc., which itself is a subsidiary of Kaptor Financial Inc. Kaptor Financial owns several other companies, either in whole or in part. The parties refer to these companies as the Kaptor Group. An individual named Eric Inspektor controls the entire Kaptor Group, either directly or indirectly.

[7] The Kaptor Group, including the respondents, had deposit accounts with the TD Bank. Initially, they did not have any credit facilities with the TD. Both the respondents and the Kaptor Group had financing elsewhere. Before Callidus lent operating funds to the respondents, the Laurentian Bank provided an operating facility to them. In addition, the Kaptor Group used private investors to finance their businesses through separately incorporated special purpose investment vehicles. They refer to them as "silos". The silos provided funding either through secured term debentures or preference shares.

Callidus provides financing

[8] On September 1, 2011 Callidus replaced the Laurentian Bank as the respondents' first secured lender. It did so pursuant to a credit facility agreement, under which it

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[2] R.S.C. 1985 c. B-3 as amended

[3] R.S.O. 1990, c. C-43, as amended

agreed to advance a demand loan of up to $15 million subject to certain margin conditions. The agreement provided that advances were to be used:

a) To pay off the existing indebtedness to the Laurentian Bank;

b) To repay certain silo investors;

c) To provide working capital; and

d) To finance existing and future vehicle lease and vehicle loan transactions.

[9] Another term of the agreement required the respondents to establish "blocked" accounts at a bank. The respondents had to deposit all funds they received from all sources into these blocked accounts. The respondents established the blocked accounts at the TD Bank.

[10] The Callidus credit facility had other provisions that are relevant to this application. The respondents' representations required them to disclose "all commitments of any lender (other than the Lender) for all debt for borrowed money, and all debt for borrowed money outstanding of the Borrowers or Corporate Guarantors."[4] The respondents did not disclose they owed any money to TD Bank, although at the time they did. In fact, in the schedule where the respondents were required to list their "current debt defaults", they entered "none". This was not true. I will discuss this more fully in the section "Changes to the respondents' arrangements with TD Bank", below.

[11] The respondents also represented that all the information they had given Callidus was "true and correct and does not omit any fact necessary in order to make such information not misleading."[5]

[12] Callidus made its advances to a disbursement account that the respondents maintained. The disbursement account was also at the TD Bank.

[13] The credit facility's terms provided that it was due on demand, and was repayable in full on the earlier of September 1, 2012 or an event of default. Remedies on default include Callidus' right to appoint a receiver and to apply to the court to appoint a receiver.

[14] The credit facility is fully secured by general security agreements as well as a first ranking secured interest over the properties, assets and undertakings of the respondents.

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[4] Credit facility agreement paragraph 17(k)
[5] *Ibid.* paragraph 17(q)

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Changes to the respondents' arrangements with TD Bank.

[15] The respondents and other Kaptor Group companies initially had only deposit accounts with the TD Bank. Their banking arrangements did not include any overdraft or credit facilities. In July and August of 2011 the TD noticed what it characterized as a high rate of unusual activity in the respondents' accounts as well as in those of other Kaptor Group companies.

[16] What was unusual is that more than $60 million in cheques passed through various Kaptor Group accounts. On August 18, 2011 about $18 million flowed through in a single day. TD Bank viewed this as unusual since the businesses generally had annual revenue of about $24 million. That day, the TD Bank froze the Kaptor Group accounts. When they froze the accounts, they were in an overdraft position of about $7 million, contrary to their banking arrangements with the TD.

[17] TD Bank then entered into an accommodation agreement with the Kaptor Group, including the respondents. The accommodation agreement, which was dated August 23, 2011, provided a secured loan of $5 million to cover the overdraft, and to provide some working capital. The loan was to be repaid in full by August 29, 2011. It was not.

Callidus advances

[18] Callidus knew nothing about the Kaptor Group/respondents' overdraft with the TD Bank, the accommodation agreement or their failure to repay the TD loan. On September 1, 2011 Callidus made its first advance into the respondents' disbursement accounts. The advance totalled just over $8.4 million and was used to pay out the Laurentian Bank debt, make payments to silo investors and provide working capital of just under $1 million. Clearly, given the respondents' situation with TD Bank at the time of the advance, the respondents were in breach of their representations to Callidus in the credit facility agreement.

The TD Bank's accommodation agreement is amended, then terminated

[19] Since the TD Bank had not been repaid, it entered into an agreement to amend the original accommodation agreement. The amending agreement was dated September 7, 2011, a week after Callidus had advanced. The amending accommodation agreement provided for the Kaptor Group to acknowledge it was in overdraft at that date to the extent of $2.6 million. TD Bank agreed to advance up to $2 million (instead of the original $5 million) to cover the overdraft. TD Bank was to be repaid in full by September 12, 2011. Again, it was not.

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[20] On September 16, TD Bank entered into an agreement to terminate the accommodation agreement. In the termination agreement TD Bank agreed to extend the financing subject to certain paydowns, and with the requirement that the financing be paid in full by September 30. Once again, Kaptor Group failed to pay off the debt. It remains outstanding. Currently, the respondents owe the TD Bank about $1 million.

[21] By this point the respondents had set up the required blocked account and disbursement accounts at TD Bank, and Callidus had advanced. By this point as well, TD Bank was no longer prepared to do business with the respondents. As part of its termination agreement with the respondents, TD Bank required them to transfer the blocked accounts and disbursement accounts within 90 days of September 16, 2011.

[22] Before TD Bank made its various accommodation agreements with the respondents and Kaptor Group, there was a three week period in September where the TD Bank returned as NSF many cheques the respondents had written for payroll, investor payments and dealer and supplier payments. The NSF cheques to silo investors also put the respondents in breach of their obligations to Callidus.

Callidus learns of the debt with TD Bank

[23] Callidus did not learn of any of the respondents' agreements with TD Bank, or the security they had given the Bank until three weeks after Callidus had made its first advance. It was only around that time that Eric Inspektor, who essentially controls the Kaptor Group, including the respondents, told Callidus that the respondents and other Kaptor Group companies maintained accounts with the TD Bank. He said that their arrangements with the TD Bank permitted the TD Bank to offset overdrafts in one corporate account against deposits in another, including the disbursement accounts into which Callidus deposited its advances to the respondents.

[24] Mr. Inspektor explained that because of the overdraft position the Kaptor Group found itself in, the TD Bank had returned as NSF some of the cheques the respondents had written to some silo investors under Callidus' initial advance. It was one of the conditions of the advance that these investors were to be paid from the advance. Until this time, Callidus knew nothing of any debt the respondents owed to TD Bank. Callidus also did not know that one of the conditions of its initial advance had not been fulfilled – that is, paying off some specific silo investors.

[25] Matters deteriorated. TD Bank dishonoured various Cashland cheques for things like payroll, dealership payments and business expenses. Dealers were complaining to the Ontario Motor Vehicle Industry Council.

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The field audit

[26] Under the terms of its security, Callidus was permitted to conduct a field audit of the respondents. When it did, it discovered that some government remittances were made late. It also learned that Mr. Inspector had directed funds in various Kaptor Group accounts to cover overdrafts in other accounts. This might have included diversion of funds from the respondents to cover overdrafts of other Kaptor Group companies. Over $300,000 in September lease and loan payments had been deposited into the disbursement accounts instead of into the blocked accounts. Mr. Inspektor and his wife deposited nearly $700,000 into the disbursement accounts instead of the blocked accounts. Again, this constituted a breach of the terms of the credit facility agreement.

The Callidus demand

[27] Needless to say, all of this created significant concern for Callidus. Callidus took the position that the respondents had made misrepresentations and material non-disclosure to it. It viewed the respondents' actions as constituting material breaches of the credit facility agreement. It was not prepared to continue to lend. On October 18, 2011 it demanded payment in full, pursuant to the terms of the credit facility agreement. It also served notice under section 244 of the *BIA* of its intention to enforce its security.

The Callidus forbearance agreement and events following

[28] On October 25, 2011 Callidus entered into a forbearance agreement with the respondents. Callidus agreed to forbear from enforcing its rights, but only on a day-to-day basis. The agreement permitted Callidus to terminate it at any time, in its sole and absolute discretion.

[29] In the Callidus forbearance agreement the respondents have acknowledged Callidus' *BIA* Notices are valid. They agree not to contest the validity of the demands for payment. They waive the 10-day notice period, and consent to the immediate enforcement of Callidus' security.

[30] The forbearance agreement also required the respondents to hire a new interim executive officer to replace Mr. Inspektor, who ceased to have any managerial role, or any cheque signing authority. The respondents also agreed to hire MNP

corporate Finance Inc. to find them alternate financing so they could pay out Callidus by April 30, 2012. They were not able to secure alternate financing in this way.

[31] The agreement also required the respondents to submit a complete restructuring plan to Callidus by November 30, 2011. First, the plan had to be acceptable to Callidus, and second had to be completed by December 31, 2011. The respondents have been unable to comply with either of these conditions.

[32] Although the parties concede the term is not enforceable, the Callidus forbearance agreement also contains a promise from the respondents not to commence any restructuring or reorganization proceedings under either the *BIA* or *CCAA.*

[33] Since the forbearance agreement, Callidus says the respondents' financial position has deteriorated more. The loan balance has increased by more than $770,000 while the lease rental stream has dropped by about $225,000. By the end of November, the respondents were in an over advance position of more than $1.2 million.

[34] Callidus was not prepared to continue without changes to the arrangement. On November 16, Callidus told the respondents it would continue to fund under the credit facility if and only if there was a minimum cash injection at least $500,000 into the businesses by subordinated debt or equity within two days, and the respondents would also have to fund their 30% of the cost of buying new vehicles for lease. The respondents failed to fulfil either of these conditions.

[35] On November 24, Callidus terminated the forbearance agreement, and told the respondents it would apply to court to have a receiver appointed.

[36] Even though it has terminated the forbearance agreement, Callidus continues to provide some funding to the respondents. It does so at its discretion, in order to protect its security.

[37] The respondents have been looking for alternate financing. They have not been able to secure any.

Discussion:

[38] Callidus takes the position that the respondent made material misrepresentations even before the first advance. It says had it known of the respondents' situation with TD Bank it would never have agreed to advance in the first place. Now it sees the respondents' financial position deteriorating. Its demand for payment has not been satisfied. The respondents' revenue stream is declining, meaning it cannot acquire new vehicles to lease. Callidus says this results in a reduction of its security, while the debt increases. As a result, Callidus says it is just

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and convenient to appoint a receiver in order to protect its security and the interests of other stakeholders.

[39] For their part, the respondents accuse Callidus of taking an aggressive and unreasonable position (even though every position Callidus has taken has been supported by the specific terms of either the credit facility or the forbearance agreement.) The respondents point out that they are not actually behind in their payments. They view the interim financial officer who is now in place as being akin to a "soft receivership", and suggested that if they were able to have a *CCAA* stay in place for thirteen weeks, they would be able to restructure. They did not, however, present any restructuring plan, even in very draft form.

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Receiver?

[40] Callidus brought its receivership application under both section 101 of the *Courts of Justice Act,* and s.47 of the *BIA.* The test to appoint a receiver under the *CJA* requires the court to conclude it would be just and convenient to do so. The court may appoint an interim receiver under s. 47 of the *BIA* if and only if the court is persuaded a receiver is necessary to protect the debtor's estate or the interests of the creditor who sent a notice under s. 244(1) of the *BIA.*

[41] The question is whether it is more in the interests of all concerned to have the receiver appointed or not.[6] In order to answer the question the court must consider all the circumstances of the case, particularly:

a) The effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;

b) The parties' conduct; and

c) The nature of the property and the rights and interests of all parties in relation to it.[7]

[42] Receivers are considered an "extraordinary" remedy, much in the same way as granting an injunction is considered an extraordinary remedy. The law is clear, however, that an applicant who wishes the court to appoint a receiver need not show irreparable harm if a receiver is not appointed.[8]

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[6] *Bank of Nova Scotia v. Freure Village on Clair Creek,* 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (S.C.J.)
[7] *Bank of Montreal v. Carnival Leasing Limited,* 2011 ONSC 1007 (CanLII)
[8] *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* [1995] O.J. No. 144 (O.C.J. – Gen. Div.)

[43] Many security instruments will specifically contemplate appointing a receiver. The fact that the creditor has a right to appoint a receiver under its security is therefore an important consideration. Generally, a court will appoint a receiver when it is necessary to enforce rights between the parties or to preserve of assets pending judgment. Receivers will also be appointed where there is a serious apprehension about the safety of the assets.

[44] Here, of course, the credit facility agreement itself specifically contemplated appointing a receiver. Following the reasoning in *Fruere Village,* the "extraordinary" nature of the remedy is therefore less important here than it might otherwise be.

[45] This leads me to consider the interests of all concerned, in order to determine whether the test under either the *Courts of Justice Act* or *Bankruptcy and Insolvency Act*, or both, has been met.

[46] What is the likely effect on the parties of appointing a receiver? From Callidus' point of view, it will allow it to protect its security, and dispose of it in an organized and court-supervised fashion. It proposes to sell the businesses as a going concern, in order to maximize value for all stakeholders. The respondents concede that a possible restructuring plan might be to liquidate, in which case the hope would also be a going concern sale. In this regard, I see no difference in outcome if a receiver is appointed.

[47] Callidus has legitimate concerns about the businesses continuing as a going concern while the respondents attempt to restructure. The respondents have stopped purchasing vehicles for lease. They have no money to do so. As a result, the value of Callidus' security is declining.

[48] The activities in the TD accounts that led to the Bank's freezing them suggest companies that were out of financial control, operating outside of the normal course of business.

[49] The respondents' difficulties with the TD Bank overdraft arose in August of last year. They have been given every opportunity since then to cure their defaults, and have failed to do so.

[50] Similarly, the respondents have been in default with Callidus since it demanded payment in mid October of last year, and delivered its notice of intention to enforce its security. Even though Callidus had agreed to forbear, the respondents have failed to honour the terms of the forbearance agreement.

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[51] Neither Callidus nor TD Bank has faith in the respondents' management. This is a factor that supports appointing a receiver. [9] While the interim executive officer Mr. Willis has brought some stability to the businesses, they cannot operate without further borrowing, and none is available. Without further borrowing, the respondents cannot purchase new inventory for lease, and thus its inventory is declining. What this means is that its lease and loan revenues are also declining, while its debt load to Callidus is increasing. All this suggests to me that appointing a receiver is necessary in order to protect Callidus' security from further erosion.

[52] The respondents' past conduct also gives cause for concern if there is no receiver who can manage the businesses and arrange for an orderly sale under the court's supervision.

[53] As to the nature of the property, I note that Callidus' security is declining in value. Both secured creditors' rights in it are being eroded. The court must put an end to the continued haemorrhaging of money. Given the respondents' failure to come up with even a rudimentary restructuring plan, it is time for a receiver to take control, and manage the businesses to the extent necessary to result in an orderly liquidation to protect the interests of all stakeholders.

[54] At the hearing of the application and cross-application, the respondents urged me to consider only the current situation with the businesses, and look to the future, rather than to problems in the past. Even doing only this, there is no comfort to Callidus. The respondents have repeatedly sought new financing and failed – even after I made the receivership order, but held it in abeyance so they could refinance. Most importantly, nothing prevents the respondents from continuing their efforts to restructure, even though I have appointed a receiver.

CCAA?

[55] The respondents took the position that granting an initial order under the *CCAA* is the proper way to proceed. They point to the fact that Mr. Willis (the interim executive officer) says the businesses are not out of control, are not a disaster, and are good businesses that will not deteriorate if a stay is granted and the companies are allowed to restructure. I disagree.

[56] The respondents have no operating capital. They are borrowers in default, with two unwilling lenders who are unprepared to lend more. Under the *CCAA* these lenders have no obligation to advance more funds.[10] Without further advances,

[9] *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.* [2011] O.J. No. 2954 (S.C.J.)
[10] Section 11.01(b) of the *CCAA*

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the respondents cannot continue to operate without further deterioration in inventory of vehicles and the resulting deterioration in revenue.

[57] The respondents ask, what is the harm in letting them reorganize? While that is an interesting question, it is not the test. It seems to me this is nothing more than a last ditch effort on the respondents' part to stave off the inevitable. In *Re Marine Drive Properties Ltd.* [11] the court put a similar situation this way: "to put in bluntly, the Petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding ... they need time to 'try to pull something out of the hat.'" Or, as Farley J. put it in *Re Inducon Development Corp.,* [12] "... *CCAA* is designed to be remedial; it is not however designed to be preventative. *CCAA* should not be the last gasp of a dying company; it should be implemented if it is to be implemented, at a stage prior to the death throe."

[58] Here, the respondents only brought their application after Callidus had brought its application for a receiver. The respondents knew in November that Callidus intended to seek a receiver. They waited until they had been served with the receivership application before launching their own effort to restructure. As a result, the cross-application for *CCAA* relief seems more a defensive tactic than a *bona fide* attempt to restructure. The respondents have no restructuring plan. They have no outline of a plan. They do not have even a "germ of a plan". Again, as the court said in *Inducon*:

> [W]hile it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be requisite for the germ of a plan.

[59] The respondents have been attempting to refinance for some time. They have failed to meet every deadline for payment they agreed to with Callidus as well as with the TD Bank. Even when I delayed the date for the receivership order to take effect in order to give the respondents time to complete a refinancing, they were unable to do so.

[60] The absence of even a "germ of a plan" militates against granting relief under the *CCAA.*

[61] Finally, in considering the question of whether to grant relief under the *CCAA,* I must also look at the position of the two major secured creditors. Neither will

[11] 2009 BCSC 145
[12] [1992] O.J. No. 8 (Gen. Div.)

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support a plan of arrangement. They represent a considerable part of the respondents' creditors. I have no evidence any other creditors would support a plan, either. I see no merit in making an initial order and imposing a stay in circumstances where a plan of arrangement is most likely going to be defeated.

[62] Having considered all these factors, I decline to grant relief under the *CCAA.*

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Conclusion:

[63] It is for these reasons I made the order I did on December 14, 2011.

_____

MESBUR J.

Released: 20120105

2021 SCC 30 (CanLII)

SUPREME COURT OF CANADA

CITATION: Canada *v.* Canada North Group Inc., 2021 SCC 30

APPEAL HEARD: December 1, 2020
JUDGMENT RENDERED: July 28, 2021
DOCKET: 38871

BETWEEN:

Her Majesty The Queen in Right of Canada
Appellant

and

Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd., Ernst & Young Inc. in its capacity as monitor and Business Development Bank of Canada
Respondents

- and -

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS: (paras. 1 to 74) — Côté J. (Wagner C.J. and Kasirer J. concurring)

CONCURRING REASONS: (paras. 75 to 182) — Karakatsanis J. (Martin J. concurring)

JOINT DISSENTING REASONS: (paras. 183 to 253)	Brown and Rowe JJ. (Abella J. concurring)
DISSENTING REASONS: (paras. 254 to 265)	Moldaver J.

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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Her Majesty The Queen in Right of Canada *Appellant*

v.

Canada North Group Inc.,
Canada North Camps Inc.,
Campcorp Structures Ltd.,
DJ Catering Ltd.,
816956 Alberta Ltd.,
1371047 Alberta Ltd.,
1919209 Alberta Ltd.,
Ernst & Young Inc. in its capacity as monitor and
Business Development Bank of Canada *Respondents*

and

Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Indexed as: Canada *v.* Canada North Group Inc.

2021 SCC 30

File No.: 38871.

2020: December 1; 2021: July 28.

2021 SCC 30 (CanLII)

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Bankruptcy and insolvency — Priority — Source deductions — Priming charges — Employee source deductions not remitted to Crown by companies in receivership — Judge supervising restructuring proceedings under Companies' Creditors Arrangement Act ordering priming charges over debtor companies' assets in favour of interim lender, monitor and directors — Order giving priority to priming charges over claims of secured creditors and providing that they are not to be limited or impaired in any way by provisions of any federal or provincial statute — Property of debtor companies subject to deemed trust in favour of Crown for unremitted source deductions under Income Tax Act — Whether court has authority to rank priming charges ahead of Crown's deemed trust for unremitted source deductions — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4.1) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2, 11.51, 11.52.

Canada North Group and six related corporations initiated restructuring proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). In their initial *CCAA* application, they requested a package of relief including the creation of three priming charges (or court-ordered super-priority charges): an administration charge in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred, a financing charge in favour of an interim lender, and a directors' charge

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protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The application included an affidavit from one of their directors attesting to a debt to Her Majesty The Queen for unremitted employee source deductions and GST. The *CCAA* judge made an order ("Initial Order") that the priming charges were to "rank in priority to all other security interests, . . . charges and encumbrances, claims of secured creditors, statutory or otherwise", and that they were not to be "otherwise . . . limited or impaired in any way by . . . the provisions of any federal or provincial statutes" ("Priming Charges"). The Crown subsequently filed a motion for variance, arguing that the Priming Charges could not take priority over the deemed trust created by s. 227(4.1) of the *Income Tax Act* ("*ITA*") for unremitted source deductions. The motion to vary was dismissed, and the Crown's appeal to the Court of Appeal was also dismissed.

Held (Abella, Moldaver, Brown and Rowe JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Côté** and Kasirer JJ.: The Priming Charges prevail over the deemed trust. Section 227(4.1) does not create a proprietary interest in the debtor's property. Further, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case, or between the *ITA* and s. 11 of the *CCAA*.

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In general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. The most important feature of the *CCAA* is the broad discretionary power it vests in the supervising court: s. 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This jurisdiction is constrained only by restrictions set out in the *CCAA* itself and the requirement that the order made be appropriate in the circumstances — its general language is not restricted by the availability of more specific orders in ss. 11.2, 11.4, 11.51 and 11.52. As restructuring under the *CCAA* often requires the assistance of many professionals, giving super priority to priming charges in favour of those professionals is required to derive the most value for the stakeholders. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, would defy fairness and common sense.

Her Majesty does not have a proprietary interest in a debtor's property that is adequate to prevent the exercise of a supervising judge's discretion to order super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it. Section 227(4.1) does not create a beneficial interest that can be considered a proprietary interest, and it does not give the Crown the same property interest a common law trust would. Without attaching to specific property, creating the usual right to the enjoyment of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner.

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Furthermore, under Quebec civil law, it is clear that s. 227(4.1) does not establish a legal trust as it does not meet the three requirements set out in arts. 1260 and 1261 of the *Civil Code of Québec*. Although s. 227(4.1) provides that the assets are deemed to be held "separate and apart from the property of the person" and "to form no part of the estate or property of the person", the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): no specific property is transferred to a trust patrimony, and there is no autonomous patrimony to which specific property is transferred.

Section 227(4.1) states that the Receiver General shall be paid the proceeds of a debtor's property "in priority to all such security interests", as defined in s. 224(1.3), but court-ordered super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it are not security interests within the meaning of s. 224(1.3). Section 224(1.3) defines "security interest" as meaning "any interest in, or for civil law any right in, property that secures payment or performance of an obligation" and including "an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for". The grammatical structure of this provision evidences Parliament's intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within the definition. Court-ordered super-priority charges are utterly different from any of the interests listed in s. 227(4.1) because they were not made for the sole benefit of the holder of the

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charge, nor were they made by consensual agreement or by operation of law. Instead, they were ordered by the *CCAA* judge to facilitate the restructuring in furtherance of the interests of all stakeholders. This interpretation is consistent with the presumption against tautology, which suggests that Parliament intended interpretive weight to be placed on the examples, and with the *ejusdem generis* principle, which limits the generality of the final words on the basis of the narrow enumeration that precedes them.

Preserving the deemed trusts under s. 37(2) of the *CCAA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Similarly, granting Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full under s. 6(3) does not modify the deemed trust created by s. 227(4.1) in any way. In any event, s. 6(3) comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise.

Finally, whether Her Majesty is a "secured creditor" under the *CCAA* or not, the supervising court's power in s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders. Although ss. 11.2, 11.51 and 11.52 of the *CCAA* may attach only to the property of the debtor's company, there is no such restriction in s. 11. That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary.

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Per **Karakatsanis** and Martin JJ.: There is no conflict between the *ITA* and *CCAA* provisions at issue in this appeal. The broad discretionary power under s. 11 of the *CCAA* permits a court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

Section 227(4.1) of the *ITA* provides that a deemed trust attaches to property of the employer to the extent of unremitted source deductions "notwithstanding any security interest in such property" or "any other enactment of Canada". Although this provision clearly specifies that the Crown's right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the *ITA*. Section 227(4.1) states that the amount of the unremitted source deductions is "beneficially owned" by the Crown, but there is no settled doctrinal meaning of the term "beneficial ownership", and s. 227(4.1) modifies even those features of beneficial ownership that are widely associated with it under the common law.

As a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law. In the case of the deemed trust in s. 227(4.1), there is no identifiable trust property and therefore no certainty of subject matter. Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278. As a result, s. 227(4.1) traces the value of the unremitted source deductions, capping the Crown's right at that value, and the specific

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property that constitutes the debtor's estate remains unchanged, with the debtor continuing to have control over it.

The *Bankruptcy and Insolvency Act* ("*BIA*") and the *CCAA* each give the deemed trust meaning for their own purposes. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. To realize these goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process. In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides an exception for deemed trusts that are not true trusts. Section 67(3) provides a further exception by stating that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted source deductions under the *ITA* and other statutes. The result of this scheme is that the debtor's estate — to the extent of the unremitted source deductions — is not "property of a bankrupt divisible among his creditors", as required by s. 67(1) of the *BIA*. Section 67 therefore gives content to the Crown's right of beneficial ownership under s. 227(4.1) of the *ITA*: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

In contrast, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies. Due to its remedial nature, the *CCAA* is famously skeletal in nature and there is no rigid formula for the division of assets. When a debtor's restructuring is on

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the table, the goal pivots, and interim financing is introduced to facilitate restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scheme under the *BIA*.

The Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3) of the *CCAA*. Section 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions "shall . . . be regarded as being held in trust for Her Majesty". Although this signals that, unlike deemed trusts captured by s. 37(1), the Crown's deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. Section 6(3) gives specific effect to the Crown's right by requiring that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. As such, the Crown can demand to be paid in full in priority to all "security interests", including priming charges. The remedial goal of the *CCAA* is at the forefront of providing flexibility in preserving the Crown's right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the *CCAA*. The fact that the Crown's right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is consistent with the different schemes and purposes of the *BIA* and *CCAA*.

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Sections 11.2, 11.51 and 11.52 of the *CCAA*, which allow the court to order priming charges over a company's property, do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. Instead, that authority comes from s. 11 of the *CCAA*. Section 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the requirements of good faith and due diligence on the part of the applicant. It can be used to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions for two reasons. First, ranking a priming charge ahead of the Crown's deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown's right under s. 227(4.1) remains intact "notwithstanding any security interest" in the amount of the unremitted source deductions. Second, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. Interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order could further the *CCAA*'s remedial goals. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate the proposal of a plan of compromise that, in any event, will be required to pay the Crown in full.

Per Abella, **Brown** and **Rowe** JJ. (dissenting): The appeal should be allowed. The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) and the related deemed trust provisions under the the *ITA*, the *CPP*, and the *EIA* (collectively, the "Fiscal Statutes") bear only one plausible interpretation: the

Crown's deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and 227(4.1) of the *ITA* was clear and unmistakable: it granted this unassailable priority by employing the unequivocal language of "notwithstanding any . . . enactment of Canada". This is a blanket paramountcy clause; it prevails over all other statutes. No similar "notwithstanding" provision appears in the *CCAA*. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the *CCAA*, s. 37(2) preserves the deemed trusts of the Fiscal Statutes.

The Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*, and the priming charges provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* fall under the definition of "security interest", because they are "interests in the debtor's property securing payment or performance of an obligation", i.e. the payment of the monitor, the interim lender, and directors. As the definition of "security interest" in the *ITA* includes "encumbrances of any kind, whatever, however or whenever arising, created, deemed to arise or otherwise provided for", there is no reason that the definition would preclude the inclusion of an interest that is designed to operate to the benefit of all creditors. This is sufficient to decide the appeal.

This finding does not leave the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*. Section 11 of the *CCAA* contains a grant of broad

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supervisory discretion and the power to "make any order that it considers appropriate in the circumstances", but that grant of authority is not unlimited. Parliament avoided any conflict between the *CCAA* and the *ITA* by imposing three restrictions that are significant here. First, although s. 37(1) of the *CCAA* provides that "property of the debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision", s. 37(2) provides for the continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding. In addition, while the deemed trusts are not "true trusts" and the commingling of assets renders the money subject to the deemed trusts untraceable, tracing has no application to s. 227(4.1). Second, the unremitted source deductions are deemed not to form part of the property of the debtor's company. If there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest. However, priming charges can attach only to the debtor's property, so the Crown's interest under the deemed trust is not subject to the Priming Charges. Third, under the definition of "secured creditor" in s. 2 of the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes. That definition must be read as "secured creditor means . . . a holder of any bond of the debtor company secured by . . . a trust in respect of, all or any property of the debtor company", which makes it manifestly clear that the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes.

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Giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 of the *CCAA* meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*. Section 6(3) of the *CCAA*, which protects the Crown's claims under the deemed trusts as well as claims not subject to the deemed trusts under the Fiscal Statutes, operates only where there is an arrangement or compromise put to the court. In contrast, the deemed trusts arise immediately and operate continuously from the time the amount was deducted or withheld from employee's remuneration, and apply to only unremitted source deductions. Without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the *ITA*, because most of the Crown's claims rank as unsecured under s. 38 of the *CCAA*. However, s. 6(3) does not explain the survival of the deemed trust or the rights conferred on the Crown under the deemed trust. Their survival is explained by s. 37(2), which continues the operation of s. 227(4.1), or by s. 227(4.1), which provides that the proceeds of the trust property "shall be paid to the Receiver General in priority to all such security interests". Finally, s. 6(3) protects different interests than those captured by the deemed trusts, and the right not to have to compromise under s. 6(3) is a right independent of the Crown's right under deemed trusts.

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Section 11.09 of the *CCAA*, which permits the court to stay the Crown's enforcement of its claims under the deemed trust claims, can apply to the Crown's deemed trust claims, but it does not remove the priority granted by the deemed trusts.

Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. The deemed trust is not a "true" trust and it does not confer an ownership interest or the rights of a beneficiary to the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec*. The requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust as the deemed trust is a legal fiction with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*.

Finally, concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges would not lead to absurd consequences. The conclusion that interim financing would simply end was not supported by the record, and there are usually enough funds available to satisfy both the Crown claim and the court-ordered priming charges. Equally unfounded is the claim that confirming the priority of the deemed trusts would inject an unacceptable level of uncertainty into the insolvency process. Interim lenders can rely on the company's financial statements to evaluate the risk of providing financing.

Per **Moldaver** J. (dissenting): There is substantial agreement with the analysis and conclusions of Brown and Rowe JJ. However, there are two points to be addressed. First, the question of the nature of the Crown's interest should be left to

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another day. This is because, properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to direct that the Crown's interest under s. 227(4.1) of the *ITA* — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

Second, while there is agreement that s. 37(2) of the *CCAA* can be interpreted as an internal restriction on s. 11, if this interpretation is mistaken, s. 11 is nonetheless restricted by s. 227(4.1), as Parliament has expressly indicated the supremacy of s. 227(4.1) over the provisions of the *CCAA*. The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority. A necessary consequence of the absolute supremacy of the Crown's deemed trust claim is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the *CCAA*. Unlike s. 227(4.1), which is focused on ensuring the priority of the Crown's claim, s. 6(3) merely establishes a six-month timeframe for payment to the Crown in the event that the debtor company succeeds in staying viable as a going concern. Accordingly, if s. 6(3) gave effect to the Crown's interest, the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim. Further, as s. 6(3) does not apply where a liquidation occurs under the *CCAA*, the Crown would be deprived of its priority over security interests in such circumstances.

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It cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for *CCAA* proceedings. If circumstances do arise in which the priority of the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid any consequences that would undermine the remedial purposes of the *CCAA*.

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APPEAL from a judgment of the Alberta Court of Appeal (Rowbotham, Wakeling and Schutz JJ.A.), 2019 ABCA 314, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111, [2019] A.J. No. 1154 (QL), 2019 CarswellAlta 1815 (WL Can.), affirming a decision of Topolniski J., 2017 ABQB 550, 60 Alta. L.R. (6th) 103,

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52 C.B.R. (6th) 308, [2018] 2 W.W.R. 731, [2017] A.J. No. 930 (QL), 2017 CarswellAlta 1631 (WL Can.). Appeal dismissed, Abella, Moldaver, Brown and Rowe JJ. dissenting.

Michael Taylor and *Louis L'Heureux*, for the appellant.

Darren R. Bieganek, *Q.C.*, and *Brad Angove*, for the respondents Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as monitor.

Jeffrey Oliver and *Mary I. A. Buttery*, *Q.C.*, for the respondent the Business Development Bank of Canada.

Kelly J. Bourassa, for the intervener the Insolvency Institute of Canada.

Randal Van de Mosselaer, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

The reasons of Wagner C.J. and Côté and Kasirer. JJ. were delivered by

CÔTÉ J. —

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I. Overview

[1] The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), has a long and storied history. From its origins in the Great Depression to its revival and reinvention during the 1970s and 1980s, the *CCAA* has played an important role in Canada's economy. Today, the *CCAA* provides an opportunity for insolvent companies with more than $5,000,000 in liabilities to restructure their affairs through a plan of arrangement. The goal of the *CCAA* process is to avoid bankruptcy and maximize value for all stakeholders.

[2] In order to facilitate the restructuring process, courts supervising *CCAA* restructurings may authorize an insolvent company to incur certain critical costs associated with this process. Supervising courts may also secure payment of these costs by ordering a super-priority charge against the insolvent company's assets. Today, our Court is called upon to determine whether a supervising court may order super-priority charges over assets that are subject to a claim of Her Majesty protected by a deemed trust created by s. 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*").

[3] The Crown raises two arguments as to why a supervising court should be unable to subordinate Her Majesty's interest to super-priority charges. First, the Crown says that s. 227(4.1) creates a proprietary interest in a debtor's assets and a court cannot attach a super-priority charge to assets subject to Her Majesty's interest. Second, the Crown says that even if s. 227(4.1) does not create a proprietary interest, it creates a

security interest that has statutory priority over all other security interests, including super-priority charges.

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[4] Both of these arguments must fail. As this Court has previously held, the *CCAA* generally empowers supervising judges to order super-priority charges that have priority over all other claims, including claims protected by deemed trusts. In all cases where a supervising court is faced with a deemed trust, the court must assess the nature of the interest established by the empowering enactment, and not simply rely on the title of deemed trust. In this case, when the relevant provisions of the *ITA* are examined in their entirety, it is clear that the *ITA* does not establish a proprietary interest because Her Majesty's claim does not attach to any specific asset. Further, there is no conflict between the *CCAA* order and the *ITA*, as the deemed trust created by the *ITA* has priority only over a defined set of security interests. A super-priority charge ordered under s. 11 of the *CCAA* does not fall within that definition. For the reasons that follow, I would therefore dismiss the appeal.

II. Background

[5] Canada North Group and six related corporations ("Debtors") initiated restructuring proceedings under s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), but soon changed course and sought to restructure under the *CCAA*. In their initial *CCAA* application, they requested a package of relief standard to *CCAA* proceedings, including a thirty-day stay on all proceedings against them, the appointment of a monitor and the creation of three super-priority charges. The first

charge they requested was an administration charge of up to $1,000,000 in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred. The second was a $1,000,000 financing charge in favour of an interim lender. The third was a $150,000 directors' charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The Debtors included in their initial motion an affidavit from one of their directors attesting to a $1,140,000 debt to Her Majesty The Queen for source deductions and Goods and Services Tax ("GST").

[6] Justice Nielsen of the Court of Queen's Bench heard the motion together with a cross-motion by the Debtors' primary lender, Canadian Western Bank, seeking the appointment of a receiver. Justice Nielsen granted an initial order in favour of the Debtors on the terms requested in the initial application, aside from a $500,000 reduction in the administration charge (Alta. Q.B., No. 1703-12327, July 5, 2017 ("Initial Order")). The terms of that order included the following with regard to priority:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. [Emphasis deleted; para. 44.]

Justice Nielsen further ordered that these charges "shall not otherwise be limited or impaired in any way by . . . (d) the provisions of any federal or provincial statutes" (para. 46).

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[7] Three weeks after the Initial Order was granted, the Debtors sought supplementary orders extending the stay of proceedings and increasing the interim financing to $2,500,000. Canadian Western Bank again filed a motion to appoint a receiver. At the hearing of the three motions, counsel for Her Majesty appeared in order to advise that Her Majesty would be filing a motion to vary the Initial Order on the ground that the order failed to recognize Her priority interest in unremitted source deductions (the portion of remuneration that employers are required to withhold from employees and remit directly to the Canada Revenue Agency ("CRA")).

[8] The Crown filed the motion soon after. Its argument for variance was grounded in the nature of Her Majesty's interest in the Debtors' property. It argued that the nature of Her Majesty's interest is determined by s. 227(4.1) of the *ITA* and that that provision creates a proprietary interest:

> **(4)** Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be

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> property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > **(a)** to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > **(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

III. Judgments Below

A. *Court of Queen's Bench, 2017 ABQB 550, 60 Alta. L.R. (6th) 103*

[9] Justice Topolniski heard Her Majesty's motion to vary the Initial Order. Despite the delay between the Initial Order and the motion to vary, Topolniski J. found that she had jurisdiction to hear the motion based on the discretion and flexibility conferred by the *CCAA*. However, she dismissed the motion on the ground that s. 227(4.1) of the *ITA* creates a security interest that can be subordinated to court-ordered super-priority charges.

[10] Justice Topolniski relied upon *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, and *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002]

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2 S.C.R. 720, to conclude that the deemed trust created by s. 227(4.1) of the *ITA* is not a proprietary interest. Rather, the *ITA* creates something similar to a floating charge over all the debtor's assets, which permits the debtor to alienate property subject to the deemed trust. These characteristics are inconsistent with a proprietary interest, and thus s. 227(4.1) does not create such an interest.

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[11] Justice Topolniski also considered whether s. 227(4.1) creates a security interest that requires Her Majesty's interest to take priority over court-ordered charges. She acknowledged that the *CCAA* preserves the operation of the deemed trust, but she found that it also authorizes the reorganization of priorities by court order. Because each of the charges included in the Initial Order was critical to the restructuring process, they were necessarily required by the *CCAA* regime.

B. *Leave to Appeal, 2017 ABCA 363, 54 C.B.R. (6th) 5*

[12] Following the dismissal of the Crown's motion, the Debtors determined that there were sufficient assets in the estate to satisfy both Her Majesty and the beneficiaries of the three court-ordered super-priority charges in full. However, the Crown sought and obtained leave to appeal in order to seek appellate guidance on the nature of Her Majesty's priority.

C. *Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29*

[13] The Court of Appeal dismissed the appeal. It was divided as to whether the super-priority charges had priority over Her Majesty's claim. Justice Rowbotham wrote for the majority and agreed with the motion judge that s. 227(4.1) of the *ITA* creates a security interest, in accordance with this Court's earlier finding in *First Vancouver* that the deemed trust is like a "floating charge over all of the assets of the tax debtor in the amount of the default" (*First Vancouver*, at para. 40). She found further support for this in the fact that the deemed trust also falls squarely within the *ITA*'s definition of "security interest" in s. 224(1.3).

[14] After determining that Her Majesty's interest in the Debtors' property was a security interest, Rowbotham J.A. turned to the question of whether the deemed trust could be subordinated to the court-ordered super-priority charges. She found that "while a conflict may appear to exist at the level of the 'black letter' wording" of the *ITA* and the *CCAA*, "the presumption of statutory coherence require[d] that the provisions be read to work together" (para. 45). A deemed trust that could not be subordinated to super-priority charges would undermine both Acts' objectives because fewer restructurings could succeed and thus less tax revenue could be collected. If the Crown's position prevailed, then absurd consequences could follow. Approximately 75 percent of restructurings require interim lenders. Without the assurance that they would be repaid in priority, these lenders would not come forward, nor would monitors or directors. The reality is that all of these services are provided in reliance on super priorities. Without these priorities, *CCAA* restructurings may be severely curtailed or

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at least delayed until Her Majesty's exact claim could be ascertained, by which point the company might have totally collapsed.

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[15] Justice Wakeling dissented. In his view, none of the arguments raised by the majority could overcome the text of the *ITA*. On his reading, the text of s. 227(4.1) is clear: Her Majesty is the beneficial owner of the amounts deemed to be held separate and apart from the debtor's property, and these amounts must be paid to Her Majesty notwithstanding any type of security interest, including super-priority charges. In his view, nothing in the *CCAA* overrides this proprietary interest. Section 11 of the *CCAA* cannot permit discretion to be exercised without regard for s. 227(4.1) of the *ITA*, nor can ss. 11.2, 11.51 and 11.52 of the *CCAA* be used, as they only allow a court to make orders regarding "all or part of the company's property" (s. 11.2(1)). In conclusion, since no part of the *CCAA* authorizes a court to override s. 227(4.1), a court must give effect to the clear text of s. 227(4.1) and cannot subordinate Her Majesty's claims to super-priority charges.

IV. Issue

[16] The central issue in this appeal is whether the *CCAA* authorizes courts to grant super-priority charges with priority over a deemed trust created by s. 227(4.1) of the *ITA*. In order to answer this question, I proceed in three stages. First, I assess the nature of the *CCAA* regime and the power of supervising courts to order such charges. Given that supervising courts generally have the authority to order super-priority charges with priority over all other claims, I then turn to s. 227(4.1) of the *ITA* to

determine whether it gives Her Majesty an interest that cannot be subordinated to super-priority charges. Here I assess the Crown's two arguments as to why s. 227(4.1) provides for an exception to the general rule, namely that Her Majesty has a proprietary or ownership interest in the insolvent company's assets and that, even if Her Majesty does not have such an interest, s. 227(4.1) provides Her with a security interest that has absolute priority over all claims. I conclude by assessing how courts should exercise their authority to order super-priority charges where Her Majesty has a claim against an insolvent company protected by a s. 227(4.1) deemed trust.

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V. Analysis

[17] In order to determine whether the *CCAA* empowers a court to order super-priority charges over assets subject to a deemed trust created by s. 227(4.1) of the *ITA*, we must understand both the *CCAA* regime and the nature of the interest created by s. 227(4.1).

A. *CCAA Regime*

[18] The *CCAA* is part of Canada's system of insolvency law, which also includes the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 6(1), for banks and other specified institutions. Although both the *CCAA* and the *BIA* create reorganization regimes, what distinguishes the *CCAA* regime is that it is restricted to companies with liabilities of more than $5,000,000 and "offers a more flexible mechanism with greater judicial discretion, making it more responsive to

complex reorganizations" (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14).

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[19] The *CCAA* works by creating breathing room for an insolvent debtor to negotiate a way out of insolvency. Upon an initial application, the supervising judge makes an order that ordinarily preserves the status quo by freezing claims against the debtor while allowing it to remain in possession of its assets in order to continue carrying on business. During this time, it is hoped that the debtor will negotiate a plan of arrangement with creditors and other stakeholders. The goal is to enable the parties to reach a compromise that allows the debtor to reorganize and emerge from the *CCAA* process as a going concern (*Century Services*, at para. 18).

[20] The view underlying the entire *CCAA* regime is thus that debtor companies retain more value as going concerns than in liquidation scenarios (*Century Services*, at para. 18). The survival of a going-concern business is ordinarily the result with the greatest net benefit. It often enables creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor company (para. 60). Thus, this Court recently held that the *CCAA* embraces "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 42, quoting

J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 14).

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[21] The most important feature of the *CCAA* — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, "On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (*Callidus Capital*, at para. 67). Keeping in mind the centrality of judicial discretion in the *CCAA* regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services*, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the *CCAA* (para. 70). For instance, given that the purpose of the *CCAA* is to facilitate the survival of going concerns, when crafting an initial order, "[a] court must first of all provide the conditions under which the debtor can attempt to reorganize" (para. 60).

[22] On review of a supervising judge's order, an appellate court should be cognizant that supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests. Appellate courts should also recognize that orders are generally temporary or interim in nature and that the restructuring process is constantly evolving. These considerations require not only that supervising judges be endowed with a broad discretion, but that appellate courts exercise particular caution before interfering with orders made in accordance with that discretion (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), at paras. 30-31).

[23] In addition to s. 11, there are more specific powers in some of the provisions following that section. They include the power to order a super-priority security or charge on all or part of a company's assets in favour of interim financiers (s. 11.2), critical suppliers (s. 11.4), the monitor and financial, legal or other experts (s. 11.52), or indemnification of directors or officers (s. 11.51). Each of these provisions empowers the court to "order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.4(4), 11.51(2) and 11.52(2)).

[24] As this Court held in *Century Services*, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over

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orders made under the specific provisions. These include, for example, key employee retention plan charges (*Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), and bid protection charges (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

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[25] In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60, quoting the amended initial order in that case, this Court confirmed that a court-ordered financing charge with priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", had priority over a deemed trust established by the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), to protect employee pensions. Justice Deschamps wrote for a unanimous Court on this point. She found that the existence of a deemed trust did not preclude orders granting first priority to financiers: "This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the [debtor-in-possession ("DIP")] charge" (para. 48).

[26] Justice Deschamps first assessed the supervising judge's order to determine whether it had truly been necessary to give the financing charge priority over the deemed trust. Even though the supervising judge had not specifically considered the deemed trust in the order authorizing a super-priority charge, he had found that there was no alternative but to make the order. Financing secured by a super priority was

necessary if the company was to remain a going concern (para. 59). Justice Deschamps rejected the suggestion "that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust", because "[t]he harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries" (para. 59).

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[27] After determining that the order was necessary, she turned to the statute creating the deemed trust's priority. Section 30(7) of the *PPSA* provided that the deemed trust would have priority over all security interests. In her view, this created a conflict between the court-ordered super priority and the statutory priority of the claim protected by the deemed trust. The super priority therefore prevailed by virtue of federal paramountcy (para. 60).

[28] There are also practical considerations that explain why supervising judges must have the discretion to order other charges with priority over deemed trusts. Restructuring under the *CCAA* often requires the assistance of many professionals. As Wagner C.J. and Moldaver J. recently recognized for a unanimous Court, the role the monitor plays in a *CCAA* proceeding is critical: "The monitor is an independent and impartial expert, acting as 'the eyes and the ears of the court' throughout the proceedings . . . . The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing" (*Callidus*

Capital, at para. 52, quoting *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 109). In the words of Morawetz J. (as he then was), "[i]t is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position" (*Timminco*, at para. 66).

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[29] This Court has similarly found that financing is critical as "case after case has shown that 'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'" (*Indalex*, at para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). As lower courts have affirmed, "Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges" (*First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, at para. 51 (CanLII)).

[30] Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality . . . that lending is governed by the commercial imperatives of the lenders" (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and

develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not amount to a trust under general principles of law would "defy fairness and common sense" (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at p. 33).

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[31] It is therefore clear that, in general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. Similarly, courts have ensured that the *CCAA* is given a liberal construction to fulfill its broad purpose and to prevent this purpose from being neutralized by other statutes: [TRANSLATION] "As the courts have ruled time and again, the purpose of the *CCAA* and orders made under it cannot be affected or neutralized by another [Act], whether of public order or not" (*Triton Électronique inc. (Arrangement relatif à)*, 2009 QCCS 1202, at para. 35 (CanLII)). "This case is not so much about the rights of employees as creditors, but the right of the court under the [*CCAA*] to serve not the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd.* [*v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.)] . . . Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the [*CCAA*] must be served" (*Pacific National Lease Holding*, at para. 28). Courts have been particularly cautious when interpreting security interests so as to ensure that the *CCAA*'s important purpose can be fulfilled. For instance, in *Chef Ready Foods*, Gibbs J.A. observed that if a bank's rights under the *Bank Act*, S.C. 1991, c. 46, were to be interpreted as being immune from the

provisions of the *CCAA*, then the benefits of *CCAA* proceedings would be "largely illusory" (p. 92). "There will be two classes of debtor companies: those for whom there are prospects for recovery under the [*CCAA*]; and those for whom the [*CCAA*] may be irrelevant dependent upon the whim of the [creditor]" (p. 92). It is important to keep in mind that *CCAA* proceedings operate for the benefit of the creditors as a group and not for the benefit of a single creditor. Without clear and direct instruction from Parliament, we cannot countenance the possibility that it intended to create a security interest that would limit or eliminate the prospect of reorganization and recovery under the *CCAA* for some companies. To do so would turn the *CCAA* into a dead letter. With this in mind, I turn to the specific provision at issue in this appeal.

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B. *Nature of the Interest Created by Section 227(4.1) of the ITA*

[32] The Crown argues that, despite the authority a supervising court may have to order super-priority charges, Her Majesty's claim to unremitted source deductions is protected by a deemed trust, and that ordering charges with priority over the deemed trust is contrary to s. 227(4.1) of the *ITA*. To determine whether this is true, we must begin by understanding how the deemed trust comes about.

[33] Section 153(1) of the *ITA* requires employers to withhold income tax from employees' gross pay and forward the amounts withheld to the CRA. When an employer withholds income tax from its employees in accordance with the *ITA*, it assumes its employees' liability for those amounts (s. 227(9.4)). As a result, Her Majesty cannot have recourse to the employees if the employer fails to remit the

withheld amounts. Instead, Her Majesty's interest is protected by a deemed trust. Section 227(4) of the *ITA* provides that amounts withheld are deemed to be held separate and apart from the employer's assets and in trust for Her Majesty. If an employer fails to remit the amounts withheld in the manner provided by the *ITA*, s. 227(4.1) extends the trust to all of the employer's assets. In this case, the Debtors failed to remit the amounts withheld to the CRA, bringing s. 227(4.1) into operation.

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[34] When a company seeks protection under the *CCAA*, s. 37(1) of the *CCAA* provides that most of Her Majesty's deemed trusts are nullified (unless the property in question would be regarded as held in trust in the absence of the statutory provision creating the deemed trust). However, s. 37(2) of the *CCAA* exempts the deemed trusts created by s. 227(4) and (4.1) of the *ITA* from the nullification provided for in s. 37(1). These deemed trusts continue to operate throughout the *CCAA* process (*Century Services*, at para. 45). In my view, this preservation by the *CCAA* of the deemed trusts created by the *ITA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Therefore, the Crown's arguments must be assessed by reviewing the nature of the interest created by s. 227(4.1) of the *ITA*.

[35] Before doing so, and while it is not strictly speaking required of me given the reasons I set out below, I pause here to clarify the role of s. 6(3) of the *CCAA*, which provides as follows:

> **(3)** Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> **(a)** subsection 224(1.2) of the *Income Tax Act* . . . .

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[36] Section 6(3) merely grants Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full to Her Majesty of certain claims within six months after court sanction. Section 6(3) does not say that it modifies the deemed trust created by s. 227(4.1) of the *ITA* in any way, and it comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise. Section 6(3) also applies to numerous claims that are not protected by the deemed trust, including penalties, interest, withholdings on non-resident dispositions and certain retirement contributions (see ss. 224(1.2) and 227(10.1) of the *ITA*, the latter of which refers to amounts payable under ss. 116, 227(9), (9.2), (9.3), (9.4) and (10.2), Part XII.5 and Part XIII). Equating the deemed trust with the right under s. 6(3) renders s. 37(2) of the *CCAA* and the deemed trust meaningless. I therefore proceed, as this Court did in *Indalex*, by assessing the interest created by s. 227(4.1) of the *ITA* without regard to the *CCAA* (*Indalex*, at para. 48).

[37] Section 227(4.1) provides:

> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > **(a)** to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > **(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

(1) Does Section 227(4.1) of the *ITA* Create a Proprietary or Ownership Interest in the Debtor's Assets?

[38] This appeal — like previous appeals to this Court — does not require the Court to exhaustively define the nature and content of the interest created by s. 227(4.1) of the *ITA* (*Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, and *First Vancouver*). All that is necessary is to determine whether s. 227(4.1) confers upon Her Majesty an interest in the debtor's property that precludes a court from ordering charges with priority over Her Majesty's claim. The Crown argues that s. 227(4.1) does so by giving Her Majesty a proprietary interest in the debtor's assets, which "causes

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those assets to become the property of the Crown" (A.F., at para. 46). The Crown rests this argument on the wording of the section. First, it says that property equal in value to the amount deemed to be held in trust by a person is deemed to be held "separate and apart from the property of the person". Second, it says that the property deemed to be held in trust is deemed "to form no part of the estate or property of the person". Third, it says that the property deemed to be held in trust "is property beneficially owned by Her Majesty notwithstanding any security interest in such property". The Crown submits that, as a result of Her Majesty's proprietary interest, amounts subject to the deemed trust cannot be considered assets of the debtor in *CCAA* proceedings.

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[39] In order to determine whether s. 227(4.1) confers a proprietary or ownership interest upon Her Majesty, we must look at the nature of the rights afforded to Her Majesty by the deemed trust and compare them to the rights ordinarily afforded to an owner. To begin with, it is clear that the statute does not purport to transfer legal title to any property to Her Majesty. Instead, the Crown's argument places considerable weight on the common law meaning of the words "beneficially owned by Her Majesty" and "in trust". Trusts and beneficial ownership are equitable concepts that are part of the common law. As in all cases of statutory interpretation, the meaning of these words is a question of parliamentary intent. In the interpretation of a federal statute that uses concepts of property and civil rights, reference must be had to ss. 8.1 and 8.2 of the *Interpretation Act*, R.S.C. 1985, c. I-21. These sections provide:

> **8.1** Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and,

> unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
>
> **8.2** Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

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[40] In other words, where Parliament uses a private law expression and is silent as to its meaning, courts must refer to the applicable provincial private law. This is known as the principle of complementarity. However, as both these sections also make clear, Parliament is free to derogate from provincial private law and create a uniform rule across all provinces (see R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 158-59).

[41] In this case, Parliament has expressly chosen to dissociate itself from provincial private law. Section 227(4.1) says that it operates "[n]otwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law". In *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, the majority found that, through these words, Parliament has created a standalone scheme of uniform application across all provinces (paras. 11-13). The nature of the deemed trust created by s. 227(4.1) must thus be understood on its own terms.

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[42] With that said, it is also clear that Parliament has chosen to use terms with established legal meanings in constructing the deemed trust. While the meaning of these terms is not to be based on their precise meaning under Alberta common law, it is difficult to attempt to understand s. 227(4.1) without any reference to how these concepts generally operate. Despite the protestations of my colleagues Justices Brown and Rowe, I do not see how we could begin to understand the meaning of the words "deemed trust", "held in trust" or "beneficially owned" without reference to the civil law or common law. The law of trusts in both civil law and common law thus provides critical context for understanding Parliament's intent. From a civil law perspective, some courts have found it awkward to apply the idea of beneficial ownership under s. 227(4.1) in Quebec "on the ground that it is a concept that is obviously derived from the common law" (*Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31, at para. 48). I agree with the following observation by Noël J.A. (as he then was):

> It is not the task of the judiciary to determine whether it is appropriate for Parliament to use common law concepts in Quebec (or to use civil law concepts elsewhere in Canada) for the purpose of giving effect to federal legislation. The task of the courts is limited to discovering Parliament's intention and giving effect to it. [para. 49]

[43] Under Quebec civil law, it is clear that s. 227(4.1) does not establish a trust within the meaning of the *Civil Code of Québec* ("*C.C.Q.*"). Articles 1260 and 1261 *C.C.Q.* provide the following:

> **1260.** A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.
>
> **1261.** The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.

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As this Court held in *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31, "Three requirements must therefore be met in order for a trust to be constituted [under Quebec civil law]: property must be transferred from an individual's patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property."

[44] Under s. 227(4.1) of the *ITA*, however, no specific property is transferred to a trust patrimony. Indeterminacy remains as to which assets are subject to the deemed trust, *ergo*, as to which assets left the settlor's patrimony and entered the trust's patrimony. Although s. 227(4.1) provides that the assets are deemed to be held "separate and apart from the property of the person" and "to form no part of the estate or property of the person", this is not sufficient to constitute an autonomous patrimony such as the one contemplated by the civilian trust regime. It flows from the autonomous nature of the trust patrimony that assets held in trust must be property in which none of the settlor, trustee or beneficiary has any property right. But this runs afoul of the interest created by s. 227(4.1), because nothing in that provision deprives the person whose assets are subject to a deemed trust of property rights in these assets. Therefore,

the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): there is no autonomous patrimony to which specific property is transferred.

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[45] Furthermore, under s. 227(4.1), the person whose assets are subject to the deemed trust would act as trustee. Again, this is inconsistent with the definition of a trustee in civil law. The person whose assets are subject to a deemed trust pursuant to s. 227(4.1) does not "undertak[e], by his acceptance, to hold and administer" a trust patrimony (art. 1260 *C.C.Q.*). But most importantly, the fact that assets subject to the deemed trust are indeterminate makes the trustee's role effectively impossible to play. The *C.C.Q.* provides that the trustee "has the control and the exclusive administration of the trust patrimony" and "acts as the administrator of the property of others charged with full administration" (art. 1278). Thus, the trustee under s. 227(4.1) would be required to administer its own property — or at least an indefinite part of it — in the interest of Her Majesty (art. 1306 *C.C.Q.*). The trustee would be subject to obligations impossible to fulfill, such as the obligation not to mingle the administered property with its own (art. 1313 *C.C.Q.*). Obviously, one cannot act as an administrator of the property of others with respect to one's own property. It is therefore clear that the interest created by s. 227(4.1) has little, if anything, in common with the trust in civil law.

[46] In the common law, a trust arises when legal ownership and beneficial ownership of a particular property are separated (see *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224, at para. 18). "Because a trust

divides legal and beneficial title to property between a trustee and a beneficiary, respectively, the 'hallmark' characteristic of a trust is the fiduciary relationship existing between the trustee and the beneficiary, by which the trustee is to hold the trust property solely for the beneficiary's enjoyment" (para. 17 (footnote omitted)). As Rothstein J. wrote, because of this fiduciary relationship, "[t]he beneficial owner of property has been described as 'the real owner of property even though it is in someone else's name'" (*Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at para. 4, quoting *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570).

[47] While the precise rights given to a beneficial owner may vary according to the terms of the trust and the principles of equity, I agree with the Crown that, where this type of interest exists, it will generally be inappropriate for the supervising judge to order a super-priority charge over the property subject to the interest, although the broad power conferred on the court by s. 11 of the *CCAA* would enable it to do so. Property held in trust cannot be said to belong to the trustee because "in equity, it belongs to another person" (*Henfrey*, at p. 31). However, a close examination of the nature of the interest created by s. 227(4.1) of the *ITA* reveals that it does not create this type of interest because "[t]he employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted" (R. J. Wood and R. T. G. Reeson, "The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*" (2000), 15 *B.F.L.R.* 515, at p. 532). In other words, the

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key attributes that allow the common law to refer to beneficial ownership as being a proprietary interest are missing.

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[48] According to the common law understanding of a trust, the legal owner or trustee owes a fiduciary duty to the equitable owner or beneficiary. The fiduciary relationship impresses the office of trustee with three fundamental duties: the trustee must act honestly and with reasonable skill and prudence, the trustee cannot delegate the office, and the trustee cannot personally profit from its dealings with the trust property or its beneficiaries (see *Valard*, at para. 17). This severely restricts what the trustee may do with trust property and creates a relationship significantly different from the one between a debtor and a creditor. For instance, while a debtor may attempt to reduce its debt or reach a compromise, a trustee cannot, since it must always act in the best interest of the beneficiary and cannot consider its own interests. Similarly, while a debtor is liable to a creditor until the debt is repaid, a trustee is not liable to a beneficial owner where property is lost, unless it was lost through a breach of the standard of care owed (see E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 14). In the case of the deemed trust, however, Parliament did not create such a fiduciary relationship. Parliament expressly contemplated a potential compromise between Her Majesty and the debtor in s. 6(3) of the *CCAA*. In addition, the terms of the *ITA* do not require that the debtor actually keep the property subject to the deemed trust separate and use it solely for the benefit of Her Majesty. In fact, Her Majesty does not enjoy the benefit of Her interest in the property while the property is held by the debtor. Instead, Parliament

contemplated that the debtor would continue to use and dispose of the property subject to the trust for its own business purposes (see *First Vancouver*, at paras. 42-46).

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[49] Another core attribute of beneficial ownership is certainty as to the property that is subject to the trust (see Gillese, at p. 39). Many deemed trusts fail to provide for certainty of subject matter. For instance, in *Henfrey*, the Court considered the deemed trust created by the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388. Like s. 227(4.1) of the *ITA*, the *Social Service Tax Act* provided that tax collected but not remitted was deemed to be held in trust for Her Majesty. It further provided that unremitted amounts were deemed to be held separate and apart from and form no part of the assets or estate of the tax collector. While McLachlin J. found that the property was identifiable at the time the tax was collected, she noted that "[t]he difficulty in this, as in most cases, is that trust property soon ceases to be identifiable. The tax money is mingled" (p. 34). Therefore, she concluded that there was no trust under general principles of equity. The legislature's attempt to resolve this problem by deeming the amounts to be separate from and form no part of the tax debtor's property was merely a tacit acknowledgment that "the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust" (p. 34).

[50] In *First Vancouver*, this Court examined the nature of the interest created by s. 227(4.1) of the *ITA*. Writing for the Court, Iacobucci J. held that this provision creates a charge which "is in principle similar to a floating charge over all the assets of

the tax debtor in the amount of the default" (para. 40). He concluded that Parliament specifically intended to create a charge with fluidity, a charge that could readily float over all of the debtor's assets rather than attach to a particular one (para. 33). Parliament's intention was to capture any property that comes into the possession of the tax debtor whilst simultaneously allowing any asset to be alienated and the proceeds of disposition to be captured (para. 5).

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[51] This lack of certainty as to the subject matter of the trust is even starker in the present case than in *Henfrey* or in *Sparrow Electric*, where there was certainty as to the assets until they were mingled. Section 227(4.1) purports to bring all assets owned by the debtor within its reach. Despite the wording of the section, this interest — one of the same nature as a "floating charge" — has no particular property to which it attaches. Without certainty of subject matter, equity cannot know which property the debtor has a fiduciary obligation to maintain in the beneficiary's interest and thus "[t]he notion of a trust without a *res* simply cannot be made sensible or coherent" (Wood and Reeson, at pp. 532-33 (footnote omitted); see also *Sparrow Electric*, at para. 31).

[52] Parliament's decision to avoid certainty of subject matter was an intentional modification to the deemed trust following this Court's decision in *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182. In *Dauphin Plains*, the Court refused to enforce Her Majesty's claim because the Crown had failed to establish that the moneys purported to be deducted actually existed or were kept in

such a way as to be traceable (p. 1197). Traceability is another key aspect of a beneficial interest, since it allows the beneficial owner to enjoy the benefits of ownership, such as income from the property. It also ensures that the beneficial owner is responsible for the costs of ownership. By choosing not to attach Her Majesty's claim to any particular asset, Parliament has protected Her Majesty from the risks associated with asset ownership, including damage, depreciation and loss. I agree with Gonthier J., who, speaking of the predecessor to s. 227(4.1) (albeit in dissent), said that "this subsection is antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into" (*Sparrow Electric*, at para. 37). Had Parliament wanted to confer a beneficial ownership interest upon Her Majesty, it would have had to impose these associated risks as well.

[53] For the same reason as in *Henfrey*, the statement that property is deemed to be removed from the debtor's estate is equally ineffective at preventing a judge from ordering super priorities over the debtor's property. Because the deemed trust does not attach to specific property and the debtor remains free to alienate any of its assets, no property is actually removed from the debtor's estate.

[54] This interpretation is supported by the existence of s. 227(4.2) of the *ITA*, which specifically anticipates other interests taking priority over the deemed trust (something that would be impossible if there were an ownership interest). It states that "[f]or the purposes of subsections 227(4) and 227(4.1), a security interest does not

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include a prescribed security interest". In the *Income Tax Regulations*, C.R.C., c. 945, s. 2201(1), the Governor in Council has defined "prescribed security interest" as a registered mortgage "that encumbers land or a building, where the mortgage is registered . . . before the time the amount is deemed to be held in trust by the person". Therefore, in certain situations, mortgage holders take priority over Her Majesty.

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[55] I reiterate that, without specific property to attach to, there can be no trust. The fact that s. 227(4.1) specifically anticipates that the character of assets will change over time and automatically releases any assets that the debtor chooses to alienate from the deemed trust means that Parliament had in mind something different from beneficial ownership in the common law sense of the word. I tend to agree with Noël J.A.'s assessment of s. 227(4.1): "The deemed trust mechanism, whether applied in Quebec or elsewhere, effectively creates in favour of the Crown a security interest . . ." (*Caisse populaire d'Amos*, at para. 46).

[56] Other scholars agree that s. 227(4.1) "merely secures payment or performance of an obligation" (R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85, at p. 95; see also A. Duggan and J. Ziegel, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 *U.T.L.J.* 227, at pp. 245-46). Wood and Reeson reach the particularly damning conclusion that "[t]he concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking" and thus "the use of inappropriate legal concepts" has led to the creation of a "statutory

provision [that] is deeply flawed" (pp. 531-32). They "suspec[t] that the intention of the drafters was that Revenue Canada should obtain a charge on all the assets of the debtor", and they state that "the statutory deemed trust is nothing more than a legislative mechanism that is intended to create a non-consensual security interest in the assets of the employer" (p. 533).

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[57] Nonetheless, for our purposes it is not necessary to conclusively determine whether the interest created by s. 227(4.1) should be characterized as a security interest. What is clear is that s. 227(4.1) does not create a beneficial interest that can be considered a proprietary interest. Like the deemed trust at issue in *Henfrey*, it "does not give [the Crown] the same property interest a common law trust would" (p. 35). Without attaching to specific property, creating the usual right to the enjoyment of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner. Therefore, I do not accept the Crown's argument that Her Majesty has a proprietary interest in a debtor's property that is adequate to prevent the exercise of a supervising judge's discretion to order super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it.

(2) Does Section 227(4.1) of the *ITA* Create a Super Priority That Conflicts With a Court-Ordered Super-Priority Charge?

[58] The Crown also refers to the part of s. 227(4.1) which states that the Receiver General shall be paid the proceeds of a debtor's property "in priority to all

such security interests", as defined in s. 224(1.3). In the Crown's view, court-ordered super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it are security interests within the meaning of s. 224(1.3) and therefore Her Majesty's interest has priority over them.

[59] My colleagues Justices Brown and Rowe point to the legislative history of s. 227(4.1) as evidence that Parliament intended Her Majesty's deemed trust to have "absolute priority" over all other security interests (para. 201). In particular, they rely upon Justice Iacobucci's comment in *Sparrow Electric* that "it is open to Parliament to step in and assign absolute priority to the deemed trust" by using the words "shall be paid to the Receiver General in priority to any such security interest" (reasons of Brown and Rowe JJ., at para. 202, citing *Sparrow Electric*, at para. 112). They further rely upon the press release accompanying the amendments, which stated that the deemed trust was to have absolute priority.

[60] With respect, I disagree with this reasoning. *Sparrow Electric* dealt with a type of interest very different from the one before us now. In *Sparrow Electric*, this Court held that a fixed and specific charge over the tax debtor's inventory had priority over Her Majesty's deemed trust created by the *ITA*. Thus the purpose of the amendments was to "clarify that the deemed trusts for unremitted source deductions and GST apply whether or not other security interests have been granted in respect of the inventory or trade receivables of a business" (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997), at p. 2). If Parliament

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had intended that the deemed trust have absolute priority, it would not have enacted s. 227(4.2) at the same time. As noted above, s. 227(4.2) provides that "a security interest does not include a prescribed security interest", and thus specifically envisions that the deemed trust will not have absolute priority. In my view, by using the words "in priority to all such security interests" in s. 227(4.1), Parliament intended that the priority be absolute not over all possible interests, but only over security interests as defined in s. 224(1.3). What must therefore be determined is whether a court-ordered super-priority charge under the *CCAA* falls within that definition.

[61] Section 224(1.3) reads as follows:

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

[62] This definition is expansive. However, the list of illustrative security interests makes it clear that a super-priority charge created under the *CCAA* cannot fall within its meaning. Court-ordered super-priority charges are utterly different from any of the interests listed. These super-priority charges are granted, not for the sole benefit of the holder of the charge, but to facilitate restructuring in furtherance of the interests of all stakeholders. In this way, they benefit the creditors as a group. The fact that Parliament chose to provide a list of examples whose nature is so unlike that of a court-ordered super-priority charge demonstrates that it must have had a very different type

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of interest in mind when drafting s. 224(1.3). I could not agree more with Professor Wood about the limited class of interests that Parliament had in mind:

> [Court-ordered super-priority charges] are fundamentally different in nature from security interests that arise by way of agreement between the parties and from non-consensual security interests that arise by operation of law. Court-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group. Given the fundamentally different character of court-ordered charges, it would be reasonable to expect that they would be specifically mentioned in the ITA definition of a security interest if they were to be included. [Emphasis added; p. 98.]

[63] My colleagues Brown and Rowe JJ. allege that this interpretation of s. 224(1.3) is contrary to our Court's decision in *Caisse populaire Desjardins de l'Est de Drummond*, where Rothstein J. wrote that the provided examples "do not diminish the broad scope of the words 'any interest in property' (para. 15; see also para. 14). With respect, I disagree with my colleagues. As Justice Rothstein explained at para. 40, his comments were made in response to the argument that the list of examples of security interests was exhaustive. I agree with him that the list of examples provided is not exhaustive. However, the examples remain illustrative of the types of interests that Parliament had in mind and are clearly united by a common theme or class because Parliament employed a compound "means . . . and includes" structure to establish its definition: "*security interest* means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes . . . ". In my view, this structure evidences Parliament's intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within

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the definition. The critical difference between the listed security interests and super-priority charges ordered under s. 11 of the *CCAA* or any of the sections that follow it explains both why the latter are excluded from the list of specific instruments and why there can be no suggestion that they may be included in the broader term "encumbrance" at the end of that list. The *ejusdem generis* principle supports this position by limiting the generality of the final words on the basis of the narrow enumeration that precedes them (*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1040). All of the other instruments arise by agreement or by operation of law. Therefore, court-ordered super-priority charges under s. 11 or any of the sections that follow it are different in kind from anything on the list.

[64] Using the list of specific examples to ascertain Parliament's intent in this case is also consistent with the presumption against tautology. In *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, McLachlin C.J. defined this presumption in the following way:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: Sullivan, at p. 158. Thus, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose" (p. 158). This principle is often invoked by courts to resolve ambiguity or to determine the scope of general words.

(Para. 36, quoting R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 158; see also *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 45.)

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[65] The *ITA* contains two definitions of "security interest", in s. 224(1.3) and s. 18(5). For the purposes of computing taxpayer income, Parliament chose to define "security interest" in s. 18(5) in nearly the same manner as in s. 224(1.3), but without listing the ten specific security instruments: "*security interest*, in respect of a property, means an interest in, or for civil law a right in, the property that secures payment of an obligation". The presumption against tautology means that we must presume that Parliament included the specific additional words in s. 224(1.3) because they "have a specific role to play in advancing the legislative purpose" (*Placer Dome*, at para. 45, quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159). Applying the presumption against tautology demonstrates that Parliament intended interpretive weight to be placed on the examples.

[66] To come back to *Caisse populaire Desjardins de l'Est de Drummond*, I agree with Rothstein J. that the definition of "security interest" in s. 224(1.3) of the *ITA* is expansive such that it "does not require that the agreement between the creditor and debtor take any particular form" (para. 15). However, I am of the view that there is a key restriction in this expansive definition. The definition focuses on interests created either by consensual agreement or by operation of law, and these types of interests are usually designed to protect the rights of a single creditor, usually to the detriment of other creditors. In that case, the Court was considering whether a right to compensation conferred on a single creditor by a contract entered into between that creditor and the debtor was a security interest within the meaning of s. 224(1.3). The situation at issue in that case was completely different than the one at issue in the present case. Indeed,

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in the present case, the interest of the participants in the restructuring is created by a court order, not by an agreement or by operation of law. As I have said above, when a judge orders a super-priority charge in *CCAA* proceedings, it is quite a different type of interest as the *CCAA* restructuring process benefits all creditors and not one in particular.

[67] Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of "security interest", it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, "The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation" (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as "a key aspect of the debtor's ability to attempt a workout", one would expect Parliament to use clearer language where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that "nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors" (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

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[68] In conclusion, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case. I therefore respectfully disagree with my colleague Justice Moldaver's suggestion that there may be a conflict between s. 11 of the *CCAA* and the *ITA* (para. 258). The Initial Order's super-priority charges prevail over the deemed trust.

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C. *Was It Necessary for the Initial Order to Subordinate Her Majesty's Claim Protected by a Deemed Trust in This Case?*

[69] Finally, I must now identify the provision in which the Initial Order here should be grounded. While the initial order under consideration in *Indalex* was based on the court's equitable jurisdiction, in most instances, orders in *CCAA* proceedings should be considered an exercise of statutory power (*Century Services*, at paras. 65-66).

[70] As discussed above, a supervising court's authority to order super-priority charges is grounded in its broad discretionary power under s. 11 of the *CCAA* and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52. Those provisions authorize the court to grant certain priming charges that rank ahead of the claims of "any secured creditor". While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a "secured creditor" under the *CCAA*. Professor Wood is of the view that Her Majesty is not a "secured creditor" under the *CCAA* by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the *CCAA* create "two distinct approaches — one

that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (p. 96). Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. I do not need to definitively determine if Her Majesty falls within the definition of "secured creditor" under the *CCAA* by virtue of Her trust. Instead, I would ground the supervising court's power in s. 11, which "permits courts to create priming charges that are not specifically provided for in the *CCAA*" (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.

[71] My colleagues Brown and Rowe JJ. also argue that "priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*" (para. 223 (emphasis in original)). With respect, this argument cannot stand because, although ss. 11.2, 11.51 and 11.52 of the *CCAA* contain this restriction, there is no such restriction in s. 11. As Lalonde J. recognized, [TRANSLATION] "In exercising the authority conferred by the *CCAA*, including inherent powers, the courts have not hesitated to use this jurisdiction to intervene in contractual relationships between a debtor and its creditors, even to make orders affecting the rights of third parties" (*Triton Électronique*, at para. 31). There may be circumstances where it is appropriate for a court to attach charges to property that does not belong to the

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debtor — if, for instance, this deemed trust were to be equivalent to a proprietary interest. However, that circumstance does not arise in this case because the property subject to Her Majesty's deemed trust remains the property of the debtor, as the deemed trust does not create a proprietary interest. My colleagues' reliance on s. 37(2) of the *CCAA* is similarly ill-founded. As I said earlier, s. 37(2) simply preserves the status quo. It does not alter Her Majesty's interest. It merely continues that interest and excludes it from the operation of s. 37(1), which would otherwise downgrade it to the interest of an ordinary creditor.

[72] That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary. In creating a super-priority charge, a supervising judge must always consider whether the order will achieve the objectives of the *CCAA*. When there is the spectre of a claim by Her Majesty protected by a deemed trust, the judge must also consider whether a super priority is necessary. The record before us contains no reasons for the Initial Order, so this is difficult to determine in this case. Given that Her Majesty has been paid and that the case is in fact moot, it is not critical for us to determine whether the supervising judge believed it was necessary to subordinate Her Majesty's claim to the super-priority charges. Based on Justice Topolniski's reasons for denying the Crown's motion to vary the Initial Order, it is clear that she would have found that the super-priority charges deserved priority over Her Majesty's interest (paras. 100-104). However, I wish to say a few words on when it may be necessary for a supervising judge to subordinate Her Majesty's interest to super-priority charges.

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[73] It may be necessary to subordinate Her Majesty's deemed trust where the supervising judge believes that, without a super-priority charge, a particular professional or lender would not act. This may often be the case. On the other hand, I agree with Professor Wood that, although subordinating super-priority charges to Her Majesty's claim will often increase the costs and complexity of restructuring, there will be times when it will not. For instance, when Her Majesty's claim is small or known with a high degree of certainty, commercial parties will be able to manage their risks and will not need a super priority. After all, there is an order of priority even amongst super-priority charges, and therefore it is clear that these parties are willing to have their claims subordinated to some fixed claims. A further example of where different considerations may be in play is in so-called liquidating *CCAA* proceedings. As this Court recently recognized, *CCAA* proceedings whose fundamental objective is to liquidate — rather than to rescue a going concern — have a legitimate place in the *CCAA* regime and have been accepted by Parliament through the enactment of s. 36 (*Callidus Capital*, at paras. 42-45). Liquidating *CCAA* proceedings often aim to maximize returns for creditors, and thus the subordination of Her Majesty's interest has less justification beyond potential unjust enrichment arguments.

VI. Disposition

[74] I would dismiss the appeal with costs in this Court in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

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The reasons of Karakatsanis and Martin JJ. were delivered by

KARAKATSANIS J. —

I. Overview

[75] When a company seeks to restructure its affairs in order to avoid bankruptcy, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*), allows the court to order charges in favour of parties that are necessary to the restructuring process: lenders who provide interim financing, the monitor who administers the company's restructuring, and directors and officers who captain the sinking ship (among others). These charges, often referred to as "priming charges", are meant to encourage investment in the company as it undergoes reorganization. A company's reorganization, as an alternative to the devastating effects of bankruptcy, serves the public interest by benefitting creditors, employees, and the health of the economy more generally.

[76] In this case, the *CCAA* judge ordered priming charges over the estates of Canada North Group and six related companies (Debtor Companies) in favour of an interim lender, the monitor, and directors. Property of two of the Debtor Companies, however, was also subject to a deemed trust in favour of the Crown, under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (*ITA*), for unremitted source deductions consisting of employees' income tax, Canada Pension Plan contributions, and

employment insurance premiums. While this appeal is moot because there are sufficient assets to satisfy both the Crown's deemed trust claim and the priming charges, this Court is asked to determine which has priority in the restructuring: the priming charges under the *CCAA* or the deemed trust under the *ITA*.

[77] Section 227(4.1) of the *ITA* provides that, when an employer fails to remit source deductions to the Crown, a deemed trust attaches to the property of the employer to the extent of the unremitted source deductions. The deemed trust operates "notwithstanding any security interest in such property" and "[n]otwithstanding . . . any other enactment of Canada". Sections 11.2, 11.51 and 11.52 of the *CCAA* give the court authority to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. Read on their own, these provisions appear to give different parties super-priority in an insolvency. This issue of statutory interpretation has been described as the collision of an unstoppable force with an immoveable object (R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85).

[78] The appellant, the Crown, argues that s. 227(4.1) of the *ITA* creates a proprietary right in the Crown because, through the mechanism of a deemed trust, it gives the Crown beneficial ownership of the amount of the unremitted source deductions. In other words, that *amount* is the Crown's property and a *CCAA* judge

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cannot, therefore, order a charge over it; it should be taken out of the estate and can play no role in the restructuring process.

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[79] In contrast, the respondents argue that s. 227(4.1) creates a security interest in the Crown squarely contemplated by ss. 11.2, 11.51 and 11.52 of the *CCAA*. They further submit that there is no conflict between the relevant provisions because the policies underlying both Acts can be harmonized in favour of giving effect to the *CCAA* provisions.

[80] For the reasons below, I conclude that there is no conflict between the *ITA* and *CCAA* provisions. The right that attaches to "beneficial ownership" under s. 227(4.1) of the *ITA* must be interpreted in the specific statutory context in which it arises. Here, the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by the requirement that the plan of compromise pay the Crown in full. Because I do not conclude that the Crown's interest fits within the relevant statutory definition of "secured creditor" under the *CCAA*, it is not captured by the court's authority to order priming charges under ss. 11.2, 11.51 and 11.52 of the *CCAA*. However, in my view, the broad discretionary power under s. 11 of the *CCAA* permits a court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This conclusion harmonizes the purposes of both federal statutes. I would dismiss the appeal.

II. Facts

[81] In July 2017, the Court of Queen's Bench of Alberta issued an order granting the Debtor Companies protection under the *CCAA* (Alta. Q.B., No. 1703-12327, July 5, 2017 (Initial Order)). The Initial Order provided for priming charges in the following order of priority: (1) an Administration Charge of $500,000 in favour of the court-appointed Monitor, Ernst & Young Inc.; (2) an Interim Lender's Charge of $1,000,000 in favour of the interim lender, Business Development Bank of Canada (BDBC); and (3) a Directors' Charge of $150,000 (together, Priming Charges). The Interim Lender's Charge was later increased to $3,500,000 and the Administration Charge to $950,000.

[82] Paragraph 44 of the Initial Order provided that the Priming Charges have priority over the claims of secured creditors:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge . . . shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise . . . in favour of any Person.

[83] Paragraph 46 of the Initial Order provided that the Priming Charges "shall not otherwise be limited or impaired in any way by . . . (d) the provisions of any federal or provincial statutes".

[84] At the time of the Initial Order, two of the Debtor Companies had failed to remit source deductions and owed the Crown $685,542.93. The Crown applied to vary

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the Priming Charges in the Initial Order on the basis that paras. 44 and 46(d) failed to recognize the Crown's legislated interest in unremitted source deductions. The Crown argued that s. 227(4.1) of the *ITA*, s. 23(4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (*CPP*), and s. 86(2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (*EIA*), require the Crown's claims for unremitted source deductions to have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *CCAA*. In these reasons, I will only refer to s. 227(4.1) of the *ITA* as the relevant *ITA*, *CPP* and *EIA* provisions are identical and the latter two statutes cross-reference the *ITA*.

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III. Decisions Below

A. *Court of Queen's Bench of Alberta, 2017 ABQB 550, 60 Alta. L.R. (6th) 103 (Topolniski J.)*

[85] The application judge held that court-ordered priming charges under ss. 11.2, 11.51 and 11.52 of the *CCAA* have priority over the Crown's deemed trust for unremitted source deductions. First, she concluded that the Crown's deemed trust under s. 227(4.1) of the *ITA* creates a security interest rather than a proprietary interest because the definition of "security interest" in the *ITA* includes an interest created by a deemed or actual trust, and it would be inconsistent to interpret the Crown's interest under s. 227(4.1) contrary to its enabling statute. She also reasoned that the deemed trust is a security interest because it lacks certainty of subject matter and is therefore not a true trust.

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[86] Second, the application judge concluded that s. 227(4.1) of the *ITA* and ss. 11.2, 11.51 and 11.52 of the *CCAA* are not inconsistent because any conflict can be avoided by interpretation. She reasoned that the policy objectives of both Acts have to be respected because they were enacted by the same government. On the one hand, the collection of source deductions is at the heart of the *ITA*. On the other, the *CCAA* aims to facilitate business survival. The application judge concluded that, without the court's ability to order priming charges, interim lending "would simply end", along with "the hope of positive *CCAA* outcomes" (para. 102). The goals of both Acts can therefore only be achieved if priority is given "to those charges necessary for restructuring", while the deemed trust ranks in priority to all other secured creditors (para. 112).

B. *Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29 (Rowbotham and Schutz JJ.A., Wakeling J.A. Dissenting)*

[87] A majority of the Court of Appeal dismissed the Crown's appeal. It agreed with the application judge that the Crown's deemed trust under s. 227(4.1) of the *ITA* creates a security interest rather than a proprietary interest. It also agreed that the Crown's position failed to reconcile the objectives of the *ITA* and *CCAA*, and given the importance of interim lending, concluded that absurd consequences could follow if the Crown's position prevailed.

[88] Wakeling J.A. disagreed. He concluded that s. 227(4.1) of the *ITA* makes two unequivocal statements: first, that the Crown is the beneficial owner of the debtor's property to the extent of the unremitted source deductions; and second, that this amount

must be paid to the Crown notwithstanding the security interests of any other secured creditors, including, in his opinion, the holders of a priming charge. As a result, it was unnecessary to reconcile policy objectives. In his view, the notwithstanding clause in s. 227(4.1) was conclusive because the relevant *CCAA* provisions lacked the same language. As a result, there was "no need to look beyond the four corners of s. 227(4.1) to determine the scope of the unassailable priority it creates" (para. 135). Finally, Wakeling J.A. noted that there is perfect correlation between the purpose of the *ITA* and the plain meaning of s. 227(4.1).

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IV. Parties' Submissions

A. *The Appellant the Crown*

[89] The Crown's submissions before this Court echo the dissent at the Court of Appeal: the text of s. 227(4.1) unequivocally states that unremitted source deductions become the property of the Crown. The Crown argues that the plain meaning of s. 227(4.1) aligns with its purpose, which is to protect the largest source of government revenue.

[90] The Crown makes two principal submissions. First, it submits that the Crown's interest under s. 227(4.1) of the *ITA* is a proprietary interest rather than a security interest because the text of s. 227(4.1) causes the unremitted source deductions to become the property of the Crown. There is no need to rely on the "notwithstanding clause" in s. 227(4.1) because the *ITA* and *CCAA* provisions work harmoniously; the

priming charges can only attach to a company's property and s. 227(4.1) provides that the unremitted source deductions are beneficially owned by the Crown.

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[91] Second, the Crown submits in the alternative that, even if its interest is a security interest, it ranks ahead of the priming charges. This is because a priming charge under the *CCAA* is a security interest within the meaning of the *ITA*, and s. 227(4.1) specifically states that the deemed trust ranks ahead of all other security interests.

B. *The Respondent Business Development Bank of Canada*

[92] The respondent BDBC, urges this Court to follow the approach taken by the courts below. It submits that the Crown's interest under the deemed trust is a security interest because (1) the enabling statute, the *ITA*, defines a deemed trust as a security interest; (2) this Court, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, characterized the deemed trust as a "floating charge", which is a security interest; and (3) the opposite conclusion, that it is a proprietary interest, would be at odds with commercial reality. As the definition of "secured creditor" in the *CCAA* includes the holder of a deemed trust, that Act contemplates that a priming charge can rank ahead of the Crown's deemed trust. Thus, ss. 11.2, 11.51 and 11.52 of the *CCAA* contemplate that a priming charge can rank ahead of the Crown's deemed trust.

C. *The Respondent Ernst & Young, in its Capacity as Monitor*

[93] Both BDBC and Ernst & Young (together, Respondents) submit that the Crown's deemed trust is a security interest and that the statutes can be interpreted harmoniously to avoid a conflict. The Monitor submits that a court-ordered priming charge is not a security interest within the meaning of s. 227(4.1) of the *ITA* because it is not specifically listed in the definition of security interest under the *ITA*, and as a taxing statute, the *ITA* requires a strict, textual approach to interpretation.

[94] The Monitor also highlights that the Crown is a unique creditor because it has immediate information available to it respecting remittance and can certify and pursue amounts owing immediately.

V. Issue

[95] The issue on appeal is whether court-ordered priming charges under the *CCAA* can rank ahead of the Crown's deemed trust for unremitted source deductions, as created by s. 227(4.1) of the *ITA* and related provisions of the *CPP* and *EIA*. It is clear from the wording of s. 227(4.1) of the *ITA* that, if there is any conflict with a provision from another Act, s. 227(4.1) is to prevail. Accordingly, this appeal turns on whether, and to what extent, the *CCAA* regime conflicts with s. 227(4.1) of the *ITA*. In answering that question, I proceed in four steps:

1. What rights does s. 227(4.1) of the *ITA* confer on the Crown in respect of unremitted source deductions?

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2. How is the Crown's deemed trust for unremitted source deductions treated in Parliament's insolvency regime?

3. Do ss. 11.2, 11.51 and 11.52 of the *CCAA* permit the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?

4. If not, does s. 11 of the *CCAA* allow the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?

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VI. Analysis

A. *What Rights Does Section 227(4.1) of the ITA Confer on the Crown in Respect of Unremitted Source Deductions?*

(1) General Scheme and Background of Sections 227(4) and 227(4.1) of the *ITA*

[96] Section 153(1) of the *ITA* requires employers to deduct and withhold amounts from their employees' wages (source deductions) and remit those amounts to the Receiver General by a specified due date. When source deductions are made, s. 227(4) deems that they are held separate and apart from the property of the employer and from property held by any secured creditor of the employer, notwithstanding any security interest in that property. Source deductions are deemed to be held in trust for Her Majesty for payment by the specified due date.

[97] If source deductions are not paid by the specified due date, s. 227(4.1) extends the trust in s. 227(4). It deems that a trust attaches to the employer's property to the extent of any unremitted source deductions; that the trust existed from the moment the source deductions were made; and that the trust did not form part of the estate or property of the employer from the moment the source deductions were made (all regardless of whether the employer's property is subject to a security interest). It also deems that, to the extent of any unremitted source deductions, the employer's property is property "beneficially owned" by the Crown, notwithstanding any security interest in the employer's property:

> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > **(a)** to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > **(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

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[98] The *ITA* defines "security interest" in s. 224(1.3):

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

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[99] As emphasized by the Crown, ss. 227(4) and 227(4.1) were amended to their current form — excerpted above — to reverse the effect of this Court's decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411. The Crown submits that, in explicitly reversing *Sparrow Electric*'s result, Parliament meant to always give the Crown super-priority in an insolvency. I do not agree that such a broad conclusion can be drawn from this legislative history. In *Sparrow Electric*, the issue was who, between a lending bank and the Crown, had priority in the debtor's bankruptcy. The bank had a general security agreement over all of the debtor's property, which it entered into several months before successfully petitioning the debtor into bankruptcy. While the debtor also owed the Crown $625,990.86 in unremitted source deductions at the time of the bankruptcy, the first instance of non-remittance to the Crown was *after* the bank entered its general security agreement.

[100] Iacobucci J., writing for a majority of the Court, held in favour of the bank. At that time, the deemed trust was worded differently, triggering only upon an event of "liquidation, assignment, receivership or bankruptcy", and the amount of the unremitted source deductions was only deemed to be held "separate from and form no

part of the estate in liquidation, assignment, receivership or bankruptcy" (para. 13 (emphasis added)). The majority therefore concluded that the deemed trust did not attach to the debtor's property because, at the relevant time, that property was already "legally the [bank's]" (para. 98). Because the bank had a fixed and specific charge over all of the debtor's property, there was nothing left for the trust to attach to. The trust could not be effective unless there was some unencumbered asset in the bankruptcy out of which the trust could be deemed (para. 99).

[101] After *Sparrow Electric*, Parliament amended the deemed trust to ensure that, in a case like *Sparrow Electric*, the deemed trust attached notwithstanding any security interest held in the debtor's property (*First Vancouver*, at para. 27). As Iacobucci J. explained in *First Vancouver*, Parliament intended "to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect" (para. 28).[1]

[102] In this appeal, the Crown argues that a court-ordered priming charge under the *CCAA* is a security interest for the purposes of the Crown's deemed trust. I agree that the definition of "security interest" in s. 224(1.3) of the *ITA* is broad, capturing

[1] It bears noting, however, that ss. 227(4) and 227(4.1) of the *ITA* do not give the Crown priority over all creditors. They explicitly carve out an exception for the rights of unpaid suppliers (*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 81.1) and the rights of farmers, fisherman, and aquaculturists (s. 81.2). In addition, s. 227(4.2) of the *ITA* carves out an exception for a prescribed security interest, defined in the *Income Tax Regulations*, C.R.C., c. 945, s. 2201. Broadly, a prescribed security interest is a mortgage in land or a building which is registered before the failure to remit the source deductions at issue (Regulatory Impact Analysis Statement, SOR/99-322, *Canada Gazette*, Part II, vol. 133, No. 17, August 18, 1999, at pp. 2041-42).

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"any interest in . . . property that secures payment or performance of an obligation and includes an interest . . . created by or arising out of a . . . charge . . ., however or whenever arising, created, deemed to arise or otherwise provided for". However, Wood makes the observation that court-ordered charges are fundamentally different in nature from the security interests that arise by consensual agreement or by operation of law enumerated in s. 224(1.3) because "they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group" (Wood (2020), at p. 98). As a result, he reasons that "it would be reasonable to expect that they would be specifically mentioned in the ITA definition of security interest if they were to be included" (p. 98).

[103] While s. 227(4.1) undeniably operates notwithstanding any security interest — and priming charge — over the debtor's property, the legislative history post-*Sparrow Electric* says nothing about the Crown's specific right to unremitted source deductions, pursuant to the deemed trust, when a company undergoes restructuring under the *CCAA*. Even if, as the Crown insists, a priming charge under the *CCAA* is a security interest for the purposes of the Crown's deemed trust (and I do not settle that debate in these reasons), that does not define what *rights* the Crown has, in a *CCAA* restructuring, pursuant to its deemed trust. This Court has never considered how s. 227(4.1) of the *ITA* interacts with the *CCAA* regime in light of the seminal insolvency decisions in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271. This appeal calls on this Court to do so.

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(2) The Right of Beneficial Ownership in Section 227(4.1) of the *ITA*

[104] The Crown argues that s. 227(4.1) creates a proprietary right in the Crown because it gives the Crown beneficial ownership of the amount of the unremitted source deductions. Because this is an *ownership* right, the amount of the unremitted source deductions is taken out of the debtor's estate, effectively giving the Crown super-priority. In other words, the Crown agrees with the dissent in the Court of Appeal: that property is the Crown's property and a *CCAA* judge cannot order a charge over it. The Respondents, in line with the Court of Appeal majority, submit that s. 227(4.1) creates a security interest and can therefore be subordinated to a priming charge under the *CCAA*.

[105] These submissions rely heavily on characterizing the Crown's interest as either a "security interest" or as "proprietary" in nature. However, in my view, defining an entitlement as one or the other does not resolve the issues on appeal because neither characterization has essential features in the abstract. Rather, a statutory entitlement takes its character from the statutory provision. General concepts of "proprietary right" and "security interest" — or of "property," "trust" and "beneficial ownership" — are of limited assistance in this analysis.

[106] This Court has noted that property is often understood as a "bundle of rights" and obligations (*Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166, at para. 43). Depending on which rights someone holds, their "bundle of rights" can be viewed as a weak or robust proprietary interest. For this reason, the

holder of a security interest has been described as having a proprietary right in its security. In *Sparrow Electric*, for example, both Iacobucci J., writing for the majority, and Gonthier J., writing for the dissent, explained the secured creditor in that case as having a proprietary right in, and effectively owning, the debtor's property that secured its debt (paras. 42 and 98).

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[107] Similarly, Ronald C. C. Cuming, Catherine Walsh and Roderick J. Wood state that, in the context of personal property security legislation, a secured creditor holds a proprietary right in collateral. This is because, for these authors, "[t]he defining characteristic of a proprietary right . . . is that it is . . . enforceable against the world", and the right of a secured creditor with a perfected security interest is enforceable against the world (*Personal Property Security Law* (2nd ed. 2012), at p. 613). Without an explanation for what the terms mean in a particular context, it is difficult to draw any conclusion from characterizing something as one or the other. (While there is a clear difference between a right *in rem* (available against the world at large) and a right *in personam* (available against a determinate set of individuals), whether the term "proprietary right" means a "right *in rem*" or the term "security interest" means a "right *in personam*" depends upon the statutory context. In any event, the submissions before this Court were not framed in these terms).

[108] This Court explained in *Saulnier* that, when analyzing the definition of property under a statute, there is little use in considering property in the abstract or even under the common law because "Parliament can and does create its own lexicon" for

particular purposes (para. 16; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286, at paras. 11-12). Indeed, "interests unknown to the common law may be created by statute" (*Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952, at p. 999, citing Ross J. in *Town of Lunenburg v. Municipality of Lunenburg*, [1932] 1 D.L.R. 386 (N.S.S.C.), at p. 390). As a result, caution is required before importing definitions from other contexts, relying on statements or description from cases out of context, and employing general concepts like "proprietary right" and "security interest". It is crucial in this appeal to stay within the bounds of the statutory provisions being interpreted.

[109] Section 227(4.1) states that the amount of the unremitted source deductions is "beneficially owned" by the Crown. However, it does not follow that this right of beneficial ownership is absolute or that the term imports specific rights that flow from it. This is not a case where Parliament has used a term with an established legal meaning — leading to an inference that Parliament has given the term that meaning in the statute in question (*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20). The concept of beneficial ownership does not have a precise doctrinal meaning in the common law of Canada, and it does not exist in the civil law of Quebec. It is also not used consistently in the *ITA*. The meaning of "beneficially owned" in s. 227(4.1) can only be understood in the specific, relevant statutory context in which it arises. To that end, while s. 227(4.1) uses the mechanism of a trust and confers some type of beneficial ownership on the Crown, it modifies even those features of beneficial ownership that are widely associated with it under the common law.

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[110] As a federal statute with national application, the *ITA* rests on the private law of the provinces. This relationship of complementarity is codified in s. 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21. However, the federal statute can derogate and dissociate itself from the private law when it legislates on a matter that falls within its jurisdiction: see M. Lamoureux, "*The Harmonization of Tax Legislation Dissociation: A Mechanism of Exception Part III*" (online). As I shall explain, the trust created by s. 227(4.1) disassociates itself from the requirements of a trust in both the provincial common law and civil law.

[111] I proceed as follows: (1) there is no settled doctrinal meaning of the term beneficial ownership; and (2) s. 227(4.1) does not create a true trust because there is no certainty of subject matter. A lack of certainty of subject matters means that the Crown cannot, through tracing, claim appreciation of trust value and the trustee (tax debtor) is free to dispose of trust property. These features render the Crown's beneficial ownership weaker than generally understood at common law. The result is an interest "unknown to the common [or civil] law". We cannot, therefore, look at s. 227(4.1) in isolation to define the way in which the Crown's "beneficially owned" property under s. 227(4.1) should be treated in an insolvency — that clarification must come from, and indeed does come from, Parliament's insolvency legislation.

(i) No Settled Doctrinal Meaning

[112] Beneficial ownership is most commonly used in the law of trusts to broadly distinguish between who has legal title to property (the trustee) and who has beneficial

enjoyment of that property (the beneficiary). *Black's Law Dictionary* (11th ed. 2019), for example, defines a "beneficial owner" as "[o]ne recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else, esp. one for whom property is held in trust" (p. 1331).

[113] Despite this common usage, there is no clear definition of the rights flowing from the term "beneficial ownership" under the common law (see, e.g., C. Brown, "Beneficial Ownership and the Income Tax Act" (2003), 51 *Can. Tax J.* 401; M. D. Brender, "Beneficial Ownership in Canadian Income Tax Law: Required Reform and Impact on Harmonization of Quebec Civil Law and Federal Legislation" (2003), 51 *Can. Tax J.* 311, at p. 316). As well, the *Civil Code of Québec* does not have a concept of beneficial ownership (see *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31, at paras. 48-49).

[114] The term itself is also contentious within the academy, giving rise to a heated debate about whether a trust beneficiary should be thought of as an *owner* at all (see, e.g., D. W. M. Waters, "The Nature of the Trust Beneficiary's Interest" (1967), 45 *Can. Bar Rev.* 219; L. D. Smith, "Trust and Patrimony" (2008), 38 *R.G.D.* 379; B. McFarlane and R. Stevens, "The nature of equitable property" (2010), 4 *J. Eq.* 1; J. E. Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust" (2014), 27 *Can. J.L. & Jur.* 473; Brender, at p. 316). The conventional view is that a trust beneficiary only has a right *in personam* against the trustee to enforce the terms of the trust, which is not a proprietary right in the trust property. A different view

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is that a trust beneficiary has equitable ownership of trust property, despite the existence of an intermediary with legal title (Brown, at pp. 413-14). Some suggest that there is a midway approach in Canada: depending on the context, a beneficiary's right is either a personal right against the trustee or a proprietary right in trust property (Brender, at p. 316).

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[115] In "Beneficial Ownership and the Income Tax Act", Brown notes the debate in the academy and analyzes how the terms "beneficial ownership", "beneficial owner", and "beneficially owned" are used in the *ITA*. After examining 26 provisions invoking beneficial ownership in the *ITA*, she concludes that its meaning is "no longer obvious" (p. 452).

[116] This Court need not resolve the ongoing debate. However, it serves to highlight that "the real question is what is the nature of a beneficiary's interest in a trust when considered in the context of the legislation that is sought to be applied" (Brown, at p. 419). In the *ITA* context, Brown concludes that "the matter of what 'beneficial ownership' means for tax purposes must be settled within the structure of the ITA" (p. 435). Further, whether the beneficiary's rights within the *ITA* are *in rem* or *in personam* will often depend on a combination of factors, like the wording of the deeming provision, private law concepts, case law, and tax policy (see pp. 435-36).

[117] In my view, the works cited above belie the notion that s. 227(4.1) of the *ITA*, and its use of the concept of beneficial ownership, is unequivocal in meaning. Not only is there no settled definition of beneficial ownership under the common law, there

also appears to be no consistent meaning of the term in the *ITA*. And the concept does not exist in Quebec civil law. The meaning of beneficial ownership when used in a statute must always be construed within the context of the particular provision in which it occurs. What is necessary is careful scrutiny of s. 227(4.1), and specifically, the right of beneficial ownership it gives the Crown, particularly in the context of a statutory deemed trust with no specific subject matter.

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(ii) Section 227(4.1) Does Not Create a "True" Trust

[118] A statutory deemed trust is a unique legal vehicle. Unlike an express trust, which can be created by contract, will, or oral and written declarations, and unlike a trust that arises by operation of law, a statutory deemed trust "is a trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property" (*Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, at para. 18; see also A. Grenon, "Common Law and Statutory Trusts: In Search of Missing Links" (1995), 15 *Est. & Tr. J.* 109, at p. 110).

[119] Being a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law, namely, certainty of intention, certainty of subject matter, and certainty of object (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; see also *Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee*, 2020 ONCA 282, 59 E.T.R. (4th) 174, at para. 163).

[120] Section 227(4.1), for example, does not fulfill the ordinary requirements of the common law of trusts (see R. J. Wood and R. T. G. Reeson, "The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*" (2000), 15 *B.F.L.R.* 515, at pp. 522-24). There is no identifiable trust property and therefore no certainty of subject matter (*Henfrey*, at p. 35). To use the terminology in *Henfrey*, s. 227(4.1) is not a "true" trust (p. 34). Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278: see *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31.

[121] This departure from a standard requirement of trust formation — certainty of subject matter — results in at least two features of s. 227(4.1) that are at odds with the operation of ordinary trusts. First, through equitable tracing, the beneficiary of a trust can claim appreciation in trust value, but this advantage is impossible without identifiable trust property (*Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at pp. 79 and 92-93; *Foskett v. McKeown*, [2001] 1 A.C. 102 (H.L.), at pp. 129-31; L. D. Smith, *The Law of Tracing* (1997), at pp. 347-48). The tracing mechanism in s. 227(4.1) provides that the value of any unremitted source deductions continues to survive in the assets remaining in the tax debtor's hands. Section 227(4.1) traces the *value* of the unremitted source deductions, necessarily capping the Crown's right at that value. In *Sparrow Electric*, Gonthier J. explained that such a tracing mechanism is "antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter

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of the trust and the fund or asset which the subject matter is being traced into" (para. 37; see also Wood and Reeson, at p. 518; Smith (1997), at pp. 310-20 and 347-48; R. J. Wood, "The Floating Charge in Canada" (1989), 27 *Alta. L. Rev.* 191, at p. 221).

[122] While s. 227(4.1) gives the Crown beneficial ownership in the value of unremitted source deductions, it does not allow the Crown to claim more than the value of the source deductions. In other words, it gives the Crown the right of beneficial ownership without at least some of the advantages that beneficial ownership often entails.

[123] Second, a trustee cannot normally dispose of trust property in the ordinary course of the trustee's business. Section 227(4.1), however, allows the tax debtor to dispose of its property, conveying clear title to property subject to the trust.

[124] This was the point made by Iacobucci J. in *First Vancouver* when he likened the deemed trust in s. 227(4.1) to a floating charge. Because a floating charge is a security interest, the Respondents rely on Iacobucci J.'s analogy to argue that s. 227(4.1) only creates a security interest as opposed to a proprietary right. I disagree with the Respondents' submission — the limited analogy to a floating charge in that context cannot be relied on in this case to liken the Crown's interest to a security interest for the purposes of the *CCAA*.

[125] One of the issues in *First Vancouver* was whether the deemed trust in s. 227(4.1) continued to attach to property that had been sold by the tax debtor to a

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third-party purchaser for value. The Court concluded that, in the event of a sale to a third party, "the trust property is replaced by the proceeds of sale of such property" (para. 40). This is because the deemed trust "does not attach specifically to any particular assets of the tax debtor so as to prevent their sale" and the tax debtor is thereby "free to alienate its property in the ordinary course" (para. 40). In this way, "the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor" (para. 40). As a result, the deemed trust in s. 227(4.1) would not override the rights of third-party purchasers for value (para. 44).

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[126] In short, the deemed trust in s. 227(4.1) clearly "anticipate[s] that the character of the tax debtor's property will change over time" (*First Vancouver*, at para. 41). In making these statements, Iacobucci J. did not, however, equate the deemed trust in s. 227(4.1) to a floating charge for all purposes. Otherwise, the trust would not attach until an event of crystallization, and s. 227(4.1) clearly contemplates that the trust attaches from the moment source deductions are made or withheld (see s. 227(4.1)(a) and (b); see also A. Duggan and J. Ziegel, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 *U.T.L.J.* 227, at p. 246; Wood (1989), at p. 195).

[127] The Court's limited analogy to a floating charge in *First Vancouver* helps explain why "beneficial ownership" in s. 227(4.1) again means something narrower than it does outside of that statutory context. The Crown's right of beneficial ownership does not prevent the trustee from disposing of trust property until the Canada Revenue

Agency (CRA) enforces the deemed trust (Canada Revenue Agency, *Tax collections policies* (online); see also *ITA*, ss. 222, 223(1) to (3), (5) and (6) and 224(1)). Freely disposing of trust property, including for one's own business purposes, is obviously not something a trustee can do under the common law.

[128] The Crown's reliance on s. 227(4.1)(b) of the *ITA* is misplaced for similar reasons. That clause specifies that the amount of the unremitted source deductions is deemed to "form no part of the estate or property of the person from the time the amount was so deducted or withheld". The Crown argues that this is further clarification that a *CCAA* judge cannot order a charge over that amount. Again, the deeming words of s. 227(4.1)(b) must be interpreted in the context of a trust without certainty of subject matter. To say that a certain *amount* does not form part of the debtor's estate or property reiterates that the Crown has an interest in that amount; it also clarifies that the debtor's interest in its estate is reduced by that amount. However, it does not change the *makeup* of the estate itself — it does not change the specific property that constitutes the debtor's estate. So long as the thing that is deemed not to form part of the debtor's estate or property is an amount or value of money rather than property with a specific subject matter, the debtor's estate remains unchanged and the debtor continues to have control over it.

[129] To conclude, beneficial ownership under s. 227(4.1) is a manipulation of the concept of beneficial ownership under ordinary principles of trust law. The logical

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incoherence of s. 227(4.1) has prompted some scholars to criticize the provision as using inappropriate legal concepts. For example, Wood and Reeson state:

> . . . we believe that the design of [s. 227(4.1) of the *ITA*] is deeply flawed. . . . In large measure, the difficulties have as their source the use of inappropriate legal concepts. The concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking. The employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted. The tracing exercise does not seek to identify a chain of substitutions, and a proprietary claim is available without the need for a proprietary base.
>
> . . .
>
> The misuse of the trust concept and the perversion of conventional tracing principles empty these concepts of meaning and will pose a threat to the rationality of the law. [Footnote omitted; pp. 531-33.]

[130] Others have similarly commented that, in substance, s. 227(4.1) only creates a security interest (J. S. Ziegel, "Crown Priorities, Deemed Trusts and Floating Charges: *First Vancouver Finance v. Minister of National Revenue*" (2004), 45 C.B.R. (4th) 244, at p. 248; Duggan and Ziegel, at pp. 239 and 245-46; M. J. Hanlon, V. Tickle and E. Csiszar, "Conflicting Case Law, Competing Statutes, and the Confounding Priority Battle of the Interim Financing Charge and the Crown's Deemed Trust for Source Deductions", in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 897).

[131] Similarly, in *Caisse populaire Desjardins de Montmagny*, this Court rejected the Crown's argument that s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (*ETA*), which is nearly identical to s. 227(4.1) of the *ITA*, created a proprietary

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right in the Crown (paras. 20-27). In that case, the debtor companies owed goods and services tax (GST) at the time of their respective bankruptcies. As the Crown's GST claims are unsecured in bankruptcy, the tax authorities took the position that amounts owing up to the date of the bankruptcy were the Crown's property. This Court unanimously disagreed with that position, concluding that the manner and mechanism of collecting GST was not consistent with a proprietary right (paras. 21-23).

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[132] In any event, treating s. 227(4.1) as only effectively creating a security interest would not resolve the issues in this appeal without reference to how the Crown's interest arises under the *CCAA*. As noted above, broad general characterizations do not help in defining the specific attributes of this deemed trust. This Court must grapple with the fact that s. 227(4.1) is both structured as a security interest, like a charge, but also uses the mechanism of a deemed trust.

[133] The takeaway for this appeal is that the structure of s. 227(4.1), on its own, does not shed light on what to do with the Crown's beneficial ownership of unremitted source deductions in the insolvency regimes. Although the provision is clear that the Crown's right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the *ITA*. The unique statutory device manipulates private law concepts and cannot be carried through to a logical conclusion for the purposes of insolvency. For this reason, it is not surprising that the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) and the

CCAA specifically articulate how the deemed trust for unremitted source deductions should be treated.

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[134] I now turn to that half of the equation: Parliament's insolvency regime.

B. *How Is the Crown's Deemed Trust for Unremitted Source Deductions Treated in Parliament's Insolvency Regime?*

(1) Parliament's Insolvency Regime

[135] There are three main statutes in Parliament's insolvency regime: the *CCAA*, which is at issue in this appeal, the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (*WURA*). (The *WURA* covers insolvencies of financial institutions and certain other corporations, like insurance companies, and is not relevant to this appeal (s. 6(1); *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 39)). In *Century Services*, Deschamps J., writing for the majority, described insolvency as

> the factual situation that arises when a debtor is unable to pay creditors . . . . Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation. [para. 12]

[136] The *BIA* contains both a liquidation regime and a restructuring regime (*Century Services*, at paras. 13 and 78). The liquidation regime provides a detailed statutory scheme of distribution whereby the debtor's assets are liquidated and distributed to creditors. In contrast, the restructuring regime allows debtors to make proposals to their creditors for the adjustment and reorganization of debt. The *BIA* is available to debtors, either natural or legal persons, owing $1000 or more (s. 43(1)).

[137] The *CCAA* is predominantly a restructuring statute and access is restricted to companies with liabilities in excess of $5 million (s. 3(1)). As Deschamps J. explained in *Century Services*, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies (paras. 15 and 59, quoting *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Liquidations do not only harm creditors, but employees and other stakeholders as well. The *CCAA* permits companies to continue to operate, "preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all" (*Century Services*, at para. 77). In enacting a restructuring statute, Parliament recognized that companies have more value as going concerns, especially since they are "key elements in a complex web of interdependent economic relationships" (para. 18).

[138] Due to its remedial nature, the *CCAA* is famously skeletal in nature (*Century Services*, at paras. 57-62). It does not "contain a comprehensive code that lays

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out all that is permitted or barred" (para. 57, quoting *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, per Blair J.A.). Under s. 11, for example, the court may make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act. Section 11 has been described as "the engine that drives this broad and flexible statutory scheme" (*Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36; see also *9354-9186 Québec inc.*, at para. 48). Deschamps J. observed in *Century Services* that these discretionary grants of jurisdiction to the courts have been key in allowing the *CCAA* to adapt and evolve to meet contemporary business and social needs. Although judicial discretion must always be exercised in furtherance of the *CCAA*'s remedial purpose, it takes many forms and has proven to be flexible, innovative, and necessary (paras. 58-61; *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450, at para. 102).

[139] This is in contrast to the liquidation regime in the *BIA*, which has slightly different purposes. In *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, Gonthier J. explained that bankruptcy serves two goals: it "ensure[s] the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se* [and it ensures] the financial rehabilitation of insolvent individuals" (para. 7; see also *9354-9186 Québec inc.*, at para. 46). Similarly, Sarra and Houlden and Morawetz JJ. describe the purposes of the *BIA* as permitting both "an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start and resume his or her place in the business community" and "the orderly and

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fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis" (*The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at p. 2).

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[140] To realize its goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process (*Century Services*, at para. 13; *Husky Oil*, at para. 85). It "provide[s] an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules" (*Century Services*, at para. 15). The *BIA*'s comprehensive nature ensures, among other things, that there is a single proceeding in which creditors are placed on an equal footing and know their rights. It also ensures that, post-discharge, the bankrupt will have enough to live on and can have a fresh start (*Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 41). While proposals under the *BIA*'s restructuring regime similarly serve a remedial purpose, "this is achieved through a rules-based mechanism that offers less flexibility" (*Century Services*, at para. 15).

[141] Importantly, the specific goals of restructuring in the *CCAA*, in contrast to liquidation, result in the introduction of a key player: the interim lender. Interim financing, previously referred to as debtor-in-possession financing, is a judicially-supervised mechanism whereby an insolvent company is loaned funds for use during and for the purposes of the restructuring process. Before the 2009 amendments, there were no statutory provisions on interim financing in the *CCAA*, but the institution was well-established in the jurisprudence (L. W. Houlden, G. B. Morawetz and J. Sarra,

Bankruptcy and Insolvency Law of Canada (4th ed. rev. (loose-leaf)), vol. 4, at N§93; see also *Century Services*, at para. 62). The 2009 amendments codified much of the existing jurisprudence, and I discuss the statutory provisions in detail below.

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[142] Interim financing is crucial to the restructuring process. It allows the debtor to continue to operate on a day-to-day basis while a workout solution is being arranged. A plan of compromise would be futile if, in the interim six months, the debtor was forced to close its doors. For this reason, Farley J., in *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 1, quoting *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at para. 24, observed that interim financing helps "keep the lights . . . on". Similarly, in *Indalex*, Deschamps J. explained that giving interim lenders super-priority "is a key aspect of the debtor's ability to attempt a workout" (para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). Without interim financing and the ability to prime (i.e., to give it priority) the interim lender's loan, the remedial purposes of the *CCAA* can be frustrated (para. 58).

[143] With this background in mind, I turn now to consider the treatment of the Crown's deemed trust for unremitted source deductions in Parliament's insolvency regime.

(2) The Deemed Trust for Unremitted Source Deductions in the *BIA* and *CCAA*

[144] The statutes in this case are all federal statutes. The *ITA*, *BIA*, and *CCAA* make up a co-existing and harmonious statutory scheme, enacted by one level of government (see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337, on the presumption of coherence). An example of this co-existence is when, in the insolvency regime, Parliament modifies entitlements that it otherwise grants the Crown outside of insolvency. For example, through s. 222(3) of the *ETA*, Parliament provides for a statutory deemed trust in favour of the Crown for unremitted GST. Parliament also renders that deemed trust, which is nearly identical in language to s. 227(4.1) of the *ITA*, ineffective in the *BIA* and *CCAA* (*BIA*, ss. 67(2) and 86(3); *CCAA*, s. 37(1); *Century Services*, at paras. 51-56). As I shall explain, Parliament also deals specifically with the deemed trust in s. 227(4.1) of the *ITA* in the *BIA* and *CCAA*, albeit in different ways.

[145] In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67 is under the heading "Property of the Bankrupt". Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides that any provincial or federal deemed trust in favour of the Crown does not qualify as a trust under s. 67(1)(a) unless it would qualify as a trust absent the deeming provision (in other words, unless it would qualify as a common law or true trust) (see *Caisse populaire Desjardins de Montmagny*, at para. 15; *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197, 444 D.L.R. (4th) 273, at paras. 32-33). Section 67(3) states that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted source deductions under the *ITA*, *CPP* or *EIA*.

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Thus, while s. 67(2) provides in general terms an exception to s. 67(1)(a), that exception does not apply to the Crown's deemed trust for unremitted source deductions by virtue of s. 67(3).

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[146] The result of this scheme is that the debtor's estate — to the extent of the unremitted source deductions — is not "property of a bankrupt divisible among his creditors" (*BIA*, s. 67(1)). For the purposes of the *BIA*'s liquidation regime, it is effectively the Crown's *property*. Together, ss. 67(1)(a) and 67(3) give content to the Crown's right of beneficial ownership under s. 227(4.1) of the *ITA*: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

[147] In the *CCAA*, the Crown's deemed trust appears in ss. 37(2) and 6(3), alongside other deemed trusts and devices. Section 37(2) explicitly preserves the operation of s. 227(4.1) in *CCAA* proceedings:

> 37 **(1)** Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **(2)** Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

> **(a)** that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
>
> **(b)** the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a provincial pension plan as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,
>
> and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

[148] Due to this language, the Court in *Century Services* variously described the s. 227(4.1) trust as "surviv[ing]", "continu[ing]", and "remain[ing] effective" in the *CCCA* (see paras. 38, 45, 49, 53 and 79). The Crown relies on these observations to argue that the deemed trust remains fully intact in the *CCAA*, conferring a proprietary right on the Crown that cannot be subordinated to any other party.

[149] In my view, the Crown's submission overextends the analysis in *Century Services*. The issue in that case was whether the deemed trust under s. 222(3) of the *ETA* for unremitted GST was effective in the *CCAA*. As mentioned, s. 222(3) is almost identical in wording to s. 227(4.1) of the *ITA*, providing that the deemed trust extends to property of the tax debtor equal in value to the amount of the unremitted GST and extends to property otherwise held by a secured creditor pursuant to a security interest.

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Section 222(3) of the *ETA* also provides that the deemed trust operates despite any other enactment of Canada, except the *BIA*. Thus, under the *BIA*, the Crown priority for unremitted GST is lost. However, under the *CCAA*, s. 37(1) provides that statutory deemed trusts in favour of the Crown should not be regarded as trusts unless they would qualify as trusts absent the deeming language. The Court in *Century Services* grappled with the apparent conflict between s. 222(3) of the *ETA* and s. 37(1) (then s. 18.3(1)) of the *CCAA*.

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[150] A majority of the Court reasoned that, through statutory interpretation, the apparent conflict could be resolved in favour of the *CCAA* (*Century Services*, at para. 44). Parliament had shown a tendency to move away from asserting Crown priority in insolvency. Under both the *BIA* and *CCAA*, it had enacted a general rule that deemed trusts in favour of the Crown are ineffective in insolvency. It had also explicitly carved out an exception to that general rule for unremitted source deductions. The logic of the *CCAA* suggested that only the deemed trust for unremitted source deductions survived (paras. 45-46).

[151] Thus, while the Court emphasized that the deemed trust in s. 227(4.1) "survives" in the *CCAA*, it did not comment on *how* it survives. This Court has never considered the scope of the deemed trust under the *CCAA*, especially in light of the purposes of the *CCAA* and the equivocal nature of the beneficial ownership conferred through the deeming provision. For this appeal, it is necessary to probe into ss. 37(2)

and 6(3) to determine *how* the *CCAA* construes the Crown's right to unremitted source deductions.

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[152] To that end, although s. 37(2) of the *CCAA* is almost identical to s. 67(3) of the *BIA*, it does not have the same effect because it is not nested under a provision like s. 67(1)(a). Section 37(2) of the *CCAA* carves out an exception to s. 37(1), which is different from s. 67(1)(a). While s. 67(1)(a) excludes trust property from property of the bankrupt divisible among creditors, s. 37(1) only provides that "property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision". Unlike the *BIA*, the *CCAA* is silent on how trust property should be treated and silent on what constitutes property of the debtor in a restructuring context — indeed, there is no definition of property in the *CCAA* at all. This is in keeping with the *CCAA*'s comparatively skeletal nature.

[153] The result is that s. 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions "shall . . . be regarded as being held in trust for Her Majesty". However, although this signals that, unlike deemed trusts captured by s. 37(1), the Crown's deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. In keeping with the *CCAA*'s flexibility, s. 37(2) says little about what the Crown's unique right of beneficial ownership under s. 227(4.1) of the *ITA* requires. But

as I shall explain, s. 11 gives the court broad discretion to consider and give effect to the Crown's interest recognized in s. 37(2).

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[154] In addition, s. 6(3) of the *CCAA* gives specific effect to the Crown's right under the deemed trust. Under that provision, the court cannot sanction a plan of compromise unless it pays the Crown in full for unremitted source deductions within six months of the plan's sanction (assuming the Crown does not agree otherwise):

> **(3)** Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> **(a)** subsection 224(1.2) of the *Income Tax Act* . . . .

[155] Pursuant to s. 6(3), then, the Crown's right under s. 227(4.1) includes a right *not to have to compromise*. The Crown can demand to be paid in full under the plan "in priority to all . . . security interests". The right is therefore different in kind than a security interest. While there may be some risk to the Crown that the plan may fail, and the Crown may not be paid in full if the restructuring dissolves into liquidation and the estate is depleted in the interim, the *CCAA* recognizes that there is societal value in helping a company remain a going concern. This remedial goal is at the forefront of providing flexibility in preserving the Crown's right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the *CCAA*.

[156] In my view, the reason for this difference between the *BIA* and *CCAA* is straightforward. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. The debtor's property has to be divided according to the statute's rigid priority scheme. To begin the process of distribution, it is necessary to pool together the debtor's funds and determine what is, and is not, available for creditors. A comprehensive definition of property of the debtor is necessary, and no flexibility is needed in the regime to facilitate the liquidation process. There is also no other overarching goal, like facilitating the debtor's restructuring, that requires an institution like interim financing or requires modifying entitlements.

[157] In a restructuring proceeding under the *CCAA*, however, there is no rigid formula for the division of assets. Certain debt might be restructured; other debt might be paid out. When a debtor's restructuring is on the table, the goal pivots, and interim financing is introduced to facilitate the restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scene.

[158] The fact that the Crown's right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is therefore consistent with the different schemes and purposes of the Acts. This is not a circumstance where Parliament attempted to harmonize entitlements across the regimes (see, e.g., *Indalex*, at para. 51, per Deschamps J.). The *CCAA* gives the deemed trust meaning for its purposes. The

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concrete meaning given is that a plan of compromise must pay the Crown in full within six months of approval.

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C. *Do Sections 11.2, 11.51 and 11.52 of the CCAA Permit the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?*

[159] In this case, the Initial Order subordinated the Crown's deemed trust to the Priming Charges. The courts below found that this authority is derived from ss. 11.2, 11.51 and 11.52 of the *CCAA*, which allow the court to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. For example, the relevant portions of s. 11.2, which are substantially similar to the relevant portions of ss. 11.51 and 11.52, read as follows:

> **11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[160] As priming charges can "rank in priority over the claim of any secured creditor", the definition of "secured creditor" in s. 2(1) is key:

> ***secured creditor*** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds . . . .

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[161] The Respondents submit, in line with the courts below, that the Crown is a "secured creditor" under the *CCAA* in respect of its interest in unremitted source deductions because the enabling statute, the *ITA*, itself defines the holder of a deemed trust as holding a "security interest" (see *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274). The Respondents also rely on the analogy in *First Vancouver* likening the Crown's deemed trust to a floating charge (which is a security interest). Accordingly, the Respondents argue that ss. 11.2, 11.51 and 11.52 give the court authority to rank priming charges ahead of the Crown's deemed trust.

[162] The Crown, like the dissent at the Court of Appeal, argues that the Crown is not a "secured creditor" because the definition of "secured creditor" in the *CCAA* does not list the holder of a deemed trust and because ss. 37 to 39 of the *CCAA* clearly draw a distinction between the Crown's deemed trust for unremitted source deductions, on the one hand, and the Crown's secured and unsecured claims on the other. Accordingly, the Crown argues that ss. 11.2, 11.51 and 11.52 do *not* give the court authority to rank priming charges ahead of the Crown's deemed trust.

[163] As I shall detail, I conclude that ss. 11.2, 11.51 and 11.52 do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

[164] First, I agree with the Respondents that the general definition of security interest under the *ITA* includes the holder of a deemed or actual trust (s. 224(1.3)). However the reference to security interest in s. 227(4.1) is not to the Crown's interest but to others' interest in the debtor's property. In my view, any definition of security interest in the *ITA* is not relevant to defining the Crown's interest since it serves an entirely different purpose. What matters is whether the *CCAA* provisions give the court authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This is determined by interpreting the words of the *CCAA* and how the *CCAA* defines secured creditor.

[165] I also agree with the Crown that the definition of "secured creditor" in the *CCAA* does not specifically list the holder of a deemed or actual trust. In addition, the Crown's interest cannot simply be called a "charge". As explained above, although the Crown's deemed trust has some parallels with a floating charge, the provision also employs some aspects of beneficial ownership. I would also hesitate to draw analogies with any of the other terms listed in the *CCAA* definition. The holders of several of these instruments are often described as having proprietary rights in their security. It was a legislative choice to define them as secured creditors for the purposes of the *CCAA*. It is difficult to shoehorn the Crown's deemed trust into the definition of

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"secured creditor" in the *CCAA*, particularly as the *CCAA* specifically refers to the deemed trust in s. 37(2).

[166] Moreover, I agree with the Crown that ss. 37 to 39 of the *CCAA* treat the Crown's deemed trust and the Crown's secured claims as distinct interests. After s. 37 of the *CCAA*, dealing with deemed trusts, s. 38(1) provides a general rule that secured claims of the Crown rank as unsecured claims. Section 38(2) contains an exemption from s. 38(1) for consensual security interests that are granted to the Crown. Section 38(3) contains an exemption for the CRA's enhanced requirement to pay. Finally, s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of a *CCAA* proceeding, and s. 39(2) subordinates a Crown security or charge to prior perfected security interests.

[167] As Wood notes, "These provisions adopt two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (Wood (2020), at p. 96). If s. 227(4.1) of the *ITA* gave the Crown the status of a secured creditor, then the CRA would presumably need to comply with ss. 38 and 39 by registering its security interest. No one suggests that the Crown has to register its claim for unremitted source deductions. In my view, ss. 37 to 39 draw a distinction between deemed trusts on the one hand and secured and unsecured claims on the other, and the Crown is not, therefore, a "secured creditor" under the *CCAA* for its right to unremitted source deductions.

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[168] This is dispositive for the purposes of ss. 11.2, 11.51 and 11.52 of the *CCAA*. These sections do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

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D. *Does Section 11 of the CCAA Allow the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?*

[169] The remaining issue is whether another provision in the *CCAA*, namely s. 11, confers that jurisdiction. As noted above, s. 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act:

> **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.

[170] In *9354-9186 Québec inc.*, this Court explained that the discretionary authority in s. 11 is broad, but not boundless (para. 49). There are three "baseline considerations": (1) the order sought must be appropriate; (2) the applicant must be acting in good faith; and (3) the applicant must demonstrate due diligence (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). Appropriateness is assessed by inquiring whether the order sought advances the remedial objectives of the *CCAA*. The general language of s. 11 should not, however, be "restricted by the availability of more specific orders" (*Century Services*, at para. 70).

[171] In keeping with its broad language, s. 11 of the *CCAA* has been used to make a wide array of orders. Most recently, for example, this Court clarified that it can be used to bar a creditor from voting on a plan where the creditor has acted for an improper purpose (*9354-9186 Québec inc.*, at paras. 56 and 66).

[172] The issue in this case is whether s. 11 can be used to rank an interim lender's loan, or other priming charge, ahead of the Crown's deemed trust for unremitted source deductions. In my view, it can, for two reasons.

[173] First, given my conclusion about the content of the Crown's right under s. 227(4.1) of the *ITA* for the purposes of the *CCAA* (requiring that it at least be paid in full under a plan of compromise), ranking a priming charge ahead of the Crown's deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown's right under s. 227(4.1) remains intact "notwithstanding any security interest" in the amount of the unremitted source deductions. For this reason, it is irrelevant whether a priming charge under ss. 11, 11.2, 11.51 or 11.52 of the *CCAA* is a "security interest" within the meaning of s. 227(4) and (4.1) of the *ITA*. The analysis above does not depend on finding that a priming charge is not captured within the *ITA* definition.

[174] In addition, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. For example, interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order

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could, again depending on the circumstances, further the remedial objectives of the *CCAA*. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate the proposal of a plan of compromise that, in any event, will be required to pay the Crown in full.

[175] Second, I do not accept the Crown's argument that s. 11 is unavailable because other *CCAA* provisions, namely ss. 11.2, 11.51 and 11.52, confer more specific jurisdiction (see *9354-9186 Québec inc.*, at paras. 67-68).

[176] While I agree that s. 11 is restricted by the provisions set out in the *CCAA* and cannot be used to violate specific provisions in the Act, s. 11 is not "restricted by the availability of more specific orders". The fact that specific provisions of the *CCAA* allow the court to rank priming charges ahead of a secured creditor does not mean that the court can *only* rank priming charges ahead of a secured creditor. Such an interpretation would amount to reading words into ss. 11.2, 11.51 and 11.52 that do not exist. An order that ranks a priming charge ahead of the beneficiary of the deemed trust is different in kind than the orders contemplated by ss. 11.2, 11.51 and 11.52, which contemplate the subordination of secured creditors. There is no provision in the *CCAA* stipulating what the court can do with trust property and no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust. So long as the order does not conflict with other provisions in the Act, namely ss. 37(2) and 6(3), and so long as it fulfills the "baseline considerations" of appropriateness, good faith, and due diligence, an order ranking a

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priming charge ahead of the Crown's deemed trust would fall under the jurisdiction conferred by s. 11 (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). As explained above, there would be no conflict with ss. 37(2) and 6(3) of the *CCAA*.

[177] Both parties invoked policy concerns to assist in the interpretative exercise. I do not find it necessary to resort to such arguments. However, it is far from evident that interim lending would simply end if the Crown's deemed trust had super-priority in an appropriate case. It is also far from evident that the Crown would suffer significantly if the priming charges had super-priority in an appropriate case, given the existence of s. 6(3) of the *CCAA* requiring full payment, and the Crown's favourable treatment in the *BIA* liquidation regime in the event the restructuring failed. What is clear is that interim lending is crucial to the restructuring process, and the Crown's deemed trust for unremitted source deductions is crucial to tax collection. It will be up to the *CCAA* judge to weigh and balance the moving pieces.

[178] To that end, s. 11 of the *CCAA* gives the court discretion and flexibility to weigh several considerations in ranking a priming charge ahead of the Crown's deemed trust for unremitted source deductions. It requires the court to take a focused look at the specific facts of a case to determine whether such an order is necessary and appropriate. Where relevant, the court will consider the Crown's interest in the deemed trust as a result of s. 37(2). Courts may no doubt look to the factors already listed in s. 11.2(4) — the likely duration of *CCAA* proceedings, plans for managing the company during those proceedings, views of the company's major creditors and the monitor, and

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the company's ability to benefit from interim financing, among others — for guidance. Section 11.2(4) of the *CCAA* states:

> **(4)** In deciding whether to make an order, the court is to consider, among other things,
>
> > **(a)** the period during which the company is expected to be subject to proceedings under this Act;
> >
> > **(b)** how the company's business and financial affairs are to be managed during the proceedings;
> >
> > **(c)** whether the company's management has the confidence of its major creditors;
> >
> > **(d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
> >
> > **(e)** the nature and value of the company's property;
> >
> > **(f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
> >
> > **(g)** the monitor's report referred to in paragraph 23(1)(b), if any.

[179] In addition, it seems to me that courts may consider:

- whether the interim lender has indicated, in good faith, that it will not lend to the debtor without ranking ahead of the Crown's deemed trust;
- the relative amounts of the interim loan and the unremitted source deductions (if the amount of the unremitted source deductions is a small fraction of the amount of the interim loan, the interim lender may not be significantly prejudiced without super-priority);

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- whether, and for how long, the Crown allowed source deductions to go unremitted without taking action (see, e.g., Hanlon, Tickle and Csiszar); and
- finally, the prospects of success of a restructuring; and whether the *CCAA* is likely to be used to sell the debtor's assets.

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[180] Finally, different considerations will apply if a court is considering ranking a different party's charge, like the Monitor's or Directors' Charge, ahead of the Crown's deemed trust.

VII. Conclusion

[181] I would dismiss the appeal and clarify that the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions is derived from s. 11 of the *CCAA* rather than ss. 11.2, 11.51 and 11.52. The Crown's interest under s. 227(4.1) of the *ITA* is a deemed trust interest, but beneficial ownership of deemed trust property is a manipulation of private law concepts, without settled meaning. Accordingly, the specific nature of beneficial ownership of deemed trust property must be determined in the relevant context in which it is asserted. Here, the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3). The former is flexible, requiring the Crown's deemed trust property to be considered when appropriate under the Act; the latter specifically requires that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. The Crown's right differs under

the *BIA*, in keeping with the different goals and schemes of liquidation and restructuring. Given the content of the Crown's right to unremitted source deductions in a *CCAA* restructuring, there is no conflict between s. 227(4.1) of the *ITA* and s. 11 of the *CCAA*. The schemes of both federal Acts can be harmonized and the objectives of both statutes furthered.

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[182] The Respondents will have their costs in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

The reasons of Abella, Brown and Rowe JJ. were delivered by

BROWN AND ROWE JJ. —

I. Overview

[183] At issue in this appeal is whether the Crown's deemed trust claim for unremitted source deductions under s. 227(4) and (4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), s. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"), and ss. 23(4) and 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*") (collectively, the "Fiscal Statutes"), have priority over court-ordered priming charges under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[184] The present iteration of the deemed trust provision, s. 227(4.1) of the *ITA*, was the result of a 1997 amendment enacted by Parliament directly in response to this Court's interpretation of the provision's predecessor in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997)). That provision was itself the result of several amendments, beginning in 1942, with the amendment introducing the deemed trust in s. 92(6) and (7) of the *Income War Tax Act*, R.S.C. 1927, c. 97 (previously S.C. 1917, c. 28) (*An Act to amend the Income War Tax Act*, S.C. 1942-43, c. 28, s. 31). The provision and the historical amendments demonstrate Parliament's intention to safeguard its ability to collect employee source deductions under the relevant statutes, in priority to all other claims against a debtor's property.

[185] The Crown appeals from the decision of the Court of Appeal of Alberta which, like the chambers judge, held that the *CCAA* court could subordinate the deemed trust claims under the Fiscal Statutes to the priming charges (2019 ABCA 314, 93 Alta. L.R. 29, aff'g 2017 ABQB 550, 60 Alta. L.R. (6th) 103). Having examined the pertinent provisions of the Fiscal Statutes, and for the reasons that follow, we find ourselves in respectful disagreement with that conclusion, and prefer the view of the dissenting judge, Wakeling J.A. The Crown's deemed trust claims under the Fiscal Statutes have ultimate priority and cannot be subordinated by priming charges.

[186] In our view, the text of the impugned provisions in the Fiscal Statutes is clear: the Crown's deemed trust operates "[n]otwithstanding . . . any other enactment

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of Canada" (*ITA*, s. 227(4.1)).[2] Parliament used unequivocal language — indeed, *the very language suggested by this Court* in *Sparrow Electric* — to give ultimate priority to the Crown's claim. Further, and again in clear and unequivocal text, Parliament imposed limits on the broad grant of authority by which a court can prioritize priming charges, thereby making plain the superiority of deemed trust claims. Finally, no provision of the *CCAA* is rendered meaningless by this interpretation. Unlike in other contexts such as the legislative scheme governing the GST/HST, Parliament has left no room for subordinating the deemed trusts under the Fiscal Statutes in pursuit of other legislative objectives. We would, therefore, allow the appeal.

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II. Analysis

A. *General Comments on the Nature of the Deemed Trusts Under the Fiscal Statutes*

[187] The deemed trust created by the *ITA* is an essential instrument to collect source deductions (*First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, at para. 22). The *ITA* grants special priority to the Crown to collect unremitted source deductions, reflecting its status as an "involuntary creditor" (*First Vancouver*, at para. 23).

[188] Section 227(4) and (4.1) of the *ITA* reads:

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[2] The wording of the deemed trust provisions in the relevant provisions of the Fiscal Statutes is materially identical. This decision focuses on the deemed trusts in s. 227(4) and (4.1) of the *ITA*. The reasoning herein, however, applies with equal force to each of the other statutes.

> **(4)** Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > **(a)** to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > **(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[189] These sections describe two relevant events. First, at the time of the deduction, a trust is deemed in favour of the Crown, binding every person (the "tax debtor") who collects source deductions in the amount withheld until the person remits the source deductions (*ITA*, s. 227(4)). Section 227(4) deems the tax debtor to hold the

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source deductions "separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person".

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[190] The second event occurs where the tax debtor has failed to remit the source deductions in accordance with the manner and time provided by the *ITA*. Section 227(4.1) extends the deemed trust to all "property of the person and property held by any secured creditor . . . equal in value to the amount so deemed to be held in trust". This is achieved by deeming the source deductions to be held "in trust for Her Majesty" from the moment the amount was "deducted or withheld by the person, separate and apart from the property of the person". Parliament further provided that the unremitted source deductions under the Fiscal Statutes "form no part of the estate or property of the person" from the time of deduction or withholding, and is "property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests".

[191] This Court has held that the deemed trust is a "creatur[e] of statute" and "is not in truth a real [trust], as the subject matter of the trust cannot be identified from the date of creation of the trust" (*Sparrow Electric*, at para. 31, per Gonthier J., citing D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117, and adopted in *First Vancouver*, at para. 37). This statement fuelled a debate in this appeal about whether the deemed trust is a security interest or a proprietary interest, with the

respondents arguing that the Crown cannot hold a proprietary interest in the debtor's property because there is a lack of certainty in the subject matter.

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[192] We agree with each of our colleagues Justices Karakatsanis and Côté that the deemed trust is not a "true" trust and that it does not confer an ownership interest or the rights of a beneficiary on the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec* (Karakatsanis J.'s reasons, at paras. 119-20; Côté J.'s reasons, at paras. 43 and 49). Respectfully, however, our colleagues miss the point of the *deemed* quality of the trust. The matters of a property interest, certainty of subject matter and autonomous patrimony that arise from attempts to describe the operation of the deemed trust are entirely irrelevant and do not assist in deciding this appeal, nor in understanding Parliament's intent. The deemed trust is a legal fiction, with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*. As noted in *First Vancouver*, at para. 34, "it is open to Parliament to characterize the trust in whatever way it chooses; it is not bound by restraints imposed by ordinary principles of trust law". While *First Vancouver* considered the contrast between a statutory trust and a common law trust, the same applies to our colleague Côté J.'s reference to the *Civil Code* (*Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31, at para. 49). What matters here is not *the characterization* of the deemed trust that is at issue, but its *operation*. And as we explain, it *operates* to give the Crown a statutory right of access to the debtor's property to the extent of its *corpus* and a right to be paid in priority to all security interests.

[193] Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. It is of course true that, in common law Canada, for a trust to come into existence there must be certainty of intention, certainty of subject matter, and certainty of object (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 140; E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 41). Similarly, under the Quebec civil law, "[t]hree requirements must . . . be met in order for a trust to be constituted: property must be transferred from an individual's patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property" (*Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31). And, again, it is also true that the subject matter of the deemed trust under s. 227(4.1) cannot be identified from the date of creation of the trust and does not constitute an autonomous patrimony to which specific property is transferred.

[194] But again, none of this remotely matters here. Statutory text, not ordinary principles of trust law, determines the nature of, and rights conferred by, deemed trusts (*First Vancouver*, at para. 34). And this Court has recognized that Parliament, through the trust deemed by s. 227(4.1) of the *ITA*, has "revitaliz[ed] the trust whose subject matter has lost all identity" (*Sparrow Electric*, at para. 31, per Gonthier J., adopted in *First Vancouver*, at para. 37). This is because the subject matter of the deemed trust is ascertained *ex post facto*, corresponding to the property of the tax debtor and property held by any secured creditor equal in value to the amount deemed to be held in trust by s. 227(4) that, but for the security interest, would be property of the tax debtor. In short,

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the subject matter is whatever assets the employer then has from which to realize the original trust debt. Hence Iacobucci J.'s description in *First Vancouver* of the operation of s. 227(4.1) as "similar in principle to a floating charge" (para. 4). Parliament also circumvented the traditional requirements of the *Civil Code* for constituting a trust by requiring the amount of the unremitted source deductions to be held "separate and apart from the property of the [debtor]" and to "form no part of the estate [*patrimoine*, in the French version] or property of the [debtor]" (s. 227(4.1)).

[195] In short, the requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust. Parliament did not legislate a "true" trust. Instead, it legislated a deeming provision which "artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used" (*R. v. Verrette*, [1978] 2 S.C.R. 838, at p. 845).

[196] On this point, and contrary to the view of the majority at the Court of Appeal, Iacobucci J. *did not* hold that the deemed trust *is* a floating charge — nor that it was "of the same nature" (Côté J.'s reasons, at para. 51) — but rather that it operated *similarly*, by permitting a debtor in the interim to alienate property in the normal course of business. They are distinct legal concepts; whereas the deemed trust takes "priority over existing and future security interests", a floating charge would be overridden by a subsequent fixed charge (*Toronto-Dominion Bank v. Canada*, 2020 FCA 80, [2020] 3 F.C.R. 201, at para. 62; see also *First Vancouver*, at para. 28).

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[197] Significantly, the s. 227(4.1) deemed trust does not encompass the whole of the tax debtor's interest in property, but only the amount deemed to be held in trust by s. 227(4). But this does not mean the Crown cannot have a property interest in the debtor's property. It merely limits that interest to the extent of the unremitted source deductions. This makes sense. The Crown may collect only what it is owed.

B. *The Deemed Trust Under the Fiscal Statutes Have Absolute Priority Over All Other Claims in CCAA Proceedings*

[198] The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) of the *ITA* and the related deemed trust provisions under the Fiscal Statutes bear only one plausible interpretation: the Crown's deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and (4.1) of the *ITA* was clear and unmistakable.

(1) The Deemed Trusts Apply Notwithstanding the Provisions of the *CCAA*

(a) *Text of the Fiscal Statutes*

[199] The text of s. 227(4.1) of the *ITA* is determinative: the Crown's deemed trust claim enjoys superior priority over all "security interests", including priming charges under the *CCAA*. The amount subject to the deemed trusts is deemed "to be held . . . separate and apart from the property of the person" and "to form no part of the

estate or property of the person". It is "beneficially owned by Her Majesty", and the "proceeds of such property shall be paid . . . in priority to all such security interests". The Crown's right pursuant to its deemed trust is clear: it is a right to be paid in priority to all security interests.

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[200] Parliament granted this unassailable priority by employing the unequivocal language of "[n]otwithstanding any . . . enactment of Canada". This is a "blanket paramountcy clause"; it prevails over all other statutes (P. Salembier, *Legal and Legislative Drafting* (2nd ed. 2018), at p. 385). No similar "notwithstanding" provision appears in the *CCAA*, subordinating the claims under the deemed trusts of the Fiscal Statues to priming charges. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the *CCAA*, s. 37(2) *preserves* the deemed trusts of the Fiscal Statutes. This distinguishes the deemed trust at issue here from those discussed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which were nullified by the operation of what is now s. 37(1). Deschamps J. repeatedly contrasted the different deemed trusts and specified that "the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy" (para. 38). The *ITA* and *CCAA* thus operate without conflict.

(b) *Legislative Predecessor Provisions*

[201] The predecessor provisions of a statutory provision form part of the "entire context" in which it must be interpreted (*Merk v. International Association of Bridge,*

Structural, Ornamental and Reinforcing Iron Workers, Local 771, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28). And here, it confirms that, by enacting s. 227(4.1) of the *ITA*, Parliament intended for the deemed trusts arising from the Fiscal Statutes to have absolute priority over all secured creditors, as defined in s. 224(1.3) of the *ITA*.

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[202] As already noted, Parliament amended s. 227(4.1) of the *ITA* to its current form in response to this Court's decision in *Sparrow Electric*. In *Sparrow Electric*, both Royal Bank and the Minister claimed priority to the proceeds from the tax debtor's property. This Court held that the Bank had priority since the inventory was subject to the Bank's security before the deemed trust arose. In reaching this conclusion, Iacobucci J. invited Parliament to grant absolute priority to the Crown, and showed how this could be achieved:

> I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation. [Emphasis added; para. 112.]

[203] Parliament proceeded to do just that. It amended the Fiscal Statutes to reinforce its priority. The press release accompanying the amendments stated that the objective of the amendments was to "assert the absolute priority of the Crown's claim [for] unremitted source deductions [and to] ensure that tax revenue losses are

minimised and that delinquent taxpayers and their secured creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown" (Department of Finance Canada, at p. 1 (emphasis added)).

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[204] The purpose of these amendments was described by Iacobucci J. for this Court in *First Vancouver*. It was, he recognized, to grant priority to the deemed trusts and ensure the Crown's claim prevails over secured creditors, irrespective of when the security interest arose (paras. 28-29). "It is evident from these changes" he added, "that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister" (para. 29). Parliament's intention could not have been clearer.

[205] Indeed, our colleagues' view to the contrary leaves us wondering: if the all-encompassing scope of the notwithstanding clause of s. 227(4.1) of the *ITA* is *insufficient* to prevail over the priming charges, what language would possibly be *sufficient*? Courts must give proper effect to Parliament's plain statutory direction, and not strain to subvert it on the basis that Parliament's categorical language or "basket clause" did not itemize a particular security interest.

(2) The Priming Charges Are "Security Interests" Within the Meaning of the Fiscal Statutes

[206] The priming charge provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* allow the supervising court to "make an order declaring that all or part of the

company's property is subject to a security or charge" ("*charge ou sûreté*" in the French version). This does not, however, prevail over the deemed trust created by s. 227(4.1) of the *ITA*, which provides that the unpaid amounts of the deemed trust for source deductions have priority over all "security interests". That term is defined by s. 224(1.3) of the *ITA* as follows:

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

This makes clear that a "security interest" includes a "charge" (a "*sûreté*" in the French version). Further, ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* describe the priming charges as a "security or charge". There can be no doubt, therefore, that priming charges under the *CCAA* are security interests under the *ITA*.

[207] Even were this insufficient, the definition of "security interest" in s. 224(1.3) of the *ITA* is sufficiently expansive to capture *CCAA* priming charges. The word "includes", and the categorical language of "encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for" could not be any more expansive. As Professor Sullivan explains, "The purpose of a list of examples following the word 'including' is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude

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something that is meant to be included" (*Sullivan on the Construction of Statutes* (6th ed. 2014), at para. 4.39).

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[208] This Court has already recognized, in *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, that Parliament chose "an expansive definition of 'security interest' . . . in order to enable maximum recovery by the Crown" (para. 14), such that it captures any interest in the property of the debtor that secures payment or performance of an obligation:

> In order to constitute a security interest for the purposes of s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, the creditor must hold "any interest in property that secures payment or performance of an obligation". The definition of "security interest" in s. 224(1.3) *ITA* does not require that the agreement between the creditor and debtor take any particular form, nor is any particular form expressly excluded. So long as the creditor's interest in the debtor's property secures payment or performance of an obligation, there is a "security interest" within the meaning of this section. While Parliament has provided a list of "included" examples, these examples do not diminish the broad scope of the words "any interest in property" . . . . [Emphasis added; para. 15.]

In that case, Rothstein J. held for the Court that a contract providing a right to compensation (or set-off at common law) could constitute a "security interest" under s. 224(1.3) of the *ITA*, *despite that it was not enumerated in the definition* and that it is *not traditionally understood as such* (paras. 37-40).

[209] For all these reasons, the priming charges fall under the definition of "security interest", because they are "interest[s] in the debtor's property [that] secur[e] payment or performance of an obligation", i.e. the payment of the monitor, the interim

lender, and directors. Consequently, the Crown's interest under the trust deemed created by s. 227(4.1) of the *ITA* enjoys priority over the priming charges.

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[210] Our colleague Côté J., however, sees the matter differently. In our respectful view, she disregards this Court's authoritative statement of the law in *Caisse populaire Desjardins de l'Est de Drummond*. Specifically, she concludes that priming charges are not "security interests" under the *ITA* because "[c]ourt-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group" (Côté J.'s reasons, at para. 62 (emphasis deleted), quoting R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85, at p. 98). With respect, nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors.

[211] Further, and irrespective of the nature of *CCAA* proceedings, our colleague's conclusion is irreconcilable with this Court's holding in *Caisse populaire Desjardins de l'Est de Drummond* and with the "expansive definition" Parliament adopted to maximize recovery (*Caisse populaire Desjardins de l'Est de Drummond*, at para. 14). The fact that the instrument is court-ordered and is for the presumed benefit of all creditors is irrelevant. It does not affect *the nature* of the priming charges — to secure the payment of an obligation — which is the only relevant criterion (para. 15). As for the express inclusion of "priming charges" in the definition and their creation

by court order, we reiterate that "*sûreté*" and "*charge*" are explicitly included "however or whenever arising, created, deemed to arise or provided for" (*ITA*, s. 224(1.3)).

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[212] Nor is Professor Wood's commentary, and by extension, the reasoning in *DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237, and *Minister of National Revenue v. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278, of any avail to our colleague Karakatsanis J. (para. 102; see also Wood, at p. 98, fns. 51-52). While those judgments held that finance leases and conditional sales agreements did not fall under the definition of s. 224(1.3) of the *ITA* because they were not specifically listed, that reasoning was later squarely rejected in *Caisse populaire de l'Est de Drummond*. And, were that not enough, *Mega Pets* and *Schwab*, unlike the instant case, dealt with situations where property was not transferred to the debtor, which facts were treated as determinatively supporting the conclusion that the instruments in those cases were not "security interests". For example, under a conditional sales agreement, the seller does not have an interest in the debtor's property because ownership rests with the seller until performance of the obligation (*Mega Pets*, at para. 32). By contrast, the priming charges secure payment out of property that remains the debtor's.

[213] Finally, this Court's interpretation of "security interest" in *Caisse populaire de l'Est de Drummond* is confirmed by the French version of the text. "*Sont en particulier des garanties*" is illustrative, not limitative. *Le Robert* (online) defines "*en particulier*" (in particular) as [TRANSLATION] "particularly, among others,

especially, above all" (emphasis added). Unsurprisingly, the French version of s. 224(1.3) has been described as being [TRANSLATION] "as broadly worded as possible" (R. P. Simard, "Priorités et droits spéciaux de la couronne", in *JurisClasseur Québec — Collection droit civil — Sûretés* (loose-leaf), vol. 1, by P.-C. Lafond, ed., fasc. 4, at para. 20). There is no discordance between both versions of the text. The French version conforms perfectly to the English text's use of the verb "includes", and confirms the plain reading of the English version.

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[214] Respectfully, our colleagues Côté and Karakatsanis JJ. frustrate the clear will of Parliament. Clear, all-inclusive language should be treated as such, and not circumvented by straining to draw distinctions of no legal significance whatsoever or by searching for what is not specifically mentioned in order to avoid the otherwise inescapable conclusion that Parliament granted absolute priority to the deemed trusts.

(3) Conclusion

[215] It is this simple:

1. the Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*;

2. the priming charges are "security interests" within the meaning of the Fiscal Statutes; and

3. the *CCAA* does not subordinate the claims under the deemed trusts of the Fiscal Statutes to the priming charges.

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[216] This is sufficient to decide the appeal: the deemed trusts of the Fiscal Statutes have priority over the priming charges. However, in view of the respondents' submissions that such a finding leaves the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*, and that recognizing the ultimate priority of the Crown's deemed trust renders certain provisions of the *CCAA* meaningless, we are compelled to explain why this is not so.

C. *The CCAA and the Fiscal Statutes Operate Harmoniously*

(1) The Broad Grant of Authority Under Section 11 of the *CCAA* Is Not Unlimited

[217] It is not disputed that s. 11 of the *CCAA* contains a grant of broad supervisory discretion and the power to "make any order that it considers appropriate in the circumstances" to give effect to that supervisory role (see J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 18-19). What is in dispute, however, are the limits to this broad power.

[218] A supervising judge's authority to grant priming charges was not always contained in the *CCAA*. Prior to the 2009 amendments, it was derived from the courts' inherent jurisdiction (*Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th)

274, at para. 14; Q.B. reasons, at para. 105). While the amendments in some respects represented a codification of the past practice, they clarified how priming charges operated (*CCAA*, ss. 11.2, 11.51 and 11.52). Despite being "the engine driving the statutory scheme", s. 11's exercise was expressly stated by Parliament to be "subject to the restrictions set out in this Act" (see *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at paras. 48-49, citing *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). Three such restrictions are significant here.

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(a) *The Continued Operation of the Deemed Trusts for Unremitted Source Deductions (Section 37(2))*

[219] The first restriction on the authority to grant priming charges is found in s. 37(2) of the *CCAA*. This provides for the continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding — a point this Court *repeatedly* highlighted in *Century Services*, at paras. 78-81. At the hearing of this appeal, the respondents argued that s. 37(1) nullifies the Crown's priority in respect of all deemed trusts under the *CCAA*, and that s. 37(2) acts merely to reincorporate the deemed trusts under the Fiscal Statutes into *CCAA* proceedings without their absolute priority. This tortured interpretation misconceives the effect of s. 37(1).

[220] Section 37(1) provides that, despite any deemed trust provision in federal or provincial legislation, "property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision", but it is expressly made "[s]ubject to subsection (2)". Through

s. 37(2), Parliament also preserved the operation of the deemed trusts under the Fiscal Statutes within *CCAA* proceedings by providing that "[s]ubsection (1) does not apply in respect of amounts deemed to be held in trust under [the Fiscal Statutes]". In the face of Parliament's clear direction that the deemed trusts operate "notwithstanding" any other enactment, and the express preservation of the deemed trusts in the *CCAA*, there is simply no basis whatsoever for reading s. 37 as invalidating the deemed trust provisions under the Fiscal Statutes only to revive them with a conveniently lesser priority. Such an interpretation finds no support in the text, context, or purpose of the statutory schemes. Rather, all those considerations support the view that the deemed trusts under the Fiscal Statutes are preserved in *CCAA* proceedings in both form and substance, along with their absolute priority.

[221] Before turning to the second restriction, we note each of our colleagues Karakatsanis J. and Côté J. fail to give effect to Parliament's decision, expressed in clear statutory text, to "preser[ve] deemed trusts and asser[t] Crown priority only in respect of source deductions" under the *CCAA* (*Century Services*, at para. 45). For the same reason, the reliance they place on *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, is misconceived. There, the Court held that the deemed trust created by provincial legislation was not a "true trust" so as to fall outside the debtor's property under what is now s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). That is not this case. Unlike the deemed trust in *Henfrey*, the deemed trusts of the Fiscal Statutes receive a particular treatment in bankruptcy and insolvency proceeding because they are preserved by s. 37(2) of the *CCAA* and s. 67(3)

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of the *BIA*. Further, while the Court in *Henfrey* concluded that the deemed trust was ineffective in bankruptcy because the commingling of assets rendered the money subject to the deemed trusts untraceable, this rationale has no application to s. 227(4.1). In *First Vancouver*, this Court noted that "by deeming the trust to be effective 'at any time' the debtor is in default, the amendments serve to strengthen the conclusion that the Minister is not required to trace its interest to assets which belonged to the tax debtor at the time the source deductions were made" (para. 37). Again, no conclusions regarding the nature of the deemed trusts flow from the fact that tracing is irrelevant under s. 227(4.1): the deemed trusts are statutory instruments and the question is one of operation, *not* characterization.

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(b) *Priming Charges Attach Only to the Property of the Debtor Company*

[222] The second restriction on the *CCAA*'s broad authority to grant priming charges is that the *CCAA* requires priming charges to attach only to "all or part" of the property of the debtor's company (s. 11.2(1); see also ss. 11.51(1) and 11.52(1)). Here, Parliament evinces a clear intent to preserve the ultimate priority it afforded the deemed trusts under the Fiscal Statutes. This is because, by operation of s. 227(4.1) of the *ITA* and s. 37(2) of the *CCAA*, the unremitted source deductions are deemed *not* to form part of the property of the debtor's company.

[223] Parliament could not have been more explicit: the source deductions are deemed never to form part of the company's property and, if there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's

property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest. Whether this is a true ownership interest is irrelevant to this appeal as the legislation *deems* the Crown to obtain beneficial ownership for these purposes. It follows that the priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*, of which Parliament took great care to ensure the source deductions were deemed to form no part. As Michael J. Hanlon explains:

> While it has been held that an interim financing charge may rank ahead of the deemed trusts existing in favour of the Canada Revenue Agency with respect to amounts owing on account of unremitted source deductions, this appears to be incorrect. Property deemed to be held in trust pursuant to the provisions creating the deemed trust are deemed not to form part of the debtor's estate, and given that those deemed trusts with respect to source deductions, are preserved in a *CCAA* context, the interim financing charge would not attach to those assets. [Emphasis added; footnotes omitted.]
>
> (*Halsbury's Laws of Canada — Bankruptcy and Insolvency* (2017 Reissue), at HBI-376)

(c) *The Definition of "Secured Creditor" (Section 2)*

[224] The third restriction on the *CCAA*'s broad authority to grant priming charges is that the court "may order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.51(2) and 11.52(2)). Also, the definition of "secured creditor" in s. 2(1) of the *CCAA* makes it manifestly clear that the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes:

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> ***secured creditor*** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds . . . .

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This definition highlights two relevant considerations. First, the definition should be read as encompassing two classes of creditors. And second, the use of the word "trust" must be given legal significance.

[225] As to the first consideration, we accept the Crown's submission that the proper reading of the definition of secured creditor references only two classes of secured creditors: (i) holders of direct security, and (ii) holders of secured bonds. So understood, a secured creditor means either

> a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company,

or

> **a holder of any bond of a debtor company secured by** a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or **a trust in respect of, all or any property of the debtor company** . . . .

The reference to "trust" appears only in relation to an instrument securing a bond of the debtor company. The definition must be read as "secured creditor means . . . a holder of any bond of a debtor company secured by . . . a trust in respect of, all or any property of the debtor company". Accordingly, holders of an interest under a deemed trust are not a third class of creditors (A. Prévost, "Que reste-t-il de la fiducie réputée en matière de régimes de retraite?" (2016), 75 *R. du B.* 23, at p. 58).

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[226] While finding this interpretation "initially attractive", the majority of the Court of Appeal ultimately rejected this reading. It did so because, irrespective of whether the definition needs a third reference to a "holder of a trust" drafted in parallel to the first two classes of creditors, the Crown's interest could be classified as a "charge" and is therefore captured by the first class of secured creditors (C.A. reasons, at paras. 42-43). Respectfully, this is incorrect. Deemed trusts are not covered by the word "charge". To conclude that the word "charge" encompasses "deemed trusts" under the first class of secured creditors when "charge" and "trust" are listed distinctly under the second class of secured creditors (holders of secured bonds) would be incoherent and run contrary to legislative presumptions in statutory interpretation. Why would Parliament include a specific reference to *trusts* if they are already covered by *charge*? Parliament is presumed to avoid "superfluous or meaningless words, [and] phrases" (*Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 178). The deliberate and distinct text of "trust" and "charge" shows that it was not Parliament's intention to have holders of deemed trusts

subsumed under "charge" such that the Crown in this circumstance would become a secured creditor.

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[227] In any case, if there were only one class of creditor, the Crown would not be a secured creditor with respect to the deemed trust claim under the Fiscal Statutes. While Parliament distinguished between "deemed or actual trust[s]" in s. 224(1.3) of the *ITA*, it made no such distinction in the definition of secured creditor. Parliament is presumed to legislate with intent and chose its words carefully. Our role as a court with respect to legislation is interpretation, not drafting. We must ascribe legal significance to Parliament's choice of text — that is, to the words Parliament chose and *did not* choose.

(d) *"Restrictions" Under Section 11 of the CCAA*

[228] Our colleague Karakatsanis J. agrees with our analysis of the priming charge provisions, but she does not seem to view them as "restrictions" within the meaning of s. 11 because "[t]he general language of s. 11 should not . . . be 'restricted by the availability of more specific orders'" (Karakatsanis J.'s reasons, at para. 170, citing *Century Services*, at para. 70). With respect, as a matter of law and statutory interpretation this view is simply unavailable to our colleague. Neither s. 11 nor the court's inherent jurisdiction can "empower a judge . . . to make an order negating the unambiguous expression of the legislative will" (*Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, at p. 480; see also *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 32). Parliament has imposed clear

restrictions on the courts' power to give priority to priming charges. It is one thing to rely on s. 11 as a source of general authority even when other specific orders are available; it is another to misconstrue s. 11 as a source of unfettered authority to circumvent such unambiguous restrictions. While courts may use their general s. 11 power to create priming charges for purposes other than those that are specifically enumerated (see Wood, at pp. 90-91), Parliament has clearly expressed its intention to restrict any such charge in a critical way — it cannot take priority over the Crown's deemed trust.

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[229] For the same reason, we respectfully find untenable our colleague Justice Moldaver's suggestion that it is unclear whether there are restrictions *internal* to the *CCAA* itself that would prevent a court from using its power under s. 11 to order a priming charge in priority to the Crown's deemed trust claim. This statement does not account for Parliament's clear intention, recorded in s. 37(2), to preserve the Crown's right to be paid in absolute priority over all secured creditors in *CCAA* proceedings. It also renders superfluous the restrictions on the court's authority to prioritize priming charges under ss. 11.2(2), 11.51(2) and 11.52(2) of the *CCAA*.

[230] Further, our colleague Moldaver J. says it is unnecessary to "define the particular nature or operation of the" deemed trust under the *ITA* (para. 255), and relies on the "notwithstanding" language of s. 227(4.1) of the *ITA* to determine whether the Crown's claim can have priority over priming charges. This interpretation effectively reads in a conflict in the statutory schemes, despite this Court's clear direction that "an

interpretation which results in conflict should be eschewed unless it is unavoidable" (*Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47). In any event, this is not an *unavoidable* conflict: there is simply *no* conflict. Parliament *avoided* any conflict between the *CCAA* and the *ITA* by imposing restrictions upon the court's authority under s. 11 of the *CCAA*.

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(e) *Structure of Crown Claims Under the CCAA*

[231] Finally, while not a "restrictio[n] set out in [the *CCAA*]", as specified in s. 11, the cogency of the statutory scheme as a whole depends on an interpretation where the Crown cannot be a secured creditor. This is so because classifying the Crown as "secured creditor" would disrupt the structure of Crown claims that the *CCAA* clearly defines at ss. 37 to 39 (Wood, at p. 98). Section 37 applies to deemed trust claims, with s. 37(1) providing that deemed trusts in favour of the Crown are ineffective under the *CCAA*, as a general rule, and s. 37(2) providing an exemption for the deemed trust for source deductions. Section 38(1) sets out the general rule that the Crown's secured claims rank as unsecured claims, with specific exemptions at s. 38(2) and (3). Finally, s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of the *CCAA* proceedings but, under s. 39(2), that security is subordinate to prior perfected security interests.

[232] This leads us to question why Parliament would expressly "preserve" the deemed trusts of the Fiscal Statutes by operation of s. 37(2), only then to rank the Crown as an unsecured creditor by the operation of s. 38(1). Unlike the interpretation

that affords the deemed trusts ultimate priority, allowing the Crown to be reduced to an unsecured creditor in respect of its deemed trust claims would render s. 37(2) almost meaningless. Further, this interpretation would require the Crown to register its claim under s. 39(1) to preserve its status because the deemed trust is not afforded the exemption under s. 38. It would be illogical for Parliament to confer greater protection on secured claims afforded an exemption under s. 38(2) or (3) than it conferred on deemed trusts for source deductions, when the clear objective was to confer "absolute priority" on the latter (*First Vancouver*, at paras. 26-28).

[233] We note that Professor Wood is not alone in recognizing that "sections 38 and 39 of the CCAA govern the conditions upon which a Crown claim can be viewed as 'secured' for the purposes of the CCAA" (F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §79.2). Since the deemed trusts for unremitted source deductions under the Fiscal Statutes do not meet the conditions of these sections, it follows that the Crown's claim is not "secured".

[234] In our view, a plain reading of the definition of secured creditor within the context of the broader statutory scheme results in a single inescapable conclusion. That is, there are three classes of Crown claims under the *CCAA*: (1) claims pursuant to deemed trusts continued under the *CCAA*; (2) secured claims; and (3) unsecured claims. The claims for unremitted source deductions fall under the first type: claims pursuant to deemed trusts continued under the *CCAA*.

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(2) Recognizing the Ultimate Priority of the Crown's Deemed Trust Does Not Defeat the Purpose of any Provision of the *CCAA*

[235] For two further and related reasons, the majority at the Court of Appeal and the respondents resist the conclusion that the Crown's deemed trust enjoys absolute priority.

(a) *Protection of Crown Claims Under Section 6(3)*

[236] First, the majority held that granting ultimate priority to the deemed trusts would render s. 6(3) of the *CCAA* meaningless. This provision prohibits the court from sanctioning a compromise or arrangement unless it provides for payment in full to the Crown, within six months of the sanction of the plan, of all amounts due to the Crown. The majority reasoned that if the Crown is always paid first for its deemed trust claims under the Fiscal Statutes, there would be no need to protect the Crown claims under s. 6(3).

[237] Respectfully, this conclusion is erroneous. A review of the purpose and scope of s. 6(3) of the *CCAA* is clear: it operates only where there is an arrangement or compromise put to the court, and it protects the entirety of the Crown claim pursuant to s. 224(1.2) of the *ITA* and similar provisions of the Fiscal Statutes. This includes claims *not* subject to the deemed trusts under the Fiscal Statutes, such as income tax withholdings, employer contributions to employment insurance and CPP, interest and penalties. In contrast, the deemed trusts arise immediately and operate continuously

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"from the time the amount was deducted or withheld" from the employee's remuneration, and apply to *only those* deductions. It follows, then, that, without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the *ITA*. This is because most of the Crown's claims rank as unsecured under s. 38 of the *CCAA*.

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[238] It bears emphasizing that s. 6(3) does *not* apply where no arrangement is proposed or to *CCAA* proceedings which involve the liquidation of the debtor's assets. Such "liquidating CCAAs" are "now commonplace in the *CCAA* landscape" (*Callidus Capital Corp.*, at para. 42). The absolute priority of the deemed trusts under the Fiscal Statutes, continued by s. 37(2) of the *CCAA*, provides protection to the Crown's claim for unremitted source deductions in liquidating CCAAs. Each of our colleagues Côté and Karakatsanis JJ. deprive the Crown of its guaranteed entitlements in such cases, despite Parliament having unambiguously granted "absolute priority" to claims for unremitted source deductions (Department of Finance Canada).

[239] We note that our colleague Karakatsanis J. does not conclude that s. 6(3) is rendered nugatory by our interpretation; rather, she says that, since the term "beneficial ownership" as it is used in the deemed trusts does not have the same meaning at common law, we must look to the *CCAA* to ascertain the Crown's rights. This "manipulation of private law concepts, without settled meaning", she further says,

raises the question of *how* the deemed trust survives under the *CCAA* (para. 181). And the answer, she finds, is furnished by s. 6(3).

[240] This is wrong for three reasons. First, there is no question as to how the deemed trust survives. Section 37(2) operates to exempt the deemed trusts under the Fiscal Statutes from any change in form or substance under the *CCAA*; this continues the operation of s. 227(4.1), which confers absolute priority on the Crown's claim to the deemed trusts under the Fiscal Statutes. In other words, the deemed trust survives as it was under the Fiscal Statutes. It is unsurprising, therefore, that this Court did not opine on *how* the trust "survives" in *CCAA* proceedings in *Century Services*: it is, with respect, plain and obvious.

[241] Secondly, our colleague Karakatsanis J.'s suggestion that the understanding of the rights conferred on the Crown under the deemed trust must arise from reading s. 6(3) of the *CCAA* entirely bypasses the text of the *ITA* which specifically sets out those rights. After providing that the Crown has "beneficial ownership" of the value of the unremitted source deduction, the *ITA* continues: "the proceeds of such property shall be paid to the Receiver General in priority to all such security interests" (s. 227(4.1)). This is the right of the Crown under the deemed trust, and our colleague fails to give effect to this right.

[242] Finally, as we have discussed, s. 6(3) protects different interests than those captured by the deemed trusts. If s. 6(3) were to exhaust the Crown's rights under the *CCAA*, our colleague Karakatsanis J. correctly observes that "there may be some risk

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to the Crown that the plan [under s. 6(3)] may fail, and the Crown may not be paid in full if the restructuring dissolves into liquidation and the estate is depleted in the interim" (para. 155 (emphasis added)). This, however, only supports our interpretation. The right "not to have to compromise" under s. 6(3) is a right independent of the Crown's right under deemed trusts (para. 155 (emphasis deleted)).

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(b) *Power to Stay the Crown's Garnishment Right (Section 11.09)*

[243] Secondly, the majority at the Court of Appeal and the respondents say that giving effect to the clear statutory wording would be contrary to the purpose of s. 11.09 of the *CCAA*, which grants courts the power to stay the Crown's garnishment right under the *ITA* (C.A. reasons, at para. 54). This demonstrates, the argument goes, Parliament's intent to have the court exercise control over the Crown's interests while monitoring the restructuring proceedings. On this view, granting absolute priority to the deemed trusts under the Fiscal Statutes necessarily implies that s. 11.09 of the *CCAA* does not apply to the deemed trust claim.

[244] Again respectfully, this is not so. A court-ordered stay of garnishments under s. 11.09 of the *CCAA can* apply to the Crown's deemed trust claims under the Fiscal Statutes because the deemed trust provisions and s. 11.09 each serve different purposes: the deemed trusts grant a priority to the Crown, while s. 11.09 imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the *ITA*. In other words, s. 11.09 permits the Court to stay the Crown's ability to enforce its claims under the deemed trusts, but it does not remove its priority.

[245] The critical point is this: giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts under the Fiscal Statutes by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*.

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(3) Conclusion

[246] As with our discussion of the deemed trust's absolute priority, the harmonious operation of the *CCAA* and the Fiscal Statutes can be summarized as follows:

1. the *CCAA* preserves the Crown's right to be paid in priority to all security interests for its claims for source deductions under the Fiscal Statutes;

2. under the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes;

3. as priming charges can attach only to the debtor's property, and as Parliament has made it clear that unremitted source deductions form no part of the debtor's property, the Crown's interest under the deemed trust is not subject to the priming charges;

4. section 6(3) of the *CCAA*, which operates only where there is an arrangement or compromise put to the court, protects the entirety of the Crown claim under s. 224(1.2) of the *ITA* and similar provisions of the Fiscal Statutes; and

5. the deemed trust's grant of priority to the Crown is unaffected by s. 11.09, which instead imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the *ITA*.

D. *Policy Reasons Do Not Support a Different Interpretation*

[247] The majority of the Court of Appeal and the respondents place significant weight on what they view as the potentially "absurd consequences" that would result from concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges. The same point implicitly underlies our colleague Côté J.'s reasons. Indeed, the majority at the Court of Appeal went as far as to warn that, under this interpretation, interim financing would "simply end", an assertion that "almost certainly goes too far" (C.A. reasons, at para. 50; Wood, at p. 99). It added that it would lead to more business failures and, in turn, undermine tax collection (paras. 48 and 50). We disagree.

[248] The "absurd consequences" identified by the majority at the Court of Appeal rest on faulty premises. The conclusion that interim financing would "simply end" was not supported by the record. The majority extrapolated from admittedly

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incomplete and dated data about interim financing drawn from a textbook which does not indicate the presence of a deemed trust claim. This sweeping statement elides cases where there is no interim lending and cases, such as this one, where the debtor's assets are sufficient to satisfy both the interim lending and the Crown's deemed trust claim. This is an omission that cannot be readily ignored as there are usually enough funds available to satisfy both the Crown claim *and* the court-ordered priming charges (Wood, at p. 100). Equally unfounded is the majority's claim that confirming the priority of the deemed trusts of the Fiscal Statutes would "inject an unacceptable level of uncertainty into the insolvency process" (C.A. reasons, at para. 51). A company applying under the *CCAA* is required to provide its financial statements (s. 10(2)(c)), which include the source deductions owed to the Crown. Interim lenders can rely on this information to evaluate the risk of providing financing.

[249] Moreover, the majority at the Court of Appeal did not consider that Parliament can, and did, choose to prioritize the integrity of the tax system over the interests of secured creditors. Indeed, and with respect, the majority's own interpretation arguably itself produces absurd results, whereby employees' gross remuneration are conscripted as a subsidy to secure interim financing and the services of insolvency professionals.

[250] We therefore do not remotely see the consequences of our interpretation as rising to the level of absurdity. And Parliament has unambiguously struck the balance it considered appropriate in pursuit of the dual objectives of collecting unremitted

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source deductions, which are not the property of the debtor, and avoiding the "devastating social and economic effects of bankruptcy" (*Century Services*, at para. 59, quoting *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Whether s. 227(4.1) of the *ITA* is an effective means to protect the fiscal base or whether "the Crown is biting off the hand that feeds it" are not questions that this Court has the competence or legitimacy to answer (C.A. reasons, at para. 48).

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[251] In any event, even were there evidence that giving priority to the deemed trusts under the Fiscal Statutes over the priming charges produced absurd results, our conclusion would be no different. The presumption against absurdity is exactly that: a presumption. Nothing more. Illogical consequences flowing from the application of a statute do not give rein to courts to disregard clear legislative intent. As Lamer C.J. noted in *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 41, "Parliament . . . has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly."

[252] Here, Parliament's intention to give absolute priority to the deemed trust of the Fiscal Statutes is unequivocal. Our role is to give effect to this intention.

III. Disposition

[253] We would allow the appeal. The respondents should be entitled to costs in accordance with "Schedule B" to the regulations (*Rules of the Supreme Court of*

Canada, SOR/2002-156). There are no exceptional circumstances that would justify enhanced costs. Despite the appeal being moot, it was not improper for the Crown to seek the correct interpretation of the Fiscal Statutes.

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The following are the reasons delivered by

MOLDAVER J. —

[254] I have had the benefit of reading the reasons of my colleagues, Justice Côté, Justice Karakatsanis, and Justices Brown and Rowe. While I substantially agree with the analysis and conclusions of Brown and Rowe JJ., there are two points that I wish to address.

[255] First, unlike Brown and Rowe JJ., I see no reason to define the particular nature or operation of the Crown's interest under s. 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). While a future appeal may require this Court to determine exactly how the Crown's interest under s. 227(4.1) "survives", and whether it amounts to some form of ownership interest in the debtor's property, as Brown and Rowe JJ. maintain, some form of security interest in that property, or something else entirely (e.g., a right not to have to compromise, as Karakatsanis J. maintains), such an inquiry is not necessary in this case. Properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to

direct that the Crown's interest — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

[256] In my view, to the extent that Brown and Rowe JJ. conclude that the Crown's interest under s. 227(4.1) affords the Crown beneficial ownership over the source deductions such that "the source deductions are deemed never to form part of the company's property", they have effectively decided the appeal by two paths — first, by way of the Crown's absolute priority under s. 227(4.1), and second, by way of the Crown's beneficial ownership over any unremitted source deductions (para. 223). As they note, if the Crown's interest amounts to an ownership interest and unremitted source deductions do not form part of the debtor company's property, priming charges could never attach to those source deductions, whether ordered under the specific priming charge provisions or the court's broad power under s. 11 of the *CCAA* (paras. 222-23). If this is indeed the case, it is not clear that the issue of competing priority between the Crown's interest and court-ordered priming charges ever arises, as the source deductions would be simply inaccessible to anyone other than the Crown. As I am not necessarily convinced that the Crown's interest under s. 227(4.1) amounts to an ownership interest, and as the Crown's absolute priority does not depend on this conclusion, I would leave the question of the nature of the Crown's interest to another day.

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[257] Second, while I agree with Brown and Rowe JJ. that s. 37(2) of the *CCAA* can be interpreted as an internal restriction on s. 11, I hesitate to accept this conclusion, as it strikes me that in order to give proper effect to Parliament's intention for s. 11 to serve as "the engine" that drives the *CCAA* and empowers supervising judges to further its remedial objectives, any restrictions on that discretionary power should be explicit and unambiguous (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 48, citing *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). With respect, s. 37(2) does not amount to such an explicit and unambiguous restriction. Rather, s. 37(2) is a simple exception to s. 37(1), which serves to nullify the effect of any statutory provision that deems property to be held in favour of the Crown:

> **37(1)** Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **(2)** Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act* . . . .

[258] In effect, then, the function of s. 37(2) is merely to preserve the Crown's deemed trust under s. 227(4.1) from extinguishment under s. 37(1). In preserving the Crown's interest, however, "s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding", nor does it say anything that would limit the court's power under s. 11 to order priming charges in priority to the Crown's deemed trust claim (Karakatsanis J.'s reasons, at para. 153). Indeed, as Karakatsanis J. notes, "There is no provision in the *CCAA* stipulating what the court can do with trust property and

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no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust" (para. 176). Rather, it is only when one looks to s. 227(4.1) that the absolute priority of the Crown's interest — and the resulting limitations on s. 11 — become apparent. It is thus not entirely clear that interpreting s. 37(2) as an internal restriction accords with the function of s. 37(2) or the leeway that Parliament intended for the scope of powers under s. 11. In other words, the relationship between ss. 11 and 37(2) may not be as clear-cut as my colleagues seem to suggest. Accordingly, while I ultimately agree with Brown and Rowe JJ. that s. 37(2) can be interpreted as an internal restriction so as to avoid a conflict between the *CCAA* and *ITA*, I feel it important to explain that, if this interpretation is mistaken, s. 11 is nonetheless restricted by the external text of s. 227(4.1).

[259] If s. 37(2) does not amount to an internal restriction on s. 11, using s. 11 to prioritize priming charges over the Crown's deemed trust claim would put the provision in direct conflict with s. 227(4.1) which, as my colleagues Brown and Rowe JJ. have explained, requires that the Crown's claim be ranked in priority to all security interests, including priming charges. The direct conflict would trigger the "[n]otwithstanding" language in s. 227(4.1), which states that "[n]otwithstanding . . . any other enactment of Canada", the Crown's claim is to have priority. This language thus imposes an external restriction on the court's power under s. 11. Indeed, the supremacy of s. 227(4.1) is implicitly acknowledged by the text of s. 11 as, unlike s. 227(4.1), which operates despite "any other enactment of Canada", s. 11 only operates "[d]espite

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anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*", but not despite anything in the *ITA*. Accordingly, while the court's discretionary authority under s. 11 could, in theory, empower a court to subordinate the Crown's interest in unremitted source deductions, that power is ultimately stopped short by the express language of s. 227(4.1).

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[260] In outlining this position, I consider it important to contextualize this Court's statement in *Callidus* that "the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (para. 67). The focus in *Callidus* was on the discretionary authority of supervising *CCAA* judges within the confines of the *CCAA* itself; it was not on addressing the question of the authority of *CCAA* judges to apply s. 11 in the face of overriding federal legislation. Respectfully, where, as here, Parliament has expressly indicated the supremacy of a statute over the provisions of the *CCAA*, the court's power under s. 11 is correspondingly restricted.

[261] The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority.

[262] A necessary consequence of the absolute supremacy of the Crown's deemed trust claim over court-ordered priming charges is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the *CCAA*. Section 6(3) of the *CCAA* provides that

> [u]nless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> **(a)** subsection 224(1.2) of the *Income Tax Act* . . . .

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[263] In my view, there are two reasons why s. 6(3) cannot represent the Crown's interest under s. 227(4.1). First, the focus of s. 6(3) is to establish a timeframe for payment to the Crown of certain outstanding debts in the event that the debtor company succeeds in staying viable as a going concern. By contrast, s. 227(4.1) is focused on ensuring the *priority* of the Crown's claim. The key point of distinction here is that, under s. 6(3), the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim, as established by the *CCAA* and *ITA*. Second, as s. 6(3) applies only where a compromise or plan of arrangement is reached, the Crown's deemed trust claim would not operate in the event that a liquidation occurred under the *CCAA*, thereby depriving the Crown of its priority over security interests in such circumstances. Again, this potential consequence would be at odds with the clear intention of the *CCAA* and *ITA*.

[264] Before concluding, I would note that it cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for *CCAA* proceedings. If circumstances do arise in which the priority of

the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid any consequences that would undermine the remedial purposes of the *CCAA*.

[265] I would, therefore, allow the appeal. The respondents are entitled to costs in this Court in accordance with Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

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Appeal dismissed with costs, ABELLA, MOLDAVER, BROWN *and* ROWE JJ. *dissenting.*

Solicitor for the appellant: Attorney General of Canada, Vancouver.

Solicitors for the respondents Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as monitor: Duncan Craig, Edmonton.

Solicitors for the respondent the Business Development Bank of Canada: Cassels Brock & Blackwell, Calgary.

Solicitors for the intervener the Insolvency Institute of Canada: Blake, Cassels & Graydon, Calgary.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: Osler, Hoskin & Harcourt, Calgary.

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Federal Court of Appeal | Cour d'appel fédérale

Date: 20121030

Docket: A-445-11

Citation: 2012 FCA 272

2012 FCA 272 (CanLII)

CORAM: **NADON J.A.**
GAUTHIER J.A.
MAINVILLE J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

GLOBAL EQUITY FUND LTD.

Respondent

Heard at Calgary, Alberta, on October 11, 2012.

Judgment delivered at Ottawa, Ontario, on October 30, 2012.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NADON J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal by Her Majesty the Queen (the "Crown") from a judgment of Woods J. of the Tax Court of Canada (the "Tax Court judge"), cited as 2011 TCC 507, allowing the appeal of Global Equity Fund Ltd. ("Global") with respect to reassessments for the 1999, 2000 and 2001 taxation years issued by the Minister of National Revenue (the "Minister"). The Minister, relying on the general anti-avoidance rule (the "GAAR") set out in section 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "Act"), had disallowed a business loss in the amount of $5,600,194 claimed by Global following the disposition of shares it held in 953565 Alberta Ltd. That loss arose from the implementation of a planning technique known in the tax community as a "value shift".

[2] For the reasons set out below, I would allow this appeal and restore the Minister's assessments under the GAAR.

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Background facts

[3] The facts are fully set out in the decision of the Tax Court judge and need not be repeated. It suffices for the purposes of this appeal to set out the following summary. Some of the provisions of the Act which are relevant appear in an annex to these reasons.

[4] Global was incorporated in 1999 for the purpose of investing in credit facilities and private placements. Its sole shareholder is a trust whose beneficiaries include Mr. Riaz Mamdani, his spouse, their children, grandchildren, parents, siblings, nieces and nephews. At the time the concerned transactions were entered into, Mr. Mamdani and his wife had two very young children.

[5] At some point, Mr. Mamdani sought professional advice to implement strategies for Global in order to defer tax. A plan for this purpose was developed and implemented just prior to September 30, 2001, which was Global's taxation year end. The plan may be summarized as follows:

a. a new corporation, 953565 Alberta Ltd. ("Newco") was incorporated;
b. a new trust was set up whose beneficiaries were Mr. Mamdani's children and grandchildren (the "Children's Trust");
c. Global subscribed to common shares of Newco for a consideration of $5,600,250;

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d. Newco declared a dividend on the common shares held by Global in the form of non-voting preferred shares which were redeemable and retractable for $5,600,250 and which had a paid-up capital of $56;

e. Newco issued additional common shares to Global for a consideration of $200,000; however, it was acknowledged in the Tax Court that this step was inserted as window dressing in order to give the common shares some value;

f. Global sold all the common shares it held in Newco to the Children's Trust for a consideration of $200,000; it was as a result of this sale that Global claimed a loss of $5,600,194;

g. a loan was made by Newco to Global for $5,600,000; the loan bore interest at prime plus 2% and the loan agreement provided for an equity participation of 25% of the increase in fair market value of Global's assets while any part of the loan remained outstanding; an amendment to the loan agreement was made a few months later which deleted the interest and increased the equity participation to 50%;

h. Global granted an interest in its property to Newco to secure the loan.

[6] At the time the plan was implemented, it was contemplated that the loss resulting from the sale of the common shares of Newco to the Children's Trust might be a business loss for tax purposes since Global itself was involved in the business of trading securities. Consequently, in the income statement and balance sheet filed with Global's corporate tax return for 2001, the transactions were reported as increasing its losses from operations. $56 was recorded as revenue from the stock dividend, and the subscription price for the common shares of Newco was deducted

as part of the cost of sales. The overall result was that Global claimed a net business loss of $5,600,194. The claimed loss gave rise to a significant tax benefit through the elimination, or near elimination, of tax payable under the Act for Global's 2001, 2000 and 1999 taxation years.

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[7] Pursuant to notices of reassessment dated April 11, 2005, the Minister, applying the GAAR, reassessed Global to deny this loss in its 2001 taxation year and the carry-back of the loss from the 2001 taxation year to the 1999 and 2000 taxation years. Global appealed to the Tax Court of Canada.

The decision of the Tax Court of Canada

[8] The Tax Court judge allowed the appeal on the GAAR issue even though she found that the transactions were "highly artificial" and that the loss resulted "from a shuffle of paper" by which "no real economic loss was suffered" (reasons of the Tax Court judge at para. 4). She also noted that she may well have upheld the reassessments under the GAAR had the Crown raised different arguments (*ibid.* at para. 9).

[9] Since it was conceded that the transactions gave rise to a tax benefit, the issues before the Tax Court judge were whether the transactions were "avoidance transactions" within the meaning of the GAAR and whether there was a misuse or abuse of the provisions of the Act relied upon to achieve the tax benefit that triggered the GAAR.

[10] The Tax Court judge found that the transactions were "avoidance transactions", notwithstanding Global's submissions that they were entered into for the purpose of creditor protection (*ibid.* at paras. 61, 62 and 76). This finding is not challenged in this appeal. In any event, there was abundant and cogent evidence before the Tax Court judge for her to reach such a finding.

[11] The Tax Court judge also found that the transactions did not result, directly or indirectly, in a misuse or abuse of any provisions of the Act under the meaning of subsection 245(4). It is this conclusion which the Crown challenges in this appeal.

[12] The Tax Court judge noted that in the GAAR analysis required to conclude a misuse or abuse of any provision of the Act, the first task is to interpret the provision giving rise to the tax benefit to determine its object, spirit or purpose. The judge noted that the burden of this task is placed on the Crown. She found that the Crown had not satisfied its burden with respect to this element of the GAAR (reasons of the Tax Court judge at paras. 85 to 88).

[13] Global relied on sections 3, 4, 9 and 111 of the Act to achieve the tax benefit. The Crown did not take issue with this (*ibid.* at para. 87). The Crown's position was not to allege that any specific provision of the Act had been misused or abused, but rather that the transactions resulted in an abuse having regard to the Act as a whole. The Crown's position is set out in detail at paragraphs 89, 90 and 91 of the Tax Court judge's reasons, and the following extract from the Crown's argument (reproduced at para. 89 of the Tax Court judge's reasons) summarizes that position:

> The minister has not alleged that a specific provision has been misused in this arrangement. Rather, the transactions in the Series of Transactions resulted directly or indirectly in an

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> abuse having regard to the provisions of the Act read as a whole, all within the meaning of subsection 245(4) of the Act. The Minister argues that the object and purpose of the provisions of the Act read as a whole is to permit only *bona fide* losses as deductions from income or capital gains.

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[14] The Tax Court judge held that the Crown had failed to establish that the object, spirit or purpose of the Act was to restrict business losses to real losses realized outside of an economic unit, as had been submitted to her. The Tax Court judge reached that conclusion following an analysis found in paragraphs 90 to 100 of her reasons, which I reproduce here for ease of reference:

> [90] It is important to note that the Crown does not allege that any of the provisions relied on for the tax benefit (s. 3, 4, 9, 111) have been misused. Section 9 appears to be a key provision relied on by Global as it brings in commercial principles in calculating income and loss. The Crown acknowledges that this provision, read alone, permits the deduction of the loss claimed by Global.
>
> [91] The essence of the Crown's argument is that the object and spirit of the provisions relied upon by Global are influenced by other provisions in the *Act*. These provisions all restrict the deduction of losses in one way or another. It is submitted that, as a result of these other provisions, the object and spirit of the provisions relied on is disclosed. As a result, only real losses realized outside the economic unit may be deducted.
>
> [92] The problem that I have with the Crown's argument is that the provisions referred to by the Crown are limited in scope. None of them, either separately or together, in my view, are suggestive of the broad object and spirit that business losses are limited to real losses realized outside the economic unit.
>
> [93] The provisions relied on by the Crown are s. 18(13), 18(14), 18(15), 40(3.3), 40(3.4), 54, former section 55, and s. 111(3), 111(4) and 111(5). They are reproduced in an appendix.
>
> [94] Only one of these provisions deals with artificial losses in general. It is former section 55(1), which was repealed when the GAAR was introduced. When it was in force, it only applied to transactions on capital account.
>
> [95] The Crown acknowledges that some of the other provisions are also targeted to capital losses. They are s. 40(3.3), 40(3.4), 54 and 111(4).

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> [96] In the case of provisions which target capital losses, I do not believe that Parliament intended that they inform as to the object and spirit of the provisions relied on by Global. The legislative schemes relating to business and capital transactions are generally distinct.
>
> [97] As for provisions that apply to business losses, the Crown relies on s. 18(13), 18(14), 18(15), 111(3) and 111(5). The problem that I have with relying on these provisions is that each of them has a narrow focus.
>
> [98] Subsections 18(13), 18(14) and 18(15) are restricted to losses from a money lending business and adventures in the nature of trade. Subsection 111(3) narrowly targets a double deduction of losses. Subsection 111(5) restricts the deduction of losses on a change of control.
>
> [99] I am unable to discern a general policy from these provisions, separately or together, that restricts business losses in the manner that the Crown suggests. The provisions are too narrowly drawn to disclose an intention by Parliament of a general restriction against the deduction of artificially-created business losses.
>
> [100] For this reason, I have concluded that the first step of the abuse analysis has not been satisfied by the Crown. In particular, the Crown has failed to establish that the object and spirit of the provisions relied upon for the tax benefit is to restrict business losses to "real losses realized outside the economic unit."

Positions of the parties in this appeal

(a) The appellant Crown's position

[15] The submissions made by the Crown in this appeal are substantially different from those it made in the Tax Court of Canada.

[16] First, the Crown now specifically relies on sections 3, 4, 9 and 111 of the Act for the GAAR analysis. In its memorandum, the Crown offers at least two distinct but related rationales for these provisions: (a) the first new rationale is that the object, spirit or purpose of sections 3, 4, 9 and 111 is to allow the deduction of business losses "only to the extent that they reflect an underlying actual economic loss" so as "to ensure that a taxpayer's loss for a taxation year is an actual and accurate

loss that reflects a true picture of the taxpayer's business operations over a defined period of time" (Crown's memorandum at paras. 59 and 61); (b) the second rationale is that the object, spirit or purpose of these provisions is to allow the deduction of true losses that reflect an actual "reduction in wealth" (Crown's memorandum at para. 71).

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[17] The Crown relies for these rationales on the common dictionary meaning of the terms "income", "loss", and "business" found in sections 3, 4 and 9 of the Act, and on the decisions of the Supreme Court of Canada in *Stewart v. Canada*, 2002 SCC 46, [2002] 2 S.C.R. 645 ("*Stewart*") and *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147 ("*Canderel*").

[18] Second, the Crown now also relies on former subsection 245(1) of the Act which read as follows:

> In computing income for the purposes of this act, no deduction may be made in respect of a disbursement or an expense made or incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce income.

[19] Although this provision was repealed as a result of the adoption of the GAAR, and though it only dealt with expenses and disbursements, the Crown nevertheless submits that the intended effect of incorporating it into the GAAR was to maintain a general statutory assumption against transactions that produce artificial results in computing losses for taxation purposes.

[20] Third, the Crown now also submits that the common shares of Newco were not acquired by Global as inventory, or as part of an adventure in the nature of trade, that is, for resale at a profit. As

a logical consequence, the Crown adds that the loss resulting from the transactions should have been denied under section 9 of the Act.

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[21] Fourth, the Crown now also adds that these shares were capital property in the hands of Global, and that the provisions of the Act which address capital losses as part of the capital gains regime introduced in 1972 should therefore be considered and applied in this case. The Crown refers to two recent decisions of the Tax Court of Canada where the capital loss deductions in transactions similar to those under consideration in this appeal were denied on the basis of GAAR. Since the hearing of the appeal in this case, these two Tax Court decisions have been affirmed by our Court: *Triad Gestco Ltd. v. Her Majesty the Queen*, 2012 FCA 258 ("*Triad Gestco*") and *1207192 Ontario Ltd. v. AGC*, 2012 FCA 259 ("*1207192 Ontario*").

[22] Fifth, whether or not the loss in issue is deemed a capital loss, the Crown submits that the same rationale as determined by the Tax Court of Canada in these two above-mentioned cases should be applied to the interpretation of sections 3, 4, 9 and 111 of the Act, since the transactions in this case are substantially similar to those considered in *Triad Gestco* and *1207192 Ontario*.

[23] Finally, relying on the comment of the Tax Court judge (at para. 102 of her reasons) that she would have no hesitation in finding that the transactions at issue frustrate the object and purpose of the provisions relied upon in light of their vacuous nature, the Crown submits that this Court should conclude likewise.

(b) The respondent Global's position

[24] Global notes that the Crown failed to satisfy the first step of the abuse analysis before the Tax Court judge. It submits that the judge's finding on this matter is unassailable, as is clearly apparent from the fact that the Crown does not challenge in this appeal the judge's interpretation of the Act or any of the relevant provisions which it had put to her.

[25] Since in a GAAR analysis the onus is on the Minister to identify the object, spirit or purpose of the provisions of the Act that are claimed to have been frustrated or defeated, Global asks how the Crown can argue in this appeal that there is some "clear" rationale that only permits the deduction of true losses representing "a decrease in wealth" when it keeps changing its mind and takes inconsistent and incompatible positions in this Court and in the Tax Court of Canada. Global submits that the Crown cannot be said to have met its burden in such circumstances, as the taxpayer should be entitled to the benefit of the doubt.

[26] In addition, Global notes that the Crown now argues in this appeal against its own admissions made before the Tax Court judge and against its reassessment position. Global adds that if the Crown believed that the non-capital loss could be disallowed under section 9 of the Act, or that the loss was actually a capital loss and not a business loss, the Minister could have reassessed on that basis and the Crown could have pled such positions, led evidence, and argued the same before the Tax Court judge. None of this was done.

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[27] Global further submits that the new rationale put forward by the Crown relying on sections 3, 4, 9 and 111 of the Act is, in essence, the Haig-Simons economic formulation of income as the net accretion of wealth between two points in time, a formulation which has not been enacted into law by Canada or any other country. It refers for this purpose to the discussions of the Haig-Simons formulation found in P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (Toronto: Carswell, 2010) at pp. 82-83; and in V. Krishna, *Fundamentals of Income Tax Law* (Toronto: Carswell, 2009) at pp. 111 to 113.

[28] Global adds that nowhere in the text of sections 3, 4, 9 or 111 of the Act is there any reference to the term "artificial" or "true losses" or "decreases in wealth", or any suggestion of there being any rationale that these provisions are only intended to permit the deduction of "true losses representing a decrease in wealth" as advanced by the Crown, or that "true losses" are included in any calculation relevant to these provisions. Global further submits that nothing is stated nor implied in section 111 that the loss carry over rules only apply to what the Minister determines to be "true losses representing a decrease in wealth". For Global, regardless of how losses arise or whether a taxpayer continues to have income from the relevant source, paragraph 111(1)(*a*) provides that non-capital losses may be carried forward and carried back a number of years.

[29] Global also notes that there are numerous provisions of the Act that deem income or loss to arise in certain circumstances. For Global, this establishes that the context of the Act does not support the Crown's position that only true losses representing a decrease in wealth may be claimed.

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[30] Global also notes that former subsection 245(1) relied upon by the Crown applied to deductions of disbursements or expenses that would unduly or artificially reduce income, and neither of these circumstances exist in this case. The appeal before this Court rather relates to a disposition of property on income account at a loss.

[31] Finally, Global notes that the Crown is relying on an *obiter* comment made by the Tax Court judge in order to support the second part of the subsection 245(4) test, *i.e.* whether the transactions at issue frustrate or defeat the rationale of the concerned provisions of the Act. Global submits that such a conclusion cannot rationally flow from an *obiter* comment which does not even identify the provisions of the Act which are allegedly frustrated or defeated.

The issues

[32] The principal issues to be determined in this appeal may be stated as follows:

i. Can the Crown rely in this appeal on new arguments which were not raised by the Minister in assessing the taxpayer nor relied upon by the Crown in the Tax Court of Canada?

ii. Do the transactions in issue result in a misuse or abuse of the provisions relied upon by the taxpayer within the meaning of subsection 245(4) of the Act?

Can the Crown rely in this appeal on new arguments which were not raised by the Minister in assessing the taxpayer nor relied upon by the Crown in the Tax Court of Canada?

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[33] Most of the arguments raised by the Crown in this appeal were not raised by the Minister in reassessing the taxpayer, nor relied upon by the Crown in the Tax Court of Canada.

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[34] Subsection 152(9) of the Act governs the right of the Minister to advance an alternative argument in support of an assessment. That provision was first introduced into the Act in 1998 as a legislative response to the ruling of the Supreme Court of Canada in *Continental Bank v. Canada*, [1998] 2 S.C.R. 358. It provides for the following:

152. (9) The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act	**152.** (9) Le ministre peut avancer un nouvel argument à l'appui d'une cotisation après l'expiration de la période normale de nouvelle cotisation, sauf si, sur appel interjeté en vertu de la présente loi :
(*a*) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and	*a*) d'une part, il existe des éléments de preuve que le contribuable n'est plus en mesure de produire sans l'autorisation du tribunal;
(*b*) it is not appropriate in the circumstances for the court to order that the evidence be adduced.	*b*) d'autre part, il ne convient pas que le tribunal ordonne la production des éléments de preuve dans les circonstances.

[35] The following principles have been found to apply when the Minister seeks to rely on subsection 152(9): (a) the Minister cannot include transactions which did not form the basis of the taxpayer's reassessment; (b) the right of the Minister to present an alternative argument in support of an assessment is subject to paragraphs 152(9)(*a*) and (*b*), which speak to the prejudice to the taxpayer; and (c) the Minister cannot use subsection 152(9) to reassess outside the time limitations

set out in the Act, or to collect tax exceeding the amount of the assessment under appeal: *The Estate of David G. Walsh v. Her Majesty the Queen*, 2007 FCA 222, 367 N.R. 127 at para. 18.

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[36] Applying these principles to this appeal, I find that Global is prejudiced by some of the new arguments submitted for the first time in this appeal. Specifically, the Crown's arguments that (a) the common shares of Newco were not acquired by Global as inventory or as part of an adventure in the nature of trade, that is for resale at a profit, and should consequently have been denied under section 9, and (b) that these shares were capital property and the capital gains provisions of the Act should have been applied to the losses resulting from their sale.

[37] These two new arguments involve issues of mixed fact and law for which an evidentiary basis was not established in the Tax Court of Canada. Had these arguments been initially made by the Minister or the Crown, Global might have adduced relevant evidence in the Tax Court of Canada to counter them. As a result of the evidentiary prejudice to Global, the Crown is precluded from raising these arguments in this appeal, and these arguments shall therefore be disregarded.

[38] The other arguments raised by the Crown are all legal arguments made on the basis of the existing evidentiary record, and they may therefore be advanced in this Court. The transactions at issue are the same, no new reassessment is proposed, no additional tax exceeding the amounts of the concerned reassessments is claimed, and no new evidence is required to sustain or to counter these new arguments. Moreover, Global's counsel acknowledged at the hearing of this appeal that no evidentiary prejudice resulted from these arguments.

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[39] Though I conclude that some of the Crown's new arguments may be properly raised in this appeal, I cannot condone the Crown's conduct in acting as it has. Taking into account the handling of this litigation by the Crown, it is not surprising that the Tax Court judge cautioned (at para. 9 of her reasons) about the limited jurisprudential value of her decision. The taxpayer in this case has thus had to respond to ever moving Crown arguments and positions, and some of these are plainly contradictory to prior positions taken by the Crown. This is not a proper way of conducting GAAR litigation where one of the principal questions at issue is the discharging of the Crown's burden to identify the object, spirit or purpose of the provisions of the Act claimed to have been frustrated or defeated.

[40] As a result, Global has had to assume in this case the costs of defending itself from ever changing Crown positions concerning the GAAR in this appeal and before the Tax Court of Canada. Taking into account that this is a GAAR case, and the substantial and numerous changes in positions taken by the Crown, I am of the view that Global should be awarded its costs in this Court and in the Tax Court of Canada, irrespective of the result of this appeal. Moreover, in this Court, Global's costs should be determined on a two counsel basis at the high end of column V of Tariff B.

Do the transactions in issue result in a misuse or abuse of the provisions relied upon by the taxpayer within the meaning of subsection 245(4) of the Act?

(a) The required analysis

[41] As already noted, the parties agree that the loss resulting from the transactions at issue give rise to a tax benefit within the meaning of subsection 245(1) of the Act. Moreover, Global does not

challenge the finding of the Tax Court judge that these transactions were avoidance transactions under the meaning of subsection 245(3).

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[42] The principal issue before us, therefore, is whether these avoidance transactions amount to misuse or abuse under the meaning of subsection 245(4). The relevant extracts of subsection 245(4) read as follows:

245.(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction	**245.** (4) Le paragraphe (2) ne s'applique qu'à l'opération dont il est raisonnable de considérer, selon le cas :
(*a*) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of	*a*) qu'elle entraînerait, directement ou indirectement, s'il n'était pas tenu compte du présent article, un abus dans l'application des dispositions d'un ou de plusieurs des textes suivants :
(i) this Act,	(i) la présente loi,
...	[…]
or	
(*b*) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.	*b*) qu'elle entraînerait, directement ou indirectement, un abus dans l'application de ces dispositions compte non tenu du présent article lues dans leur ensemble.

[43] The inquiry under subsection 245(4) contains two parts. The first step is to determine the object, spirit or purpose of the provisions of the Act that are relied on for the tax benefit, having regard to the scheme of the Act, the relevant provisions and permissible extrinsic aids. The second step is to examine the factual context of the case in order to determine whether the avoidance

transactions defeat or frustrate the object, spirit or purpose of the provisions in issue: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paras. 55 to 62 ("*Canada Trustco*"); *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721 at paras. 69 to 73 ("*Copthorne*").

[44] The first step is essentially a question of law, but it is incumbent on the Crown to identify the object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated: *Canada Trustco* at paras. 44 and 65. The textual, contextual and purposive analysis is employed for this purpose in order to search for the rationale resulting from the words used in the provisions or which underlies these words and which may not be captured by the bare meaning of the words themselves: *Copthorne* at para. 70.

[45] In addition to the provisions of the Act that are relied on for the tax benefit, the consideration of context may involve an examination of other sections of the Act, as well as permissible extrinsic aids. However, as noted in *Copthorne* at para. 91, "not every other section of the Act will be relevant in understanding the context of the provision at issue. Rather, relevant provisions are related 'because they are grouped together' or because they 'work together to give effect to a plausible and coherent plan' (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 361 and 364)."

[46] The second step requires a consideration of whether the transactions fall within or frustrate the identified purpose of the concerned provisions of the Act. This is necessarily a fact intensive

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inquiry: *Canada Trustco* at para. 44. The analysis will lead to a finding of abusive tax avoidance where the result of the avoidance transactions (1) achieves an outcome that the statutory provisions relied on were intended to prevent; (2) defeats the underlying rationale of these provisions; or (3) circumvents certain provisions in a manner that frustrates or defeats their object, spirit or purpose: *Lipson v, Canada*, 2009 SCC 1, [2009] 1 S.C.R. 3 at para. 40; *Canada Trustco* at para. 45. These considerations are not independent of one another and may overlap: *Copthorne* at para. 72.

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[47] In applying this test, there is no distinction between an "abuse" and a "misuse", since subsection 245(4) requires a single unified approach: *Canada Trustco* at para. 43; *Copthorne* at para. 73.

[48] In any event, the GAAR may only be applied to deny a tax benefit when the abusive nature of the transactions is clear, and if the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer: *Canada Trustco* at paras. 50 and 66; *Copthorne* at paras. 68 and 72.

(b) The object, spirit or purpose of the provisions of the Act that are relied on for the tax benefit

[49] It is not disputed that the provisions relied on by Global for the tax benefit resulting from the transactions are sections 3, 4, 9 and 111 of the Act. These are the core provisions for the purposes of the analysis under paragraph 245(4), and the Crown now recognizes - in this appeal - that it is the object, spirit or purpose of these provisions which must be determined for the purposes of the GAAR.

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[50] However, the Crown adds that in determining the object, spirit or purpose of these provisions, consideration must given to (a) former subsection 245(1) of the Act, and to (b) the provisions of the Act concerning capital losses. I disagree. Though in addition to the provisions of the Act that are relied on for the tax benefit, the consideration of context may involve an examination of other sections of the Act , as noted above, not every other section of the Act will be relevant in understanding the context of the provisions at issue. Rather, other provisions are relevant either because they are grouped together with the directly relevant provisions or because all these provisions work together to give effect to a plausible and coherent plan: *Copthorne*, at para. 91.

[51] Former subsection 245(1) has little or no relevance in the circumstances of this appeal. That subsection provided that in computing income under the Act, no deduction in respect of a disbursement or expense made or incurred in respect of a transaction or operation would be allowed in circumstances that would unduly or artificially reduce income. The circumstances contemplated under that former subsection simply do not occur in the transactions at issue in this appeal. The transactions before this Court do not concern artificial disbursements or expenses, but rather a loss on income account following the disposition of shares. Consequently, even if it had not been repealed, former subsection 245(1) would simply have been too remote from the transactions at issue in order to be considered for the purposes of the required analysis.

[52] Nor may the Crown rely on the provisions of the Act relating to capital losses in order ascertain the object, spirit or purpose of sections 3, 4, 9 and 111 of the Act as they concern the use of business losses for taxation purposes. The provisions of the Act relating to capital losses are

distinct from those relating to business losses, and these provisions usually operate independently from one another. The Crown offers no support for its suggestion that the rationales for capital losses and business losses are aligned and instruct each other. To accede to the Crown's position would be to search for an overriding policy in the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue. The Crown's approach would send this Court on the search for an overreaching policy to override the wording of the provisions of the Act, and it would inappropriately place the formulation of taxation policy in the hands of this Court. This is precisely what the Supreme Court of Canada instructs us not to do: *Canada Trustco* at paras. 41-42:

[53] The issue at hand, therefore, is to identify the object, spirit or purpose of sections 3, 4, 9 and 111 of the Act. However, it is not necessary to analyse all aspects of these basic provisions of the Act, but only their object, spirit or purpose as it may relate to the use of a business loss for taxation purposes.

[54] Section 3 provides the basic mechanism for determining a taxpayer's income for a taxation year. It sets out separate sources of income (office, employment, business or property) and capital gains that are aggregated in subsections 3(*a*), (*b*) and (*c*) and computed separately according to different rules. Subsection 3(*d*) then allows a set-off of the taxpayer's loss for the year from employment, business or property against that aggregated amount.

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[55] Section 4 sets out that a taxpayer's income or loss for a taxation year from an office, employment, business, property or other source is the taxpayer's income or loss computed in accordance with the Act.

[56] Section 9 provides (a) that a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year, and (b) the taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss for the taxation year from that source computed by applying the provisions of the Act respecting the computation of income from that source, with such modifications as the circumstances require.

[57] Section 111 allows a taxpayer to carry-forward and carry-back certain losses, including business losses, for a certain number of statutorily defined years.

[58] Regarding income and losses that are sourced in a business, it is apparent from reading these provisions that their underlying rationale is to make the taxpayer subject to tax on business profits in the year the profits are realized, and relieved from tax to the extent that there has been a business loss in that year. Business losses of a given year may also be carried back or carried forward to other years within a specified statutory period in order to offset for taxation purposes certain other income sources.

[59] The Act does not define the key expressions used in these provisions, notably the terms "income". "profit" and "loss". The fact that these key terms remain undefined is clearly a deliberate

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legislative choice. The GAAR cannot and should not be used to impute a special overarching meaning to these expressions. The use of GAAR for such a purpose would inappropriately place the formulation of fundamental taxation policy in the hands of the courts: *Canada Trustco* at para. 41. As a general principle, courts should avoid judicial innovations and rule making in tax law: *Stewart* at para. 4. As aptly noted by Iacobucci J. in *Canderel* (at para. 41): "The law of income tax is sufficiently complicated without unhelpful judicial incursions into the realm of lawmaking. As a matter of policy, and out of respect for the proper role of the legislature, it is trite to say that the promulgation of new rules of tax law must be left to Parliament."

[60] The Crown suggests in this appeal that only the deduction of business losses that reflect an "actual reduction in wealth" or "an actual economic loss" should be recognized for income tax purposes under sections 3, 4, 9 and 111 of the Act. These two expressions suggested by the Crown may have a meaning in the context of economic theory or even some aspects of fiscal policy, but it is not clear that they aptly describe all business losses that are or should be recognized as such for income tax purposes. I do not agree with the Crown that it is necessary, in the context of these proceedings, to impart such an overarching meaning to the concept of a business loss, an exercise which Parliament has itself deemed inappropriate.

[61] The analysis required here under the GAAR and concerning the treatment of a loss resulting from a business source under sections 3, 4, 9 and 111 of the Act must consequently be much more modest.

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[62] The policy or purpose underlying these provisions is grounded in the words of the provisions themselves. However, as part of the analysis, we must also "look beyond the mere text of the provisions and undertake a contextual and purposive approach to interpretation in order to find a meaning that harmonizes the wording, object, spirit and purpose of the provisions of the Income Tax Act": *Canada Trustco* at para. 47. The fundamental rationale underlying these provisions is that, in order to be used for taxation purposes, business losses must be grounded in some form of economic or business reality. As noted in *Canderel* at para. 53, "[i]n seeking to ascertain profit, the goal is to obtain an accurate picture of the taxpayer's profit for the year." That same common sense principle applies to a business loss, thus harmonizing the concept of business loss with the related concept of profit under the Act.

[63] There is some flexibility in the concept of business loss. Nevertheless, a textual, contextual and purposive interpretation of sections 3, 4, 9 and 111 of the Act as they relate to that concept, leads to the rationale that if a business loss is to be used for taxation purposes under those provisions, there must, at the very least, be an air of economic or business reality associated with that loss.

(c) Do the transactions at issue defeat or frustrate this object, spirit or purpose?

[64] Determining whether the transactions at issue defeat or frustrate this underlying policy or purpose is a question of mixed fact and law. In this case, the Tax Court judge did not consider the issue, save to comment (at para. 102 of her reasons) that had she agreed with the Crown's position on the first step of the analysis under subsection 245(4), she would have concluded that the second

step was satisfied. I agree with Global that this *obiter* comment cannot support a conclusion on the second part of the analysis.

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[65] It is thus necessary to consider whether this analysis should be remitted to the Tax Court judge for a new determination in accordance with these reasons. The matter could indeed be returned to the Tax Court judge. However, it is well established that appellate courts have the jurisdiction to make a fresh assessment of the evidence on the record where they deem such an assessment to be in the interests of justice and feasible on a practical level: *Masterpiece Inc. v. Alavida Lifestyles Inc.,* 2011 SCC 27, [2011] 2 S.C.R. 387 at para. 103; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at para. 33. In this case, this Court has a complete record on which to make a determination on the second step of the subsection 245(4) analysis. Determining the issue now will avoid further delaying the proceedings. Moreover, I am of the view that the interests of justice would be well served by this Court finally deciding the matter.

[66] The loss generated by Global as a result of the transactions resulted from a value shift between one of the classes of shares held by Global to another class of shares it held. This is simply a paper loss. The fundamentals of the transactions are simple: the inherent value of the common shares in Newco held by Global was moved to the preferred shares issued to Global, with the result that the common shares were left with little value but still with a high cost associated to them, while the preferred shares issued as a dividend had a high value but a low associated cost. Nothing was gained or lost, however in selling the common shares to the Children's Trust, Global technically realized a large loss on paper.

[67] The vacuity and artificiality of transactions may confirm their abusive nature: *Mathew v. Canada*, 2005 SCC 55, [2005] 2 S.C.R. 643 (*sub. nom. Kaulius v. The Queen*) at para. 62. The Tax Court judge found that the transactions at issue in this case were "vacuous" and "highly artificial". I agree. Like the proverbial rabbit out of the magician's hat, the loss which occurred as a result of these transactions was pulled out of thin air. These transactions are nothing more than a paper shuffle carried out with the purpose of creating an artificial business loss for the purpose of avoiding the payment of taxes otherwise owed on the profits resulting from the real-world business operations of Global.

[68] There is no air of economic or business reality associated with the loss, and consequently, I find that the transactions which created this artificial loss defeat the underlying rationale of sections 3, 4, 9 and 111 of the Act, to the extent that these provisions allow for the use of business losses for income taxation purposes.

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Conclusions

[69] I would therefore allow this appeal with respect to the GAAR issue. Nevertheless, for the reasons set out above, Global should be entitled to its costs in this Court and in the Tax Court of Canada. In this Court, Global's costs should be determined on a two counsel basis at the high end of column V of Tariff B.

"Robert M. Mainville"

J.A.

"I Agree.
M. Nadon."

"I Agree.
Johanne Gauthier."

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ANNEX

Income Tax Act, R.S.C. 1985, c. 1 (5th supp.) (the "Act")

- Section 3 of the Act:

3. The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:	**3.** Pour déterminer le revenu d'un contribuable pour une année d'imposition, pour l'application de la présente partie, les calculs suivants sont à effectuer :
(*a*) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,	*a*) le calcul du total des sommes qui constituent chacune le revenu du contribuable pour l'année (autre qu'un gain en capital imposable résultant de la disposition d'un bien) dont la source se situe au Canada ou à l'étranger, y compris, sans que soit limitée la portée générale de ce qui précède, le revenu tiré de chaque charge, emploi, entreprise et bien;
(*b*) determine the amount, if any, by which	*b*) le calcul de l'excédent éventuel du montant visé au sous-alinéa (i) sur le montant visé au sous-alinéa (ii):
(i) the total of	(i) le total des montants suivants :
(A) all of the taxpayer's taxable capital gains for the year from dispositions of property other than listed personal property, and	(A) ses gains en capital imposables pour l'année tirés de la disposition de biens, autres que des biens meubles déterminés,
(B) the taxpayer's taxable net gain for the year from dispositions of listed personal property,	(B) son gain net imposable pour l'année tiré de la disposition de biens meubles déterminés,

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exceeds

(ii) the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's allowable business investment losses for the year,

(ii) l'excédent éventuel de ses pertes en capital déductibles pour l'année, résultant de la disposition de biens autres que des biens meubles déterminés sur les pertes déductibles au titre d'un placement d'entreprise pour l'année, subies par le contribuable;

(*c*) determine the amount, if any, by which the total determined under paragraph (*a*) plus the amount determined under paragraph (*b*) exceeds the total of the deductions permitted by subdivision e in computing the taxpayer's income for the year (except to the extent that those deductions, if any, have been taken into account in determining the total referred to in paragraph (*a*), and

c) le calcul de l'excédent éventuel du total établi selon l'alinéa *a*) plus le montant établi selon l'alinéa *b*) sur le total des déductions permises par la sous-section e dans le calcul du revenu du contribuable pour l'année (sauf dans la mesure où il a été tenu compte de ces déductions dans le calcul du total visé à l'alinéa *a*));

(*d*) determine the amount, if any, by which the amount determined under paragraph (*c*) exceeds the total of all amounts each of which is the taxpayer's loss for the year from an office, employment, business or property or the taxpayer's allowable business investment loss for the year,

d) le calcul de l'excédent éventuel de l'excédent calculé selon l'alinéa *c*) sur le total des pertes subies par le contribuable pour l'année qui résultent d'une charge, d'un emploi, d'une entreprise ou d'un bien et des pertes déductibles au titre d'un placement d'entreprise subies par le contribuable pour l'année;

and for the purposes of this Part,

Pour l'application de la présente partie, les règles suivantes s'appliquent :

(*e*) where an amount is

e) si un montant est calculé selon

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determined under paragraph (*d*) for the year in respect of the taxpayer, the taxpayer's income for the year is the amount so determined, and	l'alinéa *d*) à l'égard du contribuable pour l'année, le revenu du contribuable pour l'année correspond à ce montant;
(*f*) in any other case, the taxpayer shall be deemed to have income for the year in an amount equal to zero.	*f*) sinon, le revenu du contribuable pour l'année est réputé égal à zéro.

- Paragraph 4(1)(*a*) of the Act:

4. (1) For the purposes of this Act,	**4.** (1) Les règles suivants s'appliquent à la présente loi :
(*a*) a taxpayer's income or loss for a taxation year from an office, employment, business, property or other source, or from sources in a particular place, is the taxpayer's income or loss, as the case may be, computed in accordance with this Act on the assumption that the taxpayer had during the taxation year no income or loss except from that source or no income or loss except from those sources, as the case may be, and was allowed no deductions in computing the taxpayer's income for the taxation year except such deductions as may reasonably be regarded as wholly applicable to that source or to those sources, as the case may be, and except such part of any other deductions as may reasonably be regarded as applicable thereto; and	*a*) le revenu ou la perte d'un contribuable pour une année d'imposition provenant d'une charge, d'un emploi, d'une entreprise, de biens ou d'une autre source, ou de sources situées dans un endroit déterminé, s'entend du revenu ou de la perte, selon le cas, du contribuable, calculés conformément à la présente loi, à supposer que ce contribuable n'ait eu, durant l'année d'imposition, aucun revenu ni perte, sauf ce qui provenait de cette source, ni aucun revenu ou perte, sauf ce qui provenait de ces sources, selon le cas, et qu'il n'ait eu droit à aucune déduction dans le calcul de son revenu pour l'année d'imposition à l'exception des déductions qu'il est raisonnable de considérer comme entièrement applicables à cette source ou à ces sources, selon le cas, et à l'exception de la partie de toutes autres déductions qu'il est raisonnable de considérer comme
...	

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applicable à cette source ou à ces sources;

[…]

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- Section 9 of the Act:

9. (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

9. (1) Sous réserve des autres dispositions de la présente partie, le revenu qu'un contribuable tire d'une entreprise ou d'un bien pour une année d'imposition est le bénéfice qu'il en tire pour cette année.

(2) Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.

(2) Sous réserve de l'article 31, la perte subie par un contribuable au cours d'une année d'imposition relativement à une entreprise ou à un bien est le montant de sa perte subie au cours de l'année relativement à cette entreprise ou à ce bien, calculée par l'application, avec les adaptations nécessaires, des dispositions de la présente loi afférentes au calcul du revenu tiré de cette entreprise ou de ce bien.

(3) In this Act, "income from a property" does not include any capital gain from the disposition of that property and "loss from a property" does not include any capital loss from the disposition of that property.

(3) Dans la présente loi, le revenu tiré d'un bien exclut le gain en capital réalisé à la disposition de ce bien, et la perte résultant d'un bien exclut la perte en capital résultant de la disposition de ce bien.

- Subsections 111(1), (3) and (8) of the Act (in part):

111. (1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such portion as the taxpayer may claim of the taxpayer's

111. (1) Pour le calcul du revenu imposable d'un contribuable pour une année d'imposition, peuvent être déduites les sommes appropriées suivantes :

(*a*) non-capital losses for the 20 taxation years immediately preceding and the 3 taxation years immediately following the year;

a) ses pertes autres que des pertes en capital subies au cours des 20 années d'imposition précédentes et des 3 années d'imposition suivantes;

…

[…]

(3) For the purposes of subsection 111(1),

(3) Pour l'application du paragraphe (1):

(*a*) an amount in respect of a non-capital loss, restricted farm loss, farm loss or limited partnership loss, as the case may be, for a taxation year is deductible, and an amount in respect of a net capital loss for a taxation year may be claimed, in computing the taxable income of a taxpayer for a particular taxation year only to the extent that it exceeds the total of

a) une somme au titre d'une perte autre qu'une perte en capital, d'une perte agricole restreinte, d'une perte agricole ou d'une perte comme commanditaire pour une année d'imposition n'est déductible, et la déduction d'une somme au titre d'une perte en capital nette pour une année d'imposition ne peut être demandée, dans le calcul du revenu imposable d'un contribuable pour une année d'imposition donnée que dans la mesure où la somme dépasse le total des montants suivants :

(i) amounts deducted under this section in respect of that non-capital loss, restricted farm loss, farm loss or limited partnership loss in computing taxable income for taxation years preceding the particular taxation year,

(i) les sommes déduites selon le présent article, au titre de cette perte autre qu'une perte en capital, perte agricole restreinte, perte agricole ou perte comme commanditaire, dans le calcul du revenu imposable pour les années d'imposition antérieures à l'année donnée,

(i.1) the amount that was claimed under paragraph 111(1)(*b*) in respect of that net capital loss for taxation years preceding the particular taxation year, and

(i.1) le montant demandé en déduction selon l'alinéa (1)*b*) au titre de cette perte en capital nette pour les années d'imposition antérieures à l'année donnée,

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(ii) amounts claimed in respect of that loss under paragraph 186(1)(*c*) for the year in which the loss was incurred or under paragraph 186(1)(*d*) for the particular taxation year and taxation years preceding the particular taxation year, and

(ii) les sommes réclamées au titre de cette perte en vertu de l'alinéa 186(1)*c*) pour l'année au cours de laquelle la perte a été subie ou en vertu de l'alinéa 186(1)*d*) pour l'année d'imposition donnée et les années d'imposition antérieures à l'année d'imposition donnée;

(*b*) no amount is deductible in respect of a non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss, as the case may be, for a taxation year until

b) aucune somme n'est déductible au titre d'une perte autre qu'une perte en capital, d'une perte en capital nette, d'une perte agricole restreinte, d'une perte agricole ou d'une perte comme commanditaire pour une année d'imposition avant que :

(i) in the case of a non-capital loss, the deductible non-capital losses,

(i) dans le cas d'une perte autre qu'une perte en capital, les pertes autres que les pertes en capital déductibles,

(ii) in the case of a net capital loss, the deductible net capital losses,

(ii) dans le cas d'une perte en capital nette, les pertes en capital nettes déductibles,

(iii) in the case of a restricted farm loss, the deductible restricted farm losses,

(iii) dans le cas d'une perte agricole restreinte, les pertes agricoles restreintes déductibles,

(iv) in the case of a farm loss, the deductible farm losses, and

(iv) dans le cas d'une perte agricole, les pertes agricoles déductibles,

(v) in the case of a limited partnership loss, the deductible limited partnership losses,

(v) dans le cas d'une perte comme commanditaire, les pertes comme commanditaire déductibles,

for preceding taxation years have been deducted.

pour les années d'imposition antérieures n'aient été déduites.

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…

(8) In this section,

…

“non-capital loss”
« perte autre qu’une perte en capital »

“non-capital loss” of a taxpayer for a taxation year means, at any time, the amount determined by the formula

(A + B) - (D + D.1 + D.2)

where

A
is the amount determined by the formula

E – F

where

E
is the total of all amounts each of which is

(*a*) the taxpayer’s loss for the year from an office, employment, business or property,

(*a.1*) an amount deductible under paragraph 104(6)(*a.4*) in computing the taxpayer’s income for the year,

(*b*) an amount deducted under paragraph (1)(*b*) or section 110.6, or deductible under any

[…]

(8) Les définitions qui suivent s’appliquent au présent article.

[…]

« perte autre qu’une perte en capital »
“non-capital loss”

« perte autre qu’une perte en capital » La perte autre qu’une perte en capital d’un contribuable pour une année d’imposition correspond, à un moment donné, au montant obtenu par la formule suivante :

(A + B) - (D + D.1 + D.2)
où :

A
représente le montant obtenu par la formule suivante :

E – F

où :

E
représente le total des sommes représentant chacune :

a) la perte que le contribuable a subie pour l’année relativement à une charge, à un emploi, à une entreprise ou à un bien,

a.1) une somme déductible en application de l’alinéa 104(6)*a.4*) dans le calcul du revenu du contribuable pour

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of paragraphs 110(1)(*d*) to (*d.3*), (*f*), (*g*), (*j*) and (*k*), section 112 and subsections 113(1) and 138(6), in computing the taxpayer's taxable income for the year, or

(*c*) if that time is before the taxpayer's eleventh following taxation year, the taxpayer's allowable business investment loss for the year, and

F
is the amount determined under paragraph 3(*c*) in respect of the taxpayer for the year,

B
is the amount, if any, determined in respect of the taxpayer for the year under section 110.5 or subparagraph 115(1)(*a*)(vii),

C
[Repealed, 2000, c. 19, s. 19(4)]

D
is the amount that would be the taxpayer's farm loss for the year if the amount determined for B in the definition "farm loss" in this subsection were zero,

D.1
is the total of all amounts deducted under subsection 111(10) in respect of the taxpayer for the year, and

D.2
is the total of all amounts by which

l'année,

b) une somme déduite en application de l'alinéa (1)*b*) ou de l'article 110.6 dans le calcul de son revenu imposable pour l'année ou une somme déductible en application de l'un des alinéas 110(1)*d*) à *d.3*), *f*), *g*), *j*) et *k*), de l'article 112 et des paragraphes 113(1) et 138(6) dans le calcul de son revenu imposable pour l'année,

c) si le moment donné est antérieur à la onzième année d'imposition postérieure du contribuable, sa perte déductible au titre d'un placement d'entreprise pour l'année,

F
la fraction calculée selon l'alinéa 3*c*) à l'égard du contribuable pour l'année;

B
le montant déterminé à l'égard du contribuable pour l'année selon l'article 110.5 ou le sous-alinéa 115(1)*a*)(vii);

C
[Abrogé, 2000, ch. 19, art. 19(4)]

D
le montant qui constituerait sa perte agricole pour l'année, si le montant représenté par l'élément B dans la formule figurant à la définition de « perte agricole » au présent paragraphe était zéro;

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the non-capital loss of the taxpayer for the year is required to be reduced because of section 80;	D.1 le total des montants déduits en application du paragraphe (10) relativement au contribuable pour l'année;
	D.2 le total des montants à appliquer en réduction de la perte autre qu'une perte en capital du contribuable pour l'année par l'effet de l'article 80.
…	[…]

.

- Subsections 245(1) to (5) of the Act:

245. (1) In this section,	**245.** (1) Les définitions qui suivent s'appliquent au présent article.
"tax benefit" *« avantage fiscal »*	« attribut fiscal » *"tax consequences"*
"tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty;	« attribut fiscal » S'agissant des attributs fiscaux d'une personne, revenu, revenu imposable ou revenu imposable gagné au Canada de cette personne, impôt ou autre montant payable par cette personne, ou montant qui lui est remboursable, en application de la présente loi, ainsi que tout montant à prendre en compte pour calculer, en application de la présente loi, le revenu, le revenu imposable, le revenu imposable gagné au Canada de cette personne ou l'impôt ou l'autre montant payable par cette personne ou le montant qui lui est remboursable.
"tax consequences" *« attribut fiscal »*	« avantage fiscal » *"tax benefit"*
"tax consequences" to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount	

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that is relevant for the purposes of computing that amount;

"transaction"
« opération »
"transaction" includes an arrangement or event.

(2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

(3) An avoidance transaction means any transaction

(*a*) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily

« avantage fiscal » Réduction, évitement ou report d'impôt ou d'un autre montant exigible en application de la présente loi ou augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi. Y sont assimilés la réduction, l'évitement ou le report d'impôt ou d'un autre montant qui serait exigible en application de la présente loi en l'absence d'un traité fiscal ainsi que l'augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi qui découle d'un traité fiscal.

« opération »
"transaction"

« opération » Sont assimilés à une opération une convention, un mécanisme ou un événement.

(2) En cas d'opération d'évitement, les attributs fiscaux d'une personne doivent être déterminés de façon raisonnable dans les circonstances de façon à supprimer un avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, de cette opération ou d'une série d'opérations dont cette opération fait partie.

(3) L'opération d'évitement s'entend :

a) soit de l'opération dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets

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for *bona fide* purposes other than to obtain the tax benefit; or

(*b*) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

(*a*) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of

(i) this Act,

(ii) the *Income Tax Regulations*,

(iii) the *Income Tax Application Rules*,

(iv) a tax treaty, or

(v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any

véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable;

b) soit de l'opération qui fait partie d'une série d'opérations dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable.

(4) Le paragraphe (2) ne s'applique qu'à l'opération dont il est raisonnable de considérer, selon le cas :

a) qu'elle entraînerait, directement ou indirectement, s'il n'était pas tenu compte du présent article, un abus dans l'application des dispositions d'un ou de plusieurs des textes suivants :

(i) la présente loi,

(ii) le *Règlement de l'impôt sur le revenu*,

(iii) les *Règles concernant l'application de l'impôt sur le revenu*,

(iv) un traité fiscal,

(v) tout autre texte législatif qui est utile soit pour le calcul d'un impôt ou de toute autre

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amount that is relevant for the purposes of that computation; or

(*b*) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

somme exigible ou remboursable sous le régime de la présente loi, soit pour la détermination de toute somme à prendre en compte dans ce calcul;

b) qu'elle entraînerait, directement ou indirectement, un abus dans l'application de ces dispositions compte non tenu du présent article lues dans leur ensemble.

(5) Without restricting the generality of subsection (2), and notwithstanding any other enactment,

(*a*) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,

(*b*) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person,

(*c*) the nature of any payment or other amount may be recharacterized, and

(*d*) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section,

(5) Sans préjudice de la portée générale du paragraphe (2) et malgré tout autre texte législatif, dans le cadre de la détermination des attributs fiscaux d'une personne de façon raisonnable dans les circonstances de façon à supprimer l'avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, d'une opération d'évitement :

a) toute déduction, exemption ou exclusion dans le calcul de tout ou partie du revenu, du revenu imposable, du revenu imposable gagné au Canada ou de l'impôt payable peut être en totalité ou en partie admise ou refusée;

b) tout ou partie de cette déduction, exemption ou exclusion ainsi que tout ou partie d'un revenu, d'une perte ou d'un autre montant peuvent être attribués à une personne;

c) la nature d'un paiement ou d'un autre montant peut être qualifiée autrement;

d) les effets fiscaux qui

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result, directly or indirectly, from an avoidance transaction.

découleraient par ailleurs de l'application des autres dispositions de la présente loi peuvent ne pas être pris en compte.

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-445-11
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE J.M. WOODS OF THE TAX COURT OF CANADA DATED OCTOBER 28, 2011.	
STYLE OF CAUSE:	*The Queen v. Global Equity Fund Ltd.*
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	October 11, 2012
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	NADON J.A. GAUTHIER J.A.
DATED:	October 30, 2012

APPEARANCES:

William Softley Margaret McCabe	FOR THE APPELLANT
Jehad Haymour Sophie Virji	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MYLES J. KIRVAN Deputy Attorney General of Canada	FOR THE APPELLANT
FRASER MILNER CASGRAIN LLP Calgary, Alberta	FOR THE RESPONDENT

2012 FCA 272 (CanLII)

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

INDEXED AS: CENTURY SERVICES INC. *v.* CANADA (ATTORNEY GENERAL)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

RÉPERTORIÉ : CENTURY SERVICES INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

2010 CSC 60

N^{o} du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

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The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

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Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

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recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

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No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

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Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

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

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] La juge Deschamps — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

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Act, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d'avis d'accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L'entreprise a vendu certains éléments d'actif excédentaires, comme l'y autorisait l'ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s'applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s'applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s'appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l'époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l'emportait sur la *LACC*, la Couronne jouissant ainsi d'un droit prioritaire à l'égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu'elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l'objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu'il sera utile de le faire.

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[4] On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

[5] On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[7] First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la *LACC*, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 $ soit détenue par le contrôleur dans son compte en fiducie.

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la *LFI*. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la *LFI* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la *LACC* n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

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that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

[9] This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la *LACC*, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la *LTA*, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la *LTA* à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la *LACC*.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Questions en litige

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

(1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?

(2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?

(3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain

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[10] La première question porte sur les priorités de la Couronne dans le contexte de l'insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l'égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l'époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d'imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c'est souvent le cas, le conflit apparent peut être résolu au moyen des principes d'interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l'historique de la *LACC*, la fonction de cette loi parmi l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d'insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l'objectif de cette loi et l'interprétation qu'en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l'espèce, j'aborderai la conclusion du juge Tysoe selon laquelle l'ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l'insolvabilité*

[12] L'insolvabilité est la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

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a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

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the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

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Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la *LACC*, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la *LACC*. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La *LACC* est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

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the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la *LACC*. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la *LACC*.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la *LACC* dans la pratique contemporaine,

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flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

ni des avantages qu'offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la LACC [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d'un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d'insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

[22] Si les instances en matière d'insolvabilité peuvent être régies par des régimes législatifs différents, elles n'en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l'objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

> [TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d'éviter l'anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l'absence d'un processus collectif, chaque créancier sait que faute d'agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

Le modèle de la procédure unique vise à faire échec à l'inefficacité et au chaos qui résulteraient de l'insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d'un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

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3.2 *GST Deemed Trust Under the CCAA*

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d'une priorité en cas d'insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l'insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l'objet d'aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu'elle l'était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l'État en cas d'insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l'État ne bénéficie d'aucune priorité, alors qu'aux États-Unis et en France il jouit au contraire d'une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d'une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l'impôt sur le revenu et des cotisations à l'assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s'applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n'a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

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held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

[33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

également les biens détenus par un créancier garanti qui, si ce n'était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l'égard des retenues à la source relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC (voir par. 227(4) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J'emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d'un litige portant sur la priorité de rang entre, d'une part, une fiducie réputée établie en vertu de la *LIR* à l'égard des retenues à la source, et, d'autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l'Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D'après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l'égard des biens du débiteur pour une valeur égale à la somme due au titre de l'impôt sur le revenu — commençait à s'appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l'emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n'existait pas de biens susceptibles d'être visés par la fiducie réputée de la *LIR* lorsqu'elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu'elle est réputée s'appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l'arrêt *Sparrow Electric* »).

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[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. . . .

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed . . . .

[35] The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

[36] The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

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subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 . . .

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

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[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** . . .
>
> . . .
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution . . . .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

> **18.4** . . .
>
> . . .
>
> (3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :
>
> *a*) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;
>
> *b*) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation . . .

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

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conflicts, apparent or real, and resolve them when possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy,

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l'égard de la TPS dans le cadre de la *LACC*. Dans l'arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d'appel de l'Ontario a invoqué la doctrine de l'abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d'appel de l'Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu'en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

> [TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d'appel de l'Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s'estimait donc tenue de suivre l'arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu'une disposition d'une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d'abroger une disposition plus spécifique

the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

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in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édiction visait justement à prévenir.

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[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

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[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

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

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

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

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the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

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

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

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

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

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

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

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

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

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

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

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

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

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

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

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purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

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

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

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

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matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

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

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

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

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

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stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

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

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

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

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

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

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

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

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

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

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the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

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

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

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lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

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

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

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to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

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

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

3.4 *Fiducie expresse*

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

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

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

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

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

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

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

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

[87] Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

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that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

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And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

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II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l'existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*.

[98] La première est la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l'effet contraire n'a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

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apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . .

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[102] Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC que* sous celui de la *LFI.*

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[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit

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security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[108] In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

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provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

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be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

[115] Section 11[1] of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

1 Section 11 was amended, effective September 18, 2009, and now states:

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

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

[115] L'article 11[1] de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

11. Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

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(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) . . . [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) . . . [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

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interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* . . . . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

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various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

[123] Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

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[125] The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> . . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, . . . at p. 239 . . . :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> > On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

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legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as

2 The amendments did not come into force until September 18, 2009.

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

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"new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

. . .

(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

[130] Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[131] The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

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Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

> Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

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for payment of the GST funds during the *CCAA* proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

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(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

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(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou

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as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

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and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou

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effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

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18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii),

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in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

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(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

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Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

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collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

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3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

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37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la

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creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

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(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

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(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

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(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Appeal allowed with costs, ABELLA J. *dissenting.*

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

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COURT OF APPEAL FOR BRITISH COLUMBIA

NO. CA12944
VANCOUVER REGISTRY

IN THE MATTER OF THE COMPANY ACT R.S.B.C. 1979, c. 59 AND IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 c. C-36 AND IN THE MATTER OF: CHEF READY FOODS LTD. AND ISTONIO FOODS LTD. BETWEEN: CHEF READY FOODS LTD. RESPONDENT (PETITIONER) AND: HONGKONG BANK OF CANADA APPELLANT (RESPONDENT)	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE GIBBS

Before: The Honourable Mr. Justice Carrothers
The Honourable Mr. Justice Cumming
The Honourable Mr. Justice Gibbs

Counsel for the Appellant: D. I. Knowles and H. M. Ferris

Counsel for the Respondent: R. H. Sahrmann and L. D. Goldberg

Date and Place Heard: October 12, 1990
Vancouver, British Columbia

Date and Place Handed Down: October 29, 1990
Vancouver, British Columbia

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The sole issue on this appeal is whether a stay order made by a Chambers judge under s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, Chap. C-36 is a bar to realization by the Hongkong Bank of Canada (the "Bank") on security granted to it under s. 178 of the Bank Act, R.S.C. 1985, Chap. B-1.

The facts relevant to resolution of the issue are not in dispute. The respondent Chef Ready Foods Ltd. ("Chef Ready") is in the business of manufacturing and wholesaling fresh and frozen pizza products. The appellant Bank provided credit and other banking services to Chef Ready. As part of the security for its indebtedness Chef Ready executed the appropriate documentation and filed the appropriate notices under s. 178 of the Bank Act. Accordingly the Bank holds what is commonly referred to as "section 178 security".

Chef Ready encountered financial difficulties. On August 22, 1990, following upon some fruitless negotiations, the Bank, through its solicitors, demanded payment from Chef Ready. The debt then stood at $365,318.69 with interest accruing thereafter at $150.443 per day. Chef Ready did not pay.

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On August 27, 1990 the Bank commenced proceedings upon debenture security which it held and upon guarantees by the principals of Chef Ready. Also on August 27, 1990, the Bank appointed an agent under a general assignment of book debts which it held, with instructions to the agent to realize upon the accounts. In the meantime, on August 23, 1990, so as to qualify under the Companies' Creditors Arrangement Act (the "C.C.A.A."), Chef Ready had granted a trust deed to a trustee and issued an unsecured $50 bond. On August 28, 1990, the day after the Bank commenced its debenture and guarantee proceedings, Chef Ready filed a petition seeking various forms of relief under the C.C.A.A. On the same day Chef Ready filed an application, ex parte, as they were entitled to do under the C.C.A.A., for an order to be issued that day granting the relief claimed in the petition.

The application was heard in Chambers in the afternoon of August 28, 1990 and the following day. The Bank learned "on the grapevine" of the application and appeared on the hearing and was given standing to make submissions. It also filed affidavit evidence which appears to have been taken into account by the Chambers judge. The affidavit evidence had appended to it, inter alia, the s. 178 security documentation. On August 30, 1990 the Chambers judge granted the order and delivered oral reasons at the end of which he said:

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> "I therefore conclude that the Companies' Creditors Arrangement Act is an overriding statute which gives the court power to stay all proceedings including the right of the bank to collect the accounts receivable."

The reasons refer specifically to the accounts receivable because the Bank was then poised ready to take possession of those accounts and collect the amounts owing. Its right to do so arose under the general assignment of book debts and under clause 4 of the s. 178 security instrument:

> " 4. If the Customer shall sell the property or any part thereof, the proceeds of any such sale, including cash, bills, notes, evidence of title, and securities, and the indebtedness of any purchaser in connection with such sales shall be the property of the Bank to be forthwith paid or transferred to the Bank, and until so paid or transferred to be held by the Customer on behalf of and in trust for the Bank. Execution by the Customer and acceptance by the Bank of an assignment of book debts shall be deemed to be in furtherance of this declaration and not an acknowledgement by the Bank of any right or title on the part of the Customer to such book debts."

The formal order made by the Chambers judge contains a paragraph which stays realization upon or otherwise dealing with any securing on "the undertaking, property and assets" of Chef Ready:

> " THIS COURT FURTHER ORDERS THAT all proceedings taken or that might be taken by any of the Petitioners' creditors or any other person, firm or

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> corporation under the Bankruptcy Act (Canada) or the Winding-Up Act (Canada) shall be stayed until further Order of this Court upon 2 days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until the further Order of this Court upon 2 days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of this Court upon 2 days notice to the Petitioners and subject to such terms as this Court may impose and that the right of any person, firm or corporation to realize upon or otherwise deal with any property, right or security held by that person, firm or corporation on the undertaking, property and assets of the Petitioners be and the same is postponed;"
>
> (Emphasis added.)

The jurisdiction in the court to make such a stay order is found in s. 11 of the C.C.A.A.:

> " 11. Notwithstanding anything in the Bankruptcy Act or the Winding-Up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-Up Act or either of them;
>
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the

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> leave of the court and subject to such terms as the court imposes."

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The question of whether a step, not involving any court or litigation process, taken to realize upon the accounts receivable is a "suit, action or other proceeding...against the company" is not before the court on this appeal. The Bank does not put its case forward on that footing. Its contention is more general in nature. It is that s. 178 security is beyond the reach of the C.C.A.A.; put another way, that whatever the scope of the C.C.A.A. it does not go so far as to impede or qualify, or give jurisdiction to make orders which will impede or qualify, the rights of realization of a holder of s. 178 security. Consistent with that position, by way of relief on the appeal the Bank asks only that the stay order be varied to free up the s. 178 security:

> "NATURE OF ORDER SOUGHT
>
> An order that the appeal of the Appellant be allowed and an order be made the Order of the Judge in the Court below be set aside insofar as it restrains the Appellant from exercising its rights under its section 178 security..."

The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company

incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. ll.

There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. But that does not dispose of the issue. There is the Bank Act to consider.

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There is nothing in the Loans and Security division of the Bank Act either, where s. 178 is found, which specifically excludes direct or indirect impact by the C.C.A.A. Nonetheless the Bank's position, in essence, is that there is a notional cordon sanitaire around s. 178 and other sections associated with it such that neither the C.C.A.A. or orders made under it can penetrate. In support of its position the Bank relies heavily upon the recent unanimous judgment of the Supreme Court of Canada in Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, and to a lesser degree upon an earlier unanimous Supreme Court of Canada judgment in Flintoft v. Royal Bank of Canada (1964), S.C.R. 631.

The principal issue in Hall was whether ss. 19 to 36 of the Saskatchewan Limitation of Civil Rights Act applied to a security taken under ss. 178 and 179 of the Bank Act. The court held that it was beyond the competence of the Saskatchewan Legislature "to superadd conditions governing realization over and above those found within the confines of the Bank Act" (p. 154). In the course of arriving at its decision the court considered the property interest acquired by a bank under s. 178 security, the legislative history leading up to the present ss. 178 and 179, the purposes intended to be achieved by the legislation, and the rights of a bank holding s. 178 security. All of those considerations

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have application to the issue here, and the judgment merits reading in full to appreciate the relevance of all of its parts. However , a few extracts will serve to illustrate the Bank's reliance:

> "...a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower" (p. 134)
>
> "...the Parliament of Canada has enacted these sections not so much for the benefit of banks as for the benefit of manufacturers" (p.139)
>
> "...These sections of the Bank Act have become an integral part of bank lending activities and are a means of providing support in many fields of endeavour to an extent which otherwise would not be practical from the standpoint of prudent banking" (p. 139)
>
> "The bank obtains and may assert its right to the goods and their proceeds against the world, except as only Parliament itself may reduce or modify those rights" (p. 143)
>
> "...the rights, duties and obligations of creditor and debtor are to be determined solely by reference to the Bank Act..." (p. 143)
>
> "The essence of that regime [ss. 178 and 179], it hardly needs repeating, is to assign to the bank, on the taking out of the security, right and title to the goods in question, and to confer, on default of the debtor, and immediate right to seize and sell those goods..." (p. 152)
>
> "...it was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in the Bank Act itself" (p. 154)
>
> "...Parliament, under its power to regulate banking, has enacted a complete code that at once

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> defines and provides for the realization of a security interest" (p. 155).

It is the insular theme which runs through these propositions that the Bank seizes upon to support its claim for immunity. But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the Bank under ss. 178 and 179? It does not detract from the Bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; it does not prevent immediate crystallization of the right to seize and sell; it does not breach the "complete code". All that it does is postpone the exercise of the right to seize and sell. And here the Bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise. It follows from this analysis that there is no apparent bar in the Bank Act to the application of the C.C.A.A. to s. 178 security and the Bank's rights in respect of it.

Having regard to the broad public policy objectives of the C.C.A.A. there is good reason why s. 178 security should not be excluded from its provisions. The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became

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insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed - the Bankruptcy Act and the Winding-Up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business. These excerpts from an article by Stanley E. Edwards at p.587 of 1947 Vol. 25 of the Canadian Bar Review, entitled "Reorganizations Under The Companies' Creditors Arrangement Act", explain very well the historic and continuing purposes of the Act:

> " It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C. H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little The trade connections associated with the system and held by the management may also be

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valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders." (p. 592)

" There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing companies or their successors. The results of permitting dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past.

Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that this dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be

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made for reorganization of insolvent corporations." (p. 590)

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It is apparent from these excerpts and from the wording of the statute that, in contrast with ss. 178 and 179 of the Bank Act which are preoccuppied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's rights in respect of s. 178 security are accorded an unique status which renders those rights immune from the provisions of the C.C.A.A. the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the Bank signifies and collects the accounts receivable Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; and those for whom the C.C.A.A. may be irrelevant dependant upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A.

was enacted it is difficult to imagine that the legislators of the day intended that result to follow.

In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. See such cases as Meridian Developments Inc. v. T.D. Bank (1984), 52 C.B.R. 109 (Alta.Q.B.); Northland Properties Limited v. Excelsior Life Insurance Company (1989), 34 B.C.L.R. (2d) 122 (B.C.C.A.); Re Feifer and Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Que.C.A.); Wynden Canada Inc. v. Gaz Metropolitaine (1982), 44 C.B.R. 285 (Que.S.C.); and Norcen Energy Resources v. Oakwood Petroleums (1988) 72 C.B.R. 2 (Alta.Q.B.). The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

The trend which emerges from this sampling will be given effect here by holding that where the word security occurs in the C.A.A.A. it includes s. 178 security and where the word creditor occurs it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes therefore, the broad scope of the C.C.A.A. prevails.

1990 CanLII 529 (BC CA)

For these reasons the disposition by the Chambers judge of the application made by Chef Ready will be upheld. It follows that the appeal is dismissed.

"The Honourable Mr. Justice Gibbs"

I AGREE: The Honourable Mr. Justice Carrothers

I AGREE: The Honourable Mr. Justice Cumming

1990 CanLII 529 (BC CA)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Classic Mortgage Corporation v. 0768723 B.C. Ltd.,* 2017 BCSC 1100

Date: 20170628
Docket: H102747
Registry: Kelowna

Between:

Classic Mortgage Corporation

Petitioner

And

0768723 B.C. Ltd., 0741449 B.C. Ltd., Rick Dowding, 638070 Alberta Ltd., Her Majesty the Queen in Right of Canada

Respondents

Before: Master S. Wilson

Reasons for Judgment

Counsel for the Petitioner, 638070 Alberta Ltd.:	A.C. Kempf
Counsel for the Respondents, 0768723 B.C. Ltd. and 0741449 B.C. Ltd.:	R. Burke
Place and Date of Hearing:	Kelowna, B.C. June 26, 2017
Place and Date of Judgment:	Kelowna, B.C. June 28, 2017

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[1] The sole matter for me to decide on this application was whether the petitioner, R504 Enterprises Ltd. can be compelled upon payment of the redemption amount to assign the mortgage debt and/or the mortgaged property to the registered owner's new lender pursuant to s. 14(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 252.

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Background

[2] The material steps that have brought the parties to this application are set out below.

[3] On September 16, 2006, the registered owner of the subject property, the respondent 0768723 B.C. Ltd. ("076"), mortgaged the property to Classic Mortgage Corporation.

[4] In September 2010, 076 granted a second mortgage to the respondent 638070 Alberta Ltd. ("638").

[5] 638 obtained order nisi in foreclosure proceedings commenced under its second mortgage in December 2014, at which point it obtained judgment in the approximate amount of $8,100,000. The amount currently owed under that second mortgage is approximately $12,000,000.

[6] On June 15, 2016, Classic Mortgage Corporation obtained order nisi under the first mortgage that is the subject of this proceeding. At the time of the order nisi, the debt owed was $964,036.12, the amount currently owed is slightly in excess of $1,000,000.

[7] In November 2016, the petitioner assigned the mortgage to R504 Enterprises Ltd. ("R504").

[8] On February 10, 2017, I granted an order permitting assignment of the *in rem* portions of the order nisi to R504; at the same time, I adjourned R504's application for an order absolute.

[9] On March 1, 2017, Madam Justice Warren dismissed an appeal of my decision permitting the *in rem* assignment.

[10] On May 8, 2017, I made an order by consent (the "Consent Order") that provided as follows:

> 1. BY CONSENT, the Respondents, 0768723 B.C. Ltd. and/or 0741449 B.C. Ltd., shall have the right to redeem the first mortgage provided they/it does so on or before June 30, 2017; and
> 2. BY CONSENT, if there is no redemption of the mortgage that is the subject of this foreclosure proceeding by either or both of the Respondents, 0768723 B.C. Ltd. and 0741449 B.C. Ltd., the Applicant, R 504 Enterprises Ltd. is granted order absolute of foreclosure on July 1, 2017;

[11] The Consent Order was endorsed by Mr. Burke on behalf of 076 and 0741449 B.C. Ltd. ("074") and Mr. Kempf on behalf of Classic Mortgage Corporation, 638 and R504.

[12] 076 and 074 say they have now obtained financing to redeem the first mortgage, but their new lender requires an assignment of the first mortgage as security for its loan. 076 and 074 seek an order to compel that assignment.

The law

[13] The right of a mortgagor to compel an assignment of the mortgage when the mortgagor is entitled to redeem is contemplated in s. 14(1) of the *Law and Equity Act*, which states the following:

> 14(1) Despite any stipulation to the contrary, if a mortgagor is entitled to redeem, the mortgagor may require the mortgagee, or the mortgagee's personal representatives or assigns, instead of giving a certificate of payment or reconveying, and on the terms on which the mortgagee would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs and the mortgagee is bound to assign and convey accordingly.

[14] Notwithstanding what might appear to be the clear wording on the face of s. 14(1), however, the courts of this province and elsewhere have held that the right

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to demand an assignment does not apply where a mortgagor has granted a second mortgage.

[15] The effect of a second mortgage is described in *Falconbridge on Mortgages*, W.B. Rayner and R.H. McLaren, 4th ed, (Canada Law Book Limited, 1977) at 388, as follows:

> The effect of a legal mortgage is to transfer the legal estate in the land to the mortgagee and to create in favour of the mortgagor a right to redeem the mortgage. The effect of a second mortgage is to transfer to the second mortgagee the right to redeem the first mortgage and to create in favour of the mortgagor a new right, namely, to redeem the second mortgage.

[16] Chief Justice McEachern in *Gulf Estates Ltd. v. Rix*, 1985 CanLII 392 (BCSC), following the leading case of *Teevan v. Smith* (1882), 20 Ch. D. 724 (C.A.), a decision that is based upon similarly worded legislation, concluded that a mortgagor could not compel an assignment when the equity of redemption rested with a subsequent mortgagee, although the mortgagee may consent to a different outcome: see for example, *Gulf Estates v. Rix*, at para. 14:

> Turning to s. 15, a mortgagor is not "entitled to redeem" in the sense of permitting him to require a mortgagee to assign the mortgage to a third party when the equity of redemption is in a subsequent mortgagee. In such circumstances the most a mortgagor can do, without the consent of the mortgagee, is pay off the mortgage and obtain a discharge which, upon registration, operates as a conveyance of the estate to the person best entitled.
>
> [Emphasis added]

The position of the parties

[17] The parties do not disagree that a mortgagor cannot generally compel an assignment if the mortgagor has granted a second mortgage.

[18] What 076 and 074 argue here is that because 638 has consented to a redemption of the first mortgage as evidenced by the Consent Order, R504 can be compelled to assign the mortgage as contemplated by s. 14(1).

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[19] In the alternative, 076 and 074 say that they are entitled to the assignment based upon the wording of para. 6 of the order nisi that also permits redemption and the ability to compel a reconveyance free and clear of all encumbrances.

[20] 638 says that if 076 and 074 can compel an assignment, it would create exactly the "mischief" that *Teevan v. Smith* and *Gulf Estates Ltd. v. Rix* were designed to prevent, namely putting a mortgagor's new lender in the position of being able to foreclose off by way of subsequent order absolute the second mortgagee's equity.

[21] 638 also says that the Consent Order is in error to the extent that it refers to 638, and that there are other respondents who were not parties to the Consent Order and therefore are not bound by it.

[22] 638 also submits that the Consent Order does nothing new, and simply extended the date for redemption but added nothing that was not already in place by way of the order nisi.

[23] For the reasons that follow, I find that 076 and 074 cannot compel R504 to assign the mortgage to their new lender.

Preliminary Matter - the Consent Order

[24] Since 076 and 074 argue that their right to compel an assignment is derived from the Consent Order, I must deal first with the argument that the Consent Order is in error and ought not to be seen as a consent on the part of 638.

[25] The petitioner in this proceeding and 638, being the first and second mortgagees, respectively, have the same counsel. The consent order as drafted provides that Mr. Kempf is solicitor for each of Classic Mortgage Corporation, R504 and 638, both in the preamble and also below Mr. Kempf's signature where the order was endorsed. In the absence of any evidence in support of such an argument, I cannot accept that Mr. Kempf was not binding his client 638 when he endorsed the order.

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Discussion

[26] Since 638 is bound by the Consent Order, the question is therefore what did 638 agree to.

[27] The fatal flaw in 076's and 074's argument is that it equates the right of redemption with the right to compel an assignment under s. 14(1) of the *Law and Equity Act*. At common law, a mortgagor conveyed title to the mortgaged property to the mortgagee; upon redemption, the mortgagee was required to reconvey the title back to the mortgagor. The right to an assignment, by contrast, is a statutory right: see *Falconbridge on Mortgages* at p. 389:

> No person who redeems a mortgage is entitled to call for an assignment of the mortgage otherwise than by virtue of a contract to that effect or by virtue of the statute mentioned below. Apart from statute or a special agreement a mortgagee, on being redeemed, is obliged merely to reconvey the mortgaged estate.

[28] In *Great-West Life Assurance Co. v. Rix* (1984) 59 BCLR 75 (B.C.C.A.), our Court of Appeal held that an assignment under the *Law and Equity Act* is not a redemption. Hinkson J.A. held the following at para. 31:

> Section 15 of the Law and Equity Act is a statutory alternative to the right to redeem. If a mortgagor is entitled to redeem, instead of redeeming he may require the mortgagee, instead of giving a certificate of payment or reconveying, to assign the mortgage debt to a third person. But if that alternative is chosen, then the mortgagor does not redeem.

[29] A mortgagor in the position of 076 has the right to redeem the first mortgage, but for the reasons set out in *Gulf Estates Ltd. v. Rix* and *Teevan v. Smith* is not entitled to require an assignment because the equity of redemption has been conveyed by way of the second mortgage to 638. The question is therefore whether 638 has agreed to something else.

[30] If 076 and 074 have the right to compel an assignment of the mortgage, that right would need to be provided for in the Consent Order, there being no suggestion of any other agreement. The Consent Order provides that 076 and 074 have the

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right to redeem the property up until June 30, 2017. The Consent Order makes no reference to a right on the part of 076 and 074 to require assignment.

[31] The effect of the Consent Order was to provide 076 and 074 with an extension of the deadline to obtain new financing, something they had indicated was in the works at the time of that Consent Order. On a plain reading of the Consent Order, 638 agreed to an extension of the redemption period, but nothing else. The right to require an assignment is a different remedy from redemption. The argument that 638 consented to an assignment of the first mortgage pursuant to s. 14(1) of the *Law and Equity Act* must fail.

[32] The alternative argument, namely that 076 and 074 can require an assignment based on the wording of the order nisi is similarly flawed. The order nisi provided at para. 6 the following:

> 6. Upon the Respondents, or any of them, paying into Court to the credit of this cause at the Kelowna Court Registry, Courthouse, 1355 Water Street, Kelowna, British Columbia, the amount required to redeem the Lands and Premises before pronouncement of either Order Absolute or an Order approving sale of the Lands and Premises, the Petitioner shall reconvey the Lands and Premises, free and clear of all encumbrances in favour of it or any person claiming by, through or under it, and shall deliver up all documents in its custody relating thereto to the Respondents so paying or to whom they shall appoint.

[33] 076 and 074 argue that the portion of paragraph 6 that would require the petitioner to reconvey the property gives them the right to demand an assignment under s. 14(1). An order nisi granted in a foreclosure proceeding in this province will always expressly provide for the right to redeem, regardless of whether the mortgagor has granted subsequent mortgages; the order nisi here is consistent with orders that are routinely granted. However, a mortgagor only has the right to demand the statutory remedy of an assignment under s. 14(1) instead of redeeming the mortgage if the right of redemption has not been conveyed to another. For the reasons discussed above, the right to redeem and the right to demand an assignment are different remedies.

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[34] Because it does not automatically follow that a mortgagor with the right to redeem has the right to require an assignment, it does not matter that the right to redeem is confirmed in the order nisi. The order nisi does not provide 076 and 074 with the right to demand an assignment. The alternative argument must also fail.

Disposition

[35] The application is dismissed with costs to the application respondents.

"Master Wilson"

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Classic Mortgage Corporation v. 0768723 B.C. Ltd.,* 2017 BCSC 1225

Date: 20170717
Docket: H102747
Registry: Kelowna

Between:

Classic Mortgage Corporation

Petitioner
(Respondent)

And

0768723 B.C. Ltd., 0741449 B.C. Ltd.

Respondents
(Appellants)

Rick Dowding, 638070 Alberta Ltd., Her Majesty the Queen in Right of Canada

Respondents

Before: The Honourable Mr. Justice G.P. Weatherill

On appeal from: An order of the Supreme Court of British Columbia, dated June 28, 2017 (*Classic Mortgage Corporation v. 0768723 B.C. Ltd.*, 2017 BCSC 1100, KE H102747).

Reasons for Judgment

Counsel for the Petitioner (Respondent):	A.C. Kempf
Counsel for the Respondents (Appellants) 0768723 B.C. Ltd. and 0741449 B.C. Ltd.:	R. Burke
Place and Date of Hearing:	Kelowna, B.C. July 11, 2017
Place and Date of Judgment:	Kelowna, B.C. July 17, 2017

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Introduction

[1] This is an appeal from a decision by Master Wilson pronounced June 28, 2017, in this foreclosure proceeding. Master Wilson dismissed the application of the appellants 0768723 B.C. Ltd. ("076") and 0741449 B.C. Ltd. ("074") for an order requiring the assignment of the first mortgage on a property to 076's and 074's lender on them paying the amount required to redeem the mortgage.

[2] The appellants' application was brought pursuant to s. 14(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 252 [*Act*].

Background

[3] The property which is the subject matter of the action is a 160 acre parcel that forms part of the Kelowna Mountain Development owned by 076. It is legally described as:

> PID 015-122-107
> The Northwest ¼ of Section 18, Township 29
> Similkameen Division, Yale District
> except Plan KAP49085.
> (the "Property")

[4] 076 granted a first mortgage over the Property to the respondent on this appeal Classic Mortgage Corporation ("Classic") in September 2006 ("First Mortgage").

[5] 076 granted a second mortgage over the Property to the respondent 638070 Alberta Ltd. ("638") in September 2010 ("Second Mortgage").

[6] On December 17, 2014, 638 obtained an order nisi of foreclosure on the Second Mortgage together with a judgment for $8,098,542.08 plus interest and costs.

[7] On June 15, 2016, Classic obtained an order nisi of foreclosure on the First Mortgage together with a judgment for $964,036.12 plus interest and costs ("Order Nisi").

[8] On November 3, 2016, Classic assigned the First Mortgage and its right to claim under it to R504 Enterprises Ltd. ("R504").

[9] On February 6, 2017, 076 and 074 filed a notice of application seeking an extension of the redemption period under the Order Nisi, from December 15, 2016 to May 30, 2017 ("Extension Application").

[10] On February 10, 2017, Master Wilson granted an order in this proceeding substituting R504 as petitioner in respect of the *in rem* portions of the Order Nisi (the "First Wilson Order").

[11] On March 1, 2017, the First Wilson Order was upheld on appeal by Madam Justice Warren, who found that the result of the substitution order was that there were two petitioners, Classic and R504.

[12] The Extension Application was adjourned pending the disposition of the appeal of the First Wilson Order and was not heard until May 8, 2017, the same day R504 applied for order absolute of foreclosure on the First Mortgage.

[13] On that date, the parties agreed to a consent order which read in part:

> 1. BY CONSENT, the Respondents, 0768723 B.C. LTD. and/or 0741449 B.C. LTD., shall have the right to redeem the first mortgage provided they/it does do so on or before June 30, 2017; and
> 2. BY CONSENT, if there is no redemption of the mortgage that is the subject of this foreclosure proceeding by either or both of the Respondents, 0768723 B.C. LTD. and 0741449 B.C. LTD., the Applicant, R 504 Enterprises Ltd. is granted order absolute of foreclosure on July 1, 2017…
>
> ("Consent Order")

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[14] 076 and 074 obtained financing to redeem the First Mortgage. However, the lender providing financing requires an assignment of the First Mortgage as security for its loan.

[15] On June 16, 2017, 076 and 074 applied by way of notice of application for an order that, upon 076 and 074 paying R504 the amount required to redeem the First Mortgage, R504 must assign the First Mortgage to their lender ("Application Under Appeal").

[16] The Application Under Appeal was heard by Master Wilson on June 26, 2017. On June 28, 2017, Master Wilson dismissed it with costs ("Second Wilson Order").

[17] It is the Second Wilson Order that is the subject of this appeal.

[18] On June 30, 2017, 076's and 074's solicitors, Burke Law Corporation, delivered a trust cheque in the amount of $1,122,564.80 (the amount they determined was required to redeem the First Mortgage) to Pushor Mitchell LLP, counsel for Classic, R504 and 638, together with an assignment of the First Mortgage to its lenders, David William Beckingham, Capital Properties Ltd. and DLCD Holdings Ltd.

[19] The June 30, 2017 letter from Burke Law Corporation stated in part:

> Our clients, 076 and 074, elect to obtain an assignment of the mortgage from R504 rather than a reconveyance. The assignment should be to the parties named in enclosed assignment document.
>
> This trust cheque is delivered to you on your undertaking not to disburse the funds for any purpose until you have delivered to us the enclosed assignment of mortgage and assignment of rents in registrable form. This trust cheque is delivered to you on your further undertaking that, if you are unable to or unwilling to deliver the assignment to us within 10 days, you will return the full amount of the trust cheque immediately upon the expiration of the ten day period.

[20] Pushor Mitchell LLP refused to accept the trust cheque and returned the funds on July 4, 2017, stating:

> The trust conditions in your letter are unacceptable. My client 504 is entitled to act on the Order Absolute.

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> The effect of your letter is that your client did not redeem the mortgage.

Standard of review

[21] The parties agree that the standard of review of a master's decision is set out in *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.). In an appeal from a master's order in a purely interlocutory matter, the standard of appellate review is whether the order was clearly wrong. Where the master's decision raises questions which are vital to the final issue in the case, or results in a final order, the appeal is a rehearing on the standard of correctness. On a rehearing, the chambers judge may substitute his or her own assessment of the evidence for that of the master.

[22] The parties agree that the standard of review on this appeal is from a final order and is a rehearing on the standard of correctness.

Master's Decision

[23] The key findings made by Master Wilson are at paras. 26 through 34 of his reasons, wherein he stated:

> [26] Since 638 is bound by the Consent Order, the question is therefore what did 638 agree to.
>
> [27] The fatal flaw in 076's and 074's argument is that it equates the right of redemption with the right to compel an assignment under s. 14(1) of the *Law and Equity Act*. At common law, a mortgagor conveyed title to the mortgaged property to the mortgagee; upon redemption, the mortgagee was required to reconvey the title back to the mortgagor. The right to an assignment, by contrast, is a statutory right: see *Falconbridge on Mortgages* at p. 389:
>
> > No person who redeems a mortgage is entitled to call for an assignment of the mortgage otherwise than by virtue of a contract to that effect or by virtue of the statute mentioned below. Apart from statute or a special agreement a mortgagee, on being redeemed, is obliged merely to reconvey the mortgaged estate.
>
> [28] In *Great-West Life Assurance Co. v. Rix* (1984) 59 BCLR 75 (B.C.C.A.), our Court of Appeal held that an assignment under the *Law and Equity Act* is not a redemption. Hinkson J.A. held the following at para. 31:
>
> > Section 15 of the Law and Equity Act is a statutory alternative to the right to redeem. If a mortgagor is entitled to redeem, instead of redeeming he may require the mortgagee, instead of giving a

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> certificate of payment or reconveying, to assign the mortgage debt to a third person. But if that alternative is chosen, then the mortgagor does not redeem.

[29] A mortgagor in the position of 076 has the right to redeem the first mortgage, but for the reasons set out in *Gulf Estates Ltd. v. Rix* and *Teevan v. Smith* is not entitled to require an assignment because the equity of redemption has been conveyed by way of the second mortgage to 638. The question is therefore whether 638 has agreed to something else.

[30] If 076 and 074 have the right to compel an assignment of the mortgage, that right would need to be provided for in the Consent Order, there being no suggestion of any other agreement. The Consent Order provides that 076 and 074 have the right to redeem the property up until June 30, 2017. The Consent Order makes no reference to a right on the part of 076 and 074 to require assignment.

[31] The effect of the Consent Order was to provide 076 and 074 with an extension of the deadline to obtain new financing, something they had indicated was in the works at the time of that Consent Order. On a plain reading of the Consent Order, 638 agreed to an extension of the redemption period, but nothing else. The right to require an assignment is a different remedy from redemption. The argument that 638 consented to an assignment of the first mortgage pursuant to s. 14(1) of the *Law and Equity Act* must fail.

[32] The alternative argument, namely that 076 and 074 can require an assignment based on the wording of the order nisi is similarly flawed. The order nisi provided at para. 6 the following:

> 6. Upon the Respondents, or any of them, paying into Court to the credit of this cause at the Kelowna Court Registry, Courthouse, 1355 Water Street, Kelowna, British Columbia, the amount required to redeem the Lands and Premises before pronouncement of either Order Absolute or an Order approving sale of the Lands and Premises, the Petitioner shall reconvey the Lands and Premises, free and clear of all encumbrances in favour of it or any person claiming by, through or under it, and shall deliver up all documents in its custody relating thereto to the Respondents so paying or to whom they shall appoint.

[33] 076 and 074 argue that the portion of paragraph 6 that would require the petitioner to reconvey the property gives them the right to demand an assignment under s. 14(1). An order nisi granted in a foreclosure proceeding in this province will always expressly provide for the right to redeem, regardless of whether the mortgagor has granted subsequent mortgages; the order nisi here is consistent with orders that are routinely granted. However, a mortgagor only has the right to demand the statutory remedy of an assignment under s. 14(1) instead of redeeming the mortgage if the right of redemption has not been conveyed to another. For the reasons discussed above, the right to redeem and the right to demand an assignment are different remedies.

[34] Because it does not automatically follow that a mortgagor with the right to redeem has the right to require an assignment, it does not matter that

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> the right to redeem is confirmed in the order nisi. The order nisi does not provide 076 and 074 with the right to demand an assignment. The alternative argument must also fail.

Issue

[24] Did Master Wilson err in finding that, upon redemption of the First Mortgage, 076 and 074 were not entitled to require that an assignment of the First Mortgage be provided by R504 under s. 14(1) of the *Act*?

Law and Equity Act

[25] Section 14(1) of the *Act* reads:

> **Mortgagor may require mortgagee to assign**
>
> **14** (1) Despite any stipulation to the contrary, if a mortgagor is entitled to redeem, the mortgagor may require the mortgagee, or the mortgagee's personal representatives or assigns, instead of giving a certificate of payment or reconveying, and on the terms on which the mortgagee would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs and the mortgagee is bound to assign and convey accordingly.

Appellants' Position

[26] The appellants argue that the Master construed the Consent Order as simply extending the redemption period and nothing else. The appellants argue that, in fact, a significant aspect of the Consent Order was that it conferred on 076 and 074 the right to redeem the First Mortgage which, before the Consent Order, rested solely with the second mortgagee, 638.

[27] The appellants argue that the Master incorrectly found that 076 and 074 only had the right to demand a statutory remedy of an assignment under s. 14(1) instead of redeeming the mortgage if the right of redemption had not been conveyed to another, which it had in this case to 638. This, the appellants argue, does not accurately state the law because it fails to note that an exemption exists if, as in this case, 638 consented to the redemption.

[28] The appellants argue that the Master's reference to *Great West Life Assurance Co. v. Rix* (1984), 59 B.C.L.R. 75 (C.A.) [*Great West*] does not assist the

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respondents but rather assists the appellants' argument. In that case, the court stated at para. 26:

> [26] Section 15 of the Law and Equity Act is a statutory alternative to the right to redeem. If a mortgagor is entitled to redeem, instead of redeeming he may require the mortgagee, instead of giving a certificate of payment or reconveying, to assign the mortgage debt to a third person. But if that alternative is chosen, then the mortgagor does not redeem.

[29] The appellants argue until the Consent Order, 638, as holder of the Second Mortgage, was the only party that had the right to redeem the First Mortgage but by virtue of the Consent Order's terms, consented to the appellants having that right. Once the Consent Order was made, they were entitled under s. 14(1) of the *Act* to require R504 to assign the First Mortgage to their lenders.

[30] In further support, the appellants argue that the Order Nisi itself expressly gave them the right to redeem the First Mortgage and as a matter of law, had the right to call for an assignment of the mortgage debt and convey the mortgaged property to a third party as they directed.

Respondents' Position

[31] The respondents argue that this appeal has no merit. They say that the appellants' position is contrary to hundreds of years of jurisprudence that Master Wilson correctly summarized in his reasons.

[32] The Consent Order simply extended the redemption period to June 30, 2017. It did not confer upon the appellants any right to demand an assignment of the First Mortgage upon being redeemed.

[33] The respondents argue that the issue of s. 14(1) of the *Act* now raised by the appellants did not surface until over one month after the Consent Order was made when they advised for the first time that their lender required an assignment.

Discussion

[34] This appeal can be disposed of simply.

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[35] In the passages cited above, Master Wilson correctly summarized the common law principles that apply to 076's and 074's application.

[36] This appeal centers on the wording of the Consent Order and how it relates to s. 14 of the *Act*.

[37] The appellants concede that when they entered into the Second Mortgage, they transferred their right of redemption of the First Mortgage to 638 and their only right of redemption was of the Second Mortgage. They agree that, but for the wording of the Order Nisi and the Consent Order, they would not be able to avail themselves of s. 14(1) of the *Act* because they did not have the right to redeem the First Mortgage.

[38] But, they say, the Order Nisi and the Consent Order both gave them the right to redeem the First Mortgage and according to s. 14(1) of the *Act,* they could demand R504 assign the First Mortgage to their lender.

[39] I disagree.

[40] In my view, Master Wilson's decision was correct. The Consent Order did nothing more than extend 076's and 074's right to redeem (pay out) the First Mortgage to June 30, 2017. That is what was sought by 076 and 074 in the Extension Application and that is what they got.

[41] In my view, what occurred in *Great West* is precisely the situation that is occurring here. "Redemption" and "assignment" are alternatives: para. 26 of *Great West* noted above.

[42] I agree with the respondents that the only thing that occurred with the Consent Order was an extension of the redemption period. "[R]edeem" in the Consent Order simply means to pay what was owed under the First Mortgage.

[43] The appellants are attempting to bypass the long established principles summarized in *Great West* and by the learned Master. Although 076 and 074 had

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the right to redeem the First Mortgage, they had no right on redemption to demand R504 assign to their lenders without 638's express consent.

[44] The Consent Order cannot be construed as 638 consenting to such an assignment. The Consent Order simply allowed 076 and 074 until June 30, 2017, to redeem the First Mortgage; meaning, to pay what was owed under it. Upon the First Mortgage being redeemed, there would be nothing owing under it. It would presumably then be discharged and the Second Mortgage would take first priority.

[45] In the result, the appeal is dismissed with costs.

"G.P. Weatherill J."

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.,*** 2008 BCCA 327

Date: 20080815
Docket: CA036261

Between:

Cliffs Over Maple Bay Investments Ltd.

Respondent
(Petitioner/Respondent)

And

Fisgard Capital Corp. and Liberty Holdings Excel Corp.

Appellants
(Respondents/Applicants)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

Oral Reasons for Judgment

G.J. Tucker A. Frydenlund	Counsel for the Appellants
H.M.B. Ferris P.J. Roberts	Counsel for the Respondent
M. Sennott	Counsel for Century Services Inc.
M.B. Paine	Counsel for the Monitor, The Bowra Group
Place and Date of Hearing:	Vancouver, British Columbia 12 August 2008
Place and Date of Judgment:	Vancouver, British Columbia 15 August 2008

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[1] **TYSOE, J.A.**: The appellants appeal from the order dated June 27, 2008, by which the chambers judge extended the stay of proceedings that was initially granted on May 26, 2008, until October 20, 2008, and authorized financing in the amount of $2,350,000.

[2] The proceeding was commenced by The Cliffs Over Maple Bay Investments Ltd. (the "Debtor Company") under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, (the "***CCAA***") after the appellants appointed a receiver on May 23, 2008. As is often the case for initial applications under the ***CCAA***, no notice was given to the appellants or any other of the Debtor Company's creditors of the application giving rise to the May 26 stay order. In accordance with section 11(3) of the ***CCAA***, the stay contained in the order was expressed to expire on June 25.

[3] The Debtor Company then made application for further relief at the hearing commonly called the comeback hearing. The Debtor Company requested an extension of the stay until October 20, 2008, and authorization for financing in the amount of $2,350,000. This financing, which, following upon American terminology, is commonly referred to as "debtor-in-possession" or "DIP" financing, was to be secured by a charge having priority over the security held by the appellants and all other secured and unsecured creditors. The appellants made a concurrent application requesting that the May 26 order be set aside and that an interim receiver be appointed pursuant to s. 47(1) of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3. The chambers judge granted the Debtor Company's application and dismissed the appellants' application.

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Background

[4] The business of the Debtor Company is the development of a 300 acre site near Duncan, British Columbia, consisting of single family lots and multi-residential units, a hotel and apartments and a golf course. The business plan was to build the golf course and to construct servicing for subdivided lots, which were to be sold to purchasers.

[5] The development of the non-golf course lands was to be carried out in five phases. Phase I consists of 70 single family lots and 60 multi-residential units. Its construction is 95% complete and 54 of the 70 single family lots have been sold and conveyed to the purchasers, with the sale proceeds being applied towards the Debtor Company's mortgage financing.

[6] Phase II consists of 76 single family lots and is 50% complete. Phase III consists of 69 single family lots, 112 multi-residential lots and 225 hotel units, and it is 5% complete. Phases IV and V consist of 131 single family lots and 60 multi-residential units, and each is 1% complete.

[7] The golf course, which is the focal point of the development, is approximately 60 to 70% complete. A restrictive covenant in favour of the District of North Cowichan stipulates that the golf course must be at least 80% complete before more than 200 lots can be sold.

[8] There are four mortgages registered against the development. The first two mortgages are not significant – the first mortgage secures an amount of $900,000

that is also secured by a cash collateral deposit, and the second mortgage secured a loan from Liberty Mortgage Services Ltd. that has not yet been discharged because there is a dispute between the Debtor Company and Liberty Mortgage Services Ltd. as to whether $85,000 of interest is still owing.

[9] The third mortgage is held by the appellants. It is in the principal sum of $19,500,000 and has an interest rate of 19.75% per annum. It matured on March 1, 2008, and its balance is approximately $21,160,000 as of June 15, 2008. The fourth mortgage is held by the appellant, Liberty Holdings Excell Corp., and The Canada Trust Company. It is in the principal sum of $7,650,000 and has an interest rate of 28% per annum. It matured on January 1, 2008, and its balance is approximately $8,800,000 as of June 15, 2008.

[10] In addition to the indebtedness secured by the mortgages, the Debtor Company has liabilities in the following approximate amounts:

$4,460,000 – trade creditors
1,700,000 – equipment leases
1,135,000 – loans from related parties
45,000 – unpaid source deductions
$7,340,000

[11] The Debtor Company was having some difficulties with respect to the development prior to March 2008 as a result of delays and substantial budget overruns. Ongoing construction on the development was limited. The main two mortgages had matured or were about to mature, and the Debtor was unsuccessful in its efforts to obtain refinancing. However, matters came to a head in March 2008

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when the Debtor Company learned that its anticipated water source for the irrigation of the golf course was problematic.

[12] It had been contemplated that the Debtor Company would obtain water for the golf course's irrigation from a joint utilities board consisting of representatives of the City of Duncan, the District of North Cowichan and the Cowichan First Nation. The joint utilities board had jurisdiction over reclaimed water from sewage lagoons located on the lands of the Cowichan First Nation. The joint utilities board was apparently prepared to provide water from the sewage lagoons for the irrigation of the golf course but it was unable to enter into an agreement with the Debtor Company because three members of the Cowichan First Nation had rights of possession over part of the sewage lagoons and were being advised by their consultant that they should not agree to an extension of the lease of the lagoons.

[13] The Debtor Company advised the mortgage lenders of the water problem, and the lenders reacted by serving the Debtor Company with notices of intention to enforce their security in April 2008. On May 23, 2008, the mortgage lenders appointed a receiver, which precipitated the commencement of the ***CCAA*** proceeding by the Debtor Company. On May 26, 2008, the chambers judge granted the Debtor Company's *ex parte* application under the ***CCAA*** and directed the holding of the comeback hearing after notice had been given to the Debtor Company's creditors. The Debtor Company applied for authorization of the DIP financing at the comeback hearing.

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[14] When the chambers judge granted the *ex parte* application on May 26, 2008, he appointed The Bowra Group Inc. as monitor pursuant to s. 11.7 of the ***CCAA*** (the "Monitor"). The first report of the Monitor dated June 16, 2008, was before the chambers judge at the comeback hearing. Based on two previous appraisals and discussions with the realtor having the listing for the development, the Monitor estimated the value of the development under the following three scenarios:

> (a) liquidation value with no source of water for irrigation - $10 million;
>
> (b) liquidation value with a source of water for irrigation - $28 million;
>
> (c) going concern value with completion of the development - $50 million.

The Monitor also reported that the realtor believes that if the development were to be completed, there would be sufficient sale proceeds to satisfy all obligations of the Debtor Company. The appellants took issue with the going concern valuation and submitted that the development should be re-appraised by an appraiser they consider to be trustworthy.

[15] In its report, the Monitor also recommended that the court authorize the DIP financing to enable it to pursue a water source for the irrigation of the golf course. The Monitor stated that it believes that the existing management of the Debtor Company will be unable to execute the restructuring in the absence of assistance and direction. The Monitor requested that it be given additional powers so that it could pursue the water source and to receive any offers for the purchase of all or part of the development, with the view that once a water source is secured, it would make further recommendations to the court with respect to the completion of the

development. The application of the Debtor Company at the comeback hearing included a request for the expansion of the Monitor's powers.

Decision of the Chambers Judge

[16] The appellants argued before the chambers judge, as they did on this appeal, that this matter should not be under the ***CCAA*** because the business of the Debtor Company is a single real estate development and the business was essentially dormant as at the date of the application. The chambers judge considered s. 11(6) of the ***CCAA***, which reads as follows:

> The court shall not make an order under subsection (3) or (4) unless
>
> (*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

The chambers judge concluded that the preconditions contained in s. 11(6) had been met. He did not state why he considered a stay order to be appropriate in the circumstances, although his reasons reflect that he understood the nature and state of the Debtor Company's business.

[17] The chambers judge considered various authorities in relation to the application for the DIP financing. After considering the benefits and prejudice of the DIP financing, the chambers judge concluded that it was appropriate to authorize it.

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[18] Finally, the chambers judge granted the expanded powers to the Monitor. This aspect of the order was not directly challenged on appeal, but it may be affected by the outcome on the first ground of appeal.

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Appraisal Evidence

[19] The affidavit of the principal of the Debtor Company filed at the time of the commencement of the ***CCAA*** proceeding exhibited the first 11 pages of two appraisals of portions of the development. As a result of the dispute between the parties over the value of the development, the Debtor Company applied for leave to file a supplemental appeal book containing complete copies of the appraisals. We tentatively received the supplemental appeal book subject to a subsequent ruling on the leave application.

[20] In view of my conclusion on this appeal, the value of the development is not relevant. I would decline to grant the requested leave.

Standard of Review

[21] Both aspects of the order challenged on appeal were discretionary in nature. The standard of review in respect of discretionary orders has been expressed in various ways. In ***Reza v. Canada***, [1994] 2 S.C.R. 394, 116 D.L.R. (4th) 61, the standard of review was expressed in terms of whether the judge at first instance "has given sufficient weight to all relevant circumstances" (¶ 20).

[22] In ***Friends of the Oldman River Society v. Canada (Minister of Transport)***, [1992] 1 S.C.R. 3 at 76-7, 88 D.L.R. (4th) 1, the Court quoted the

following statement in ***Charles Osenton & Co. v. Johnston***, [1942] A.C. 130 at 138 with approval:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

This passage was also referred to by this Court in a case involving the ***CCAA***, ***Re New Skeena Forest Products Inc.***, 2005 BCCA 192 at ¶ 20. Newbury J.A. also made reference in that paragraph to the principle that appellate courts should accord a high degree of deference to decisions made by chambers judges in ***CCAA*** matters and will not exercise their own discretion in place of that already exercised by the chambers judge. She also stated at ¶ 26 that appellate courts should not interfere with an exercise of discretion where "the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion."

[23] In my opinion, the comments of Newbury J.A. in ***New Skeena*** were directed at ongoing ***CCAA*** matters and do not necessarily apply to the granting and continuation of a stay of proceedings at the hearing of the initial *ex parte* application or the comeback hearing. However, in view of my conclusion on this appeal, I need

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not decide whether a different standard of review applies in respect of threshold decisions to grant or continue stays of proceedings in the early stages of ***CCAA*** proceedings.

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Analysis

[24] On this appeal, the appellants challenge the decision of the chambers judge to continue the stay of proceedings until October 20, 2008, on the same basis as they opposed the application before the chambers judge. They say that the ***CCAA*** should not apply to companies whose sole business is a single land development or to companies whose business is essentially dormant. However, the real question is not whether the ***CCAA*** applies to the Debtor Company because it falls within the definition of "debtor company" in s. 2 of the ***CCAA*** and it satisfies the criterion contained in s. 3(1) of the ***CCAA*** of having liabilities in excess of $5 million. The ***CCAA*** clearly applies to the Debtor Company, and it is entitled to propose an arrangement or compromise to its creditors pursuant to the ***CCAA***. The real question is whether a stay of proceedings should have been granted under s. 11 of the ***CCAA*** for the benefit of the Debtor Company.

[25] I agree with the submission on behalf of the Debtor Company that the nature and state of its business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay. If the more deferential standard of review is applicable to the granting and continuation of the stay of proceedings at the initial and comeback hearings, there would be insufficient basis to interfere with the decision of the chambers judge because he did

give weight to these factors. However, there is another, more fundamental, factor that was not considered by the chambers judge.

[26] In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the ***CCAA***, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the ***CCAA***'s fundamental purpose.

[27] The fundamental purpose of the ***CCAA*** is expressed in the long title of the statute:

> "An Act to facilitate compromises and arrangements between companies and their creditors".

[28] This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in ***Re United Used Auto & Truck Parts Ltd.***, 2000 BCCA 146, 16 C.B.R. (4th) 141. The first is ***A.G. Can. v. A.G. Que.***(*sub. nom.* ***Reference re Companies' Creditors Arrangement Act***), [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75, where the following was stated:

> . . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."

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> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

[29] The second decision is ***Hongkong Bank v. Chef Ready Foods*** (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315-16, where Gibbs J.A. said the following:

> The purpose of the *C.C.A.A.* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the *C.C.A.A.*, the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. ll.

[30] Sections 4 and 5 of the ***CCAA*** provide that the court may order meetings of creditors if a debtor company proposes a compromise or an arrangement between it and its unsecured or secured creditors or any class of them. Section 6 authorizes the court to sanction a compromise or arrangement if a majority in number representing two-thirds in value of each class of creditor has voted in favour of it, in which case the compromise or arrangement is binding on all of the creditors.

[31] The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see ***Re Fairview Industries Ltd.*** (1991), 109

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N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (S.C.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. The case of ***Re Ursel Investments Ltd.*** (1990), 2 C.B.R. 2 C.B.R. (3d) 260 (Sask. Q.B.), rev'd on a different point (1991), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under the ***CCAA*** because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors.

[32] Counsel for the Debtor Company has cited two decisions containing comments approving the use of the ***CCAA*** to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, ***Re Lehndorff General Partner Ltd.*** (1992), 17 C.B.R. (3d) 24 at ¶ 7(Ont. Ct. Jus. – Gen. Div.) and ***Re Anvil Range Mining Corp.*** (2001), 25 C.B.R. (4th) 1 at ¶ 11 (Ont. Sup. Ct. Jus.), aff'd (2002) 34 C.B.R. (4th) 157 at ¶ 32 (Ont. C.A.). I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the ***CCAA*** to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that

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the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

[33] Counsel for the Debtor Company also relies upon the decision in ***Re Skeena Cellulose Inc.*** (2001), 29 C.B.R. (4th) 157 (B.C.S.C.), where a creditor unsuccessfully opposed an extension of the stay of proceedings on the basis that the restructuring plan was wholly dependent upon the debtor company finding a purchaser of its assets. I note that the debtor company in that case was planning to make an arrangement with its creditors. I again query, without deciding, whether the court should continue the stay to allow the debtor company to attempt to fulfil a critical prerequisite to its plan of arrangement without requiring a vote by the creditors. I appreciate that it is frequently necessary for insolvent companies to satisfy certain prerequisites before negotiating a plan of arrangement with its creditors, but some prerequisites may be so fundamental that they should properly be regarded as an element of the debtor company's overall plan of arrangement.

[34] In the present case, the Debtor Company described its proposed restructuring plan in the following paragraphs of the petition commencing the ***CCAA*** proceeding:

> 47 The Petitioner intends to proceed with a three-part strategic restructuring plan consisting of:
>
> (a) securing sufficient funds to complete Phase 2 and 3;
>
> (b) securing access to water for the irrigation system of the golf course; and
>
> (c) finishing the construction of the golf course.
>
> 48. Upon completion of the matters described in the preceding paragraph, the Petitioner believes that proceeds generated from the sale of the remaining units in Phases 1 – 3, will be sufficient

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> to fund the balance of the costs that will be incurred in completing the remaining portions of the Development.

[35] It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or extended under s. 11 of the ***CCAA***. The chambers judge failed to take this important factor into account, and it is open for this Court to interfere with his exercise of discretion. To be fair to the chambers judge, I would point out that this factor was not drawn to his attention by counsel, and it was raised for the first time at the hearing of the appeal.

[36] Although the ***CCAA*** can apply to companies whose sole business is a single land development as long as the requirements set out in the ***CCAA*** are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue

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it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[37] The failure of the chambers judge to consider the fundamental purpose of the ***CCAA*** and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the ***CCAA*** should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.

[38] I wish to add that it was open, and continues to be open, to the Debtor Company to propose to its creditors an arrangement or compromise along the lines of the restructuring plan described in paragraph 47 of the petition, although it may be a challenge to make such a plan attractive to its creditors. The creditors could then vote on such an arrangement or compromise which would involve, on their part, the concession that their rights would remain frozen while the Debtor Company carried out its restructuring. What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The ***CCAA*** was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan

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that does not involve an arrangement or compromise upon which the creditors may vote.

Other Matters

[39] In addition to the appellants and the Debtor Company, two persons appeared at the hearing of the appeal without having obtained intervenor status. The first was the Monitor, which also filed a factum. Other than clarifying certain facts, the factum was limited to the issue of preserving the charge against the assets of the Debtor Company as security for the Monitor's fees and disbursements in the event that the appeal was allowed on the appellants' first ground. In my opinion, the Monitor should have obtained intervenor status if it wished to make submissions on appeal, but the issue became academic when counsel for the appellants advised that his clients did not object to the Monitor retaining the priority charge for its fees and disbursements up to the day on which the decision on appeal is pronounced.

[40] The second additional person appearing at the hearing of the appeal was Century Services Inc., which is the lender arranged by the Debtor Company to provide the DIP financing authorized by the chambers judge. Century Services Inc. wished to make submissions with respect to the priority charge for its financing, the first tranche of which was apparently advanced last week. After counsel for the appellants advised us that there were evidentiary matters subsequent to the decision of the chambers judge bearing on this issue, we declined to hear submissions on behalf of Century Services Inc. We did not have affidavits dealing with this matter, and the Supreme Court is better suited to deal with issues that may turn on the evidence.

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Disposition

[41] I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.

[42] **FRANKEL, J.A.**: I agree.

[43] **D. SMITH, J.A.**: I agree.

[44] **FRANKEL, J.A.**: The respondent's application to file a supplemental appeal book is dismissed. The appeal is allowed in the terms stated by Mr. Justice Tysoe.

"The Honourable Mr. Justice Tysoe"

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COURT OF APPEAL FOR ONTARIO

CITATION: Crystallex (Re), 2012 ONCA 404
DATE: 20120613
DOCKET: C55434 & C55435

2012 ONCA 404 (CanLII)

O'Connor A.C.J.O., Blair and Hoy JJ.A.

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

And in the Matter of a Plan of Compromise or Arrangement of Crystallex International Corporation

Richard B. Swan, S. Richard Orzy, Derek J. Bell and Emrys Davis, for the appellant Computershare Trust Company of Canada

Andrew J.F. Kent, Markus Koehnen and Jeffrey Levine, for the respondent Crystallex International Corporation

Barbara L. Grossman, for Tenor Capital Management Company, L.P. and Affiliates

Robert Frank, for Forbes & Manhattan Inc. and Aberdeen International Inc.

David Byers, for the Monitor Ernst & Young Inc.

Heard: May 11, 2012

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated January 20, 2012, with reasons reported at 2012 ONSC 538, and from the orders of Justice Frank J.C. Newbould of the Superior Court of Justice dated April 16, 2012, with reasons reported at 2012 ONSC 2125.

Hoy J.A.:

I. OVERVIEW

[1] The primary issue in these appeals is the scope of financing the supervising judge can or should approve, without the sanction of creditors, while

a company is under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

[2] The respondent Crystallex International Corporation ("Crystallex") is a Canadian mining company. Its principal asset was the right to develop Las Cristinas in Venezuela, which is one of the largest undeveloped gold deposits in the world. Crystallex obtained this right through a contract with the Corporacion Venezolana de Guayana (the "CVG"), a state-owned Venezuelan corporation. On February 3, 2011, after Crystallex spent over $500 million on developing Las Cristinas, the CVG sent Crystallex a letter to "unilaterally rescind" the contract for reasons of "expediency and convenience". There is no suggestion in these proceedings that the rescission was due to any mismanagement by Crystallex.

[3] As a result of the cancellation of the contract, Crystallex was unable to pay its $100 million in senior 9.375 per cent notes due December 23, 2011 (the "Notes"). It sought and, on December 23, 2011 obtained, protection under the CCAA.

[4] At present, Crystallex's only asset of significance is an arbitration claim for US $3.4 billion against the government of Venezuela in relation to the cancellation of the contract. The arbitration claim is the "pot of gold" in the CCAA proceeding.

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[5] The appellant Computershare Trust Company of Canada, in its capacity as Trustee for the holders of the Notes (the "Noteholders"), appeals, with leave, three orders made by the supervising judge in the CCAA proceeding: (i) the January 20, 2012 CCAA Bridge Financing Order (with reasons released January 25, 2012 and reported at 2012 ONSC 538 (the "Bridge Financing Reasons")) authorizing Crystallex to obtain bridge financing of $3.125 million (the "Bridge Loan") from the respondent Tenor Special Situations Fund, L.P. ("Tenor L.P."); (ii) the April 16, 2012 CCAA Financing Order authorizing Crystallex to obtain $36 million of what the supervising judge characterized as Debtor in Possession ("DIP") financing from Tenor Special Situation Fund I, LLC ("Tenor") (the "Tenor DIP Loan"); and (iii) the April 16, 2012 Management Incentive Plan Approval Order approving a Management Incentive Plan ("MIP") designed to ensure the retention of key executives until the arbitration is completed. The supervising judge's reasons for the CCAA Financing Order and Management Incentive Plan Approval Order are reported at 2012 ONSC 2125 (the "DIP Financing Reasons").

[6] Among other conditions, the Tenor DIP Loan, due December 31, 2016, entitles Tenor to 35 per cent of the net proceeds of the arbitration in addition to interest, provides governance rights that may continue after Crystallex exits from CCAA protection, and requires Tenor's approval to a range of options that might customarily be offered to unsecured creditors in seeking to negotiate a plan of compromise or arrangement.

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[7] Substantially all of the creditors opposed the approval of the Bridge Loan, the Tenor DIP Loan and the MIP. Crystallex represents that it hopes to negotiate a plan of arrangement or compromise with the Noteholders and other creditors before the current stay until July 30, 2012 expires.

[8] The bulk of the $36 million Tenor DIP Loan comprises financing to pursue the arbitration claim, which may continue after the period of CCAA protection.

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II. THE LEGISLATIVE FRAMEWORK

[9] The CCAA was amended effective September 18, 2009 to add the following provisions regarding the grant of a charge to secure financing required by the debtor:

> Interim financing
>
> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> ...
>
> Factors to be considered
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (a) the period during which the company is expected to be subject to proceedings under this Act;

> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.[1]

Prior to the enactment of these provisions, the court relied on its general authority under the CCAA to approve DIP financing: see Lloyd W. Houlden, Geoffey B. Morawetz & Janis P. Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2011), at p. 1175.

III. THE BACKGROUND

A. Events Prior to the CCAA Filings

[10] Crystallex has filed a Request for Arbitration pursuant to the Canada-Venezuela Bilateral Investment Treaty, claiming $3.4 billion plus interest for the loss of its investment in Las Cristinas. The hearing of the arbitration is scheduled for November 11, 2013.

[1] Paragraph 23(1)(b) provides that the monitor shall "review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings".

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[11] Crystallex's most significant liability is its debt to the Noteholders. In addition to amounts owed to the Noteholders, Crystallex has other liabilities of approximately CAD $1.2 million and approximately US $8 million.

[12] The current Noteholders are hedge funds, some of whom purchased Notes after Venezuela announced its intention to expropriate Las Cristinas at prices as low as 25 cents on the dollar.

[13] The relationship between Crystallex and the current Noteholders is hostile. Crystallex and the Noteholders have been in litigation since 2008. Prior to the maturity date of the Notes, the Noteholders twice, unsuccessfully, brought court proceedings against Crystallex alleging that an event had occurred which accelerated Crystallex's obligation to pay the Notes. Those proceedings were also heard by the supervising judge: see *Computershare Trust Co. of Canada v. Crystallex International Corp.* (2009), 65 B.L.R. (4th) 281 (S.C.), aff'd 2010 ONCA 364, 263 O.A.C. 137; and *Computershare v. Crystallex*, 2011 ONSC 5748.

B. Commencement of Proceedings under the CCAA and Chapter 15

[14] On December 22, 2011, one day prior to the maturity of the Notes, Crystallex and the Noteholders filed competing CCAA applications. The Noteholders' application contemplated that all existing common shares would be cancelled, an equity offering would be undertaken, and if, or to the extent, the

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equity proceeds were insufficient to pay out the Noteholders, the Notes would be converted to equity.

[15] Crystallex sought authority to file a plan of compromise and arrangement, the authority to continue to pursue the arbitration in Venezuela, and the authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise financing. In his supporting affidavit sworn December 22, 2011, Robert Fung, Crystallex's Chairman and Chief Executive Officer, indicated that Crystallex wished to have all claims stayed against it until the arbitration settled or Crystallex realized the arbitration award. Crystallex had already received an unsolicited offer of financing from Tenor Capital Management.

[16] It was (and is) expected that, if the arbitration is successful and the award is collected, there will be more than enough to pay the creditors and a significant amount will be available to shareholders.

[17] On December 23, 2011, the supervising judge made an order granting Crystallex's CCAA application (the "Initial Order"). In his reasons released December 28, 2011, he explained that the Noteholders' proposal was not a fair balancing of the interests of all stakeholders: *Re Crystallex International Corporation*, 2011 ONSC 7701, at para. 26. The Noteholders did not appeal the Initial Order.

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[18] Crystallex obtained an order under chapter 15 of the United States Bankruptcy Code from the United States Bankruptcy Court for the District of Delaware, among other things giving effect to the Initial Order in the United States as the main proceeding.

C. Crystallex Develops a DIP Auction Process

[19] Paragraph 12 of the Initial Order authorized Crystallex to pursue all avenues of interim financing or a refinancing of its business or property, subject to the requirements of the CCAA and court approval, to permit it to proceed with an orderly restructuring. It further provided:

> Without limiting the foregoing, the Applicant may conduct an auction to raise interim or DIP financing pursuant to procedures approved by the Monitor and using such professional assistance as the Applicant may determine with the consent of the Monitor. If such approved procedures are followed to the satisfaction of the Monitor then the best offer as determined by the Applicant pursuant to the approved procedures shall be afforded the protection of the *Soundair* principles so that it will be too late to make topping offers thereafter and such offers will not be considered by this Court.

[20] Crystallex hired an independent financial advisory firm, Skatoff & Company, LLC, and developed a set of procedures to govern the solicitation of bids to provide financing to Crystallex. The Monitor, Ernst & Young Inc., approved the bid procedures. The bid procedures indicated that Crystallex's objective was to obtain financing of not less than $35 million, net of costs, that, on completion of the CCAA and U.S. Chapter 15 reorganization proceedings,

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would roll into financing maturing not sooner than December 31, 2014. The bid deadline was February 1, 2012.

D. The Bridge Loan

[21] On January 20, 2012, the supervising judge considered competing proposals from Tenor L.P. and the Noteholders to provide bridge financing. Tenor L.P. offered $3.125 million with interest at 10 per cent per annum. The Noteholders offered $3 million with interest at 1 per cent per annum.

[22] The board of Crystallex, taking into account advice received from Mr. Skatoff, recommended the Tenor L.P. offer. Mr. Skatoff was concerned that the Noteholders' objective may have been to defeat the larger DIP financing process so that they could ultimately impose financing terms on Crystallex. It was also his view that Crystallex should avoid entering into an important financial relationship with a hostile party.

[23] The supervising judge approved Tenor L.P.'s offer.

E. The Noteholders Object to the DIP Auction Process

[24] On January 20, 2012, the Noteholders brought a cross-motion to modify the DIP auction process then underway, which they severely criticized. They objected to the amount sought, the term, and the lender back-end entitlement a successful DIP lender could acquire. In their view, Crystallex was inappropriately seeking financing in excess of amounts required until a compromise or plan of

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arrangement could be arrived at between Crystallex and its creditors. Given their existing position in Crystallex, the Noteholders also objected to being required to sign a non-disclosure agreement containing a standstill provision in order to be a qualified bidder.

[25] The supervising judge held that if the Noteholders wished to be considered as a qualified bidder, they would have to sign a non-disclosure agreement: Bridge Financing Reasons, at para. 27. As to their other concerns, he wrote, at para. 29:

> In my view these objections are premature and it is not necessary for me to consider their strength at this stage. The time for filing bids from qualified bidders has not yet expired and what bids will be received is unknown. It is when a successful bidder has been chosen and the DIP facility is before the court for approval that these issues raised by the Noteholders would be more appropriately dealt with. Until then, there is no factual foundation for judgment to be passed on the bid procedures for the DIP facility for which Crystallex will seek approval.

F. Competing DIP Financing Offers: The Tenor DIP Loan and the Noteholders' Offer

[26] The bidders who responded to the request for DIP financing included three hedge funds that hold approximately 77 per cent of the Notes and Tenor.

[27] Those hedgefund Noteholders proposed a loan of $10 million with a simple interest rate of 1 per cent repayable on October 15, 2012.

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[28] The supervising judge described Tenor's proposed terms in the DIP Financing Reasons:

> [23] The Tenor DIP facility contains the following material financial terms:
>
> (a) Tenor will advance $36 million to Crystallex due and payable on December 31, 2016. This period for the loan is based on Crystallex's arbitration counsel's assessment of the likely timing of a decision from the arbitral tribunal and collection of the award.
>
> (b) The advances will be in four tranches, being $9 million upon execution of the loan documentation and approval of the facility by court order in Ontario, the second being $12 million upon any appeal of the Ontario court order approving the facility being dismissed and upon a U.S court order approving the facility, the third being $10 million when Crystallex has less than $2.5 million in cash and the fourth being $5 million when Crystallex again has less than $2.5 million in cash.
>
> (c) The loans are to be used to (i) repay an interim bridge loan of $3.25 million advanced by Tenor with court approval of January 20, 2012 and payable on April 16, 2012, (ii) fees and expenses in connection with the facility, (iii) general corporate expenses of Crystallex including expenses of the restructuring proceedings and of the arbitration in accordance with cash flow statements and budgets of Crystallex approved by Tenor from time to time.
>
> (d) Crystallex will pay Tenor a $1 million commitment fee.

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(e) $35 million of the loan amount will bear PIK interest (payment in kind, meaning it is capitalized and payable only upon maturity of the loan or upon receipt of the proceeds of the arbitration) at the rate of 10% per annum compounded semi-annually.

(f) Tenor will receive additional compensation equal to 35% of the net proceeds of any arbitral award or settlement, conditional upon the second tranche of the loan being advanced. Net proceeds of the award or settlement is defined as the amount remaining after payment of principal and interest on the DIP loan, taxes and proven and allowed unsecured claims against Crystallex, including the noteholders, the latter of which will have a special charge for the unsecured amounts owing. Alternatively, Tenor can convert the right to additional compensation to 35% of the common shares of Crystallex. This conversion right is apparently driven by tax considerations.

[24] The Tenor DIP facility also provides for the governance of Crystallex to be changed to give Tenor a substantial say in the governance of Crystallex. More particularly:

(a) Crystallex shall have a reduced five person board of directors, being two current Crystallex directors, two nominees of Tenor and an independent director selected by agreement of Crystallex and Tenor.

(b) The independent director shall be chair of the board of directors and shall not have a second-casting or tie-breaking vote.

(c) The independent director shall be appointed a special managing director and shall have all the powers of the board of

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> directors to (i) the conduct of the reorganization proceedings in Canada and in the U.S. and the efforts of Crystallex to reorganize the pre-filing claims of the unsecured creditors, (ii) any matters relating to the rights of Crystallex and Tenor as against the other under the facility, (iii) the administration of the MIP to the extent not otherwise delegated to the bonus pool committee under the MIP, and (iv) to retain any advisor in respect of these matters. The special manager shall first consult with a non-board advisory panel, consisting of the three Crystallex directors who will step down from the board, and consider in good faith their recommendations.
>
> (d) With respect to matters that may not at law be delegable to the special managing director, he will be required to obtain board approval. If the Tenor nominees use their votes to block that approval, Tenor will forfeit its 35% additional compensation.

> [25] The Tenor DIP facility contains proscribed rights of Tenor in the event of default. Tenor may seize and sell assets other than the arbitration proceeding (i.e. any cash and unsold mining equipment). It may not sell the arbitration claim. If there is a default before any arbitration award, Tenor would have the right to apply to court to have the Monitor or a Canadian receiver and manager appointed to take control of the arbitration proceedings. If such application were not granted, Tenor would be entitled to exercise the rights and remedies of a secured creditor pursuant to an order, the loan documentation or otherwise at law.

[29] Mr. Skatoff recommended, and the board of Crystallex agreed, to accept the Tenor DIP Loan. Mr. Skatoff indicated, in an affidavit sworn March 20, 2012,

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that he had recommended that the board reject the Noteholders' offer of a $10 million loan for 6 months because Crystallex could not be assured that it could borrow the balance of the required funds at the expiry of that period on the same terms as the Tenor DIP Loan.

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G. The Noteholders' Further, Competing Offer to Allay Mr. Skatoff's Concerns

[30] In his affidavit on behalf of the Noteholders, sworn March 27, 2012, Mr. Mattoni responded to Mr. Skatoff's concern by committing that the Noteholders would be prepared to,

> … provide financing to Crystallex on the same terms as the [Tenor DIP Loan], in the event that prior to October 1, 2012, the Court orders that such long-term financing is appropriate and necessary. The Noteholders would reserve their complete and unfettered ability as creditors to continue to oppose stay extensions or attempts to secure such long-term financing outside of a Plan of compromise (including, specifically, financing to the extent contemplated by the Proposed Loan), but they will provide it if it is ordered by the Court on the same basis as currently proposed with Tenor...

H. The Noteholders' Proposed Plan

[31] Prior to the April 5, 2012 hearing, the Noteholders proposed a plan to indicate a good faith intention to bargain. They did not seek approval of this proposed plan at the April 5, 2012 hearing.

[32] The plan's terms included that the Noteholders would provide a $10 million loan on the terms described above; exchange their debt for approximately 58 per cent of the equity; provide $35 million to Crystallex in exchange for 22.9 per cent of the equity; and provide incentives to management at a lesser level than the MIP. Their proposed plan left approximately 14 per cent of the equity for the existing shareholders.

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I. The Management Incentive Plan

[33] The Noteholders had criticized the independent directors of Crystallex as not being sufficiently independent. As a result, the independent directors of Crystallex comprising the compensation committee retained Jay Swartz, a partner of Davies Phillips Vineberg, to determine, from the perspective of an independent director, what an appropriate MIP would be. He in turn retained an independent national executive compensation consulting firm to provide expert advice. Mr. Swartz opined that the overall compensation proposal for the establishment of the bonus pool for the benefit of Crystallex's management was reasonable in the circumstances. The independent directors of Crystallex comprising the compensation committee approved the MIP.

[34] At para. 102 of the DIP Financing Reasons, the supervising judge described the MIP:

> In sum, a pool of money, consisting of up to 10% of the net proceeds of the arbitration up to $700 million and

> 2% of any further net proceeds, after all costs and charges, including the amounts owing to noteholders, is to be set aside and money in this pool may be paid to the beneficiaries of the MIP, depending on the determination of an independent committee. The amounts to be allocated to participants by the compensation committee are discretionary and could be nil. No one will be entitled to any particular amount. Members of the compensation committee will not be eligible for any payments.

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[35] The MIP sets out a number of factors to be considered by the compensation committee in exercising its discretion. They include the amount and speed of recovery, the amount of time and energy expended by the individual, and the opportunity cost to the individual in staying with Crystallex.

[36] In the view of the Noteholders, the MIP is too generous. They proposed that management receive 5 per cent through an equity participation in any after tax award. They also took issue with the range of persons eligible under the MIP.

J. The April 5, 2012 motion

[37] On April 5, 2012, Crystallex sought orders approving, among other things, the Tenor DIP Loan and the MIP. The Noteholders as well as Forbes & Manhattan Inc. and Aberdeen International Inc., creditors owed approximately $2.5 million by Crystallex, opposed both the Tenor DIP Loan and the MIP. The one shareholder who attended opposed the MIP.

[38] The supervising judge approved the Tenor DIP Loan and the MIP.[2] He also extended the stay until July 30, 2012.

K. Events since April 5, 2012

[39] Tenor made the first, $9 million advance under the Tenor DIP Loan. The Bridge Loan was repaid out of the first advance.

[40] At the hearing of this appeal, the Monitor advised that Crystallex would require further funds before the anticipated release of this court's decision. Crystallex accepted Tenor's offer to advance a further $4 million to Crystallex, on the same terms as the first, $9 million tranche of the Tenor DIP Loan. Accordingly, this further advance does not entitle Tenor to participate in any arbitration proceeds, or trigger any change in the governance of Crystallex. If the Noteholders' appeal succeeds, the additional amounts advanced by Tenor are, like the first tranche, to be immediately repaid with interest at the rate of 1 per cent per annum, and the Noteholders shall fund the repayment. No commitment fee is payable in respect of this additional advance.

[2] The MIP was approved subject to an amendment (agreed to by Crystallex) to provide that the value of any stock options ultimately realized by participants of the MIP would be deducted from the amount of any bonus awarded under the MIP on a tax neutral basis.

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IV. THE SUPERVISING JUDGE'S REASONS

A. The Bridge Loan

[41] The supervising judge noted, at para. 5 of the Bridge Financing Reasons, that Tenor L.P.'s bridge financing proposal was "really short-term DIP financing". With respect to the boards' recommendation – based on Mr. Skatoff's advice – that Tenor L.P.'s proposal be approved, he wrote, at para. 12:

> This was a business judgment protected by the business judgment rule so long as it was a considered and informed judgment made honestly and in good faith with a view to the best interests of Crystallex. See *Re Stelco Inc*. (200[5]), 9 C.B.R. (5th) 135 (Ont. C.A.) regarding the rule and its application to CCAA proceedings. I see no grounds for concluding that the decision of Crystallex to prefer the Tenor bridge financing proposal is not protected by the business judgment rule or that I should not give it appropriate deference. [Citation corrected.]

[42] The supervising judge noted, at para. 13, that "the Monitor has no basis to say that the business judgment exercised by the Crystallex board of directors was unreasonable". The supervising judge accordingly approved the Bridge Loan.

[43] Mr. Skatoff expressed concern that the Noteholders' objective in offering bridge financing on such advantageous terms (interest at the rate of 1 per cent, as opposed to the 10 per cent in the Tenor L.P. offer) was to undermine the DIP auction process. The supervising judge observed, at para. 14:

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> Whether Mr. Skatoff is correct in his concerns, it seems to me that the relatively minor extra cost involving the Tenor proposed bridge financing for at most a few months must be weighed against the risk of harm to the longer-term DIP financing auction process, and that for the sake of that process, it is preferable not to run the risks that Mr. Skatoff is concerned about.

B. The Tenor DIP Loan

[44] The substance of the supervising judge's reasons for approving the Tenor DIP Loan – as set out in the DIP Financing Reasons – may be summarized as follows.

i. The exercise of business judgment by the board of directors of Crystallex in approving the Tenor DIP Loan is a factor that can be taken into account by the court in considering whether to make an order under s. 11.2(1) of the CCAA (at para. 35).

ii. The Tenor DIP Loan did not amount to a plan of arrangement or compromise. Notably, it did not take away the rights of the Noteholders as unsecured creditors to apply for a bankruptcy order or to vote on a plan of compromise or arrangement. A vote of the creditors was therefore not required (at para. 50). In coming to this conclusion, the supervising judge relied on *Re Calpine Canada Energy Limited*, 2007 ABQB 504, 415 A.R. 196, leave to appeal refused, 2007 ABCA 266, 417 A.R. 25.

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iii. Crystallex intended to negotiate a plan of compromise or arrangement with the Noteholders during the stay extension until July 30, 2012 (paras. 48, 126). The Tenor DIP Loan is therefore distinguishable from the financing rejected by the court in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577, because in that case the debtor did not have an intention to propose an arrangement or compromise to its creditors.

iv. Because the Tenor DIP Loan involves the grant of a financial interest in part of the assets of Crystallex, it is appropriate to consider the *Soundair* factors in deciding whether to approve it (at para. 59). Crystallex conducted a robust competitive bidding process (at para. 39).

v. Mr. Skatoff's evidence was that the Noteholders' proposed six month facility "would seriously erode the chances of Crystallex obtaining third party financing in October" (at para. 90). Counsel for Computershare had said during argument on the motion that the Noteholders "were not prepared to agree to such a $35 million facility at this time but only at some future time as the $10 million facility they now proposed became due" (at para. 27). While it would have been preferable if the Noteholders had been willing to lend on the basis of the terms of the Tenor DIP facility, "it was made clear during argument that the noteholders were not prepared at this time to do so" (at para. 91).

vi. As to the enumerated factors in s. 11.2(4):

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(a) Given that Crystallex intends, if possible, to negotiate an acceptable plan of arrangement or compromise, the length of time during which Crystallex is expected to be subject to the CCAA proceedings is not a determinative factor. The financing will be required to pursue the arbitration (at para. 62) and, as the supervising judge noted, “the only way any of the creditors will receive any substantial cash payment is from the proceeds of the arbitration” (at para. 47);

(b) The management of the business and affairs of Crystallex “are a reasonable compromise between Crystallex and Tenor designed to protect the interests of the stakeholders, including the noteholders” (at para. 73). The fact that Tenor is given substantial governance rights does not in itself mean that the DIP Tenor Loan should not be approved. Tenor does not have the right to conduct the reorganization proceedings or the arbitration proceeding. Moreover, under s. 11.5(1) of the CCAA, the court may remove a director whom it is satisfied is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made. Arguably, a court could remove a Tenor nominee under this section without triggering an event of default under the Tenor DIP Loan (at paras. 63-71);

(c) While the Noteholders expressed “extreme displeasure” at Crystallex’s management’s delay in commencing arbitration proceedings,

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they do not oppose management having a continuing role in the arbitration (at para. 72);

(d) The Noteholders' argument that the terms of the Tenor DIP Loan – in particular, the fact that the refusal of the court to grant a stay or a bankruptcy are events of default, the grant of a 35 per cent interest in the arbitration proceeds, and the limits on the type of restructuring that can be concluded without the approval of Tenor – will effectively prevent any plan of arrangement was rejected (at paras. 74-82). While, as the Monitor points out, the introduction of a third party, Tenor, with consent rights to certain actions will add complexity to the negotiation of a CCAA plan (at para. 93), the Tenor DIP Loan would enhance the prospects of a viable compromise or arrangement (at para. 83):

> ... Crystallex requires additional financing to pay its expenses and continue the arbitration. A DIP loan allows the company to have the arbitration financed, which if it were not at this stage would impair the arbitration and perhaps the attitude of Venezuela towards the arbitration claim, and as such enhances the viability of a CCAA plan. I have not accepted the argument of the noteholders that the loan would prevent a plan of arrangement.

(e) The supervising judge noted that Crystallex's principal asset is its US $3.4 billion arbitration claim against Venezuela (at para. 12); and

(f) In considering the Noteholders' complaints of prejudice in the context of what the market is demanding for a DIP loan and in all the circumstances,

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the creditors have not been materially prejudiced by the Tenor DIP Loan (at para. 84).

C. The Management Incentive Plan

[45] The supervising judge considered the Noteholders' objections to the quantum and method for providing an incentive to management, the inclusion of certain persons in the MIP, and the approval of the MIP before the negotiation of a plan.

[46] In the DIP Financing Reasons, the supervising judge observed, at para. 109, that whether employee retention provisions should be ordered in a CCAA proceeding was a matter of discretion. He noted that the provisions of the MIP had been approved by an independent committee of the board of directors with impressive qualifications, relying on the opinion of Mr. Swartz. In providing that opinion, Mr. Swartz indicated that the absolute amount of the bonus pool could be very substantial and, in allocating it, the compensation committee "may have to carefully consider the absolute amounts to be paid to each member of the Management Group in order to satisfy its fiduciary duties": see DIP Financing Reasons, at para. 108. The supervising judge also noted that Mr. Swartz had retained an independent national executive compensation consulting firm to provide expert advice.

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[47] Citing *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.) and *Timminco Ltd. (Re)*, 2012 ONSC 948, the supervising judge wrote, at para. 112 of the DIP Financing Reasons, "I see no reason why the business judgment rule is not applicable, particularly when the provisions of the MIP have been approved by an independent committee of the board." He further noted, at para. 115, what appears to be the practice of approving employee retention plans before any plan has been negotiated and, at para.105, that the Tenor DIP Loan was conditional on the approval of a MIP acceptable to Crystallex and Tenor.

[48] As to who should be eligible to participate in the MIP, at para. 117, the supervising judge noted that the independent committee had exercised its business judgment on the matter and that the participants were known to Mr. Swartz . Having reviewed the evidence, the supervising judge could not "say that any of the persons included in the MIP should not be there".

V. THE PARTIES' SUBMISSIONS

A. The Noteholders' Submissions

[49] The Noteholders frame their opposition to the Tenor DIP Loan on a number of bases.

[50] They argue that s. 11.2, titled "Interim financing", only permits a supervising judge to approve financing to meet the debtor's needs while it is developing a plan to present to its creditors.

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[51] The Noteholders also argue that the supervising judge's finding that the Tenor DIP Loan would enhance the prospects of a viable compromise or arrangement was unreasonable because it resulted from an error of principle, namely an improper focus on the fact that it provided financing for the arbitration.

[52] The Noteholders submit that the supervising judge misapprehended the evidence in finding that the Noteholders were not willing to match the Tenor DIP Loan, and this error affected the outcome of the motion.

[53] They argue that the supervising judge erred in deferring to the business judgment of the directors of Crystallex in approving both the Bridge Loan and the Tenor DIP Loan. They argue that directors always make a recommendation and, if Parliament had thought this was a relevant factor, it would have specifically enumerated it in s. 11.2(4) of the CCAA.

[54] They argue that the supervising judge erred in principle in focusing on what was the most expedient way to fund the arbitration (as opposed to Crystallex's needs while negotiating a plan with the Noteholders) and, in doing so, committed the same error as the motion judge in *Cliffs Over Maple Bay*.

[55] The Noteholders' position is that the Tenor DIP Loan is effectively an arrangement, in the guise of a financing, and Crystallex is misusing the CCAA to impose a restructuring without the requisite creditor approval.

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[56] The Noteholders submit that this court should order Crystallex to accept the Noteholders' "matching" DIP loan offer.

[57] They also renew their objections to the MIP.

B. Crystallex's Submissions

[58] Crystallex argues that the Noteholders' appeal with respect to the Bridge Loan is moot because the loan has been advanced, spent and repaid.

[59] As to the Tenor DIP Loan, it argues that approving it was within the discretion of the supervising judge, the supervising judge exercised his discretion on a wide variety of findings of fact, capable of evidentiary support in the record, and there is no basis for this court to intervene. It relies on *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which recently addressed the broad discretionary jurisdiction of a supervising judge under the CCAA. Crystallex also points to *Air Canada (Re)* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.), as an instance where exit financing was approved before a plan had been approved by creditors.

C. Tenor's Submissions

[60] Tenor argues that "interim financing" in the heading to s. 11.2 of the CCAA does not mean "short term", but rather refers to the interval between two points or events, and s. 11.2 does not contain anything that would fetter the discretion of the supervising judge to select an "end point" beyond the expected conclusion

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of a plan. It argues that the duration of the Tenor DIP Loan is tailored to Crystallex's unique circumstance: all stakeholders acknowledge that the arbitration must be pursued in order for there to be meaningful recovery. In any event, it argues, marginal notes, such as the heading "interim financing" in s. 11.2, are not part of the statute, and their value is limited when a court must address a serious problem of statutory interpretation, citing the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 14, and *Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada*, 2006 SCC 46, [2006] 2 S.C.R. 447, at para. 57.

[61] Moreover, Tenor submits, the supervising judge was in the best position to perform the careful balancing of interests required to facilitate a successful restructuring.

VI. ANALYSIS

A. The Appeal from the Bridge Financing Order

[62] The Noteholders did not strongly pursue their appeal of the Bridge Financing Order. The relief sought at the conclusion of the hearing related to the Tenor DIP Loan and not the Bridge Loan. The Bridge Loan was disbursed, spent and repaid. I agree with the respondents that the Noteholders' appeal with respect to the Bridge Loan is moot. I will therefore confine my analysis to the Tenor DIP Loan and the MIP.

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B. The Appeal from the Tenor DIP Financing Order

(1) *Century Services Inc. v. Canada (Attorney General)*

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[63] The Supreme Court of Canada had occasion to interpret the CCAA for the first time in *Century Services*. It used that opportunity to make clear that the CCAA gives the courts broad discretionary powers. Those powers must, however, be exercised in furtherance of the CCAA's purposes: para. 59. Section 11, in particular, was drafted in broad language which provides that a supervising judge "may, subject to the restrictions set out in this Act … make any order that it considers appropriate in the circumstances".[3] For the majority in *Century Services*, Deschamps J. wrote:

> [69] The *CCAA* also explicitly provides for certain orders…
>
> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* – avoiding the social and economic losses resulting from liquidation of an

[3] The full text of section 11 is as follows:

> 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.

> insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

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[64] It is with the Supreme Court's interpretation of the scope of judicial discretion under the CCAA in mind that I turn to s. 11.2 and the question of whether it permits a supervising judge to approve financing that may continue for a significant period after CCAA protection ends, without the approval of creditors.

(2) Section 11.2 of the CCAA

[65] Section 11.2 is headed "Interim Financing". Headings may be used as an aid in interpreting the meaning of a statute: R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008), at p. 394, "Interim" generally means temporary or provisional: *Canadian Oxford Dictionary*, 2d ed. The weight to be given to a heading depends on the circumstances.

[66] I agree with the Noteholders that s. 11.2 contemplates the grant of a charge, the primary purpose of which is to secure financing required by the debtor while it is expected to be subject to proceedings under the CCAA. A further purpose, however, is to enhance the prospects of a plan of compromise or arrangement that will lead to a continuation of the company, albeit in restructured form, after plan approval.

[67] Section 11.2(4)(a) directs the court to consider the period during which the debtor is expected to be subject to proceedings under the CCAA. It stops short of confining the financing to the period that the debtor is subject to the CCAA. Section 11.2(4)(d) directs the court to consider if the financing would enhance the prospects of a viable compromise or arrangement.

[68] Having regard to the broad remedial purpose of the CCAA and the broad residual authority of a supervising judge described in *Century Services*, in my view section 11.2 does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection. Indeed, although in very different circumstances, financing to be available on the debtor's emergence from CCAA protection (sometimes called "exit financing") was approved before a plan was approved in *Air Canada*.[4] Both *Century Services* and section 11.2, however, in my view, signal that it would be unusual for a court to approve exit financing where opposed by substantially all of the creditors. Exit or post-plan financing is often a key element, or a pre-requisite, of the plan voted on by creditors.

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[4] In *Air Canada,* Farley J. approved a "global restructuring agreement" which included a commitment of an existing creditor to provide exit financing of approximately US $585 million on the company's emergence from CCAA. DIP financing was in place; the financing at issue was clearly recognized as exit financing. The restructuring agreement was not opposed by substantially all of the creditors. Nor was it argued that it adversely affected the ability of the creditors and the debtor to negotiate a compromise or arrangement.

[69] The question becomes whether the unique facts of this case permitted the supervising judge to approve "interim financing" that was of such duration and structure that it could well outlast the CCAA protection period. This court should not substitute its decision for that of the supervising judge. I must ask this question through the lens of the applicable standard of review.

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(3) Standard of review

[70] Appellate review of a discretionary order under the CCAA is limited. Intervention is justified only for an error in principle or the unreasonable exercise of discretion: *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (C.A.), at para. 71. An appellate court should not interfere with an exercise of discretion "where the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion": *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 26.

(4) The supervising judge did not err in principle or unreasonably exercise his discretion

[71] As detailed below, I conclude that there is no basis for interfering with the supervising judge's exercise of discretion in approving the Tenor DIP Loan.

[72] Most significantly, in this case, the supervising judge found there could be no meaningful recovery, and therefore no successful restructuring, without the

financing of the arbitration. Although the Noteholders characterized the Tenor DIP Loan as “exit financing”, it furthered the remedial purpose of the CCAA. To that extent, it is appropriate in the first sense used by Deschamps J. in *Century Services*, even though it may well outlast the period of CCAA protection. The supervising judge’s focus on the fact that the Tenor DIP Loan provided financing for the arbitration was not, in the circumstances, an error of principle.

[73] In my view, the Noteholders’ real argument is that the *means* by which the Tenor DIP Loan was approved were not appropriate. Ideally, a CCAA supervising judge is able to assist creditors and debtors in coming to a compromise. The creditors and Crystallex have not “achieved common ground” on a very significant matter. Effectively, the Noteholders argue that the creditors have not been treated as advantageously and fairly as the circumstances permit. They are the senior creditors and their offer to provide DIP financing on terms they argue matched those of the Tenor DIP Loan was not accepted. With sufficient financing in place to fund the arbitration, their leverage in negotiating a share of the arbitration proceeds has been reduced. Moreover, the Noteholders argue, the supervising judge erred in applying the business judgment rule, and, contrary to *Cliffs Over Maple Bay*, involuntarily stayed their rights during what they characterize as a restructuring. I consider each of these arguments below.

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a. The Noteholders' competing DIP loan offer

[74] The Noteholders point to their affidavit on the April motion indicating they would submit to an order to advance funds on the same terms as the Tenor DIP Loan "in the event that prior to October 1, 2012, the Court orders that such long-term financing is appropriate and necessary". The supervising judge wrote that it would have been a preferable outcome if the Noteholders had been prepared to lend at the time of the April motion on the terms of the Tenor DIP facility: DIP Financing Reasons, at para. 91. The Noteholders argue that: they were prepared to advance funds on the terms of the Tenor DIP Loan, if so ordered; the supervising judge misapprehended the evidence; and, given the supervising judge's comment that it would have been preferable if the Noteholders had been prepared to lend, that misapprehension affected the outcome of the motion.

[75] The supervising judge's comment at para. 91 of the DIP Financing Reasons makes his real concern clear. There, he stated that "at this time" the Noteholders were not prepared to lend on the terms of the Tenor DIP Loan. The Noteholders' view as of April 5, 2012 was that such long-term financing was not necessary, as the $10 million they offered to advance at that time met Crystallex's then cash requirements. The Noteholders reserved their rights to continue to oppose the approval of long term financing before they had come to an agreement with Crystallex about their entitlement, as creditors. Further hearings, and further arguments, were required. The supervising judge found, at

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para. 83 of the DIP Financing Reasons, that not putting sufficient financing in place to finance the arbitration "at this stage" would impair the arbitration. There was no suggestion from counsel for the Noteholders that on April 5, 2012 the Noteholders were prepared to waive the condition permitting them to continue to oppose the approval of long term financing. I am not satisfied that the supervising judge clearly misapprehended the evidence.

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b. Loss of leverage

[76] In Crystallex's view, a reduction of the Noteholders' leverage was desirable. It points to the Noteholders' competing CCAA application, seeking to cancel all of the shareholders' equity, which the supervising judge rejected as not fairly balancing the interests of all stakeholders. The Noteholders' plan, subsequently proposed, would entitle them to 46 per cent of the equity in return for giving up their Notes, which Crystallex also views as excessive.[5]

[77] Crystallex argues that the Noteholders are not contractually entitled to convert their Notes to equity, and should therefore not be entitled to do so. Moreover, they argue, in the event of bankruptcy, the Noteholders would only be entitled to recover their principal and interest at the statutory rate of 5 per cent under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and, if the

[5] The Noteholders proposed that they receive 22.9 per cent of the equity for the $36 million needed for the arbitration and 58 per cent of the equity in return for giving up their Notes, for a total of approximately 81 per cent of the equity. Assuming that the Noteholders sought a maximum total entitlement of 81 per cent, if they advanced the $36 million on the terms of the Tenor DIP Loan, as they now seek to do, the amount of equity on conversion of their notes would be 46 per cent. See the DIP Financing Reasons, at para. 77.

arbitration is realized, they will be entitled to the higher rate of interest they are contractually entitled to under the Notes. As Deschamps J. noted at para. 77 of *Century Services*, participants in a reorganization "measure the impact of a reorganization against the position they would enjoy in liquidation".

[78] The Noteholders counter that, contractually, they were entitled to be repaid on December 23, 2011 and, since they were not, and Crystallex proposes to defer repayment for several years and repay the Notes only if the arbitration is successful, the long delay entitles them to some equity participation. Moreover, contractually, Crystallex is restricted from incurring the Tenor DIP Loan, which will be senior to the Notes.

[79] Crystallex points to the terms of the Initial Order, affording the "best offer" the protection of the *Soundair* principles, and providing that "topping offers" would not be considered by the court. Crystallex points out that the Noteholders did not appeal the Initial Order and argues that accepting the Noteholders' matching offer would offend the *Soundair* principles. In Crystallex's view, the Noteholders were treated fairly.

[80] In turn, the Noteholders argue that the Initial Order authorized Crystallex to conduct an auction to raise *interim or DIP financing* pursuant to procedures approved by the Monitor. Since the outset, the Noteholders maintained their objection that the auction process sought more than interim or true DIP financing.

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The supervising judge deferred consideration of their objections until the DIP facility was before the court for approval.

[81] The Noteholders are sophisticated parties. They pursued a strategy. It ultimately proved less successful than hoped. It appears that the supervising judge would have been prepared to approve the advance of funds to Crystallex by the Noteholders, on the terms of the Tenor DIP Loan, notwithstanding the *Soundair* principles, had the Noteholders agreed to do so, without condition, on April 5, 2012.

[82] The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

c. The business judgment rule

[83] The supervising judge held that in addition to the factors in s. 11.2(4) of the CCAA, he could take into account the exercise or lack thereof of business judgment by the board of directors of a debtor corporation in considering DIP

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financing: DIP Financing Reasons, at paras. 32-35. He cited *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), as authority for this proposition.[6]

[84] The fact that a debtor's board of directors recommends interim financing is not a determinative factor, and in some cases may not be a material factor, in considering whether to make an order under s. 11.2. It would be unusual if the board did not recommend the financing for which the debtor seeks approval.

[85] *Stelco* should not be read as authority for the principle that the recommendation of the directors of a debtor under CCAA protection is entitled to deference in evaluating whether financing should be approved under s. 11.2 of the CCAA where the factors outlined in s. 11.2(4) have not been complied with. In *Stelco,* the debtor did not seek court approval of a recommendation of the board. In the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). It may consider, but not defer to, and is not fettered by, the recommendation of the board.

[86] The weight given by the supervising judge to the business judgment of the board of directors of Crystallex in recommending the Tenor DIP Loan is not, however, a basis for this court to interfere with his decision: *New Skeena Forest Products*, at para. 26.

[6] An incorrect citation for *Stelco* was given in the DIP Financing Reasons, at para. 33.

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d. *Cliffs Over Maple Bay* is distinguishable

[87] In *Cliffs Over Maple Bay*, the debtor was the developer of a 300 acre site intended to include residential units, a golf course and a hotel. The debtor obtained protection under the CCAA and sought approval of financing that would permit it to complete material parts of the development. It believed that the proceeds generated from the sale of units thus completed would be sufficient to fund the remaining portions of the development and that, if the development were completed, there would be sufficient sale proceeds to satisfy all of the debtor's obligations.

[88] The motion judge approved the financing; the mortgagees of the development appealed. The British Columbia Court of Appeal noted, at para. 35, that it was not suggested that the debtor intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. The court allowed the appeal, writing:

> [37] … DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors ...
>
> [38] ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a

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> restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[89] I agree with the supervising judge that this case can be distinguished from *Cliffs Over Maple Bay*, which turned on the court's finding that the debtor did not intend to negotiate a plan with its creditors.

[90] While Mr. Fung initially indicated that Crystallex's plan was to stay creditors' claims until the arbitration was settled or realized, his more recent evidence was that approval of the Tenor DIP Loan does not preclude further discussions about a plan with the creditors. In submissions before the supervising judge, and again before this court, counsel for Crystallex reiterated that Crystallex intended to exit from CCAA protection as soon as a plan was negotiated with the creditors and approved, and that Crystallex intended to negotiate a plan by the expiry of the stay on July 30, 2012. The supervising judge found that Crystallex intended to negotiate a plan with its creditors. There is some basis in the record for such a conclusion.

(5) The Tenor DIP Loan is not an arrangement

[91] An arrangement or compromise cannot be imposed on creditors unless it has been approved by a majority in number representing two thirds in value of the creditors: see s. 6(1) of the CCAA.

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[92] The supervising judge rejected the argument that the Tenor DIP Loan was a plan of arrangement or compromise and therefore required the approval of the creditors. He held, at para. 50 of the DIP Financing Reasons:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

[93] I agree. While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. In this case it was within the discretion of the supervising judge to approve the Tenor DIP Loan.

C. The Appeal from the Management Incentive Plan Approval Order

[94] In my view, the supervising judge did not err in principle or unreasonably exercise his discretion in approving the MIP. I see no basis for this court to intervene.

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[95] As the supervising judge noted, employee retention provisions are frequently authorized before a plan is negotiated. The supervising judge was alive to the exceptionally large amounts that might be paid to beneficiaries of the MIP (including Mr. Fung) in this case. The supervising judge took specific note of the issues that the Noteholders had raised in the past regarding the extent to which the independent committee of the board that recommended the MIP was truly independent, and the steps taken by that committee to address those concerns.

[96] The recommendation of an independent committee of the board that has obtained expert advice is entitled to more weight in the consideration of a MIP than is the recommendation of the board in the consideration of whether financing should be approved under s. 11.2 of the CCAA. The CCAA does not list specific factors to be considered by the court in the case of a MIP. Moreover, the board would have the best sense of which employees were essential to the success of its restructuring efforts.

[97] In addition to considering the recommendation of the independent committee of the board and Mr. Swartz, the supervising judge also reviewed the evidence to consider whether any persons had been included in the MIP who should not have been. He did not rely solely on the board's recommendation.

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VII. DISPOSITION

[98] Accordingly, I would dismiss the appeals of the CCAA Bridge Financing Order, the CCAA Financing Order, and the Management Incentive Plan Approval Order.

VIII. COSTS

[99] If the parties cannot agree, I would order that Crystallex and Tenor provide their submissions on the issue of costs within 14 days, and that the Noteholders, if so advised, provide their submissions in response within 10 days thereafter. No reply submissions are to be provided without leave.

Released: June 13, 2012
"DOC"

"Alexandra Hoy J.A."
"I agree D. O'Connor A.C.J.O."
"I agree R.A. Blair J.A."

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Dhillon v. Pannu,***
2008 BCCA 514

Date: 20081211
Docket: CA035747

Between:

Satinder Paul Singh Dhillon

Appellant
(Plaintiff)

And

**Corey Pannu also known as Chamkaur Singh Pannu and
635160 B.C. Ltd. and Balbir Kaur Pannu and
Ron Dulle and Re/Max Little Oak Realty Ltd. and
Bharat Panchal and Sutton Group-Medallion Realty**

Respondents
(Defendants)

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

M. D. Tatchell	Counsel for the Appellant
F. M. Beveridge	Counsel for the Respondents, Corey Pannu, Balbir Kaur Pannu and 635160 B.C. Ltd.
J. A. Clee	Counsel for the Respondents, Ron Dulle and Re/Max Little Oak Realty Ltd.
K. A. Murray	Counsel for the Respondents, Bharat Panchal and Sutton Group-Medallion Realty
Place and Date of Hearing:	Vancouver, British Columbia November 14, 2008
Place and Date of Judgment:	Vancouver, British Columbia December 11, 2008

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Groberman

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Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] The appellant, Mr. Dhillon, who was the plaintiff in the underlying action S104801, appeals from the order of the chambers judge dated December 19, 2007 dismissing his action for his failure to comply with an order made by the chambers judge on November 6, 2007.

[2] The plaintiff maintains that the chambers judge erred in the exercise of his discretion by failing to consider sanctions that were proportionate to the non-compliance and by making an order that was draconian in the circumstances.

[3] It is my conclusion, for the following reasons, that the plaintiff has not demonstrated an error on the part of the chambers judge or that the order was so clearly wrong as to amount to an injustice. Accordingly, it is my view that the appeal should be dismissed.

Background

[4] The plaintiff commenced the underlying action on March 28, 2007. On the same day, he registered a certificate of pending litigation in the Land Title Office against a piece of property located in Surrey, British Columbia. He commenced the action on his own behalf but had the assistance of a lawyer in preparing the necessary documents. The plaintiff attached a statement of claim to the certificate of pending litigation but did not file a statement of claim with the court registry when he commenced the action.

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[5] In the action, the plaintiff alleged that in February 2000 he had lent $150,000 on the security of a second mortgage against the Surrey property, which was in foreclosure at the time of the loan. The property was subsequently sold to the defendant, 635160 B.C. Ltd. (the officers of which are the defendants, Mr. Pannu and Mrs. Pannu), by way of a court approved sale in the foreclosure proceeding in February 2002. The sale price was apparently insufficient to repay any of the plaintiff's loan. The plaintiff claimed that Corey Pannu, Balbir Kaur Pannu and 635160 B.C. Ltd. (the "Pannu defendants") conspired with the other defendants, who were the realtors involved in the sale, and that all of the defendants were negligent. He requested relief in the form of a constructive trust over the property.

[6] The Pannu defendants responded quickly to the lawsuit. On or about April 13, 2007, they served interrogatories on the plaintiff, who responded by affidavit sworn May 14, 2007. In answer to some of the interrogatories, the plaintiff attached letters he had written. One of those letters requested documents from the lawyer who had acted on his behalf in placing the mortgage, and another of the letters was to the credit union that apparently supplied the bank draft for the funds advanced under the mortgage.

[7] In May 2007, the Pannu defendants filed and served documents for two applications – one to have the certificate of pending litigation removed from the title to the Surrey property, and the other for the dismissal of the action, pursuant to Rules 18, 18A and 19 of the *Rules of Court* or, alternatively, for an order for security for costs. On June 1, 2007, Madam Justice Brown set the hearings of the first and second applications for June 4 and 11, respectively.

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[8] On June 4, Mr. Justice Burnyeat ordered the removal of the certificate of pending litigation on certain conditions.

[9] On June 11, the second application came on for hearing before Mr. Justice Groves. At the hearing, it became apparent that a statement of claim had not been filed in the court registry, and the plaintiff indicated that he wished to make changes to the form of statement of claim attached to the certificate of pending litigation. Mr. Justice Groves decided to adjourn the application and to make a number of directions "to move this litigation on".

[10] Mr. Justice Groves adjourned both aspects of the application generally but with leave to the Pannu defendants to reinitiate them once the examinations for discovery of the plaintiff and the Pannu defendants were complete. The directions given by Mr. Justice Groves included the following:

> 4. The Plaintiff shall file his Statement of Claim on or before June 20, 2007.
>
> 5. The Plaintiff shall serve the Statement of Claim on all Defendants on or before July 5, 2007.
>
> 6. The Plaintiff and [the Pannu defendants] shall exchange Lists of Documents on or before July 10, 2007.
>
> 7. The Examinations for Discovery of the Plaintiff and [the Pannu defendants] are to take place at an agreed time prior to September 30, 2007.

[11] The plaintiff filed the statement of claim on June 18 and served it on the defendants. In early July, counsel for the Pannu defendants sent to the plaintiff their

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filed statement of defence, a list of documents and an affidavit of Mr. Pannu responding to interrogatories the plaintiff had served on June 1.

[12] On July 10, the plaintiff e-mailed an unsigned list of documents to counsel for the Pannu defendants. On July 12, counsel for the Pannu defendants wrote to the plaintiff requesting a signed copy of his list of documents and photocopies of specified documents on the list. Counsel for the Pannu defendants also noted the plaintiff's list of documents appeared deficient because it did not list audiotapes to which the plaintiff had referred during the court hearings and it did not include the volume of documents that appeared to be contained in boxes of documents the plaintiff had brought to the court hearings and stated were relevant to his claim. Counsel requested a supplemental list of documents listing the remaining documents and the audiotapes. The plaintiff did not respond to these requests despite the fact that they were repeated in letters from counsel for the Pannu defendants dated July 25, August 10 and August 31.

[13] The order of Mr. Justice Groves directed that the examinations for discovery of the plaintiff and the Pannu defendants take place before September 30. Even though the plaintiff had not complied with the requests regarding document disclosure, counsel for the Pannu defendants scheduled the examination for discovery of the plaintiff for September 12. The plaintiff arrived at his examination for discovery with three other persons who were not lawyers, and the examination for discovery did not proceed because the plaintiff declined to answer any questions unless the three people who had accompanied him were in the room. The plaintiff took no steps to arrange for an examination for discovery of the Pannu defendants.

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[14] On September 27, counsel for the Pannu defendants served the plaintiff with a notice of motion requesting that the action be dismissed as against the Pannu defendants. In the alternative, the notice of motion requested various orders regarding document disclosure and production by the plaintiff and the examination for discovery of the plaintiff. The plaintiff was served with a notice of hearing dated October 15. The application came on for hearing on November 6 before the chambers judge who subsequently made the December 19 order dismissing the action.

[15] The plaintiff was casual in his approach to the application. He made no attempt to comply with the requests made by counsel for the Pannu defendants, and he did not file an affidavit in opposition to the application. He attended at the hearing and requested an adjournment on the bases that he was not prepared to argue the matter and that he wanted to be at a hearing in another courthouse on a matter to which he was not a party. The chambers judge told the plaintiff that he did not have his priorities straight, and he refused the request for the adjournment.

[16] The chambers judge asked the plaintiff whether he had problems with producing categories of documents that were specifically requested in the notice of motion of the Pannu defendants. He told the plaintiff that he was required to disclose the audiotapes. After then asking some questions of counsel for the Pannu defendants, the chambers judge stood down so that he could read all of the materials before making an order. When he returned, the chambers judge heard oral submissions by counsel for the Pannu defendants (her written submissions

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were included in the chambers binder that the judge read). The judge then outlined the order he was making and made some comments to the plaintiff.

[17] The chambers judge did not dismiss the action as against the Pannu defendants; instead, he granted substantially all of the requested alternative relief. His order of November 6 was as follows:

> THIS COURT ORDERS that:
>
> 1. The application of These Defendants [the Pannu defendants] dated September 27, 2007 for dismissal of the Plaintiff's claim is adjourned generally, with the right of any of the Defendants to reinitiate the application for hearing with two clear days notice to all parties;
>
> 2. The Plaintiff shall produce to counsel for all Defendants a List of Documents on or before 4:00 p.m. on November 14, 2007;
>
> 3. The Plaintiff shall produce to counsel for all Defendants an Affidavit Verifying a List of Documents on or before 4:00 p.m. on November 14, 2007.
>
> 4. The Plaintiff shall produce copies of all documents listed on the List of Documents produced pursuant to paragraph 2 of this Order to counsel for all Defendants at or before 4:00 p.m. on November 21, 2007, and is entitled to charge up to 30 cents per copy to counsel for each Defendant.
>
> 5. The Plaintiff shall produce copies of the following documents to counsel for all Defendants at or before 4:00 p.m. on November 21, 2007, and is entitled to charge up to 30 cents per copy to counsel for each Defendant:
>
> (a) All records or statements evidencing the source of the funds advanced for the Mortgage granted by the Plaintiff to Jernail Singh Grewal, Premjit Kaur Grewal and Innovative Homes Inc.;
>
> (b) A copy of the front and back of the Bank draft or other instruments evidencing the forwarding of all the entirety of the mortgage amount;

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(c) Documents evidencing any payments made to the Plaintiff on the Mortgage; and

(d) Any and all documents setting out who the Mortgage funds were advanced to.

6. The Plaintiff shall attend at Coast Reporting at 1101, 808 Nelson Street in Vancouver for the Examination for Discovery of him by These Defendants on January 11, 2008 at 10:00 a.m. The Plaintiff shall attend such Examination for Discovery alone or with counsel. The requirement for provision of conduct money payable to the Plaintiff for this Examination for Discovery is waived.

7. The Application of These Defendants dated September 27, 2007 to vary paragraph 10 of the Order of Mr. Justice Groves of June 11, 2007 to allow interlocutory applications to be held in Vancouver is dismissed.

8. Paragraphs 1, 2 and 8 of the Order of Mr. Justice Groves of June 11, 2007 are varied such that These Defendants may re-initiate their applications for summary dismissal and security for costs at any time with the appropriate notice, and specifically, before the Examinations for Discovery of the parties are complete.

9. Costs of this Application, and of the attendance of the Defendants at the Examination for Discovery of the Plaintiff set for September 12, 2007, are payable by the Plaintiff in any event of the cause to all Defendants.

[18] Although paragraph 2 of the order referred to a list of documents (as opposed to a supplemental list of documents), the chambers judge made it clear to the plaintiff that he was to provide a complete and full list. The judge told the plaintiff that he should get legal advice if he had any doubt about what documents should be on the list of documents. The judge also told the plaintiff that he was simply adjourning the part of the application to strike the action and that, if he did not comply with the order, the defendants were at liberty to bring the matter back before him.

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[19] On or about November 13, the plaintiff delivered to the offices of counsel for the defendants a list of documents and photocopies of a number of documents. The list of documents was a signed version of the list of documents the plaintiff had provided in July. The photocopied documents did not include all of the documents on the list of documents; 17 appeared to be missing. The photocopied documents did include additional documents that were not listed on the list of documents. The audiotapes were neither listed nor produced.

[20] Counsel for the Pannu defendants submitted a request to appear back before the chambers judge, and a hearing date was set for December 19 for the purpose of renewing the application to dismiss the action. The other defendants joined in by filing their own notices of motion for dismissal of the action as against them.

[21] The following were the additional steps taken by the plaintiff prior to the December 19 hearing:

(a) he swore an affidavit on November 28 deposing that he had delivered to the defendants' counsel a copy of all documents in his possession that were listed on his list of documents;

(b) on December 5 he filed a notice of appeal, CA035595, and a notice of application for leave to appeal the November 6 order, together with a notice of motion returnable on January 4, 2008 seeking directions as to whether leave was required; he did not apply for a stay of the November 6 order; and

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(c) on the day of the December 19 hearing, he swore an affidavit deposing that:

(i) he had requested documents from his credit union and the law firm that had acted on his behalf in connection with the mortgage loan in the spring;

(ii) the credit union was unable to help due to the lapse of time;

(iii) the law firm had replied that it could not produce the file without a file number;

(iv) he had delivered copies of all documents that were in his possession on his list of documents and, if any documents were not delivered, it was because he did not have possession or control of them; and

(v) he had tried to comply with the November 6 order.

[22] The plaintiff did not comply with several aspects of the November 6 order. He did not deliver a new and complete list of documents (or a supplemental list of documents). He did not produce an affidavit verifying his list of documents. He did not produce copies of all the documents on his list of documents. The plaintiff did not provide affidavit evidence as to any efforts he had made after November 6 to obtain the documents enumerated in the order that were not in his possession.

[23] The plaintiff engaged the services of a lawyer on the morning of the December 19 hearing. The lawyer appeared on behalf of the plaintiff and requested an adjournment. The chambers judge did not grant the request and heard submissions.

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[24] In his oral reasons for judgment dismissing the action, the chambers judge said the following:

> [5] It may be clear from the way this hearing has proceeded that the Court is most reluctant to dismiss matters without an adjudication on the merits. There does come a time, however, when if the rules of court are to mean anything and if fairness is to be done to both parties, what Courts say has got to be followed through.
>
> [6] I am sympathetic in the sense that counsel has appeared now and I expect that things might go more smoothly if he were to remain on the file and carry this matter forward. There is another consideration other than trying to do fairness between the parties, and that is that the overall administration of justice would be brought into disrepute in my view by this Court behaving at this stage, having been as clear as it was, following the several failures to comply leading up to November 6th if it were to say, "Well, that is fine, we will give you another chance."
>
> [7] When this matter was before the Court on November 6, 2007, I gave Mr. Dhillon another chance. I set time limits, which he did not protest as unattainable, and I made it clear that I expected them to be met.
>
> [8] …
>
> [9] The time has come for him, and this matter is dismissed, in accordance with the motion, with special costs to the defendants.

[25] The plaintiff appeals from this order. He did not continue with his attempt to appeal from the order made on November 6, 2007.

Discussion

[26] The order under appeal was a discretionary order. The appellate standard of review in respect of discretionary orders has been expressed in slightly varying ways. One of the expressions of the standard of review is contained in the authority

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primarily relied upon by the plaintiff on this appeal, *House of Sga'nisim v. Canada (Attorney General)*, 2007 BCCA 483, 286 D.L.R. (4th) 557 ("*Chief Mountain*"):

> [20] In order to succeed on an appeal of an order made in the exercise of discretion, this Court must be satisfied that the trial judge erred in the exercise of his discretion in that no weight or not sufficient weight has been given to relevant considerations: *Friends of the Old Man River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76-77, 88 D.L.R. (4th) 1. In other words, this Court will not interfere with the exercise of discretion simply because we might have exercised the discretion in a different fashion.

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[27] In the relatively recent decision of *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at para. 123, the Supreme Court of Canada adopted the expression of the standard of review contained in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at 1375, 37 B.C.L.R. (2d) 145, that an appellate court should interfere with the exercise of discretion by a judge only if he "misdirects himself or if his decision is so clearly wrong as to amount to an injustice".

[28] An appellate court should not substitute its opinion in place of the opinion of the trial judge or chambers judge under the guise that the judge did not give sufficient weight to a relevant consideration. It is incumbent upon an appellant to demonstrate error on the part of the judge, and an appellate court should not interfere with the exercise of discretion by a judge simply because the judge failed to mention a relevant consideration: see *Garda v. Osborne* (1996), 72 B.C.A.C. 101 at para. 31, and *E.T. v. K.H.T.* (1996), 27 B.C.L.R. (3d) 347, 83 B.C.A.C. 267 at para. 29 (Lambert J.A. dissenting in the result). If the judge's decision is not so clearly wrong as to amount to an injustice, it must be manifest from the judge's

reasons that he or she misdirected himself or herself, or gave no weight, or insufficient weight, to a relevant consideration.

[29] In *Chief Mountain*, the court made an order that the plaintiffs provide particulars of one of the claims in the statement of claim. The particulars were not provided by the deadline and another judge ordered the particulars to be provided by an extended deadline. The particulars were not provided by the extended deadline, and the defendants scheduled a hearing of an application for the dismissal of the entire action. Some, but not all, of the particulars were supplied prior to the hearing of the application. The chambers judge allowed the application and dismissed all of the plaintiffs' claims.

[30] The appeal was allowed, and the action was reinstated. Madam Justice Saunders, on behalf of the Court, said the following:

> [26] Nevertheless, the chambers judge was required to consider proportion in weighing the degree of the delict with the degree of sanction imposed. In my view, his reasons do not reveal the required consideration. Indeed, the chambers judge stated that "no reply [to the order of Mr. Justice Cullen] has been provided by the plaintiffs" and "[the plaintiffs have] not complied with my order, and are therefore in contempt of it." However, both of these statements fail to reflect the partial compliance with the orders in evidence before him and do not address the request for a short period of time within which to completely respond.
>
> [27] This led to a disproportionate response which, unfortunately, was in symmetry with the foreshadowing comments of September 30, 2005.
>
> [28] Striking a claim (or defence) is a blunt tool, to be used sparingly. For example, in *Homer Estate v. Eurocopter S.A.*, 2003 BCCA 229, 12 B.C.L.R. (4th) 321, Southin J.A. said as to striking out a pleading (there a statement of defence) at para. 4:

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> That is a Draconian remedy only to be invoked in the most egregious of cases because it deprives the litigants of a trial on the evidence.

[31] Here, the appellant says that the decision of the chambers judge was draconian, and that the chambers judge erred in failing to measure the proportion between the delict and the sanction imposed and in failing to consider lesser sanctions. The appellant also says that the courts have endorsed a moderate approach in dealing with failure to comply with the *Rules of Court* and orders enforcing the *Rules* and that the circumstances in this case were not sufficiently egregious to require dismissal of the action.

[32] What is important to note about *Chief Mountain* is that the Court considered the dismissal order to be a particularly serious sanction because the ordered particulars related only to one of the claims made in the statement of claim (paragraph 31). *Chief Mountain* was relied upon by the appellant in *McIsaac v. Healthy Body Services Inc.*, 2007 BCCA 580, 48 C.P.C. (6th) 301, where a chambers judge had struck out a statement of defence as a result of the failure of the defendant to attend appointments for examinations for discovery on several occasions over a four-year period.

[33] In *McIsaac*, after referring to the appellant's reliance on the above passage from *Chief Mountain*, Madam Justice Saunders, again on behalf of the Court, said the following:

> [17] With respect, I do not agree that the chambers judge failed to take into consideration or gave insufficient weight to relevant considerations. He did not, in my view, err, as alleged, in considering whether there was

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> a lawful excuse for the non-attendance. … in my view, one cannot say the chambers judge ignored his obligation to weigh the seriousness of the events.

[34] Rule 2(6) of the *Rules of Court* authorizes the court to dismiss an action if a person, without lawful excuse, refuses or neglects to comply with a direction of the court. The plaintiff failed to comply with the directions given by Mr. Justice Groves on June 11, 2007. A dismissal application was brought on before the chambers judge on November 6, 2007. The chambers judge did not dismiss the action at that point and gave the plaintiff another chance. He ordered the plaintiff to do several things. All the plaintiff did was deliver photocopies of the documents on his initial, but incomplete, list of documents that were in his possession and a signed version of the initial list of documents. He did not deliver a supplemental list of documents (or a full and complete list of documents) or an affidavit verifying his list of documents. He did not take any further steps in an attempt to produce documents within his control to produce. He hired a lawyer on the morning of the application and requested an adjournment.

[35] There is nothing in the reasons of the chambers judge to indicate that he misdirected himself. It is not manifest from his reasons that the judge gave no weight, or insufficient weight, to relevant considerations. He was aware of the availability of lesser sanctions because he had imposed a lesser sanction when the dismissal application first came before him on November 6, 2007. It may have amounted to an injustice had the chambers judge dismissed the action on November 6, but I am not persuaded that it was an injustice to dismiss the action of a plaintiff who failed to comply with two successive orders, especially when the

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chambers judge clearly warned the plaintiff on November 6 of the prospect of the dismissal of his action if he failed to comply with the order made on that day.

Conclusion

[36] The plaintiff has failed to demonstrate that the chambers judge erred when he exercised his discretion to dismiss the action. I would dismiss the appeal.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Ryan"

I agree:

"The Honourable Mr. Justice Groberman"

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Court of Queen's Bench of Alberta

Citation: Fairmont Resort Properties Ltd. (Re), 2012 ABQB 39

Date: 20120117
Docket: 0901 04199
Registry: Calgary

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

And in the matter of Fairmont Resort Properties Ltd., Lake Okanagan Resort Vacation (2001) Ltd., Lake Okanagan Resort (2001) Ltd. and LL Developments Ltd.

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] On April 27, 2010, the Northwynd Limited Partnership by its general partner Fairwynd Resort Properties Ltd. applied for an order approving the acceptance by a group of CCAA debtor companies of an offer to acquire all of the secured assets of the group. This was in effect the final step in the restructuring and contemplated the sale of virtually all the CCAA debtors' assets without a plan or formal vote by creditors and without a formal sales process. The order was granted. These supplemental written reasons have been prepared to set out the history of the restructuring and to explain why the application was successful.

History of the CCAA Proceedings

[2] On March 20, 2009, this Court granted an initial order under the CCAA with respect to Fairmont Resort Properties Ltd., Lake Okanagan Resort Vacation (2001) Ltd., Lake Okanagan Resort (2001) Ltd. and LL Developments Ltd. (the "Fairmont Group"). The Fairmont Group was in the business of acquiring, developing and operating resort-based real estate for sale on an interval or time-share basis. The group held properties in Alberta, British Columbia, Hawaii, Belize and Mexico, among other locations.

[3] The Fairmont Group was also the parent company of certain subsidiaries that were engaged in the development and operation of resort properties that were not under CCAA protection but were nevertheless dependent on administration and some financial support from the Fairmont Group to operate effectively. That support continued during the CCAA proceedings under the supervision of the Monitor Ernst & Young Inc., with appropriate security for advances made.

[4] The Fairmont Group's operations were able to continue under CCAA protection from the date of the initial order until April, 2010 with the retention of core employees, the continuation of services from suppliers and the support of a revolving DIP loan. A Chief Restructuring Officer with experience in the resort business was appointed and managed the Fairmont Group with the aid of two senior management individuals.

[5] Although it suffered from continued unfavourable economic conditions in the resort industry that affected normal course sales of time-shares and from the requirement of financial support to its non-CCAA subsidiaries, the Fairmont Group reduced costs and developed and implemented what was called a "Reversionary Program". Under this program, the group marketed its residual fee simple interests under time-share leases to time-share owners and engaged in a world-wide points exchange program. Thus, illiquid assets such as unsold time-share inventories and the retained fee simple interests in land subject to time-share leases were converted to cash or accounts receivable.

[6] FRPL Finance Ltd. ("FRPL") and a related corporation were major secured creditors of the Fairmont Group, and supported the CCAA proceedings. FRPL had issued bonds to many individual investors in order to provide capital to the group. The majority of these investors, approximately 850 in total, had purchased bonds in amounts ranging from $10,000 to $60,000. The proceeds of the sale of the bonds were loaned to Fairmont Group in the years 2005 through 2007. The Fairmont Group had failed to make payments on the loans to FRPL and, as a consequence, FRPL was in default of payment obligations under the bonds. At the relevant time, FRPL owed bondholders approximately $41.5 million.

[7] On April 15, 2010, in proceedings linked to the CCAA proceedings, FRPL applied for a final order in respect of a plan of arrangement pursuant to section 193 of the *Business Corporations Act*, R.S.A. 2000, c. B-9.

[8] Rather than opting for a liquidation of the Fairmont Group's assets, FRPL proposed to its bondholders a reorganization plan involving the group's Canadian and certain of its international business and assets. The plan contemplated the development and exploitation of these assets over a period of six years within a new real estate investment trust, Northwynd Properties Real Estate Investment Trust ("Northwynd REIT"), which would be wholly owned by bondholders of FRPL.

[9] The meeting materials provided to bondholders seeking approval of the plan of arrangement advised them that the options available for recovery of FRPL's loans to the

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Fairmont Group were either the proposed reorganization plan developed by Fairmont management in conjunction with the Monitor or liquidation of the secured assets.

[10] Under the proposed plan, bondholders would exchange their bonds for trust units in the newly established Northwynd REIT. Northwynd REIT would acquire the Fairmont Group loans and security interest through a wholly-owned limited partnership, Northwynd Limited Partnership ("Northwynd"). The limited partnership would then take steps under the security to acquire ownership and control of the Fairmont Group assets.

[11] The Northwynd REIT proposed to distribute at least 90% of the net income generated by these assets to holders of trust units, as well as proposing a return of capital distributions as cash became available. Bondholders were advised that, if the Fairmont Group's projections were correct, they potentially could recover cash distributions over the following five years equal to or greater than their original investment.

[12] Bondholders were allowed by the meeting materials the option of authorizing the trustee that administered the bonds to instead take action under the FRPL security to liquidate the Fairmont Group assets. They were advised that if the holders of 25% of the principal amount of each series of bonds signed such a direction, the trustee would appoint a receiver of the assets upon completion of the CCAA proceedings and liquidate the Fairmont Group assets.

[13] The bondholders also were advised that the Monitor had prepared recovery analyses both under an orderly liquidation scenario and a forced liquidation scenario that showed recoveries pursuant to a liquidation ranging from 37% to 90% of total debt for the Series B bondholders and from 50% to 69% for the Series 1 and 2 bondholders. In the meeting materials, FRPL offered the opinion that certain internal and external factors had the potential to cause a material decline in these estimated recoveries, and recommended the reorganization plan as the better option.

[14] An overwhelming majority of voting bondholders voted in favour of the proposed arrangement. Roughly 60 to 63% of total bondholders were represented at the meeting in person or by proxy, a relatively high percentage. One Notice of Intention to Appear was served on counsel but withdrawn before the court application for final approval of the arrangement. This investor, who held approximately $163,000 in bonds, later sent a letter to the Court directly, but by then the arrangement had been approved.

[15] I found that the statutory procedures had been met, the application had been put forward in good faith, the arrangement had a valid business purpose and, on the basis of the strong bondholder support and the lack of opposition, the plan was fair and reasonable: *Re Trizec Corp.*, 21 Alta. L.R. 435.

[16] On April 19, 2010, the secured debt in the amount of approximately $52 million was assigned to Northwynd. Northwynd then applied for an order under the auspices of the CCAA proceedings approving the acceptance by the Fairmont Group of its offer to purchase all of the

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assets of the Fairmont Group in consideration for the discharge of the DIP financing and the crediting of $43.8 million against the secured debt owed to FRPL.

Analysis

[17] There are many examples of liquidating CCAA proceedings in situations similar to the one proposed in this restructuring. In *Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1, Farley, J. approved a plan that involved the sale of the debtor's assets. The applicant in that case, as in this one, framed the application in the alternative; for an order approving the sale under the CCAA or through a receivership on substantially the same terms. Farley, J. noted that the CCAA may be used to effect a sale or liquidation of a company in appropriate circumstances, most particularly where to do so would "maximize the value of the stakeholders' pie": para. 11. He also noted that, while the alternative of selling the assets through a receivership would be commercially equivalent, approval pursuant to the CCAA proceedings would be more efficient: para. 20.

[18] Northwynd recognized in its application that the sale could be carried out in one of two ways; either pursuant to the existing CCAA proceedings or through the termination of such proceedings and the appointment of a receiver. Northwynd submitted that approving the sale pursuant to the CCAA proceedings would be the most time efficient and cost effective method of proceeding.

[19] The Monitor in its Ninth Report submitted at the hearing discussed two possible restructuring alternatives to the approval of the offer. One was to conduct a more formal sales process under the auspices of the CCAA proceedings or under a receivership and the other was to accept the offer through a new receivership, rather than the ongoing CCAA proceedings. The length of time it would take to conduct a formal sales process (nine to twelve months, given the nature of the Fairmont Group's assets), the ongoing requirement of DIP financing to continue the group as a going concern and the difficulty in retaining key employees through such a process were all cited as negative factors with respect to a formal sales process. Also noted was the potential of regulatory restrictions with respect to the sale of timeshare and reversionary interests if a receiver was appointed. I accepted the opinion of the Monitor, supported by its liquidation analysis, that the potential of achieving a sale price for the secured assets that was greater than the offer was very low, and that the costs of a sales process would be significant. In summary, neither of these alternatives would improve the return to creditors, and requiring the debtor companies to undertake either of them would be a triumph of form over substance.

[20] A sale of substantially all of the assets of a debtor company is permitted in a CCAA proceeding, both pursuant to s. 36 of the CCAA if certain statutory criteria are met and in accordance with previous authority if such a sale is consistent with the purpose and policy of the CCAA and in the best interests of creditors generally: *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 at para. 7; *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 at para. 18.

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[21] With respect to such previous case authority, in *Re 1078385 Ontario Ltd.* (2004), 16 C.B.R. (5th) 152, at paras. 11 and 41, the Ontario Court of Appeal refused leave to appeal a sanction order that involved a liquidating plan, noting that the plan resulted in enhanced results for creditors and that, although the plan did not provide for the debtor companies to continue as going concerns, the enterprise would continue.

[22] In *Pope & Talbot* (oral reasons for judgment, May 20, 2008), Brenner, C.J. of the Supreme Court of British Columbia held that a CCAA liquidation is consistent with the purposes and policies of the CCAA where the assets are sold on an operating basis to the benefit of a wider constituency, commenting as follows:

> The decision by courts to extend the use of the CCAA to a liquidation is based on a recognition of the wider interests at stake in such a proceeding. The purpose of a liquidating CCAA where the assets are to be sold on an operating basis, is to fairly have regard for the interests of not only the creditors and the stakeholders of the petitioner, but also the interests of employees, suppliers and others who will be affected by a complete shutdown. So provided that the objective is to dispose of assets on an operating basis, then even though it is a liquidation, the exercise is not designed to effect a recovery for solely the secured lenders as submitted by Canfor. Clearly a continuation of operation will benefit a wider constituency.

[23] Although these CCAA proceedings were commenced prior to the enactment of amendments to the CCAA in September, 2009, the amendments were in effect at the time this application was heard. Section 36 permits the sale of a corporation's assets outside the ordinary course of business without shareholder approval if authorized by the Court and upon notice to the secured creditors likely to be affected.

[24] Under Section 36, the Court is to consider certain non-exclusive factors. I had the benefit of the Monitor's comments on these factors as follows:

(a) With respect to whether the process leading to the proposed sale was reasonable in the circumstances, the Monitor noted that it began in late summer of 2009 and that it included a review of the restructuring options by the Fairmont Group and the Monitor, a liquidation analysis by the Monitor, the development of a five year business plan, the input of the major secured stakeholders and an assessment of the time, costs and effort that would be necessary to initiate and complete asset sales. The Monitor noted that no credible unsolicited indications of interest were received during the course of the proceedings. The Monitor advised that it considered the process to be reasonable in the circumstances, and I agreed;

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(b) With respect to the Monitor's approval, the Monitor, had extensive oversight and involvement in the restructuring and approved all aspects of the process;

(c) The Monitor in its Ninth Report offered its opinion that the offer would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) The major secured creditors and the largest unsecured creditor were consulted by the Monitor, and there was no opposition to the application;

(e) With respect to the effects of the sale on the creditors and other interested parties, it was clear that creditors subordinate to the secured debt of approximately $65 million would receive no recovery under the offer, but the claims of the other two major secured creditors would not be prejudiced by the offer.

It was also noteworthy that the roughly 5000 registered time-share owners in the Fairmont Group would not be affected by the offer and would continue to have the rights granted to them under their original timeshare agreements (other than with respect to certain alleged inducements or undocumented additional rights that were repudiated during the course of CCAA proceedings). Many of the full time employees would be retained by Northwynd;

(f) Finally, with respect to whether the consideration received for the assets was reasonable and fair, the Monitor offered the opinion that it was, taking into account their market value.

[25] I agreed with the Monitor's observations, and noted that the fact that there was no opposition to the motion was indicative of the fairness of the consideration compared to market value. I also considered the following benefits that would result from the implementation of the offer:

(a) The major part of the business and operations of the Fairmont Group would continue as a going concern and the offer as a step in the plan of arrangement would provide the bondholders with an opportunity to recover the funds they lost as result of Fairmont's insolvency;

(b) The management and administration of the Fairmont Group and the remaining Fairmont subsidiaries that were not part of the

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CCAA proceedings would continue without significant interruption;

(c) Timeshare operations and the management and administration of the Fairmont, Lake Okanagan, Belize and Mexico resorts operated by Fairmont would also continue without interruption; and

(d) Northwynd would take the responsibility for the repair of a key facility which required foundation and structural repairs expected to cost more than 2.5 million in excess of funds currently held in a trust account on behalf of timeshare owners. The repair was essential for the continued use of that facility.

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[26] Nothing in Section 36 requires that a plan be filed as a condition of court approval or that there be a continuing entity after liquidation, although in this case, the business of the CCAA debtors was to be continued through a new enterprise group. Thus section 36 by implication permits the sale of substantially all of the debtor's assets even if a plan is not envisaged.

[27] Even prior to the enactment of section 36, however, CCAA courts have permitted liquidating CCAA in the absence of a plan, exercising inherent jurisdiction based on the determination that approval of such a restructuring served the purpose and policies of the CCAA in certain circumstances: *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont.Gen.Div.).

[28] I considered the obiter comment of Tysoe, J.A. in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) that it is questionable whether a court should grant a stay under the CCAA to permit a liquidating CCAA without requiring the debtor company to present a plan of arrangement to its creditors. *Cliffs Over Maple Bay*, however, is distinguishable in many respects, particularly given that the CCAA debtor had ceased to carry on business and the stay was opposed by the major creditors.

[29] In this case, there would be a surviving business enterprise, the sale was supported by the major secured creditor with overwhelming support from its affected creditors as expressed through a vote on the plan of arrangement and the sale and would give rise to the many benefits to creditors and stakeholders referred to previously in this decision. This application brought to mind the comment of Blair, J.A. in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp,* (2008) 45 C.B.R. (5th) 163 (C.A.) at para. 61:

> The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs.

[30] While a liquidating CCAA without an accompanying plan of arrangement may well give rise to concern and the potential for misuse of the CCAA process in some situations, it was in this case a reasonable, fair and efficient resolution to the restructuring process and consistent with the purpose of the CCAA. Requiring the Fairmont Group to take the offer to its creditors would have been unnecessary, given the involvement and support of the major secured creditor owed amounts far in excess of the value of the secured assets.

Conclusion

[31] It made practical and commercial sense to allow the sale process to take place under the existing CCAA proceedings. The sale was consistent with the purpose of the CCAA in that it allowed first place secured creditor whose outstanding debt significantly exceeded the value of the secured assets and the debtors' various other stakeholders to maximize recovery. The commercial reality was that under a bankruptcy or a receivership, Northwynd would have collected all proceeds from a sale of assets. A bankruptcy or receivership would have been less efficient, both in respect of time and money.

[32] I approved the acceptance of the offer, terminated the claims procedure process and approved a stay to complete the sale.

Dated at the City of Calgary, Alberta this 17th day of January, 2012.

B.E. Romaine
J.C.Q.B.A.

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Appearances:

John L. Ircandia, Q.C., Patrick T. McCarthy, Q.C. and Robin Gurofsky of Borden Ladner Gervais LLP
for Northwynd Limited Partnership

Howard A. Gorman of Macleod Dixon LLP
for Fairmont Resort Properties Ltd., Lake Okanagan Resort Vacation (2001) Ltd., Lake Okanagan Resort (2001) Ltd. and LL Developments Ltd.

Kelly J. Bourassa of Blake, Cassels & Graydon LLP
for the Monitor Ernst & Young Inc.

Larry B. Robinson, Q.C. of Davis LLP
for Resort Funding LLC

David LeGeyt of Fraser Milner Casgrain LLP
for FRPL Finance Ltd.

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Supreme Court of British Columbia
Gulf Estates Ltd. v. Rix
Date: 1985-02-01

R.N. McFee, for 283110 B.C. Ltd.

P.C. Wilson, for Bank of Nova Scotia.

R. Wicks, for Gulf Estates Limited.

(Vancouver No. H833078)

1985 CanLII 392 (BC SC)

[1] 1st February 1985, MCEACHERN C.J.S.C.:- Three medical doctors were the owners of the Blue Horizon Hotel in Vancouver. There were at least nine or ten mortgages on this property and foreclosure proceedings were taken in the course of which an order for sale was made with Gulf Estates Ltd. ("Gulf") and the Bank of Nova Scotia ("the bank"), fifth and sixth mortgagees respectively, being given conduct of the sale. Gulf and the bank entered into a listing agreement with a real estate agent and it seems to be common ground that a substantial commission subsequently became payable to this agent.

[2] There were innumerable proceedings in this court and in the Court of Appeal and the Supreme Court of Canada which it is not necessary to describe. It will be sufficient to say that the mortgagors embarked upon what has been called a "scheme of redemption" whereby they obtained the agreement of the first four mortgagees to reinstate their mortgages and they sought to pay out the fifth, sixth and seventh mortgagees and by requiring an assignment of those mortgagees to a numbered company (283110) which they controlled. No doubt they also sought to make arrangements with subsequent encumbrancers which were not disclosed to me.

[3] The scheme of redemption came apart when the Court of Appeal held that the assignment of a mortgage is not a redemption but, rather, an alternative to redemption. As a result, the property was sold to highest bidder and sufficient funds were realized to pay out at least the first six mortgagees, as well as arrears of taxes and real estate commission.

[4] Before the Court of Appeal terminated this scheme, and as an integral part thereof, the solicitors for the numbered company tendered the amounts required to redeem the

Gulf and bank mortgages and demanded an assignment of those securities. Although Gulf`s solicitors sent these funds on to Gulf, both these mortgagees refused to assign the mortgages, and both mortgagees were ultimately paid out the amounts fixed in the order nisi and other expenses, and the amounts tendered were returned to the numbered company.

[5] The problems between these parties arise out of the fact that the numbered company says it owned the Gulf and bank mortgages from the date of tender and that it should have the substantial interest payable on the mortgages from the date of tender to the date of payment, together with certain solicitor-and-client costs.

[6] The numbered company is only entitled to succeed if it was entitled to insist upon an assignment of the mortgages on the date of tender.

[7] I do not think anything turns on the fact that Gulf`s solicitors sent the amount tendered on to Gulf during the period of confusion when the vires of the redemption scheme were being determined. I reach this conclusion because of the affidavit of one of Gulf`s solicitors which is not controverted. He deposes that the numbered company agreed these considerable funds could be used during the dead time.

[8] The solicitors for the bank refused to accept the tendered funds which were invested at interest and were eventually returned with all earned income, which was about 9 per cent.

[9] Gulf and the bank really raise two defences. First, they say that the tender was insufficient because, although the amount fixed by the order nisi was tendered, Gulf and the bank had a contingent liability for real estate commission which was not properly secured. The solicitor for the numbered company gave what appears to be a kind of an undertaking with respect to the commission, but the bank's solicitors asked for an unequivocal undertaking which was not given. I do not think these mortgagees were obliged to give up their security until they were properly protected against this identified risk that actually became payable.

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[10] Second, assuming proper tender, the numbered company relies upon s. 15 of the Law and Equity Act, R.S.B.C. 1979, c. 224, which provides as follows:

> 15. Notwithstanding any stipulation to the contrary, where a mortgagor is entitled to redeem, he may require the mortgagee, or his personal representatives or assigns, instead of giving a certificate of payment or reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs and the mortgagee is bound to assign and convey accordingly. Any mortgagee in possession so required to assign, transfer and convey shall incur no legal liability which he would not have incurred if he had then executed a release of the mortgage.

[11] A casual reading of this section, imported from England, suggests that the numbered company, upon paying the amount required to redeem, could demand an assignment of the mortgages. But the law seems to be otherwise in cases such as this.

[12] In the leading case of *Teevan v. Smith* (1882), 20 Ch. D. 724 (C.A.), Jessel M.R. had to consider the same section and, after discussing the state of the law before this enactment, he concluded that where there is more than one mortgagee, a mortgagor is only entitled to redeem within the language of s. 15 if he redeems all mortgages.

[13] The situation is well stated in Falconbridge on Mortgages, 4th ed. (1977), at p. 389, as follows:

> The mortgagee is bound to reconvey to the person best entitled to the estate, that is, to the owner of the equity of redemption, if there is no subsequent encumbrancer, otherwise to the first subsequent encumbrancer, but he is not obliged to convey to any other person who by virtue of the conveyance would acquire the position of mortgagee in priority to persons better entitled to the legal estate.

[14] Turning to s. 15, a mortgagor is not "entitled to redeem" in the sense of permitting him to require a mortgagee to assign the mortgage to a third party when the equity of redemption is in a subsequent mortgagee. In such circumstances the most a mortgagor can do, without the consent of the mortgagee, is pay off the mortgage and obtain a discharge which, upon registration, operates as a conveyance of the estate to the person best entitled.

[15] Mr. McFee, on the authority of *Coupland Accept. Ltd. v. Walsh,* [1954] S.C.R. 90, [1954] 2 D.L.R. 129, argued alternatively that, in equity, the numbered company was entitled to stand in the position of the mortgagees when it paid them out. In that case a

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lender agreed to advance funds on a mortgage to refinance an existing second mortgage. The lender expected and intended to become a second mortgagee as there were no other puisne encumbrances against the property. The new mortgage was registered 4th May 1951 and the existing mortgage was paid out on 9th May but, in the meantime, a mechanics' lien was registered on 5th May 1951. No funds were advanced under the new mortgage until after the registration of the mechanics' lien.

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[16] Kellock J., at pp. 129-30, said:

> The finding in the Courts below that no advance was in fact made under the appellant's mortgage until after registration of the claim for lien disposes of the appeal except as to the contention that the appellant is entitled to stand in the place of the mortgagees under the Kerbel mortgage with respect to the sum of $46,782.50 paid by the appellant to the said mortgagees, which, with other moneys paid by the mortgagor, effected the retirement of that mortgage.
>
> The evidence is clear that it was agreed that the moneys obtained from the appellant were to be used, as they were in fact used, to pay off the existing second mortgage held by Kerbel and that the mortgage to be given to the appellant was to be in replacement of that mortgage. While the appellant's mortgage was registered on May 4, 1951, Kerbel was not paid off until May 9th and, in the meantime, the respondents' lien had been registered on May 5th. A discharge of the Kerbel mortgage, although delivered to the appellant, was not registered and, consequently, had no operation beyond that of a receipt or acknowledgment. It is only when registered that such a document becomes operative as a discharge of the mortgage: s. 69 of the *Registry Act,* R.S.O. 1950, c. 336; *Re Ross & Colclough* [1925] 4 D.L.R. 424, 28 O.W.N. 364.
>
> The appellant claims to be subrogated to the rights of the Kerbel mortgagees. It seems plain that, apart from any provisions of the *Mechanics' Lien Act,* R.S.O. 1950, c. 227, the appellant would be so entitled. In *Crosbie-Hill v. Sayer,* [1908] 1 Ch. 866 at p. 877, Parker J. stated the law as follows: "Where a third party at the request of a mortgagor pays off a first mortgage with a view to becoming himself a first mortgagee of the property, he becomes, in default of evidence of intention to the contrary, entitled in equity to stand, as against the property, in the shoes of the first mortgagee."

[17] I have no doubt the numbered company intended to replace Gulf and the bank and stand in their shoes. But that equitable process requires not just payment and intention but a new mortgage as well, and it also requires the existing encumbrancer to give up his shoes so that he may be replaced. This is a dangerous process because priority may be lost by an intervening registration and the security the lender expects to obtain may depend upon a finding of the court regarding intention, etc. The equitable protection,

which arises by operation of law in appropriate circumstances, seems to me to be different from the procedure followed by the numbered company in this case where it was asserted that an assignment could be demanded as of right. If a lender wishes to avoid risk, he should buy the existing mortgage and take an assignment. But a mortgagee is not obliged, except under s. 15, to deal with a third party, and he may refuse to do anything except execute a discharge upon being paid out.

[18] The equitable principle enunicated in *Coupland,* supra, operates to give a new mortgage the priority of the mortgage it replaces but it does not entitle the numbered company to demand the assignment of the Gulf and bank mortgages. Except for s. 15, the numbered company could only accomplish its purposes with the consent of Gulf and the bank.

[19] It follows in my view that the numbered company is only entitled to receive the return of its tender with interest. The bank has established that 9 per cent is the rate reasonably earned on moneys held in trust during the relevant period. That rate should also be paid by Gulf. The numbered company was not the owner of the Gulf and bank mortgages from the date of tender or at all.

[20] There will be directions accordingly. Gulf and the bank are entitled to the costs of this application from the numbered company.

Order accordingly.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Hayes Forest Services Limited (Re),***
2008 BCSC 1256

Date: 20080904
Docket: S085453
Registry: Vancouver

2008 BCSC 1256 (CanLII)

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

and

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57

and

In the Matter of

Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Limited

Petitioners

Before: The Honourable Mr. Justice Burnyeat

Oral Reasons for Judgment

In Chambers
September 4, 2008

Counsel for Petitioners	J.I. McLean C.D. Brousson B.J. Greenberg
Counsel for CIBC	F.R. Dearlove
Counsel for Western Forest Products	E.J. Milton, Q.C.. P.G. Voith, Q.C.
Counsel for Teal Cedar Products Ltd.	S.C. Fitzpatrick

Counsel for Klahoose First Nation	G.J. Gehlen B. Stadfeld
Counsel for GE Canada Leasing Services Company	S. Collins
Counsel for CIT Financial Ltd.	G.G. Plottel
Counsel for the Province of British Columbia	A.A. Welch
Counsel for United Steelworkers Local 1-80 and 1-85	C.D. Bavis
Place of Hearing:	Vancouver, B.C.

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[1] **THE COURT:** There are a number of motions before me. The first motion is on behalf of the Petitioners, Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Limited ("Hayes"), that the effect of the order that was granted as the initial order in these proceedings on July 31st, 2008 ("Initial Order"), as amended by Mr. Justice Leask on August 15th, 2008, be extended until October 31st, 2008.

[2] There are also motions on behalf of Teal Cedar Products Ltd. ("Teal") and Western Forest Products Ltd. ("Western") that the Initial Order be set aside because of alleged material non-disclosure. There is also a motion on behalf of the Canadian Imperial Bank of Commerce that it be permitted to file proceedings under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 ("***Act***") if the motions of Teal and Western are successful.

[3] The test of whether it is in order to extend the Initial Order is set out in s. 11(6) of the ***Act*** as follows:

> The court shall not make an order under subsection (3) or (4) unless:
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[4] I am satisfied that the applicant Hayes has acted with due diligence and in good faith since the Initial Order. If nothing else was before me, I would be satisfied that the extension requested by Hayes should be granted. However, the question raised by Teal and Western comes as a result of their applications to set aside the

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Initial Order on the basis that there was material nondisclosure and that the Initial Order would not have been made if certain facts had been disclosed. The Klahoose First Nation support the application that the Initial Order should be set aside on the basis of material non-disclosure.

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[5] The test of whether to set aside an *ex parte* order is whether the facts which were not disclosed might well have affected the outcome if they had been known at the time the application was made.

[6] There have been various decisions regarding nondisclosure in the context of proceedings under the ***Act***. In the decision of Tysoe J., as he then was, in ***United Used Auto & Parts Ltd. (Re)*** (1999), 12 C.B.R. (4th) 144, the question was whether to set aside an *ex parte* stay of proceedings granted in the initial order on the basis of nondisclosure. While dismissing the application to set aside the initial order Mr. Justice Tysoe stated:

> As was pointed out in *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (B.C.S.C.), the standard of disclosure must be realistic. In my view, the Petitioners met a realistic standard of disclosure and I decline to set aside the stay Order on the basis of non-disclosure.

[7] Similar statements were made in ***Philip's Manufacturing Ltd. (Re)*** (1991), 60 B.C.L.R. (2d) 311, and in ***Long Potato Growers Ltd. (Re)***, 2008 NBQB 231 to the effect that the disclosure must be realistic. In ***(Re) Philip's***, MacDonald J. stated:

> The complicated financial picture, which may not be fully known at the time of the application, cannot be completely covered in the initial application. The level of disclosure which the applicants suggest is completely impractical in respect of applications under the *Act*. There

> is still, and will always remain, a risk that by applying *ex parte*, the order may subsequently be set aside for material non-disclosure. However, the financial situation of the Company remains much the same as it was represented in the material and on the application for the *ex parte* order. I would still be prepared, despite the arguments I have now heard, but subject to the variations discussed below, to direct the stay of proceedings under the *Act* which I pronounced *ex parte* on September 3, 1991. (at p. 314)

[8] Counsel also rely on the decision in ***Hester Creek Estate Winery Ltd. (Re)*** (2004), 50 C.B.R. (4th) 73, where I stated:

> For the reasons set out above, I have concluded that if there had been full and fair disclosure or if the Petitioner had not inadvertently or advertently misled the court, the order that was made on February 16, 2004 would not have been made. On *ex parte* applications and in all materials which will be presented to the Court and to the creditors of a company seeking protection under the *C.C.A.A.*, it is unacceptable for the materials to constitute anything less than full and fair disclosure. Affidavit material prepared by counsel for a petitioner should not be presented to the Court without counsel making proper inquiries about all material facts. Affidavits should not be sworn in support of a petition without the affiant making proper inquiries about all material facts. Materials which constitute less than full disclosure or which mislead the Court about material facts are unacceptable. In the case at bar, the materials prepared and filed were not only woefully inadequate but were also purposely misleading. In the circumstances, the Order will be discharged. (at para. 30)

[9] In proceedings under the ***Act***, the question of whether an initial order will be made is based on whether the prerequisites under the ***Act*** such as certain debt, et cetera, have been met, whether the effect of the stay of proceedings requested will allow enough time to bring about a plan to be presented to the creditors, and whether all material facts have been disclosed. Although determinative of the issues at that time and although there was a finding of material nondisclosure, the findings in ***Hester Creek***, *supra*, were made in the context of whether or not any plan was doomed to failure, not whether the initial order itself should have been set aside.

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The facts which might affect the outcome at the first hearing are facts about whether the company qualifies or not as well as whether it is likely that a plan can come forward.

[10] In accordance with the principles set out by Tysoe J.A. in ***Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.***, 2008 BCCA 327, para. 35, I find that Hayes has shown an intention to put a plan before its creditors. I am also satisfied that the financing is in place which will allow sufficient time to bring forward a plan for the consideration of the creditors.

[11] I am not satisfied that the matters which were not disclosed when the Initial Order was granted would have resulted in the Initial Order not being made if those matters had been before me. I find that there was a realistic standard of disclosure met by Hayes which resulted in a full and fair disclosure.

[12] Both Teal and Western have contracts with Hayes. Those contracts see interim payments made relating to logging activity, a reconciliation of payments once a year, and a reference to arbitration if an agreement is not reached as to the monies which are either owing by Hayes to Teal and/or Western or by Teal and/or Western to Hayes. Although some mention of the current status of certain arbitrations is set out in the materials which were before me when the Initial Order was granted, it is the submission of Teal and Western that not sufficient detail was provided and that this material non-disclosure goes to the issue of the likelihood that there will be sufficient funds available to Hayes so that it can bring forward a plan to its creditors and that there will be significant monies owing after the arbitrations are complete so that Teal and Western will be in a position to set off monies that are

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owing to Hayes under later contracts so that there will not be sufficient funds available to Hayes during the extended time requested by Hayes. I am not in a position to accede to those submissions. First, the activities with Teal and Western generate only approximately 25 percent of the total anticipated revenue of Hayes. While this is significant, it is not necessarily material. Second, while it may be that the effect of the arbitrations will require Hayes to pay significant sums to Western and Teal and to then allow Western and Teal to set off those amounts against what may be owing by Western and Teal under later contracts, I should not assume such a result at this time. The matter should be left to the arbitrators to determine. In that regard, it may well be that Teal and Western will not even be creditors.

[13] Third, it may well be that other contracts will be available in the period to October 31st, 2008, to affect the situation as to whether a plan will be accepted by the creditors of Hayes and whether other fund sources will be available. Accordingly, while contracts may not be available from traditional sources and while it may ultimately be the case that Western and/or Teal can set off amounts against what is owing by them to Hayes, I cannot conclude that the finances between now and October 31st, 2008, will be so impaired as to make the possibility of a plan coming forward an impossibility. Accordingly, the facts surrounding the ongoing disputes between Hayes and these two potential creditors would not have affected the outcome, being the granting of the Initial Order.

[14] The Klahoose people also claim that there was material non-disclosure relating to their potential claim. While the only reference to tree farm licence number 10 was not complete, I cannot conclude that the failure to outline the current

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litigation commenced by the Klahoose people was a material nondisclosure. While that litigation raises the question of Aboriginal title as a result of an alleged failure by the Provincial Government to consult with the Klahoose people, a cutting licence has not been granted to Hayes and the question of the feasibility of heli-logging if such a licence is granted can only be ascertained if additional time is available to Hayes. Whether Hayes can see about 9 percent of its revenue from this source can only be tested if the stay is extended. As well, the Klahoose people are not creditors at this time, so the only relevance of their submission is as to the question of what revenue may be available from that source. That will only be a question which can be decided and answered if and when a cutting permit is obtained and logging does or does not start.

[15] I am also mindful of the fact that the banker for Hayes, the Canadian Imperial Bank of Commerce, supported the granting of the Initial Order and appears to be prepared to advance sufficient funds by way of Debtor in Possession financing to allow Hayes sufficient time to bring forward a plan to be voted on by its creditors. I am also satisfied that the parties who have an interest in these matters will be protected by a flow of information. The creditors and potential creditors will continue to receive information from the monitor with a report no later than September 30th, 2008 so they can then apply if it appears that a plan cannot come forward. I cannot conclude at this time that Hayes will not be in a position to place a plan before its creditors which will have a reasonable prospect of success.

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[16] The application of Hayes is allowed. The stay will remain in effect to 4:00 p.m. on October 31st, 2008. Any application by Hayes regarding that deadline will be before me no later than October 28th, 2008.

[17] Teal and Western will be at liberty to apply after October 1st, 2008, to set aside the stay if they are satisfied that the stay should be revisited because of the information set out in the report or reports of the monitor.

[18] The motion of the Canadian Imperial Bank of Commerce is adjourned generally in the circumstances. The motion of GE Canada Leasing Services Company is also adjourned generally.

[19] The orders made are made with the requirement that counsel need not approve the order as to form. However, I will impose the following schedule in that regard: the draft order or orders are to be drawn by counsel for Hayes and circulated to counsel no later than September 10th, 2008. Counsel will then have until September 15th to negotiate changes and/or to provide alternate drafts to counsel for Hayes. Counsel for Hayes will be at liberty to submit the order or orders to my attention no earlier than September 17th, 2008, at which time I will settle the terms of the order or orders if there is still a dispute as to their form. I will then arrange for the early entry of the orders in any event on September 17th, 2008.

"The Honourable Mr. Justice Burnyeat"

2008 BCSC 1256 (CanLII)

Paul Housen *Appellant*

v.

Rural Municipality of Shellbrook No. 493 *Respondent*

Indexed as: Housen *v.* Nikolaisen

Neutral citation: 2002 SCC 33.

File No.: 27826.

2001: October 2; 2002: March 28.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Torts — Motor vehicles — Highways — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Municipal law — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Appeals — Courts — Standard of appellate review — Whether Court of Appeal properly overturning trial judge's of negligence — Standard of review for questions of mixed fact and law.

The appellant was a passenger in a vehicle operated by N on a rural road in the respondent municipality. N

Paul Housen *Appelant*

c.

Municipalité rurale de Shellbrook nº 493 *Intimée*

Répertorié : Housen *c.* Nikolaisen

Référence neutre : 2002 CSC 33.

Nº du greffe : 27826.

2001 : 2 octobre; 2002 : 28 mars.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Délits civils — Véhicules automobiles — Routes — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Droit municipal — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Appels — Tribunaux judiciaires — Norme de contrôle applicable en appel — La Cour d'appel a-t-elle eu raison la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — Norme de contrôle applicable à l'égard des questions mixtes de fait et de droit.

L'appelant était passager dans le véhicule conduit par N sur une route rurale située sur le territoire de la

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failed to negotiate a sharp curve on the road and lost control of his vehicle. The appellant was rendered a quadriplegic as a result of the injuries he sustained in the accident. Damages were agreed upon prior to trial in the amount of $2.5 million, but at issue were the respective liabilities, if any, of the municipality, N and the appellant. On the day before the accident, N had attended a party at the T residence not far from the scene of the accident. He continued drinking through the night at another party where he met up with the appellant. The two men drove back to the T residence in the morning where N continued drinking until a couple of hours before he and the appellant drove off in N's truck. N was unfamiliar with the road, but had travelled on it three times in the 24 hours preceding the accident, on his way to and from the T residence. Visibility approaching the area of the accident was limited due to the radius of the curve and the uncleared brush growing up to the edge of the road. A light rain was falling as N turned onto the road from the T property. The truck a few times before approaching the sharp curve where the accident occurred. Expert testimony revealed that N was travelling at a speed of between 53 and 65 km/hr when the vehicle entered the curved portion of the road, slightly above the speed at which the curve could be safely negotiated under the conditions prevalent at the time of the accident.

The road was maintained by the municipality and was categorized as a non-designated local access road. On such non-designated roads, the municipality makes the decision to post signs if it becomes aware of a hazard, or if there are several accidents at one spot. The municipality had not posted signs on any portion of the road. Between 1978 and 1987, three other accidents were reported in the area to the east of the site of the appellant's accident. The trial judge held that the appellant was 15 percent contributorily negligent in failing to take reasonable precautions for his own safety in accepting a ride from N, and apportioned the remaining joint and several liability 50 percent to N and 35 percent to the municipality. The Court of Appeal overturned the trial judge's that the municipality was negligent.

Held (Gonthier, Bastarache, Binnie and LeBel JJ. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

municipalité intimée. N a été incapable de prendre un virage serré et il a perdu la maîtrise de son véhicule. L'appelant est devenu quadriplégique à la suite des blessures subies dans l'accident. Les parties ont convenu avant le procès du montant des dommages-intérêts, qui ont été és à 2,5 millions de dollars. La question en litige était celle de savoir si la municipalité, N et l'appelant étaient responsables et, dans ve, dans quelles proportions. Le jour qui a précédé l'accident, N avait assisté à une fête à la résidence des T, non loin de la scène de l'accident. Durant la nuit, il a continué de boire à une autre fête, où il a rencontré l'appelant. Le matin, les deux hommes sont retournés en automobile à la résidence des T, où N a continué de boire, cessant de le faire quelques heures avant de prendre la route dans sa camionnette en compagnie de l'appelant. N n'était pas familier avec le chemin en question, mais il l'avait emprunté à trois reprises au cours des 24 heures qui avaient précédé l'accident pour aller et venir de la résidence des T. À l'approche de l'endroit de l'accident, la distance de visibilité était réduite en raison du rayon de courbure du virage et de la présence de broussailles poussant jusqu'au bord du chemin Une faible pluie tombait lorsque N s'est engagé sur le chemin en quittant la résidence des T. L'arrière de la camionnette a zigzagué à plusieurs reprises avant que le véhicule n'arrive aux abords du virage serré où l'accident est survenu. Selon le témoignage d'un expert, N roulait à une vitesse se situant entre 53 et 65 km/h lorsque le véhicule s'est engagé dans la courbe, soit une vitesse légèrement supérieure à celle à laquelle le virage pouvait être pris en sécurité eu égard aux conditions qui existaient au moment de l'accident.

Le chemin, qui était entretenu par la municipalité, appartenait à la catégorie des voies d'accès locales non désignées. La municipalité installe des panneaux de signalisation sur ces chemins si elle constate l'existence d'un danger ou si plusieurs accidents se produisent au même endroit. Elle n'avait installé aucune signalisation le long de cette portion du chemin. On a signalé trois autres accidents survenus de 1978 à 1987 à l'est du lieu de l'accident dont a été victime l'appelant. La juge de première instance a estimé que l'appelant était responsable de négligence concourante dans une proportion de 15 p. 100, du fait qu'il avait omis de prendre des précautions raisonnables pour assurer sa propre sécurité en acceptant de monter à bord du véhicule de N, et elle a réparti le reste de la responsabilité solidairement entre N (50 p. 100) et la municipalité (35 p. 100). La Cour d'appel a in rmé la conclusion de la juge de première instance selon laquelle la municipalité avait été négligente.

Arrêt (les juges Gonthier, Bastarache, Binnie et LeBel sont dissidents) : Le pourvoi est accueilli et la décision de la juge de première instance est rétablie.

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Per McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ.: Since an appeal is not a re-trial of a case, consideration must be given to the standard of review applicable to questions that arise on appeal. The standard of review on pure questions of law is one of correctness, and an appellate court is thus free to replace the opinion of the trial judge with its own. Appellate courts require a broad scope of review with respect to matters of law because their primary role is to delineate and legal rules and ensure their universal application.

The standard of review for ndings of fact is such that they cannot be reversed unless the trial judge has made a "palpable and overriding error". A palpable error is one that is plainly seen. The reasons for deferring to a trial judge's ndings of fact can be grouped into three basic principles. First, given the scarcity of judicial resources, setting limits on the scope of judicial review in turn limits the number, length and cost of appeals. Secondly, the principle of deference promotes the autonomy and integrity of the trial proceedings. Finally, this principle recognizes the expertise of trial judges and their advantageous position to make factual ndings, owing to their extensive exposure to the evidence and the bene t of hearing the testimony *viva voce*. The same degree of deference must be paid to inferences of fact, since many of the reasons for showing deference to the factual ndings of the trial judge apply equally to all factual conclusions. The standard of review for inferences of fact is not to verify that the inference can reasonably be supported by the ndings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, a stricter standard. Making a factual conclusion of any kind is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Iacobucci, Major et Arbour : Étant donné que l'appel ne constitue pas un nouveau procès, il faut se demander quelle est la norme de contrôle applicable en appel à l'égard des diverses questions que soulève le pourvoi. La norme de contrôle applicable aux pures questions de droit est celle de la décision correcte et, en conséquence, il est loisible aux cours d'appel de substituer leur opinion à celle des juges de première instance. Les cours d'appel ont besoin d'un large pouvoir de contrôle à l'égard des questions de droit pour être en mesure de s'acquitter de leur rôle premier, qui consiste à préciser et à les règles de droit et à veiller à leur application universelle.

Suivant la norme de contrôle applicable aux conclusions de fait, ces conclusions ne peuvent être in rmées que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante ». Une erreur manifeste est une erreur qui est évidente. Les diverses raisons justi ant la retenue à l'égard des conclusions de fait du juge de première instance peuvent être regroupées sous trois principes de base. Premièrement, vu la rareté des ressources dont disposent les tribunaux, le fait de limiter la portée du contrôle judiciaire a pour effet de réduire le nombre, la durée et le coût des appels. Deuxièmement, le respect du principe de la retenue envers les conclusions favorise l'autonomie et l'intégrité du procès. En n, ce principe permet de reconnaître l'expertise du juge de première instance et la position avantageuse dans laquelle il se trouve pour tirer des conclusions de fait, étant donné qu'il a l'occasion d'examiner la preuve en profondeur et d'entendre les témoignages de vive voix. Il faut faire preuve du même degré de retenue envers les inférences de fait, car nombre de raisons justi ant de faire preuve de retenue à l'égard des constatations de fait du juge de première instance valent autant pour toutes ses conclusions factuelles. La norme de contrôle ne consiste pas à véri er si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis, ce qui suppose l'application d'une norme plus stricte. Une conclusion factuelle — quelle que soit sa nature — exige nécessairement qu'on attribue un certain poids à un élément de preuve et, de ce fait, commande l'application d'une norme de contrôle empreinte de retenue. Si aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modi er la conclusion factuelle.

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Questions of mixed fact and law involve the application of a legal standard to a set of facts. Where the question of mixed fact and law at issue is a of negligence, it should be deferred to by appellate courts, in the absence of a legal or palpable and overriding error. Requiring a standard of "palpable and overriding error" for of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a of negligence by a jury. Where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. A determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law, and is thus subject to a standard of palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness.

Les questions mixtes de fait et de droit supposent l'application d'une norme juridique à un ensemble de faits. Lorsque la question mixte de fait et de droit en litige est une conclusion de négligence, il y a lieu de faire preuve de retenue à l'égard de cette conclusion en l'absence d'erreur de droit ou d'erreur manifeste et dominante. Le fait d'exiger l'application de la norme de l'« erreur manifeste et dominante » aux de contrôle d'une conclusion de négligence tirée par un juge ou un jury consolide les rapports qui doivent exister entre les juridictions d'appel et celles de première instance et respecte la norme de contrôle bien établie qui s'applique aux conclusions de négligence tirées par les jurys. Si la question litigieuse en appel soulève l'interprétation de l'ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être en l'absence d'erreur manifeste et dominante. La question de savoir si le défendeur a respecté la norme de diligence suppose l'application d'une norme juridique à un ensemble de faits, ce qui en fait une question mixte de fait et de droit. Cette question est alors assujettie à la norme de l'erreur manifeste et dominante, à moins que le juge de première instance n'ait clairement commis une erreur de principe en déterminant la norme applicable ou en appliquant cette norme, auquel cas l'erreur peut constituer une erreur de droit, qui est assujettie à la norme de la décision correcte.

Here, the municipality's standard of care was to maintain the road in such a reasonable state of repair that those requiring to use it could, exercising ordinary care, travel upon it with safety. The trial judge applied the correct test in determining that the municipality did not meet this standard of care, and her decision should not be overturned absent palpable and overriding error. The trial judge kept the conduct of the ordinary motorist in mind because she stated the correct test at the outset, and discussed implicitly and explicitly the conduct of a reasonable motorist approaching the curve. Further, her apportionment of negligence indicates that she assessed N's conduct against the standard of the ordinary driver as does her use of the term "hidden hazard" and her consideration of the speed at which motorists should have approached the curve.

En l'espèce, la norme de diligence à laquelle devait se conformer la municipalité consistait à tenir le chemin dans un état raisonnable d'entretien, de façon que ceux qui devaient l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité. La juge de première instance a appliqué le bon critère juridique en concluant que la municipalité n'avait pas respecté cette norme et sa décision ne devrait pas être en l'absence d'erreur manifeste et dominante. La juge de première instance a eu à l'esprit la conduite de l'automobiliste moyen puisqu'elle a commencé son examen de la norme de diligence en formulant dès le départ le critère approprié, puis elle s'est interrogée, tant explicitement qu'implicitement, sur la façon dont conduirait l'automobiliste raisonnable en s'approchant du virage. De plus, le fait qu'elle a imputé une partie de la responsabilité à N indique qu'elle a évalué sa conduite au regard du critère du conducteur moyen, tout comme l'indique le fait qu'elle a utilisé l'expression « danger caché » et qu'elle s'est demandé à quelle vitesse les automobilistes auraient dû approcher du virage.

The Court of Appeal's of a palpable and overriding error by the trial judge was based on the erroneous presumption that she accepted 80km/h as the speed at which an ordinary motorist would approach the curve, when in fact she found that a motorist exercising

La conclusion de la Cour d'appel portant que la juge de première instance avait commis une erreur manifeste et dominante reposait sur la présomption erronée selon laquelle la juge aurait accepté que l'automobiliste moyen approcherait du virage à 80 km/h, alors que dans les faits

ordinary care could approach the curve at greater than the speed at which it would be safe to negotiate it. This was based on the trial judge's reasonable and practical assessment of the evidence as a whole, and is far from reaching the level of palpable and overriding error.

The trial judge did not err in that the municipality knew or ought to have known of the disrepair of the road. Because the hazard in this case was a permanent feature of the road, it was open to the trial judge to draw the inference that a prudent municipal councillor ought to be aware of it. Once this inference has been drawn, then unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. Prior accidents on the road do not provide a direct basis for that the municipality had knowledge of the particular hazard, but this factor, together with knowledge of the type of drivers using this road, should have caused the municipality to investigate the road which would have resulted in actual knowledge. To require the plaintiff to provide concrete proof of the municipality's knowledge of the state of disrepair of its roads is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and it was reasonable for the trial judge to draw an inference of knowledge from as an ongoing state of disrepair.

The trial judge's conclusion on the cause of the accident was a of fact subject to the palpable and overriding error standard of review. The abstract nature of the inquiry as to whether N would have seen a sign had one been posted before the curve supports deference to the factual of the trial judge. The trial judge's factual on causation were reasonable and thus should not have been interfered with by the Court of Appeal.

Per Gonthier, Bastarache, Binnie and LeBel JJ. (dissenting): A trial judge's of fact will not be overturned absent palpable and overriding error principally in recognition that only the trial judge observes witnesses and hears testimony hand and is therefore better able to choose between competing versions of events. The process of f involves

elle a estimé qu'il était possible qu'un automobiliste prenant des précautions normales s'approche du virage à une vitesse supérieure à la vitesse sécuritaire pour effectuer la manœuvre. Loin de constituer une erreur manifeste et dominante, cette conclusion découlait d'une évaluation raisonnable et réaliste de l'ensemble de la preuve par la juge de première instance.

La juge de première instance n'a pas commis d'erreur en concluant que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin. Étant donné que, en l'espèce, le danger était une caractéristique permanente du chemin, il était loisible à la juge de première instance d'inférer que le conseiller municipal prudent aurait dû être au fait du danger. Dès l'instant où une telle inférence est tirée, elle demeure inchangée à moins que la municipalité ne puisse la réfuter en démontrant qu'elle a pris des mesures raisonnables pour faire cesser le danger. Les accidents survenus antérieurement sur le chemin ne constituent pas une preuve directe permettant de conclure que la municipalité connaissait l'existence du danger particulier en cause, mais ce facteur, conjugué à la connaissance du type de conducteurs utilisant le chemin, aurait dû inciter la municipalité à faire enquête à l'égard du chemin en question, ce qui lui aurait permis de prendre connaissance concrètement de l'existence du danger. Exiger du demandeur qu'il apporte la preuve concrète de la connaissance par la municipalité du mauvais état d'entretien de ses chemins revient à imposer à ce dernier un fardeau inacceptablement lourd. Il s'agit d'information relevant du domaine de connaissance de la municipalité et, selon nous, il était raisonnable que la juge de première instance infère de sa conclusion relative au mauvais état d'entretien persistant du chemin que la municipalité possédait la connaissance requise.

La conclusion de la juge de première instance quant à la cause de l'accident était une conclusion de fait assujettie à la norme de contrôle de l'« erreur manifeste et dominante ». Le caractère théorique de l'analyse de la question de savoir si N aurait aperçu un panneau de signalisation installé avant la courbe de faire montre de retenue à l'égard des conclusions factuelles de la juge de première instance. Les constatations factuelles de cette dernière relativement à la causalité étaient raisonnables et la Cour d'appel n'aurait donc pas dû les

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Les juges Gonthier, Bastarache, Binnie et LeBel (dissidents) : Les conclusions de fait du juge de première instance ne sont pas en l'absence d'erreur manifeste ou dominante, principalement parce qu'il est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix, et qu'il est, de ce fait, plus à même de choisir entre deux versions

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not only the determination of the factual nexus of the case but also requires the judge to draw inferences from facts. Although the standard of review is identical for both of fact and inferences of fact, an analytical distinction must be drawn between the two. Inferences can be rejected for reasons other than that the inference-drawing process is An inference can be clearly wrong where the factual basis upon which it relies is or where the legal standard to which the facts are applied is misconstrued. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care, a question of law within the purview of both the trial and appellate courts.

divergentes d'un même événement. Le processus de constatation des faits exige non seulement du juge qu'il dégage le nœud factuel de l'affaire, mais également qu'il tire des inférences des faits. Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Des inférences peuvent être rejetées pour d'autres raisons que le fait que le processus qui les a produites est lui-même
Une inférence peut être manifestement erronée si ses assises factuelles présentent des lacunes ou si la norme juridique appliquée aux faits est mal interprétée. Dans le contexte du droit relatif à la négligence, la question de savoir si la conduite du défendeur est conforme à la norme de diligence appropriée est une question mixte de fait et de droit. Une fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée, question de droit qui relève autant des cours de première instance que des cours d'appel.

A question of mixed fact and law in this case was whether the municipality knew or should have known of the alleged danger. The trial judge must approach this question having regard to the duties of the ordinary, reasonable and prudent municipal councillor. Even if the trial judge correctly this as the applicable legal standard, he or she may still err in assessing the facts through the lens of that legal standard, a process which invokes a policy-making component. For example, the trial judge must consider whether the fact that accidents had previously occurred on different portions of the road would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the councillor would have been alerted to the previous accident by an accident-reporting system, a normative issue reviewable on a standard of correctness. Not all matters of mixed fact and law are reviewable according to the standard of correctness, but neither should they be accorded deference in every case.

En l'espèce, la question de savoir si la municipalité connaissait ou aurait dû connaître le danger dont on alléguait l'existence était une question mixte de fait et de droit. Le juge de première instance doit examiner cette question eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Même en supposant que le juge de première instance détermine correctement la norme juridique applicable, il lui est encore possible de commettre une erreur lorsqu'il apprécie les faits à la lumière de cette norme juridique, processus qui implique notamment l'établissement de politiques d'intérêt général. Par exemple, il doit se demander si le fait que des accidents se soient déjà produits à d'autres endroits du chemin alerterait le conseiller municipal moyen, raisonnable et prudent de l'existence d'un danger. Il doit également se demander si ce conseiller aurait appris l'existence de l'accident antérieur par un système d'information sur les accidents, question normative qui est contrôlable selon la norme de la décision correcte. Les questions mixtes de fait et de droit ne sont pas toutes contrôlables suivant cette norme, mais elles ne commandent pas systématiquement une attitude empreinte de retenue.

Section 192 of the *Rural Municipality Act, 1989*, requires the trial judge to examine whether the portion of the road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Here, the trial judge failed to ask whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident

Suivant la norme de diligence énoncée à l'art. 192 de la *Rural Municipality Act, 1989*, la juge de première instance devait se demander si le tronçon du chemin sur lequel s'est produit l'accident constituait un danger pour le conducteur raisonnable prenant des précautions normales. En l'espèce, la juge de première instance a omis de se demander si un tel conducteur aurait pu rouler

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occurred. This amounted to an error of law. The duty of the municipality is to keep the road in such a reasonable state of repair that those required to use it may, exercising ordinary care, travel upon it with safety. The duty is a limited one as the municipality is not an insurer of travellers using its streets. Although the trial judge found that the portion of the road where the accident occurred presented drivers with a hidden hazard, there is nothing to indicate that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. Where an error of law has been found, the appellate court has jurisdiction to take the factual of the trial judge as they are and to reassess these in the context of the appropriate legal test. Here, the portion of the road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the condition of the road in general signalled to the reasonable driver that caution was needed.

The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair. She made no that the municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to it on the basis that it should have known of the danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor. The question is then answered through the trial judge's assessment of the facts of the case. The trial judge erred in law by approaching the question of knowledge from the perspective of an expert rather than from that of a prudent municipal councillor and by failing to appreciate that the onus of proving that the municipality knew or should have known of the disrepair remained on the plaintiff throughout. She made palpable and overriding errors in fact by drawing the unreasonable inference that the municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of the road. As the municipality had not received any complaints from motorists respecting the absence of signs on the road, the lack of super-elevation on the curves, or the presence of vegetation along the sides of the road, it had no particular reason to inspect that segment of the road for the presence of hazards. The question of the municipality's knowledge is inextricably linked to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is

en sécurité sur le tronçon en question. Il s'agissait d'une erreur de droit. Les municipalités ont l'obligation de tenir les chemins dans un état raisonnable d'entretien de façon que ceux qui doivent les emprunter puissent, en prenant des précautions normales, y circuler en sécurité. Il s'agit d'une obligation de portée limitée, car les municipalités ne sont pas les assureurs des automobilistes qui roulent dans leurs rues. Bien que la juge de première instance ait conclu que la portion du chemin où s'est produit l'accident exposait les conducteurs à un danger caché, il n'y a rien qui indique qu'elle s'est demandé si cette portion du chemin présentait un risque pour le conducteur raisonnable prenant des précautions normales. La cour d'appel qui décèle une erreur de droit a compétence pour reprendre telles quelles les conclusions de fait du juge de première instance et les réévaluer au regard du critère juridique approprié. En l'espèce, la portion du chemin où s'est produit l'accident ne présentait pas de risque pour un conducteur raisonnable prenant des précautions normales, car l'état de ce chemin en général avertissait l'automobiliste raisonnable que la prudence s'imposait.

La juge de première instance a commis et des erreurs de droit et des erreurs de fait manifestes et dominantes en statuant que la municipalité intimée aurait dû connaître le mauvais état dans lequel se trouvait, prétendait-on, le chemin. La juge de première instance n'a pas conclu que la municipalité intimée connaissait concrètement le prétendu mauvais état du chemin, mais elle lui a plutôt prêté cette connaissance pour le motif qu'elle aurait dû connaître l'existence du danger. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de présumer que la municipalité connaissait ce fait, eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Il répond ensuite à cette question en appréciant les faits de l'espèce dont il est saisi. Dans la présente affaire, la juge de première instance a fait erreur en droit en examinant la question de la connaissance requise du point de vue du spécialiste plutôt que du point de vue du conseiller municipal prudent et en ne reconnaissant pas que le fardeau de prouver que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin ne cessait jamais d'incomber au demandeur. La juge de première instance a commis une erreur de fait manifeste et dominante en inférant déraisonnablement que la municipalité intimée aurait dû savoir que la partie du chemin où l'accident s'est produit était dangereuse, compte tenu de la preuve que des accidents avaient eu lieu ailleurs sur ce chemin. La municipalité n'avait aucune raison particulière d'aller inspecter cette portion du chemin pour voir s'il y existait des dangers, puisqu'elle n'avait reçu aucune plainte d'automobilistes relativement à l'absence de signalisation, à l'absence de surélévation des courbes ou à la présence d'arbres et de végétation en bordure du

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a duty to repair. Here, the municipality cannot have been expected to have knowledge of the hazard that existed at the site of the accident, since the hazard did not pose a risk to the reasonable driver. Implicit in the trial judge's reasons was the expectation that the municipality should have known about the accidents through an accident reporting system, a palpable error, absent any evidence of what might have been a reasonable system.

With respect to her conclusions on causation, which are conclusions on matters of fact, the trial judge ignored evidence that N had swerved on the curve he negotiated prior to the accident, and that he had driven on the road three times in the 18 to 20 hours preceding the accident. She further ignored the of the testimony of the forensic alcohol specialist which pointed overwhelmingly to alcohol as the causal factor which led to the accident, and erroneously relied on one statement by him to support her conclusion that a driver at N's level of impairment would have reacted to a warning sign. The that the outcome would have been different had N been forewarned of the curve ignores the fact that he already knew the curve was there. The fact that the trial judge referred to some evidence to support her on causation does not insulate them from review by this Court. An appellate court is entitled to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion.

Whatever the approach to the issue of the duty of care, it is only reasonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard.

chemin. La question de la connaissance de l'intimée est intimement liée à celle de la norme de diligence. Une municipalité est uniquement censée avoir connaissance des dangers qui présentent un risque pour le conducteur raisonnable prenant des précautions normales, puisqu'il s'agit des seuls dangers à l'égard desquels existe une obligation d'entretien. En l'espèce, on ne pouvait attendre de l'intimée qu'elle connaisse le danger qui existait à l'endroit où l'accident est survenu, puisque ce danger ne présentait tout simplement pas de risque pour le conducteur raisonnable. Il ressort implicitement des motifs de la juge de première instance que la municipalité aurait censément dû connaître l'existence des accidents grâce à un système d'information en la matière, erreur manifeste en l'absence de quelque élément de preuve indiquant ce qui aurait pu constituer un système raisonnable.

Relativement aux conclusions de la juge de première instance sur le lien de causalité, qui sont des conclusions de fait, celle-ci a fait abstraction de la preuve que le véhicule de N avait fait une embardée dans la première courbe et que ce dernier avait roulé à trois reprises sur le chemin en question au cours des 18 à 20 heures ayant précédé l'accident. La juge de première instance a également omis de tenir compte de l'importance du témoignage du spécialiste judiciaire en matière d'alcool, qui menait irrésistiblement à la conclusion que l'alcool avait été le facteur causal de l'accident, et elle a erronément invoqué une déclaration de celui-ci au soutien de sa conclusion que N aurait réagi à un panneau de signalisation. La conclusion que le résultat aurait été différent si N avait été prévenu de l'existence de la courbe ne tient pas compte du fait qu'il savait déjà qu'elle existait. Le fait que la juge de première instance ait mentionné certains éléments de preuve au soutien de ses conclusions sur le lien de causalité n'a pas pour effet de soustraire ces conclusions au pouvoir de contrôle de notre Cour. Le tribunal d'appel est habilité à se demander si le juge de première instance a clairement fait erreur en décidant comme il l'a fait sur le fondement de certains éléments de preuve alors que d'autres éléments mènent irrésistiblement à la conclusion inverse.

Indépendamment de l'approche choisie à l'égard de la question de l'obligation de diligence, il n'est que raisonnable d'attendre d'une municipalité qu'elle prévoit les accidents qui surviennent en raison de l'état du chemin, et non, comme en l'espèce, ceux qui résultent de l'état du conducteur. Élargir l'obligation d'entretien des municipalités en exigeant qu'elles tiennent compte, dans l'exécution de cette obligation, des actes des conducteurs déraisonnables ou imprudents, entraînerait une radicale et irréalisable de la norme actuelle.

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to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. *Standard of Review for Questions of Law*

On a pure question of law, the basic rule with respect to the review of a trial judge's ndings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, *supra*, at p. 90.

There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the of the public in it undermined. Nothing is more important than that the law as pronounced . . . should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by Kerans, *supra*, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

les normes de contrôle se rapportant à chacune des catégories de questions suivantes : (1) les questions de droit; (2) les questions de fait; (3) les inférences de fait; (4) les questions mixtes de fait et de droit.

A. *La norme de contrôle applicable aux questions de droit*

Dans le cas des pures questions de droit, la règle fondamentale applicable en matière de contrôle des conclusions du juge de première instance est que les cours d'appel ont toute latitude pour substituer leur opinion à celle des juges de première instance. La norme de contrôle applicable à une question de droit est donc celle de la décision correcte : Kerans, *op. cit.*, p. 90.

Au moins deux raisons justi ent l'application de la norme de la décision correcte aux questions de droit. Premièrement, le principe de l'universalité impose aux cours d'appel le devoir de veiller à ce que les mêmes règles de droit soient appliquées dans des situations similaires. Notre Cour a reconnu l'importance de ce principe dans *Woods Manufacturing Co. c. The King*, [1951] R.C.S. 504, p. 515 :

> [TRADUCTION] Il est fondamental, pour assurer la bonne administration de la justice, que l'autorité des décisions soit scrupuleusement respectée par tous les tribunaux qui sont liées par elles. Sans cette adhésion générale et constante, l'administration de la justice sera désordonnée, le droit deviendra incertain et la dans celui-ci sera ébranlée. Il importe plus que tout que le droit, tel qu'il a été énoncé, [. . .] soit accepté et appliqué comme l'exige notre tradition; et même au risque de nous tromper, tous les juges étant faillibles, nous devons préserver totalement l'intégrité des rapports entre les tribunaux.

Une deuxième raison, connexe, d'appliquer la norme de la décision correcte aux questions de droit tient au rôle qu'on reconnaît aux cours d'appel en matière de création du droit et qu'a souligné Kerans, *op. cit.*, p. 5 :

> [TRADUCTION] Le principe de l'universalité — et le rôle de création du droit qu'il emporte — exige beaucoup du tribunal de révision. Il exige de ce tribunal qu'il fasse preuve d'un certain degré d'expertise dans l'art d'élaborer une règle de droit juste et pratique, expertise qui ne revêt pas une importance aussi cruciale pour le premier tribunal. Dans les affaires où le droit n'est pas é, le tribunal de révision élabore des règles de droit applicables tout autant à d'éventuelles affaires qu'à celle dont il est saisi.

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Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and re ne legal rules and ensure their universal application. In order to ful ll the above functions, appellate courts require a broad scope of review with respect to matters of law.

B. *Standard of Review for Findings of Fact*

10 The standard of review for ndings of fact is that such ndings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12, at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We nd it useful, for the purposes of this appeal, to review brie y the various policy reasons for employing a high level of appellate deference to ndings of fact.

11 A fundamental reason for general deference to the trial judge is the presumption of tness — a presumption that trial judges are just as competent as appellate judges to ensure that disputes are resolved justly. Kerans, *supra*, at pp. 10-11, states that:

> If we have in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.

12 With respect to ndings of fact in particular, in *Gottardo Properties*, *supra*, Laskin J.A. summarized the purposes underlying a deferential stance as follows (at para. 48):

Ainsi, alors que le rôle premier des tribunaux de première instance consiste à résoudre des litiges sur la base des faits dont ils disposent et du droit établi, celui des cours d'appel est de préciser et de raf - ner les règles de droit et de veiller à leur application universelle. Pour s'acquitter de ces rôles, les cours d'appel ont besoin d'un large pouvoir de contrôle à l'égard des questions de droit.

B. *La norme de contrôle applicable aux questions de fait*

Suivant la norme de contrôle applicable aux conclusions de fait, ces conclusions ne peuvent être in rmées que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante » : *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Ingles c. Tutkaluk Construction Ltd.*, [2000] 1 R.C.S. 298, 2000 CSC 12, par. 42; *Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201, par. 57. On cite souvent cette norme, mais rarement les principes justi ant ce degré élevé de retenue. Pour les besoins du présent pourvoi, nous estimons qu'il est utile d'examiner brièvement les diverses considérations de principe qui incitent les cours d'appel à faire preuve d'un degré élevé de retenue à l'égard des conclusions de fait.

L'une des raisons fondamentales de cette retenue générale à l'égard des conclusions des juges de première instance tient à la présomption d'aptitude à juger — présomption selon laquelle les juges de première instance sont tout aussi aptes que les juges d'appel à apporter des solutions justes aux litiges. Kerans, *op. cit.*, dit ceci aux p. 10-11 :

> [TRADUCTION] Si nous nous à ces systèmes pour régler les différends, il nous faut présumer que les décisions qu'ils produisent sont justes. La procédure d'appel ne fait en conséquence partie du processus décisionnel que parce que nous reconnaissons que, malgré tous les efforts déployés, des erreurs se produisent. L'appel devrait être l'exception plutôt que la règle, ce qui est d'ailleurs le cas au Canada.

Pour ce qui est des conclusions de fait en particulier, dans *Gottardo Properties*, précité, le juge Laskin de la Cour d'appel de l'Ontario a résumé ainsi les objectifs qui sous-tendent le principe de la retenue judiciaire (au par. 48) :

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operational basis, whether at head or across the sea.

35 Stated differently, the lower courts committed an error in law by nding that sub-delegation was a factor identifying a person who is part of the "directing mind" of a company, when the correct legal factor characterizing a "directing mind" is in fact "the capacity to exercise decision-making authority on matters of corporate policy". This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing mind. As this erroneous nding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

36 To summarize, a nding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a nding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in nding that a trial judge erred in law in his or her determination of negligence, as it is often dif cult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

le simple fait de mettre en œuvre ces politiques dans un cadre opérationnel, que ce soit au siège social ou en mer.

En d'autres termes, les juridictions inférieures ont commis une erreur de droit en concluant que la subdélégation était un facteur permettant de quali er une personne d'« âme dirigeante » d'une société, alors que le facteur juridique applicable à cet égard est en fait « la capacité d'exercer un pouvoir décisionnel sur les questions de politique générale de la personne morale ». Cette formulation erronée du critère juridique approprié (les conditions juridiques requises pour être une « âme dirigeante ») a entaché ou vicié la conclusion factuelle des juridictions inférieures selon laquelle le capitaine Kelch était une âme dirigeante de la société. Comme cette conclusion erronée était imputable à une erreur de droit, un degré moindre de retenue s'imposait et la norme applicable était celle de la décision correcte.

En résumé, la conclusion de négligence que tire le juge de première instance suppose l'application d'une norme juridique à un ensemble de faits et constitue donc une question mixte de fait et de droit. Les questions mixtes de fait et de droit s'étalent le long d'un spectre. Lorsque, par exemple, la conclusion de négligence est entachée d'une erreur imputable à l'application d'une norme incorrecte, à l'omission de tenir compte d'un élément essentiel d'un critère juridique ou à une autre erreur de principe semblable, une telle erreur peut être quali ée d'erreur de droit et elle est contrôlée suivant la norme de la décision correcte. Les cours d'appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu'il a conclu à la négligence, puisqu'il est souvent dif cile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n'est pas facilement isolable, il s'agit alors d'une « question mixte de fait et de droit », assujettie à une norme de contrôle plus rigoureuse. Selon la règle générale énoncée dans l'arrêt *Jaegli Enterprises*, précité, si la question litigieuse en appel soulève l'interprétation de l'ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être in rmée en l'absence d'erreur manifeste et dominante.

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Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Arrangement relatif à Kanwal inc. | 2021 QCCS 953, 2021 CarswellQue 3527, EYB 2021-382616, 332 A.C.W.S. (3d) 627 | (C.S. Qué., Mar 19, 2021)

1991 CarswellOnt 219
Ontario Court of Justice (General Division), Commercial List

Inducon Development Corp., Re

1991 CarswellOnt 219, [1992] O.J. No. 8, 31 A.C.W.S. (3d) 94, 8 C.B.R. (3d) 306

Re COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36; Re INDUCON DEVELOPMENT CORPORATION and INDUCON URBAN PROPERTY CORPORATION

Farley J.

Heard: December 16-17, 1991
Judgment: December 17, 1991
Docket: Doc. B364/91

Counsel: *G.B. Morawetz* and *N.C. Saxe*, for applicant.
H. Underwood and *W.M. Black*, for Confederation Life Insurance Co.
I. Marks, for Bank of Montreal.
M. Hartman, for Aetna Life.
G. King and *D. Grieve*, for Royal Bank of Canada.
P. Griffin, for Prudential Assurance Co. Ltd.

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered:

Hongkong Bank of Canada v. Chef Ready Foods Inc. (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) — *referred to*

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) — *referred to*

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, *(*sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 — *referred to*

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) — *referred to*

Statutes considered:

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

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

Application for relief under *Companies' Creditors Arrangement Act*.

Farley J. **(orally):**

1 These are my reasons and disposition of the application by Inducon Development Corp. and Inducon Urban Property Corp. (referred to jointly as the "companies of Inducon") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("C.C.A.A.").

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2 It was indicated that the subsidiary, Inducon Urban Property Corp., was so integral and intertwined with the parent Inducon Development Corp. that the C.C.A.A. proceedings should be looked at on a joint basis. Both companies individually appear to meet the threshold test of C.C.A.A.: namely, both are insolvent; they have trust deeds with debentures outstanding (while to a degree they may be termed "instant debentures", the subscription money apparently is in the bank accounts of the companies); and there is a general proposal that there would be a compromise or arrangement between the companies and their creditors, including debenture holders, which would involve distress preferred shares and interest deferral.

3 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, *(*sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 indicates at p. 112 [C.B.R.] that one should have regard as to whether the meeting of the creditors would be productive; i.e., would there be the possibility of the vote at the meeting being positive? In the present situation, it was candidly acknowledged at first blush that the Confederation Life group ("Confederation") would likely comprise one voting class and that in any event overall Confederation somewhat exceeds 25 per cent in value of all creditors.

4 Confederation has indicated that it cannot envisage any circumstances under which it would be prepared to support the type of plan being proposed by Inducon. However, I note that at the hearing last night, it was mentioned that the parent company (235 Yorkland Boulevard Ltd. — referred to as "235") is willing to forego its claims for $3.2 million and that there were active negotiations with a potential rescuer, Dr. Tse or his company ("Tse"). However, it appears that these discussions with Tse have been rumoured since September of this year. It was indicated at this hearing that Tse apparently required that Inducon be under the protection of C.C.A.A. before proceeding further. However, on checking last night after court, counsel for Inducon this morning advised me that the Bank of Montreal obtained security over this $3.2 million on December 8, 1991. This offer appears to be somewhat questionable, given its now secondary position. It is important to note that Confederation did not indicate that it has lost all confidence in the management of Inducon; in fact, it has enjoyed an extensive and lengthy arrangement with Inducon as co-owner and mortgagee of various properties.

5 The Bank of Montreal also opposed any plan that would expose it to more contribution than the four-per-cent management fee of the headleased properties. There was no expression as to whether the Bank of Montreal would be in a class of its own so as to also obtain a veto power.

6 The elements of the possible rescue and the element of the deferral were not discussed by Confederation and in particular the deferral appeared to be news to the latter. It is not clear as to what position Confederation might take if there were a rescue situation actually in hand. It may be that such events may be of some persuasion to Confederation and to the Bank of Montreal, which now appears to be labouring somewhat. I do note that apparently, vis-à-vis Confederation, there was no urgency with respect to the major mortgage defaults, which occurred in December of 1990 and March of 1991.

7 I understand that Inducon has been scrambling in the past week to see whether it could elicit support from major creditors for a restructuring. The Royal Bank is the largest creditor (approximately double that of Confederation). It neither supported nor opposed the C.C.A.A. application. It wanted more information and proposed a monitor in conjunction with a creditors' committee to authorize expenditures during any C.C.A.A. protection.

8 The purpose of there being, absent unusual circumstances, the practice of a debtor company notifying major interested parties in a C.C.A.A. application is to avoid the general problem of ex parte orders, that is, orders obtained without any input from (major) interested parties (no matter how short the notice is). In my view, given this opportunity for input, the creditors should not take advantage of such notice to precipitate action they would ordinarily not have been able to take had they had no notice. This includes, in my view, the groundlease landlord, who appears to have caught wind of this matter. There should be relief from that sort of "unfairness" on a nunc pro tunc basis in the circumstances.

9 As to the right to convert mortgage interest to ownership or engage in shotgun buy/sell and similar matters, I am of the view that, given their nature in the circumstances (particularly the short 21-day shotgun period), the *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) reasoning especially at p. 13 [C.B.R.] and *Hongkong Bank of Canada v. Chef Ready Foods Inc.* (unreported judgment, B.C. C.A., released October 29,

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1990) [now reported at 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136], also at p. 13 [of the unreported judgment] should prevail to stay these from taking place during the C.C.A.A. protection period. That is not to say that these preliminary matters, such as notice, cannot take place. I would view the 37-day period for power-of-sale proceedings notice in the same vein.

10 As to the question of secured creditor or ownership rights, I do not think that *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) at p. 6 [C.B.R.] fully distinguishes C.C.A.A. from the *Bankruptcy Act*, R.S.C. 1985, c. B-3.

11 I think perhaps it is helpful, not only in this situation but also in other situations, to put down what I personally believe to be some appropriate ground rules. I say this lest it be thought in a particular case that anyone can come in at the last moment with what I will characterize as "previously undisclosed" information, and in that respect attempt to avoid a C.C.A.A. veto. Given the circumstances of last-minute, previously undisclosed information which might dissuade Confederation as to its opposition, any C.C.A.A. protection would be contingent upon "235" or third parties funding the fees of the monitor.

12 There are also some other aspects of C.C.A.A. which I would discuss, but I stress that these are not exhaustive. Firstly, it is an elderly statute; it was put into effect in 1933. It suffers from that disadvantage of timing. Many of the Victorian statutes and pre-Victorian statutes are more generally cast and therefore very flexible. On the other side of 1904, C.C.A.A. suffers as well from not being an up-to-date statute that takes specific notice of modern-day complexities. It is probably a ripe candidate for an overhaul, but one wonders if and when this might take place, given the unfortunate history of the long-awaited revised bankruptcy legislation.

13 Secondly, C.C.A.A. is designed to be remedial; it is not, however, designed to be preventative. C.C.A.A. should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 Thirdly, while it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be a requisite for the germ of a plan.

15 Fourth, ex parte applications are possible under the legislation. In my view, they face the very high hurdle as to why there was no notice to major interested parties in advance, so that at least the latter can appear at the time of the application to indicate whether they are amenable to support, they are dead against or they take no position at that particular time, relying upon the comeback clause to seek any relief from the possible protection given. Having received the benefit of notice, other parties should not take inappropriate advantage with a pre-emptive strike. C.C.A.A. is to be remedial in all respects; there must be the opportunity for the company to put forward its case that it could have if it had not given notice. If the company has reasonable grounds to fear a pre-emptive strike being precipitated by notice, the lack of notice would be justified. In my view, if there is no notice, the comeback clause should initially be very short (for example, 24 hours for the first week). There should always be a comeback clause in any C.C.A.A. order. Service of the order on interested parties must always be forthwith in the most expeditious and efficient fashion.

16 Fifthly, it is desirable to see if the debtor company can get support for the plan from major players. It is of course, as indicated in *Nova*, supra, fruitless to proceed with a plan that is doomed to failure at a further stage.

17 Sixthly, it seems to me that C.C.A.A. protection should not interfere with perfecting notice such as we have here with respect to the shotgun clause and power-of-sale proceedings, but it should have impact with respect to suspending the actual transaction.

18 In this particular situation, I think it is an uphill struggle for Inducon, given Confederation's present attitude prior to this hearing, which may now be joined in by the Bank of Montreal. However, given the complexity of the situation, the short time now requested (January 30, 1992 being a backdown from March 31, 1992) for protection and the possibility of possible new factors being considered, it appears to me that it would be of advantage to grant Inducon very short-term C.C.A.A. relief, but not to the extent of any transferral of pre-mortgage service cash flow from positive projects to negative projects or to general

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corporate purposes during this period. The relief will be effective until 5:00 p.m. on December 19, 1991 to give Inducon time to persuade Confederation to take a non-veto position.

19 If Inducon succeeds in convincing Confederation, the C.C.A.A. protection may continue to January 30, 1992, but subject to the comeback clause allowing for any adjustment or variation of that relief. An order will have to be finalized in that event.

Stay granted.

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Court of Appeal for Saskatchewan

Citation: ***Industrial Properties Regina Limited v Copper Sands Land Corp.*****, 2018 SKCA 36**

Date: 2018-05-23

2018 SKCA 36 (CanLII)

Docket: CACV3176

Between:

Industrial Properties Regina Limited

Appellant (Respondent)

And

Copper Sands Land Corp., Willow Rush Development Corp., Midtdal Developments & Investments Corp., Prairie Country Homes Ltd., JJL Developments & Investments Corp. and MDI Utility Corp.

Respondents (Applicants)

Docket: CACV3177

Between:

101297277 Saskatchewan Ltd.

Appellant (Respondent)

And

Copper Sands Land Corp., Willow Rush Development Corp., Midtdal Developments & Investments Corp., Prairie Country Homes Ltd., JJL Developments & Investments Corp. and MDI Utility Corp.

Respondents (Applicants)

Docket: CACV3178

Between:

Affinity Credit Union 2013

Appellant
(Respondent)

And

Copper Sands Land Corp., Willow Rush Development Corp., Midtdal Developments & Investments Corp., Prairie Country Homes Ltd., JJL Developments & Investments Corp. and MDI Utility Corp.

Respondents
(Applicants)

2018 SKCA 36 (CanLII)

REVISED JUDGMENT: The text of the original judgment has been corrected with text of the erratum (released May 23, 2018) appended.

Before:	Herauf, Ryan-Froslie and Schwann JJ.A.
Disposition:	Appeal allowed in part
Written reasons by:	The Honourable Mr. Justice Herauf
In concurrence:	The Honourable Madam Justice Ryan-Froslie The Honourable Madam Justice Schwann
On Appeal From:	QBG 1693 of 2017, Saskatoon
Appeal Heard:	March 5, 2018
Counsel:	Diana K. Lee, Q.C. and Alexander Shalashniy for Industrial Properties Regina Ltd. Rick Van Beselaere, Q.C. for 101297277 Saskatchewan Ltd. Ryan A. Pederson for Affinity Credit Union Jeffery M. Lee, Q.C. and Paul Olfert for the Respondents

Herauf J.A.

I. INTRODUCTION

[1] The respondents are six corporations, all of which are owned and controlled by one individual. The appellants represent the secured creditors of one or more of the respondents. On December 20, 2017, the respondents were granted an initial order, a sale approval and vesting order and access to interim financing pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]. The appellants appealed those orders to this Court. The appeal was heard on March 5, 2018. On March 9, 2018, the Court allowed the appeal in part with more extensive written reasons to follow. These are those reasons.

II. BACKGROUND FACTS

[2] The assets of the respondents consist of a trailer park (Copper Sands Trailer Park) and an incomplete water treatment and waste water treatment facility located on lands owned by the respondents, and undeveloped lands known as the Willow Rush property. The Copper Sands Trailer Park is the respondents' only functioning business and has two employees.

[3] As of November 2017, the respondents owed the appellants, collectively, in excess of $10,725,000. When the appellant, Affinity Credit Union, commenced foreclosure proceedings, the respondents applied pursuant to the *CCAA*, seeking the following relief, *inter alia*:

(a) an initial order staying creditor enforcement to facilitate the companies' restructurings, including the sale of Willow Rush; and

(b) an order authorizing interim financing up to $1.25 million with a priority charge, to enable it to complete the water treatment facility.

[4] On November 15, 2017, the parties argued the matter before a Chambers judge. The appellants firmly opposed the relief sought by the respondents, challenging the appropriateness of *CCAA* proceedings in the circumstances. The appellants were skeptical of the legitimacy of the Willow Rush sale and questioned whether the water treatment facility was capable of completion and, if so, whether it could produce viable capital. Due to these concerns, amongst

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others, the appellants opposed the initial order and the interim financing, stressing the prejudice the creditors would suffer if these orders were granted.

[5] After hearing submissions, the Chambers judge concluded the respondents' application was premature and adjourned the matter to enable the respondents to confirm the validity of the Willow Rush sale and to file additional material relating to completion of the water treatment facility ((21 November 2017) Saskatoon, QBG 1693/2017 (Sask CA) [*November fiat*]).

[6] The matter was returned to the Court of Queen's Bench on December 11, 2017. At that time, in addition to the application for an initial order and interim financing, the respondents asked the Chambers judge to grant sale approval and a vesting order pursuant to s. 36 of the *CCAA*, to facilitate the sale of the Willow Rush property.

[7] In his fiat ((20 December 2017) Saskatoon, QBG 1693/2017 (Sask CA) [*December fiat*]), the Chambers judge granted the respondents' applications. The Chambers judge granted the initial order, imposing a stay of creditor enforcement for 30 days, authorized $1.25 million interim financing, $800,000 of which was to be used to "complete the commissioning of the water treatment utility", $337,500 for the cost of the *CCAA* proceedings, and $112,500 for "ongoing costs", and granted the sale approval and vesting order. The vesting order was set to expire on January 12, 2018, if the proposed sale did not close.

[8] Pursuant to ss. 13 and 14(1) of the *CCAA*, the appellants sought leave from this Court to appeal the initial order, the interim financing and the sale approval and vesting order. Before leave was granted and before the expiry of the vesting order, the Willow Rush sale closed for the asking price of $4.2 million. For this reason, leave to appeal relating to the sale and vesting order were denied. Leave was granted on the issue of whether it was appropriate to grant the initial order for *CCAA* protection and to grant $1.25 million interim financing.

[9] On March 9, 2018, the Court concluded the Chambers judge had erred in granting the interim financing and the appeal related to that aspect of the matter was allowed. The appeal relating to the appropriateness of the initial order was dismissed.

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III. STANDARD OF REVIEW

[10] Decisions made pursuant to the *CCAA* are highly discretionary and attract deference from this Court. In *Stomp Pork Farm Ltd., Re*, 2008 SKCA 73, 311 Sask R 186 [*Stomp Pork*], Jackson J.A. articulated the Court's general reluctance to intervene in *CCAA* matters, noting the familiarly *CCAA* judges have with the different parties involved and the Chambers judge's meaningful understanding of the circumstances:

> [25] The Court recognizes that there is a general reluctance on behalf of appellate courts to intervene in decisions taken by restructuring judges in *CCAA* matters. The mix of business and legal decisions made in real time can make it difficult to say, after the fact and with any degree of precision, that one particular decision would have been better than another. Further, the Court is hesitant to elevate a decision in one restructuring to a principle of law that will hamper the appropriate exercise of discretion in another. …

[11] Although appellate courts exercise their right of review sparingly, *CCAA* decisions are not immune from appellate intervention. Judges making *CCAA* orders must exercise their discretion judiciously, which requires considering relevant factors and reaching a legally correct conclusion: *Stomp Pork* at para 27; *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 at para 26, [2005] 8 WWR 224. As Dr. Janis P. Sara explains, appellate courts will intervene in limited circumstances:

> Appellate courts will accord a high degree of deference when asked to interfere with the exercise of authority of a *CCAA* court. At the same time, discretionary decisions are not immune from review if the appellate court reaches the clear conclusion that there has been a wrongful exercise of authority or there is a fundamental question of the lower court's jurisdiction.
>
> (*Rescue! The Companies' Creditors Arrangement Act*,
> 2d ed (Toronto: Carswell, 2013) at 181)

[12] In *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379 [*Century Services*], the Supreme Court discussed a court's wide discretion in *CCAA* matters. The Supreme Court explained that this judicial discretion must be exercised in furtherance of the legislation's remedial purposes:

> [59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

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> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[13] The standard of review with respect to the exercise of judicial discretion, such as in *CCAA* matters, is set out in *Rimmer v Adshead*, 2002 SKCA 12 at para 58, 217 Sask R 94:

> … [T]he powers in issue are discretionary and therefore fall to be exercised as the judge vested with them thinks fit, having regard for such criteria as bear upon their proper exercise. The discretion is that of the judge of first instance, not ours. Hence, our function, at least at the outset, is one of review only: review to determine if, in light of such criteria, the judge abused his or her discretion. Did the judge err in principle, disregard a material matter of fact, or fail to act judicially? Only if some such failing is present are we free to override the decision of the judge and do as we think fit. Either that, or the result must be so plainly wrong as to amount to an injustice and invite intervention on that basis. …

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[14] Applying this standard of review, we see no merit to the appellants' argument that the Chambers judge erred in granting the initial order. However, we are of the opinion the Chambers judge failed to consider the mandatory factors enumerated in s. 11.2(4) of the *CCAA* prior to granting the interim financing. This error resulted in a wrongful exercise of discretion given the preliminary nature of the *CCAA* proceedings.

IV. THE INITIAL ORDER

[15] The first formal step in *CCAA* proceedings is the debtor company applying to the court for an initial order. The terms of initial orders are provided for in ss. 11.02(1) and (3) of the *CCAA*:

> **11.02** (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> …
>
> (3) *The court shall not make the order unless*
>
> (a) *the applicant satisfies the court that circumstances exist that make the order appropriate; and*

> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, *in good faith and with due diligence.*
>
> (Emphasis added)

[16] The purpose of the initial order is to stay creditor enforcement in order to maintain the debtor corporation's "status quo" for a specified and limited period so that it may develop a plan to be presented to creditors for their consideration. The initial order staying creditor enforcement provides the debtor corporation some breathing room to allow it to prepare, file and seek approval from creditors and ultimately the courts of its proposed plan: *Rescue! The Companies' Creditors Arrangement Act* at 31.

[17] Pursuant to ss. 11.02(1) and (3), the court may grant an initial order staying creditor enforcement for a term not exceeding 30 days, if the applicant satisfies the court that the appropriate circumstances exist and that it is acting in good faith and with due diligence.

A. Appropriate circumstances

[18] In *Century Services*, the Supreme Court discussed the remedial objectives of the *CCAA* and explained that "appropriate circumstances" exist when an order advances these remedial objectives by providing the conditions under which the debtor can attempt to reorganize:

> [60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed. …
>
> …
>
> [70] … Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. *The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. …
>
> (Emphasis added)

[19] The evidentiary burden the debtor corporation must satisfy to establish "appropriate circumstances" for the purposes of a 30-day stay order is not exceptionally onerous*:* *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432 at para 14, 9 CBR (6th) 161 [*Alberta Treasury*]; *Matco Capital Ltd. v Interex Oilfield Services Ltd.* (1 August 2006)

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Docket No. 06108395 (Alta QB) [*Matco*]; *Hush Homes Inc., Re*, 2015 ONSC 370 at paras 51–53, 22 CBR (6th) 67; *Redstone Investment Corp., Re*, 2014 ONSC 2004 at paras 49–50.

[20] As the Supreme Court noted in *Century Services*, initial *CCAA* orders are made in the "hothouse of real-time litigation" (at para 58). The debtor corporation is often in crisis-mode due to its failure to meet creditor obligations and is seeking *CCAA* protection to obtain some breathing room to enable it to get its affairs in order without creditors knocking at the door. Therefore, to obtain an initial 30-day order, the applicant is not required to prove it has a "feasible plan" but merely "a germ of a plan": *Alberta Treasury* at para 14. The court must assess whether the circumstances are such that, with the initial order, the debtor corporation has a "reasonable possibility of restructuring": *Matco*. To require the applicant corporation to present a fully-developed restructuring plan or have the support of all its creditors at the initial stage of *CCAA* proceedings, although desirable, is not expected. To impose such a threshold to establish "appropriate circumstances" would unduly hinder the purpose of an initial order which, as the Supreme Court explained in *Century Services*, is to provide the conditions under which the debtor can *attempt* to reorganize.

[21] For the purposes of an initial order, the debtor corporation must convince the court that the initial order will "usefully further" its efforts towards attempted reorganization. If the debtor corporation satisfies this onus, the court may grant the initial application and provide the conditions under which the debtor corporation can attempt to reorganize, namely, staying creditor enforcement to preserve the debtor corporation's status quo for a limited period of time. If, however, the debtor corporation fails to satisfy this onus and the court determines that the application is merely an effort by the debtor corporation to avoid its obligations to its creditors and postpone an inevitable liquidation, the initial application should be denied: *Rescue! The Companies' Creditors Arrangement Act* at 53–54.

B. Good faith and due diligence

[22] In addition to proving appropriate circumstances, the applicant corporation must convince the court that it is acting in good faith and with due diligence pursuant to s. 11.02(3)(b). Despite the wording of s. 11.02(3)(b) indicating "good faith and due diligence" applies only to orders under subsection (2), that being orders "other than initial applications", the Supreme

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Court in *Century Services* determined good faith and due diligence applies to initial orders as well:

> [69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).
>
> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. …

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[23] Although it is a consideration for granting an initial order, courts generally defer the in-depth analysis of good faith and due diligence to subsequent applications, such as the extension of the initial 30-day order: Rogers, Sieradski & Kanter, "What Does 'Good Faith' Mean in Insolvency Proceedings?" Vol 4-4 Insolvency Institute of Canada (Articles) (WL). If, however, the court determines the debtor corporation is not seeking *CCAA* protection in good faith or there is convincing evidence of a lack of due diligence, the court may deny an initial order on the basis of a failure to satisfy the baseline requirement in s. 11.02(3)(b): see *Alberta Treasury*.

C. Did the Chambers judge err in granting the initial order?

[24] The appellants submit the Chambers judge erred in concluding the respondents had satisfied the "appropriate circumstances" and "good faith and due diligence" requirements contained in ss. 11.02(3)(a) and (b).

[25] In support of this argument, the appellants contend *CCAA* proceedings are not appropriate as the respondents have only one active business, the Copper Sands Trailer Park, which has only two employees. The appellants argue *CCAA* proceedings are not needed to "avoid the social and economic costs of liquidating assets" as there are no such consequences given the minimal business activity of the respondents.

[26] In addition, the appellants submit the Chambers judge failed to consider the creditors' lack of faith and confidence in management when determining whether the initial order was appropriate. The appellants also allege the Chambers judge failed to provide adequate reasons for his conclusion that the respondents were acting in good faith and with due diligence.

[27] The Chambers judge determined the respondents were engaged in active business, which was "facing a looming liquidity condition or crisis" if an initial order and a stay of proceedings were not granted (*November fiat* at para 15). The Chambers judge concluded the "initial stay of proceedings [would] give the applicants the time to restructure and refinance their operations" (*December fiat* at para 14).

[28] The Chambers judge was satisfied the respondents were not seeking *CCAA* protection merely to postpone inevitable liquidation:

> [10] In this case I find that the applicants, or at least MDI Utility Corp. and CSLC, are engaged in an active business rather than being simply real estate developers as alleged by the respondents. CSLC operates a mobile home park. MDI Utility Corp. is completing a water treatment utility to provide wastewater treatment services to both the existing mobile home park and an upcoming Tanglewood development on CSLC lands. This is not a situation where the applicants seek CCAA protection for the purpose of obtaining more time to sell or refinance property as was the situation in *Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145; *Redekop Properties Inc. (Re)*, 2001 BCSC 1892; and *Octagon Properties Group Ltd. (Re)*, 2009 ABQB 500, 486 AR 296.
>
> (*December fiat*)

[29] As for whether there was a reasonable possibility of restructuring, the Chambers judge noted he was "satisfied that the completion of the water treatment utility [would] add to the overall net worth" of the respondents (*December fiat* at para 13). The Chambers judge also noted that the respondents had, at the time of the initial application, secured an interim financer willing to fund the completion of the water treatment utility and the *CCAA* proceedings.

[30] On this basis, the Chambers judge concluded as follows:

> [14] I am satisfied that the applicants have satisfied the onus upon them to establish that they are acting in good faith and with due diligence and that an order for an initial stay of proceedings is appropriate. ...
>
> (*December fiat*)

[31] As discussed, the purpose of the initial order is to stay creditor enforcement to grant the debtor corporation a limited period of time to attempt to devise a viable restructuring plan. To obtain an initial order, the debtor corporation must satisfy the court that the initial order will "usefully further" its efforts towards attempted reorganization. The debtor corporation is not required, at this stage of the proceedings, to provide a full-fledged restructuring plan, but is required to show, at the very least, it has a "germ of a plan": see *Alberta Treasury*. The court

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must be convinced the debtor corporation is not seeking *CCAA* proceedings simply to delay the inevitable liquidation in order to "buy time".

[32] It is clear the Chambers judge was cognizant of these purposes and the baseline considerations, which the respondents had to satisfy prior to receiving the initial order. The Chambers judge concluded the initial order would usefully further the remedial purposes of the *CCAA* by providing the conditions upon which the respondents could attempt to reorganize their affairs. He was satisfied on the evidence before him, that there was at least a "germ of a plan", given the fact the respondents had secured interim financing to facilitate the commissioning of the water treatment facility.

[33] It is also clear the Chambers judge considered the creditors' lack of confidence. In his fiat, the Chambers judge stated: "[u]fortunately, and unlike many *CCAA* applications, all of the respondent secured creditors oppose the application" (*November fiat* at para 21). Despite this, the Chambers judge determined the initial order was appropriate in the circumstances based on the factors discussed above. The Chambers judge was entitled to reach this conclusion. Whether the creditors have lost confidence in the debtor corporation's management is something the court must consider when assessing whether to grant an initial order. However, the creditors' lack of faith is not determinative and does not necessarily dictate denying an initial application: *Asset Engineering LP v Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para 27, 96 BCLR (4th) 77; *Pacific Shores Resort & Spa Ltd., Re.*, 2011 BCSC 1775 at paras 40–44 and 49(c).

[34] Upon review, although his reasons are not extensive, it is clear the Chambers judge properly considered whether the baseline considerations contained in ss. 11.02(3)(a) and (b) were satisfied. Given the real time nature of *CCAA* proceedings, Chambers judges are not required to give extensive reasons addressing each and every argument raised by the parties when granting initial applications (*Alberta Treasury Branches v Conserve Oil Corporation*, 2016 ABCA 87 at paras 14–15, 35 CBR (6th) 6). We also note that the Chambers judge was not required to undertake an in-depth analysis to determine good faith and due diligence at this stage of the proceedings as a more in-depth analysis will be taken if the respondents make an application to extend the order or if they seek additional court orders.

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[35] Given the deference afforded to a chambers judge making *CCAA* decisions, this Court will only intervene if the lack of reasons leads to a reasonable belief that the Chambers judge ignored or misconceived the evidence *in a way that affected his conclusion* (*York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, 2010 ONCA 393, 262 OAC 232). This threshold for intervention is not met in this case. Therefore, the appellants' appeal regarding the initial order is dismissed.

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V. INTERIM FINANCING

[36] In addition to granting the initial order, the Chambers judge authorized the respondents to obtain interim financing up to $1.25 million. The interim financing was given a priority charge upon the respondents' assets and over the claims of the appellants. The appellants appealed this order on the grounds the Chambers judge failed to consider the relevant factors pursuant to s. 11.2(4) of the *CCAA* prior to granting the order with respect to interim financing.

[37] Pursuant to s. 11.2(1) of the *CCAA*, a debtor corporation may apply to the court at any stage of the proceedings for interim financing. As Dr. Janis Sarra explains, "interim financing" refers primarily to the working capital that the debtor corporation requires in order to continue operating during restructuring proceedings, as well as to finance the costs of the *CCAA* process (*Rescue! The Companies' Creditors Arrangement Act* at 197). The underlying premise of interim financing is that it is a benefit to all stakeholders "as it allows the debtor to protect going-concern value while it attempts to devise a plan of compromise or arrangement acceptable to creditors" (at 197). Interim financing is generally granted to ensure the debtor corporation can continue its essential operations, such as "keeping the lights on" and paying employees, while it undergoes the *CCAA* proceedings.

[38] Before an order allowing interim financing to be obtained can be granted, the court must consider, among other things, the factors enumerated in s. 11.2(4). If granted, the court may order the interim financing have a priority charge over the corporation's assets pursuant to s. 11.2(2):

> **11.2** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by

the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

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

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

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

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

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

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

[39] If the applicant corporation applies for interim financing at the same time as it applies for an initial order, the court must be diligent in its consideration of the factors enumerated in s. 11.2(4). The court must assess whether it is imperative and appropriate to order interim financing at the very outset of *CCAA* proceedings. Given that the purpose of seeking and granting an initial order is to provide the conditions upon which the debtor corporation can plan a compromise or reorganization to present to its creditors, the court must be cautious when asked to authorize large sums of interim financing at the initial stage, unless there is evidence that the financing is needed to enable the debtor corporation to undergo this planning process. This is especially important when the applicant is seeking a priority charge on the interim financing.

A. Did the Chambers judge err in allowing interim financing to be obtained?

[40] The appellants submit the Chambers judge erred in granting the respondents $1.25 million interim financing due to his failure to consider one or more of the factors identified in s. 11.2(4).

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[41] The Chambers judge provided the following reasons for authorizing the interim financing at the same time he granted the initial application:

> [13] I also approve the interim financing order sought by the applicants. The interim financing lender, Staheli Construction Ltd., has agreed to advance the sum of $1,250,000 to the applicants subject to obtaining a first charge on the assets of the company. The $1,250,000 will be allocated $800,000 to complete the commissioning of the water treatment utility owned by MDI Utility, $337,500 for the cost of the CCAA proceedings and $112,500 for the ongoing costs of the applicants according to the proposed monitor's initial report. The respondents say that they will be prejudiced by any priority charge given to the interim lender and suggest that the completion of the water treatment utility adds little to no value to the overall net worth of the applicants. However, I am satisfied that the completion of the water treatment utility will add to the overall net worth of the applicants and the monitor will ensure that the $800,000 is being appropriately used for the purpose intended.
>
> (*December fiat*)

[42] This analysis fails to consider multiple factors in s. 11.2(4), namely the period of time the parties were expected to be subject to *CCAA* proceedings pursuant to s. 11.2(4)(a) and "whether the loan would enhance the prospects of a viable compromise or arrangement" pursuant to s. 11.2(4)(d).

[43] The appellants strongly opposed the use of any funds to complete the commissioning of the water treatment facility. In their view, it is a failed operation that will cost more than the allotted $800,000 to complete. Even if completed, the appellants are of the opinion the water treatment facility has no reasonable commercial value and therefore, its completion cannot result in a viable restructuring or compromise between it and the respondents. The appellants argued that granting interim financing to complete the water treatment facility would only result in the respondents incurring further debt; debt that will inevitably fall on the creditors' shoulders when the respondents are forced to liquidate, given that there is no chance of a successful restructuring. The appellants stressed that the interim financing would significantly prejudice their position as it has received a priority charge over the respondents' assets.

[44] Although the Chambers judge concluded the completion of the water treatment facility would "add to the overall net worth" of the respondents, he failed to consider whether this added net worth would enhance the prospect of a viable compromise pursuant to s. 11.2(4)(d). Given the creditors steadfast opposition to the interim financing, it was incumbent on the Chambers judge to consider this factor. It is clear the Chambers judge failed to do so. He also failed to

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consider the length of time the parties would be subject to *CCAA* proceedings pursuant to s. 11.2(4)(a).

[45] There was no evidence of urgent circumstances dictating a need to permit the respondents to obtain interim financing with a priority charge at this stage of the proceedings. Given that the respondents' only active business is the Copper Sands Trailer Park, which receives a monthly income that is sufficient to keep the lights on and to pay the only two employees, the interim financing was not needed to preserve the status quo or maintain the respondents' essential operations. Moreover, there was no evidence the interim financing was needed to enable the respondents' *planning* of the compromise or arrangement it would eventually present to the creditors. To the contrary, there was evidence that granting interim financing to complete the water treatment plan would *deter* the parties from reaching a viable compromise at this stage of the proceedings.

[46] Given the preliminary stage the *CCAA* proceedings were at, there was no detailed plan evidencing how the commissioning of the water treatment facility would contribute to a viable restructuring of the respondents. As discussed above, a detailed plan is not a prerequisite to obtain an initial order. However, something more concrete and justifiable is needed in order to grant interim financing for something that is beyond what is needed to preserve the debtor corporation's status quo.

[47] We note that this is not a situation where there was unanimous creditor support for the interim financing to fund the commissioning of the water treatment facility. The creditors strongly opposed the funds being sought to facilitate the construction of a project they viewed as an inevitable failure. This fact further detracts from the appropriateness of granting the interim financing, with a priority charge, at this preliminary stage of the proceedings.

[48] The Chambers judge erred by failing to properly consider how these facts impacted the likelihood of a viable compromise or arrangement being made with respect to the respondents pursuant to s. 11.2(4)(d).

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VI. CONCLUSION

[49] In conclusion, we find no error with the Chambers judge's determination that "appropriate circumstances" existed and that the respondents were acting in good faith and with due diligence so as to merit granting the initial 30-day order. The Chambers judge did, however, err in permitting the respondents to obtain $1.25 million interim financing when he granted the initial order.

[50] Therefore, the appeal is allowed in relation to the interim financing and the part of the initial order relating to interim financing is set aside. The remaining components of the initial order remain intact and the other grounds of appeal are dismissed. We note that our decision does not prevent the respondents from initiating another application for interim financing at a later date if they so choose.

[51] Since there was divided success, there will be no order as to costs with respect to the appeal or the leave application.

"Herauf J.A."

Herauf J.A.

I concur. "Ryan-Froslie J.A."

Ryan-Froslie J.A.

I concur. "Schwann J.A."

Schwann J.A.

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Korol (Re),*
2014 BCCA 380

Date: 20141007
Docket: CA041017

In The Matter of the *Patients Property Act*
R.S.B.C. 1996, Chapter 349 and amendments
Re: Violet Martha Korol

Between:

Wayne Darrell Korol

Respondent
(Petitioner)

And

The Public Guardian and Trustee of British Columbia

Respondent
(Respondent)

And

Allen Bruce Korol

Appellant
(Respondent)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Goepel

On appeal from: Orders of the Supreme Court of British Columbia, dated June 3, 2013 (*Korol (Re)*, 2013 BCSC 979) and September 3, 2013, New Westminster Docket No. S149810.

Counsel for the Appellant: J. Dubas

Counsel for the Respondent Allen Bruce Korol: K. Deane-Cloutier

Place and Date of Hearing: Vancouver, British Columbia
September 18, 2014

Place and Date of Judgment: Vancouver, British Columbia
October 7, 2014

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Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Madam Justice Stromberg-Stein

2014 BCCA 380 (CanLII)

Summary:

Appeal from the orders of a chambers judge cancelling a Certificate of Pending Litigation ("CPL") and setting aside an order restricting dealings with property ("Restraining Order") that are the subject matter of a contested family law action. In 1961 the appellant, Allen, and his spouse, Violet, were married. They separated in the early 1990s. In October 2011 Allen commenced a family law action claiming a 50% beneficial interest in two properties registered in Violet's name. Allen applied for and obtained CPLs against both properties. Under a power of attorney their son Wayne filed caveats and sought and obtained the Restraining Order. In March 2013, Wayne commenced these proceedings seeking orders appointing him committee of Violet's person and affairs. He also sought an order cancelling the CPL and setting aside the Restraining Order. The chambers judge granted all of the orders Wayne sought. Allen appeals the cancelling of the CPL and the setting aside of the Restraining Order.

HELD: Appeal allowed. The chambers judge misdirected himself when he cancelled the CPL and set aside the Restraining Order on the basis that such orders were in the best interest of the patient. In considering whether to cancel a CPL or a restraining order a judge must consider the appropriate statutory criteria. Allen was entitled to bring the application for reconsideration and special costs were unwarranted. Wayne had no standing to apply in his own right for either order.

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Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] The respondent Wayne Darrell Korol ("Wayne") brought a petition pursuant to the provisions of the *Patients Property Act*, R.S.B.C. 1996, c. 349 (the *PPA*), seeking his appointment as committee of the person and affairs of his mother, Violet Martha Korol ("Violet"). In the petition he also sought orders cancelling a certificate of pending litigation ("CPL") and setting aside an order of Master Caldwell made pursuant to s. 284 of the *Land Title Act*, R.S.B.C. 1996, c. 250 (the "*LTA*") (the "Restraining Order"). Both the CPL and the Restraining Order concerned properties which are part of the subject matter of a contested family law action between Violet and her husband, the appellant, Allen Bruce Korol ("Allen").

[2] The chambers judge appointed Wayne committee of Violet's person and affairs. He set aside the Restraining Order and cancelled the CPL. Allen now appeals the orders setting aside the Restraining Order and cancelling the CPL.

[3] For the reasons that follow I would allow the appeal.

BACKGROUND

[4] Allen and Violet were married on March 4, 1961. They are now 79 and 75 years old. They have four children who are all now adults. Throughout the marriage Allen worked as a land developer in British Columbia and elsewhere, assembling large parcels of land for commercial development. Allen indicates that Violet was a homemaker who raised the parties' children and assisted him in looking after the properties in British Columbia.

[5] On April 15, 1978, the parties purchased a home on Chartwell Drive in West Vancouver ("Chartwell"). Title to Chartwell was placed in Violet's name alone. Chartwell became the family residence and Violet continues to reside there.

[6] In the 1990s Allen and Violet provided money to the three eldest children to purchase condominiums in Langley. One of the children had difficulty maintaining his

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mortgage commitments and his property was subsequently transferred to Violet ("Langley").

[7] Allen and Violet separated in the early 1990s. In the 1990s Allen started doing business in Costa Rica and began to reside there the majority of the time. In his material he indicates that after separation he continued to forward significant sums to support Violet, some of which he claims were used to upgrade and maintain Chartwell. He alleges that he advanced approximately $1,200,000. He says that he and Violet have an understanding that Allen has a 50% beneficial interest in all real property registered in Violet's name including Chartwell and Langley.

[8] After the parties separated Allen indicates that he took steps in Costa Rica to annul the marriage. On July 8, 1999 he purported to marry in Florida. On his application to marry, Allen stated that his previous marriage had ended as a result of an annulment issued in 1993 based on the laws relating to annulment in Costa Rica.

[9] At the time of the initial application in this proceeding it was not clear whether the annulment was valid. More importantly it was not known whether Allen and Violet were still married. What was clear was that they had lived separate and apart for some 20 years.

[10] In January 10, 2008, Violet granted Wayne a power of attorney. He was also named as executor of her will, which will is dated April 1, 2010.

[11] On October 11, 2011, Allen commenced a family law action (Vancouver Registry E113148) naming Violet and Wayne as respondents. In the family law action Allen claims a 50% beneficial interest in Chartwell and Langley. He alleges in the pleading that since 1996 he has transferred approximately $1,200,000 to Violet's benefit. In an alternative allegation, he alleges that Wayne has taken monies forwarded to Violet and used them for unrelated purposes. He seeks an order of compensation and damages against both Violet and Wayne for an amount up to $3,000,000 on the basis of breach of express trust, resultant trust, constructive trust,

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restitution and *quantum meruit*. As part of that family action Allen applied for and ultimately registered CPLs against Chartwell and Langley.

[12] Under the authority of the power of attorney, Wayne filed caveats in regard to Chartwell and Langley. He then filed a petition seeking orders pursuant to s. 284 of the *LTA* prohibiting dealings with those properties. In that proceeding, Master Caldwell made the Restraining Order on December 1, 2011. The Restraining Order prevented further dealings with Chartwell or Langley pending further orders of the court. In addition the Restraining Order directed that issues concerning the equity in Chartwell and Langley and an accounting in regard to those properties would be determined in the family law action that Allen had commenced. Allen consented to the terms of the Restraining Order.

[13] On March 13, 2013, Wayne commenced these proceedings for an order that Violet, by reason of mental infirmity arising from disease, age or otherwise, was incapable of managing herself and her affairs and for an order appointing him committee of Violet's person and affairs without the necessity of furnishing a bond or other security. He sought an order cancelling the CPL against Chartwell and setting aside the Restraining Order. In support of the application he filed his own affidavit and affidavits of two medical practitioners, who each deposed that Violet was incapable of managing her affairs.

[14] At the time of the application Violet was 73 years old and retired. She continued to live at Chartwell with the assistance of a full-time caregiver. Her income was indicated to be approximately $3,200 per month, comprised of Canada Pension and Old Age Security benefits plus rental income of $2,600 from Langley and an Arizona property. Her monthly expenses are stated to be $9,175.

[15] The materials indicated that the 2013 assessed value of Chartwell was $2,654,000 while the assessed value of Langley was $301,000. Both properties are subject to lines of credit mortgages. The mortgages on Chartwell total approximately $550,000. Based on their assessed value the equity in Chartwell and Langley at the time the application was brought was $2,113,017 and $245,942 respectively.

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[16] A market value appraisal of Chartwell dated June 12, 2013 was also in evidence. That appraisal valued Chartwell at $2,915,000.

[17] In his affidavit Wayne deposed that to pay her living expenses Violet had borrowed against lines of credit on the Chartwell property. He noted that as a result of limitations set out in the Restraining Order she could not borrow any more against that property. Similarly, he deposed that Violet had used lines of credit against Langley for the upkeep and maintenance of Langley and another property registered in her name that was located in Arizona.

[18] In his response to the petition Allen raised some questions concerning the medical evidence, but indicated he was not actively opposing the appointment of a committee. Allen's position was that Wayne should not be appointed committee because of potential conflicts of interest. He submitted that the proper choice of committee would be the Public Guardian and Trustee of British Columbia ("PGT").

[19] Allen opposed cancelling the CPL or varying the Restraining Order. He submitted that the evidence did not justify the wholesale cancelling of the CPL or variation of the Restraining Order given uncertainty concerning Violet's medical situation and future needs.

[20] In its response to the petition, the PGT indicated that Wayne appeared to be the appropriate person to act as committee, save and except for the fact that he is a respondent in the family law action. It noted the exact nature and extent of the claim against Wayne in the family law action was unclear. It suggested that if Wayne was named as committee, there should be protections in place in respect of his authority to deal with Violet's real property. The PGT proposed that any order should contain specific terms that are standard in circumstances in which a committee is appointed in lieu without a bond.

THE CHAMBERS HEARING

[21] Much of the chambers hearing was dedicated to discussion as to the appropriateness of Wayne acting as committee. Submissions were also made

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concerning the merits of the family law action and the strength of Allen's potential claim to Chartwell and Langley. In regard to the CPL and Restraining Order, Wayne's stated concern was their impact on his ability to raise money for Violet's ongoing care. In the course of submissions Wayne's counsel indicated that one alternative they were considering was to obtain a reverse mortgage on Chartwell. In the course of that submission Wayne's counsel said as follows:

> And so it is not clear that she would in fact be able to get a reverse mortgage, but if she did, basically what would happen is they would pay off the two lines of credit on Chartwell at 550 and they would need to have the CPL filed by Allen in the family matter discharged, obviously it could go back on immediately after they get their security. [Emphasis added.]

[22] The chambers judge released written reasons on June 3, 2013. The reasons are indexed at 2013 BCSC 979. He noted several authorities for the proposition that the determination of choice of committee under the *PPA* must be based on the best interests of the patient: *Pineo (Re)*, [1985] B.C.J. No. 1171 (S.C.); *Mawdsley v. Austin* (1984), 14 D.L.R. (4th) 315 (B.C.S.C.); and *Lee (Re)*, 2002 BCSC 838. He concluded that even if there was a possible conflict between Wayne and his mother, the extent of same was minor in relation to the amount involved in the estate and that Wayne was the best person to defend Violet's interests. In the result he appointed Wayne committee.

[23] At para. 27 of his reasons the chambers judge noted that the PGT had recommended what he understood to be standard terms in lieu of Wayne providing a bond. Those terms, which he held should form part of the order, are:

> a) the Committee is restrained from disposing of or encumbering the real property specified in the Schedule to the Affidavit of Kindred and Fortune without further order on notice to the Public Guardian and Trustee or without the prior written consent of the Public Guardian and Trustee.
>
> b) If the Committee sells any of the real property, the net sale proceeds shall be transferred from the conveyancing lawyers' trust account to a financial institution where an investment has been established by the Committee in compliance with the *Trustee Act*. The Committee shall have no access to the capital of the investment, other than for reinvestment purposes, without the prior written consent of the Public Guardian and Trustee. The financial institution and any other

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> successor institutions shall be served with a copy of the order and proof of service of the order shall be provided to the Public Guardian and Trustee forthwith thereafter.

[24] His comments in regards to the CPL and the Restraining Order were limited to the following:

> [28] With the foregoing precautions in place I am satisfied that the Certificate of Pending Litigation should be discharged as it relates to the West Vancouver property.
>
> ...
>
> [30] The order of Master Caldwell of December 11, 2011 is hereby set aside in its entirety subject to the terms of this order as set out in paragraph 27 of these reasons for judgment.

THE RECONSIDERATION APPLICATION

[25] On August 20, 2013, Allen filed a notice of motion seeking reconsideration of the judgment. He sought orders that Chartwell could not be sold without his approval or consent, that any borrowings against Chartwell be subject to an accounting in the family law action, and the CPL on Chartwell only be postponed to allow certain specified financing to be put in place. In support of his application Allen referred specifically to the comments of Wayne's counsel at the initial hearing that the CPL could go back on the property after the new financing was arranged.

[26] In advance of the reconsideration hearing, Allen had been able to confirm that there was no annulment registered in Costa Rica which would have ended or dissolved Violet and Allen's marriage. In the result they are still legally married under the laws of Canada.

[27] On August 30, 2013, Allen commenced a second family law proceeding (Vancouver Registry E132519) seeking a division of assets under the *Family Law Act* and in the alternative under the *Family Relations Act*. He also seeks a divorce. In the second family law proceeding, Allen again sought a CPL over Chartwell and Langley.

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[28] The reconsideration application came on before the chambers judge on September 3, 2013. He gave brief unreported oral reasons dismissing the application. He said as follows:

> [1] I think what we are doing here is -- I agree with your friend that this is not the appropriate forum to deal with the protection of your client's position. I do not believe that reconsideration is merited in the circumstances here, although I am empowered, I have the discretion, to be able to proceed in that regard. I really do not think it is necessary here to -- because I do not see any potential miscarriage of justice at this point in time. My previous order, I think it was June 5th, I am not -- I may be wrong in that.
>
> ...
>
> [3] The order and the CPL is to be discharged, not replaced on title, and I am not going to put limits or conditions on the borrowing as suggested because I do not believe -- as I said, in this application, I am dealing with protection of the patient, in particular, and I see no particular prejudice to Allen Korol on this matter.

[29] He ordered Allen to pay special costs of the reconsideration application to Wayne.

[30] On November 22, 2013 a justice of this court stayed the order setting aside the Restraining Order.

ISSUES ON APPEAL

[31] The appeal challenges the orders cancelling the CPL and setting aside the Restraining Order. Allen submits the orders were not supported by law or the evidence. He submits that the CPL and Restraining Order protected his interests in the subject properties.

[32] Allen also challenges the order that he pay special costs of the reconsideration application. He submits that regardless of whether or not he was successful on that application, it was an application he was clearly entitled to bring and his conduct did not warrant the imposition of the sanction of special costs.

[33] Wayne submits the chambers judge did not err in setting aside the CPL and the Restraining Order. He submits that the orders in question are discretionary in nature and the Court should not interfere with the exercise of the chambers judge's

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discretion. He submits that in matters under the *PPA* the best interests of the patient are paramount and guide all decisions. He submits that the CPL and Restraining Order were causing hardship to Violet because they had the effect of depriving her of the capacity to deal with her real property and thus depriving her of the funds she needed to survive. In the circumstances he submits no error was made.

FRESH EVIDENCE APPLICATION

[34] In advance of the appeal both parties applied to admit voluminous amounts of evidence that was not before the chambers judge. This material included both "fresh evidence" and "new evidence". Fresh evidence is evidence that existed at the time of the chambers hearing while new evidence concerns events that took place after the hearing: *Scott v. Scott*, 2006 BCCA 504 at para. 22.

[35] The usual test governing the admission of fresh evidence in a civil appeal is set out in *R. v. Palmer*, [1980] 1. S.C.R. 75 at 775-776 [*Palmer*]. This test requires the appellant to demonstrate that the evidence was not discoverable by reasonable diligence before the end of the trial; that the evidence is credible; that it would be practically conclusive of an issue before the court; and that if believed, the evidence could have affected the result of the trial.

[36] The *Palmer* test does not apply to evidence of events that occurred subsequent to the order under appeal. This latter type of evidence must still be relevant to an issue under appeal and will only be admitted in rare cases: *Jens v. Jens*, 2008 BCCA 392 at para. 29.

[37] The fresh evidence the parties wish to introduce concerns information and documents which have been disclosed in the course of the family law proceedings and go to the merits of the respective parties' position in those proceedings. None of that evidence is relevant in determining the issues before the Court on this appeal. I would dismiss all the fresh evidence applications for want of relevance.

[38] The new evidence is related to financing that was registered against Chartwell since the orders of the chambers judge. On October 18, 2013, Wayne,

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in his capacity as committee, obtained a mortgage against Chartwell from the North Shore Credit Union in the principal amount of $450,000. There is evidence of communication between Allen's counsel and counsel for the North Shore Credit Union that the Credit Union is not opposed to a CPL being placed on the property subject to a priority agreement, the terms of which have been negotiated to the satisfaction of the Credit Union and the parties. Under the terms of the priority agreement the aggregate principal, charges and interest of all mortgages secured on Chartwell shall not exceed $1,450,000. The priority agreement would allow advances to Violet up to one-half of Chartwell's appraised value.

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[39] I would allow the North Shore Credit Union mortgage and the priority agreement to be admitted as new evidence on this appeal. The North Shore Credit Union Mortgage and the priority agreement indicate that continuation of the CPL and the Restraining Order would not prejudice Violet's interest.

THE ADJOURNMENT APPLICATION

[40] On September 3, 2014, Wayne set down an application to adjourn the appeal pending completion of the family law trial. The trial is scheduled to be heard in April, 2015. In his written submissions in support of the adjournment application Wayne's counsel submitted that an adjournment would not prejudice Allen because the stay of the order setting aside the Restraining Order prevents Violet from dealing with Chartwell and Langley without court order, provides for an accounting in the family law action, and provides that those orders are without prejudice to the positions of either party in the family law action. In these circumstances he submitted there was no practical benefit in Allen having the CPL reinstated.

[41] Allen did not consent to the adjournment. Ultimately Wayne withdrew the application and the appeal went ahead as scheduled.

DISCUSSION

A. Standard Of Review

[42] The standard of review for discretionary decisions was recently restated by the Supreme Court of Canada in *Penner v. Niagara (Regional Police Board)*, 2013 SCC 19:

> [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.

B. Analysis

[43] The initial reasons of the chambers judge were mostly directed to the question as to whether or not a committee should be appointed and who that committee should be. Having decided that Wayne should be committee, he then stated the order should include the terms proposed by the PGT. Noting the inclusions of those precautions he then, without further explanation, cancelled the CPL and set aside of the Restraining Order.

[44] Throughout the proceedings Wayne had submitted that the test to be followed in considering all of the applications was the best interest of the patient. In the reconsideration application the chambers judge, in his very terse reasons confirming that the CPL should be cancelled and the Restraining Order set aside, appears to have adopted that suggestion when he said:

> [3] The order and CPL is to be discharged, not replaced on title, and I'm not going to put limits or conditions on the borrowing as suggested because I do not believe --- as I said, in this application, I am dealing with protection of the patient, in particular, and I see no particular prejudice to Allen Korol on this matter. [Emphasis added.]

[45] With respect, in deciding to cancel the CPL and to set aside the Restraining Order on the basis of the protection of the patient, the chambers judge misdirected himself and fell into error. The error is fatal for the portion of his order dealing with

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the CPL and Restraining Order. The CPL and the Restraining Order should not have been summarily removed on the basis that they were not in Violet's best interest.

[46] While there is no doubt on the authorities that the best interest of the patient is the test in determining how the affairs of the patient are to be organized, that test does not spill over into litigation in which the patient is a party. In such litigation the fact that one of the parties acts through a committee is of no moment in determining how a particular application is to be decided.

[47] In this case Allen and Violet are in the midst of a dispute concerning ownership of Chartwell and Langley. Allen claims he is entitled to a one-half interest in each property. The CPL and the Restraining Order give notice to third parties of his claim and protect his interests while the litigation is ongoing. The terms requested by the PGT that the chambers incorporated into the order were not for Allen's benefit. They are standard terms in committee proceedings when a committee is appointed without bond. They are intended to protect the estate of the committee against wrongdoing by the committee. They do not justify cancellation of the CPL or setting aside the Restraining Order.

[48] I should further note that in light of the priority agreement, continuing the CPL and the Restraining Order does not prejudice Violet. The priority agreement allows advances to Violet up to one-half the appraised value of Chartwell. In his aborted adjournment application Wayne acknowledged that the Restraining Order provided important benefits to Allen. He did not suggest it was in any way prejudicial to Violet.

[49] In summary, the chambers judge misdirected himself as to the law that applies to cancelling the CPL and setting aside the restraining order. For the reasons indicated below, the cancelation of the CPL and the discharge of the Restraining Order must be considered in respect of the relevant *LTA* provisions (i.e., ss. 256-257 and 284).

[50] There appears to have been no basis for the order of special costs against Allen on the reconsideration application. Given the position taken by Wayne's

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counsel at the initial hearing that the CPL could be reinstated on the property once new financing was in place, it was clearly appropriate for Allen to bring that matter to the judge's attention. Allen's conduct in doing so was not such that it should be the subject of rebuke or sanction: *Stiles v. B.C. (W.C.B.)* (1989), 38 B.C.L.R. (2d) 307 (C.A.) at 311. Even if the appeal had otherwise failed, I would have allowed the appeal of the special costs order.

[51] The chambers judge applied the wrong test in setting aside the Restraining Order and cancelling the CPL. This court cannot consider the applications on their merits because Wayne brought these applications in his own name, not as committee. In his own name he had no standing to apply to cancel the CPL or set aside the Restraining Order.

[52] CPLs are a creature of statute. Section 215 of the *LTA* allows a party claiming an interest or estate in land to register a CPL. Sections 256 and 257 of the *LTA* sets out the procedure that must be followed to remove a CPL. The relevant portions read:

> **256** (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit
>
> (a) particulars of the registration of the certificate of pending litigation,
>
> (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
>
> (c) the grounds for those statements,
>
> apply for an order that the registration of the certificate be cancelled.
>
> ...
>
> (3) An application under this section must be made to the court in which the proceeding was commenced and must be brought
>
> (a) as an application in that proceeding, if the applicant is a party to the proceeding, or
>
> (b) by petition, if the applicant is not a party.
>
> **257** (1) On the hearing of the application referred to in section 256 (1), the court
>
> (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on

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> (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
>
> (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
>
> (b) may refuse to order the cancellation of the registration, and in that case may order the party
>
> (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and
>
> (ii) to give security in an amount satisfactory to the court and conditioned on the fulfilment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.
>
> (2) The form of the undertaking must be settled by the registrar of the court.
>
> (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.

[53] The present application was decided without any reference to the governing legislation. Section 256 only allows "a person who is the registered owner or claims to be entitled to an estate or interest in land against which a [CPL] has been registered" to apply for an order that the registration be cancelled. At the time of the application Wayne was neither the registered owner nor a person entitled to an estate or interest in the land which was the subject of the CPL. While Wayne did hold a power of attorney he brought the application to discharge the CPL in his own name. Wayne had no standing to apply to cancel the CPL.

[54] Section 257 sets out the considerations that a judge must ponder when asked to cancel a CPL. Those considerations include whether damages might be an adequate remedy and whether one side or the other should post security. In determining those questions the judge may consider the merits of the proposed claim. In this case the judge did not consider any of the relevant statutory criteria. His failure do so would be in itself fatal to the order setting aside the CPL.

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[55] It is important to also appreciate that restraining orders are obtained pursuant to the *LTA* as well. Any consideration as to whether they are to be discharged should be made in light of s. 284 and the case law which governs the grant and variation of injunctions obtained pursuant to that section.

[56] In this case the Restraining Order specifically allowed Violet, the PGT and any committee of Violet to apply to set aside the Restraining Order on 14 days' notice to Allen and other interested parties. The order did not authorize Wayne in his personal capacity to do so. Wayne brought these proceedings in his personal capacity. As in the case of the CPL he did not have standing in his personal capacity to set the Restraining Order aside.

[57] In fairness to the chambers judge I would be remiss if I did not note that counsel provided little assistance to the Court. None of the parties brought the governing provisions to the attention of the chambers judge or made submissions on them. Wayne's status to bring the applications was not challenged.

C. Conclusion

[58] I would set aside paragraph 6 of the chambers judge's order which set aside the Restraining Order. Paragraph 7 of the order, which cancelled the CPL, should be replaced by an order allowing Allen to file a Certificate of Pending Litigation against Chartwell, respecting his claims in family law proceedings E113148 and E132519, upon signing the priority agreement to the North Shore Credit Union in the form agreed. The priority agreement should be attached to the order.

[59] In regard to costs, I would set aside paragraph 11 of the order awarding special costs against Allen. Allen is entitled to party and party costs against Violet of the reconsideration application and the costs of the appeal. The PGT is, on terms agreed to by the parties, entitled from the estate to its costs of the appeal.

[60] Allen placed before us a draft order which contained several other provisions. In my view those matters are all best dealt with in the family law proceedings and I do not believe it is necessary to make any further orders to dispose of this appeal.

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[61] I have not dealt with the merits of the applications. Any party with standing remains at liberty to apply in the court below on proper material to cancel the CPL or set aside the Restraining Order.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kruger v. Wild Goose Vintners Inc.,* 2021 BCSC 1406

Date: 20210708
Docket: S212628
Registry: Vancouver

Between:

Roland Friedrich Kruger, Roland Kruger Family Trust, Hagen Kruger, and Hagen Kruger Family Trust

Petitioners

And

Wild Goose Vintners Inc., Duke Holdings Ltd., Bank of Montreal, and Kubota Canada Ltd.

Respondents

Before: The Honourable Mr. Justice Gomery

Oral Reasons for Judgment Re Court-Appointed Sale

In Chambers

Counsel for the Petitioners (by videoconference):	T. Louman-Gardiner
Counsel for Wild Goose Vintners Inc. (by videoconference):	R. Clark, Q.C.
Counsel for Bank of Montreal (by videoconference):	B. Gibbons N.S. Mann
Counsel for Burrowing Owl Vineyards Ltd. (by videoconference):	A. Frydenlund, Q.C.
Counsel for The Bowra Group (by videoconference):	D. Brousson
Place and Date of Hearing:	Vancouver, B.C. July 2, 2021
Place and Date of Judgment:	Vancouver, B.C. July 8, 2021

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Introduction

[1] Wild Goose Vintners Inc. owns and operates a profitable Winery (the "Winery") in the Okanagan. Its owners, a group of companies I will describe collectively as "Port," got into financial difficulties which led Wild Goose to experience cash flow difficulties. On March 25, 2021, on the application of the petitioners, who are secured creditors, this court appointed the Bowra Group as receiver of Wild Goose. It made a further order approving the sale solicitation process. Bowra now asks the court to approve a sale of the Winery to a purchaser located through that process.

[2] There are three secured creditors, Bank of Montreal, ("BMO"), which is owed approximately $6.9 million; Duke Holdings Ltd., which is owed approximately $2.1 million; and the petitioners, who are owed approximately $2.3 million. The total of the secured indebtedness is $11.3 million.

[3] Bowra's application to approve the sale is supported by all the secured creditors and the proposed purchaser.

[4] The proposed purchaser is Burrowing Owl Vineyards Inc. It offers to pay $12.6 million, subject to a working capital adjustment, which is expected to add approximately $890,000 to the purchase price. If the sale proceeds, it is expected to yield sufficient funds, net of commissions and fees consequent on the sale, to pay out the secured and unsecured creditors with little more than $1 million left over for Wild Goose.

[5] Wild Goose opposes the sale. It maintains that the sale process has been deficient. In addition, it submits that it is now in a position to redeem the security held by the positioners and Duke Holdings and will shortly be in a position to redeem the security held by BMO. Wild Goose says that it will lose its ability to redeem if the Winery is sold to Burrowing Owl. It maintains that the loss of its ability to redeem is a primary reason to refuse approval of the sale.

[6] Wild Goose has not tendered funds to the petitioners and demanded an assignment of their security. It has not applied for an order establishing its right to redeem. It simply raises its ability and intention to redeem as an independent reason for the court to refuse approval of the sale to Burrowing Owl.

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Issues

[7] The issues are as follows:

1) Apart from consideration of the redemption issue, should the sale be approved?

2) If so, should approval nevertheless be refused because it would prevent Wild Goose from redeeming the security held by the petitioners Duke Holdings and BMO?

Background

[8] The petitioners are members of a family who established Wild Goose in 1984. They owned it until 2019 when they sold it to Port. Roland Kruger of the petitioners remained the general manager of the Winery following the sale and still holds that position.

[9] BMO is Wild Goose's bank. It holds security for various loan facilities made available to Wild Goose pursuant to credit facilities established in August of 2019.

[10] The petitioners retained the accounting firm, BDO, to market Wild Goose in 2018. Approximately 80 potential buyers were contacted. The marketing culminated in a share purchase agreement on August 2, 2019, although I am told that the actual sale took place in September. Port paid: cash of approximately $9 million; a right to purchase partnership units in a Port entity; and a Note in which it promised to pay a further $2.25 million together with interest according to a payment schedule.

[11] Port defaulted on the first payment required under the Note. On July 31, 2020, the petitioners and Port agreed to a revised payment schedule in a

forbearance agreement under which Wild Goose guaranteed Port's performance of its obligations under the Note and the share purchase agreement. Port gave the petitioners a mortgage and a general security agreement in support of the guarantee.

[12] In October 2020, Wild Goose was in breach of covenants in its credit facilities from BMO. On October 15 it entered into a forbearance agreement with BMO. The forbearance period lasted until January 31, 2021.

[13] On December 1, 2020, Port removed $800,000 from Wild Goose in breach of its obligations under the share purchase agreement with the petitioners and its obligations to BMO. The petitioners promptly gave notice of default. Port proved unable to re-assure the petitioners by returning the funds. On December 22, 2020, Port defaulted in a payment required under the revised payment schedule.

[14] On January 20, 2021, the petitioners demanded payment from Wild Goose under its guarantee of Port's obligation and gave notice of their intention to enforce their security agreement.

[15] On February 11, 2021, BMO advised Wild Goose that it wished to be paid in full. Wild Goose had advised that it had received a proposal from the Royal Bank of Canada to replace BMO's credit facility. BMO asked to see the proposal, but Wild Goose did not provide it.

[16] On March 18, 2021, the petitioners commenced this proceeding seeking appointment of a receiver.

[17] On March 24, 2021, BMO demanded payment of the amounts it was owed by Wild Goose.

[18] On March 25, 2021, on the petitioner's application, Justice Groves appointed Bowra as receiver and made the sale solicitation order. While it is not a consent order, its terms were negotiated by counsel for the petitioners and counsel for Wild Goose. The order approves a stalking horse bid by Duke Holdings and sale

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solicitation procedures by which Bowra is to market Wild Goose in the hope of obtaining a better offer. For present purposes, several aspects of the order are important.

[19] First, the sale solicitation order establishes a detailed timetable for the sale process. The marketing is to commence within five days of the order, that is, by March 31, 2021. It establishes a "Bid Deadline" of 60 days afterwards, that is, May 30, 2021. Failing receipt of a qualifying bid by the Bid Deadline, Bowra is required to seek court approval of the stalking horse bid.

[20] Second, the sale solicitation process approved by the order specifically provides that Bowra shall solicit sales with the assistance of Cushman & Wakefield Ltd. ("Cushman") as agent. Cushman is a firm of realtors. The procedures further provide:

> In the event that there is a disagreement or clarification required as to the interpretation or application of these SSB procedures or the responsibilities or any person hereunder, the court will have the jurisdiction to hear such matter and to provide advice and directions upon application of the company, the receiver, the company, the Krugers or any other interested person.

[21] Third, the order expressly preserves to Wild Goose the right to redeem the petitioner's security prior to the Bid Deadline. It states:

> 3. Nothing in this Order shall prevent the Respondent Wild Goose Vintners Inc. ("Wild Goose") from redeeming the amounts owing to the Petitioners and secured by their security over the assets of Wild Goose (the "Security"), provided that such redemption:
>
> (a) Occurs before the Bid Deadline (as defined in the SSP) or as otherwise ordered by the Court;
>
> (b) Provides for payment in full of all amounts owing to the Petitioners, pursuant to the terms of their Security;
>
> (c) To the extent such amounts are not payable pursuant to section (b) above, provides for payment of all amounts payable by the Receiver, including, without limitation, the Sales Agent Remuneration as provided in the SSP; and
>
> (d) Occurs after either of:
>
> (i) This Court has made a determination that, in the event of a redemption, the Break-Up fee as defined in the Stalking Horse Bid will be an amount payable by the Receiver; or

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> (ii) The Receiver, the Petitioners, Duke Holdings Ltd., and Wild Goose have agreed as to whether the Break-Up Fee is payable by the Receiver to Duke Holdings Ltd.

[22] The reference in clause 3(c) to the Sales Agent Remuneration is to a $40,000 fee payable to Cushman to compensate it in the event that a sale does not proceed because of a redemption.

[23] Clause 3 does not directly provide for any involvement of Duke Holdings and BMO in the redemption contemplated in the clause, although counsel for the petitioners, Mr. Louman-Gardiner, submits that some involvement is implied by the court application or discussions made necessary by sub clause (d).

[24] Wild Goose did not seek to redeem the security granted to the petitioners by paying the $2.3 million it owed them prior to May 30, 2021. It can only invoke the proviso in clause 3 if the Bid Deadline is extended by court order. Although Wild Goose has not formally applied to extend the Bid Deadline, that is the substance of its submission on the redemption issue.

[25] The Burrowing Owl offer was received before the Bid Deadline. It is a qualifying bid under the sale solicitation procedures established by the order. There is no dispute that it is an improvement on the stocking horse offer. Bowra accepted the offer on June 4, 2021, subject to court approval.

First issue: Approval Apart from the Redemption Issue

Legal Framework

[26] *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*], at paragraph 16 identifies the following considerations to be taken into account in deciding whether to approve a sale negotiated by a court-appointed receiver:

1) whether the receiver made sufficient efforts to obtain the best price and did not act improvidently;

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2) the interests of all parties;

3) the efficacy and integrity of the process by which offers were obtained; and

4) whether there has been any unfairness in the sale process.

[27] As a court-appointed receiver, Bowra is an officer of the court responsible to the court and to all interested parties for the performance of its duties under the order from which it derives its authority, *Bennett on Receivership*, (2nd ed). at page 25. To the extent that an order requires a receiver to exercise discretion, the court will defer to the exercise of the receiver's business judgment unless it appears that the receiver's conduct was improvident based on the information available to it at the time, *Soundair* at paragraphs 21 to 22.

[28] In a slightly different context -- approval of a proposed sale negotiated by a mortgagee who has conduct of sale by court order -- the requirement is that "the mortgagee must go about finding a buyer in a businesslike manner, and the court must be satisfied that the sale is provident in all the circumstances", *Mission Creek Mortgage Ltd. v. Angleland Holdings Inc.*, 2013 BCCA 281, at paragraph 40. These cases lack the consideration of deference to the business judgment of a receiver who is an officer of the court.

[29] In addressing the interests of all parties, the interests of creditors are the primary consideration, though not the only or overriding consideration. *Soundair* at paragraph 30. The interests of the debtor carry weight, as do the interests of a prospective purchaser who has negotiated an agreement with the receiver. *Soundair* at paragraph 40.

[30] At the end of the day as Justice Fitzpatrick has observed in the context of the court's jurisdiction to approve a sale under s. 36 of the *Companies' Creditors Arrangement Act*, the question is whether considering the transaction as a whole the proposed sale is appropriate, fair, and reasonable; *Veris Gold Corp. (Re)*, 2015 BCSC 1204, at paragraph 23; *Quest University Canada (Re)*, 2020 BCSC 1883, at paragraphs 176 and 177.

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Analysis

[31] I begin with a preliminary observation before turning to the four considerations identified in *Soundair*.

[32] In its application response, Wild Goose argues that the sale solicitation order of March 25, 2021, is one that "the Court can make only in exceptional circumstances" because it limits Wild Goose's ability to redeem the petitioner's security. Wild Goose submits that the sale solicitation order was based on unduly pessimistic projections by the petitioners that have not been borne out and that I should consider whether the circumstances are still exceptional given the effect of the proposed sale on the equity of redemption.

[33] Wild Goose was aware of the terms of the proposed sale solicitation order before it was made. Through counsel it negotiated the language of clause 3 expressly addressing its right to redeem prior to the Bid Deadline. It did not come to court to argue for more generous language. It did not seek leave to appeal the order. It did not dispute Bowra's interpretation and application of the sales procedures established under the order as the order provided it might. It would be too late now to argue that the procedures established by the order are unfair, that they were in any way inappropriate, or that the evidence placed before the court to justify the order was inadequate so that the order should not have been made.

[34] In oral argument, counsel for Wild Goose, Mr. Clark, Q.C., disclaimed any suggestion that the sale solicitation order should not have been made. He acknowledged that Bowra's appointment benefitted Wild Goose in certain respects because Bowra was able to borrow $280,000 that Wild Goose urgently required to carry on business in the spring of 2021.

[35] Mr. Clark submits that a deficiency in the sale process is that Bowra pursued "a liquidation sale" rather than "a going concern sale," referring to statements in the advertising of the Winery that indicated that the sale was occurring by court order. I do not think this complaint is valid. In my view, the approach taken in the advertising was an inevitable consequence of the fact that the sale was being conducted by a

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receiver pursuant to court orders that benefitted Wild Goose by enabling it to continue in business while it was being sold.

1. Did Bowra make sufficient efforts to obtain the best price, or did it act improvidently?

[36] In reports to the court dated January 8 and 23, 2021, Bowra sets out the steps it took to market Wild Goose's Winery and expresses its view that the assets have been properly marketed and exposed to the market in accordance with the sale solicitation order. It recommends approval of the Burrowing Owl offer because it will provide sufficient proceeds to pay out all of the secured and unsecured creditors, provide employment for some or all of the current employees, and result in continued operation of the business, including trading with existing suppliers.

[37] Wild Goose submits that Bowra's efforts to market the Winery were inadequate; that it would have been better to have engaged the merger and acquisition department of a major accounting firm rather than a real estate firm such as Cushman; that the advertising was lackadaisical and unimpressive; that the marketing was impaired by the omission from the data room of third-party financial statements until a late date and then only notice to reader statements that are not of much use to a potential purchaser; and by the omission from the data room of updated cash flows and an appraisal which would have shown the land and buildings to be worth $10 million, rather than the $7.4 million estimated by the receiver.

[38] I do not agree that Bowra conducted the sale improvidently. It approached its task in a businesslike manner consistent with the requirements of the sale solicitation order. Its decisions as to the nature and scope of advertising, what to include in the data room, and whether to obtain better qualify financial statements and an appraisal were matters of business judgment.

[39] Bowra cannot be faulted for retaining Cushman rather than a major accounting firm to assist it in conducting the sale. The sale solicitation procedure specifies that Cushman was to be retained.

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[40] Cushman advertised the sale in print publications and on a web site. According to Cushman's report to Bowra, it sent emails to a mailing list of some 2,000 contacts, created a brochure, made more than 200 telephone calls to participants in the wine industry, and sent out more than 200 information packages.

[41] Thirty-three potential buyers signed non-disclosure agreements and were given access to the data room. Five prospective purchasers toured the property. Cushman described the effort response to its marketing efforts as "consistent strong interest."

[42] This interest resulted in two offers, the Burrowing Owl offer for $12.6 million plus working capital, and an inferior offer for $11.8 million plus working capital.

[43] Port's consultant, Mr. Ingram, claims experience in valuing wineries for the purpose of acquisitions and financing. He maintains that notice to reader financial statements are useless, in his experience, in interesting banks or other institutional lenders. He adds, however, that he is confident that he will be able to locate financing from non-institutional or conventional financiers based on the notice to reader financial statements the Winery obtained from its accountants in May 2021.

[44] Mr. Ingram's description of notice to reader statements as useless for obtaining financing from conventional lenders is overstated. Historically, Wild Goose was able to borrow millions of dollars from major banks based on its notice to reader financial statements. Port was apparently content to rely on notice to reader financial statements in negotiating its share purchase agreement of August 2019.

[45] There is no evidence that any of the potential buyers who visited the data room sought further financial information than they found there. I would expect Bowra as an officer of the court to bring such evidence forward if it existed. I am assured by Bowra through its counsel that it does not.

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2. The interests of all parties

[46] For the reasons that follow, I conclude that the creditors are at risk if the Burrowing Owl offer is not approved.

[47] Bowra has kept the Winery running through the receivership. It borrowed $280,000 to fund operations and generate sales and has recovered and repaid the borrowing from revenues. It would not have been able to operate the business without the borrowing.

[48] The Winery is now experiencing a period of solid cash flow with summer sales. However, its future is uncertain if the sale to Burrowing Owl does not take place. It has no operating line of credit.

[49] Burrowing Owl intends to retain Mr. Kruger as general manager of the Winery. Otherwise, it appears certain that the Winery will lose his services. This would be a significant loss because Mr. Kruger has been involved in managing the Winery since its inception.

[50] Mr. Kruger believes, plausibly, that there is a risk of staff departures if he goes. His belief is plausible because he has a close working relationship with the existing staff, his own relationship with Port has broken down, and he fairly holds Port responsible for the Winery's financial difficulties. The business has only 13 permanent and 12 to 14 seasonal employees, and they would naturally be aware of his perspective on these matters. They are aware of the receivership. Prior to the appointment of the receiver, at one stage payroll cheques were bouncing, a personal experience that will have proved unsettling for the staff.

[51] If the sale does not take place, there is no clear path to ending the receivership. Putting to one side the money owed to the petitioners and Duke Holdings, Wild Goose is not at present in a position to pay out BMO and obtain a discharge of its security. It remains in discussions with the Royal Bank and a consortium of investors fronted by Rowanwood Capital Corp. but is far from obtaining a commitment. All that the Royal Bank has said is that it is interested in

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pursuing discussions. What Wild Goose describes as a commitment letter dated June 29, 2021, from Rowanwood is merely a contingent statement of intention contemplating a review of five years of financial statements from the Winery, a business valuation disclosing value in the range of 13 to $15 million, and due diligence. It states:

> Once the receivership has been terminated, I expect to have term sheets to review in two to three weeks, followed by a commitment in a further three to four weeks.

[52] Wild Goose contemplates paying the petitioners and Duke Holdings, redeeming their security, and applying to discharge the receiver. Given the history of BMO's dealings with Wild Goose and Port since August 2019, it is not at all likely that BMO would allow Port to recover control of Wild Goose's finances. It would either oppose discharge or appoint its own receiver immediately on discharge of Bowra.

[53] If Wild Goose remains in receivership, it is at risk of being forced to close down at the end of the month. Its insurance policy, a condition of its licence to operate, will expire on July 31, 2021, and the existing insurer will not renew. This will not be a problem for the Winery if the sale to Burrowing Owl proceeds because Burrowing Owl operating other wineries, and the coverage of this Winery will be subsumed under Burrowing Owl's policy. However, Bowra understands that as a receiver, it may not be able to obtain the insurance coverage it would require to continue operating the Winery.

[54] If the sale is not approved and the Winery is forced to shut down and terminate employees, the value of the Winery will be reduced. There is some risk to the position of creditors.

[55] Having regard to the marketing efforts to date, Bowra does not believe that there is a better offer to be obtained than the Burrowing Owl offer. Burrowing Owl's offer can be terminated by Burrowing Owl if the sale is not consummated by August 1, 2021.

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[56] Burrowing Owl's interest obviously favours approval of the sale.

[57] Wild Goose will be prejudiced in two ways by approval of the sale. First, the sale will put an end to Wild Goose's efforts to refinance and remain the owner of the Winery. As I indicated at the outset, it is a profitable business. Over 2015 through 2018, its annual net income ranged between $274,000 and $500,000. In 2019 it suffered a loss of approximately $4,000, but in 2020 its income exceeded $900,000. The COVID-19 pandemic actually contributed to the Winery's profitability in 2020 by substituting online for restaurant sales at lower margins, a phenomenon that is not likely to be repeated in future years. Even so, Wild Goose has a significant and legitimate interest in retaining its asset.

[58] Second, the sale will probably entitle Duke Holdings to payment of a break fee of $250,000, provided under clause 10.14 of its stalking horse agreement approved by the court in the order of March 25, 2019. This is $250,000 that would otherwise be left over on payment of the amounts owing to the secured creditors.

3. The efficacy and the integrity of the process by which offers were obtained

[59] The offers were obtained in a process conducted by Bowra under the court's supervision. The process was efficacious and had integrity.

4. Has there been any unfairness in the sale process?

[60] I do not discern any unfairness in the sale process. Wild Goose does not contend that the process was unfair.

Taking everything into account apart from consideration of the redemption issue, is the proposed sale appropriate, fair, and reasonable?

[61] Having regard to the considerations I have canvassed, I find that the proposed sale is appropriate, fair, and reasonable. The sale process adhered to the procedures established by the sale solicitation order. The Winery was exposed to the market well enough to generate strong interest and two offers superior to the stalking horse offer. The sale to Burrowing Owl will generate sufficient funds to pay

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out all the secured creditors with money left over for the shareholders' loans. This sale will permit the Winery to remain in business without interruption. It will retain its existing employees and its relationships with its present suppliers.

[62] There is no good reason to believe that any future attempt to sell the Winery would generate a better offer than the Burrowing Owl offer. If the sale is not approved, future potential purchasers are less likely to invest the considerable time and expense involved in pursuing offers in like circumstances.

[63] If the proposed sale is not approved, there is a real risk that the Winery will not continue in business after July 31, 2021. Closure threatens to impair the value of the business. There is no clear path to a conclusion of the receivership. This too threatens the value of the business.

[64] If the sale to Burrowing Owl is approved, while Wild Goose would prefer to remain as owner of the Winery, it will receive fair compensation for its interest. The break fee is a transaction associated with the process which has resulted in a substantially better recovery for Wild Goose than the stalking horse offer would have.

[65] Subject to consideration of the redemption issue, I would accept Bowra's recommendation and approve the sale to Burrowing Owl.

Second Issue: the intended redemption

[66] Wild Goose has obtained funds sufficient to enable it to pay out the petitioners and redeem their security. The money would be loaned by a relative of Port's principal, Mr. Reyes. An email from the lender's law firm states:

> I confirm that we are holding $2.9 million in our trust account with instructions to advance all or part of those funds to Wild Goose Vintners Inc. in the amount required to redeem the mortgage granted in favour of Roland Kruger, Roland Kruger Family Trust, Hagen Kruger, and the Hagen Kruger Family Trust, the mortgagees. The advance of funds will be conditional on either:
>
> > (a) an assignment of the mortgage and other security held by the mortgagees to the lender; or

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> (b) if an assignment is not possible, a discharge of the mortgage and security and Wild Goose granting new third priority mortgage and other security on substantially similar terms to the mortgage and security in favour of the lender.

[67] Wild Goose emphasizes the importance of its right to redeem, noting that, in the context of a mortgage foreclosure, the equitable right to redeem even survives the pronouncement of order absolute. It maintains that pursuant to paragraph 3 of the sale solicitation order, it had an unfetterred right to redeem the petitioner's security until May 31, 2021. That right has expired, but Wild Goose argues that I should extend the deadline to permit Wild Goose to redeem at this time.

[68] Wild Goose says that it has further funds that are sufficient or very close to sufficient to pay out Duke Holdings and redeem its security. As I have already indicated, it does not have funds sufficient to pay out BMO.

Legal framework

[69] The essence of a right to redeem is a debtor's right, upon payment of a debt, to recover the property it gave to the creditor as security for payment of the debt. The right exists as a consequence of the fact that the property was only ever given to the creditor as security. The court will facilitate redemption by ordering of the conveyance of an interest in land or discharge of security registered against title to the land, *Law and Equity Act* R.S.B.C. 1996 c. 253, s. 17 [*LEA*]. The debtor is entitled to have the security held by the creditor assigned to a third party of the debtor's choosing, *LEA* s. 14.

[70] While some relevant provisions of the *LEA* are specific to land, they reflect equitable rules that apply to mortgages and other forms of security generally.

[71] The question of redemption most often arises in foreclosure proceedings. In this context, the law generously affords to the mortgagor an unfetterred right to redeem up until the time an order absolute of foreclosure is pronounced, or the property is sold under an order for sale. *Pollard v. Regional District of Central Okanagan*, 2005 BCCA 159, at paragraph 30. The court even retains a jurisdiction

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to permit an order absolute to be set aside to permit redemption, although in this case there must be a good reason for it, and the mortgagor can no longer redeem as of right. *Industrial Development Bank v. Thornhill Auto Wreckers Ltd.*, [1974] 2 WWR 57 (B.C.C.A.), at 60.

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[72] The rights and obligations or mortgagors and mortgagees in foreclosure proceedings have been worked out over many hundreds of years of jurisprudence. Proceedings for the realization of the rights of secure creditors through a court-appointed receivership are a more recent invention.

[73] The procedure in receivership proceedings is flexible. There is no requirement that a creditor obtain an order nisi before applying for an order for sale, for example. However, deference is still afforded to a debtor who wishes to redeem. *Bank of Montreal v. Hester Creek Estate Winery Ltd.*, 2004 BCSC 724, involved a sale by a court-appointed receiver/manager in which the debtor sought to tender the amount owing and redeem at the hearing of an application to approve a sale of the debtor's assets. At paragraph 27, Justice Tysoe, as he then was, observed that:

> Whenever there is a court-ordered-sale process, it is always implicit that the conduct of sale is subject to the debtor being able to pay off the secured creditor before a sale is approved by the court. I am aware of no authority to the effect that the granting of conduct of sale precludes the debtor from redeeming the property. Allowing a redemption of the mortgaged property in these circumstances does not blemish the integrity of the court process but, rather, it represents the court process at work.

[74] In a case in which a debtor seeks to redeem security after a sale has been negotiated by a receiver before a sale has been approved, consideration of the purchaser's interest and the efficacy and the integrity of the process by which an offer was obtained may favour approval of the sale, *B&M Handelman Investments Limited v. Mass Properties Inc.* (2009), 55 C.B.R. (5th) 271 (O.S.C.J.) [*Handelman*] at paras. 21-22; *Business Development Bank of Canada v. Marlwood Golf & Country Club Inc.,* 2015 ONSC 3909 at paragraphs. 26-27. However, the right to redeem must be given due weight. It must be weighed in the balance, and the extent of the possible prejudice on all sides must be taken into account; *BCIMC Construction*

Fund Corporation v. The Clover on Yonge Inc., 2020 ONSC 3659 [*BCIMC*], at paragraphs 36 to 41, 47, 49 to 52 and 66 to 69.

[75] In *BCIMC*, the debtor was a real estate developer. It sought to redeem in the course of a receivership, and the receiver objected that in light of a term of the receivership order, the debtor required leave of the court, which should be refused. The application came before the court while the sale process order was being proposed, in contrast to this case in which an order has been made and the process has already run its course. The court agreed that leave was required and granted leave to redeem in respect of the Clover project while refusing it in respect of the Halo project. The difference was that the developer was in funds to pay the amounts owing and discharged the security over the Clover project but was not in a position to do in respect of the Halo project; *BCIMC* at paragraphs 66 to 69.

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Analysis

[76] The significance of clause 3 of the sale solicitation order is that it expressly reserves to Wild Goose a right to redeem that might otherwise be lost on the reasoning in *Handelman*. However, it does so only on conditions, and it only contemplates redemption of the petitioners' security. The redemption directly contemplated by clause 3 is one that would have taken place prior to May 31, 2021, before Burrowing Owl's offer was submitted, and this application was brought.

[77] Redemption of the petitioners' security does not resolve the claims of Duke Holdings and BMO. Had Wild Goose sought to redeem all the security held by secured creditors prior to May 31, BMO and Duke Holdings might be objected, but clause 3 would have furnished it with a compelling argument in favour of granting leave. That did not occur. If Wild Goose had simply redeemed the petitioners' security and sought to stop the sales process in light of the changed circumstances, there would have been an interesting argument. That did not occur.

[78] That Wild Goose is only in a position to redeem the petitioners' security and perhaps Duke Holdings' security but not BMO's security, distinguishes this case from *Hester Creek*. In *Hester Creek*, all the secured creditors were protected by the

redemption. Here they are not. Stopping an appropriate, fair, and reasonable sale on the basis that only some of the secured creditors are to be paid out would not represent "the court process at work". In the circumstances of this case, it would represent a marked departure from the process contemplated in the sale solicitation order.

[79] BMO, Duke Holdings, and Burrowing Owl are prejudiced by the passage of time since the bid deadline of May 31, 2021. Burrowing Owl has taken time and spent money pursuing its offer. BMO has relied on the existence of the receivership and the sale solicitation process for the protection of its position. While it is technically true that they might have contemplated the possibility of a court-ordered extension of the bid deadline, a reasonable party in their position would not regard an extension as a substantial risk any more than a reasonable, successful party in litigation would ordinarily contemplate an appeal after the appeal period expired, even though appeal periods can be extended on application.

[80] In my view, protecting the integrity of the sales process contemplated by the sale solicitation order outweighs Wild Goose's claim that it should be entitled to redeem the petitioner's security in the circumstances of this case. I take into account:

a) the expiration of the bid deadline;

b) the prejudice to BMO, Duke Holdings, and Burrowing Owl, who have relied on the process for the protection of their interests;

c) the fact that redemption of the petitioner's security will not touch the secured claims of BMO and duke holdings; and

d) all the reasons I have given for concluding that apart from consideration of the redemption issue, the proposed sale is appropriate, fair, and reasonable.

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Disposition

[81] For these reasons, I approve the proposed sale to Burrowing Owl. An order will go in the terms of the draft order that is Schedule A to the notice of application, which should be amended to refer both of the reports filed by the receiver.

"Gomery, J."

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *League Assets Corp (Re),*
2014 BCSC 2589

Date: 20141009
Docket: S137743
Registry: Vancouver

In The Matter of the *Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36*, As Amended

and

In The Matter of the *Business Corporations Act,* S.B.C. 2002, c. 57, As Amended

and

In The Matter of the *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, As Amended

and

In The Matter of A Plan of Compromise and Arrangement of League Assets Corp. and Those Parties Listed on Schedule "A"

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners League Assets Corp.:	C.J. Ramsay K.G. Mak
Counsel for the Monitor, PricewaterhouseCoopers Inc.:	J. Dacks
Counsel for Quest Mortgage Corp., Quest Capital Management Corp., and 0995115 B.C. Ltd.:	C.D. Brousson
Counsel for Peoples Trust Company:	D. Jiang A.A. Bury

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Counsel for Meckelborg Financial Group Ltd. (beneficiary of Concentra Trust Mortgagee):	K.A. Robertson
Counsel for Anthem Properties Group:	J.R. Sandrelli T.R.M. Jeffries
Counsel for Onni Development Capital Corp.:	D.E. Gruber
Counsel for DIP Lenders:	G.J. Gehlen
Place and Date of Hearing:	Vancouver, B.C. October 9, 2014
Place and Date of Judgment:	Vancouver, B.C. October 9, 2014

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[1] **THE COURT:** These proceedings under the *Companies' Creditor Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") began in October 2013. The petitioners, known as the League Assets group, were involved in various businesses, but principally, real estate development.

[2] One of the principal assets of the League Assets group was what was described as the "Colwood Development". It is undisputed that a large amount of money was invested in this development. The development is comprised of four different parcels on which there are varying degrees of priority as between the secured creditors.

[3] The monitor prepared an earlier report on June 23, 2014 which has been called the "Waterfall Report". That report included an assessment or estimate of potential recoveries from that project for the stakeholders. That report confirmed an earlier assessment by the monitor and League Assets that there was no indicated value in the development beyond what was owed to certain secured creditors, being People's Trust Company, 0995115 B.C. Ltd. ("Epix") and Meckelborg Financing Group Ltd.

[4] Arising from the position taken on the lack of equity in the development, foreclosure proceedings were commenced. An order for conduct of sale was granted in favour of Meckelborg in the foreclosure on June 10, 2014. At the same time, an order absolute was also granted in favour of Epix, however, Epix was ordered not to take any steps in respect of the order absolute until after October 12, 2014. This delay was to allow Meckelborg to bring forward an offer to purchase the development property. Meckelborg has, in fact, now brought forward an offer from the Anthem Properties Group for court approval of a sale of the development properties.

[5] The petitioners are now on the brink of the order absolute becoming effective, or alternatively, the sale being approved as proposed by Meckelborg.

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[6] Despite a somewhat late awakening of the Colwood Development's potential value in September 2014, the petitioners began efforts to generate interest in the development. Within a very short time frame, the petitioners have succeeded in generating interest in a restructuring arrangement which is largely tax driven. In substance, it is proposed that Onni Development Capital Corp. take over the limited partnership which owns the Colwood Development and, needless to say, take advantage of the substantial tax losses that are in those various entities.

[7] The restructuring agreement contemplates a very complex set of transactions, which are more fully set out in the monitor's 23rd report dated October 7, 2014. The agreement anticipates that Onni will immediately provide an interim financing facility of $17.5 million, which amount is sufficient to pay the priority charges. These charges include real property taxes and the amounts owed to the three major secured creditors registered against the development. At the end of the process, it is anticipated that there will be a bankruptcy order with respect to the Colwood entities and ultimately, a proposal to the creditors.

[8] Importantly, this stands in stark contrast to the result that would otherwise have applied in respect of either a sale, as proposed by Meckelborg, or the order absolute. This transaction with Onni is anticipated to result in payment of approximately $26.4 million. This amount arises from the $17.5 million interim financing, in addition to approximately $8.9 million that will be paid to the unsecured creditors and limited partnership unit holders. In addition, the limited partnership unit holders are intended to be given what is called a contingent value certificate. As I understand it, it is a bit of a "blue sky" provision tied to income that might be generated from the development for a period of time after the closing of the Onni transaction.

[9] This application is a happy one in the sense that, but for this transaction, the unsecured creditors and the limited partnership unit holders would have faced a nil recovery, arising from the foreclosure proceedings.

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[10] The jurisdiction for the application is twofold: firstly, under the *CCAA*, s. 36, by which the court may exercise its discretion in respect of dispositions of property prior to any plan being proposed; and, secondly, the broader statutory jurisdiction of the court under the *CCAA*, s. 11. The court's broad discretion is appropriately exercised here in respect of approving this transaction in what I can describe as not ideal circumstances. I say that it is not ideal from the perspective that many of the stakeholders (such as the unsecured creditors and the limited partnership unit holders whose units are to be redeemed) have not received notice of the application.

[11] It is not entirely usual, of course, that unsecured creditors would be given notice, but limited partnership unit holders who are going to be affected clearly have an interest in these proceedings. One might approach this difficulty on the basis that it is windfall that these stakeholders would not otherwise have received. If the sale or order absolute were to become effective after the close of business tomorrow, then they would receive no recovery. However, I do not consider that it is a windfall because it appears that this is a transaction that is creating value that properly flows to them in the circumstances. It is money that they should get. But the exigencies of the situation dictate that all concerned must proceed as quickly as possible to preserve that value, such as it is.

[12] The relief sought on this application is to approve the restructuring agreement with Onni and grant authorization to the various petitioners involved in the Colwood Development to proceed with the various and complicated transactions that are anticipated under the restructuring agreement.

[13] As part of the relief sought, the petitioners seek an order that the Colwood Development land value, as defined in the restructuring agreement, shall constitute the fair market value of the Colwood lands as of the closing of the transaction. That is said to be for the purpose of clarifying the status of the other secured creditors who will not be paid through these transactions. Those secured creditors will, of course, be entitled to participate as unsecured creditors in respect of the future bankruptcy proceedings and the proposal within the bankruptcy proceedings.

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[14] Based on the significant marketing of these lands by the secured creditors and also the later marketing efforts by the petitioners and the monitor starting in September 2014, it is appropriate that the order confirm the value of the lands at the $17.5 million dollar mark. This amount accords with the interim financing amount.

[15] Accordingly, the order sought is granted. The entire order is complicated, but essentially approves the restructuring agreement and provides authorizations to allow the later transactions to complete. The order also clarifies the carve out of the Wilfert properties, as is outlined in the monitor's report. The order is approved under the *CCAA*, s. 36 and 11.

[16] The interim financing is also approved pursuant to the *CCAA*, s. 11.2. The order is consistent with the terms of the model order. It provides, of course, for the priority that is sought by Onni and that priority has been sorted out in relation to the existing priority of the current DIP lender. Having considered the s. 11.2 factors, I am satisfied that this order is appropriate.

[17] An application is also brought by Meckelborg in the foreclosure proceedings. As I have said above, Meckelborg commenced marketing the properties principally to avoid the consequences of Epix exercising its rights under the order absolute which is to be effective October 13, 2014. As a result of these sale efforts, Meckelborg entered into an agreement with Anthem Colwood Holdings Ltd. for a sale in the amount of $13.2 million. It is my understanding that this offer relates to only three of the four parcels, but would result in a payout of the Epix loan and also a partial payment of the Meckelborg loan.

[18] In light of my approval of the Onni restructuring agreement, it is anticipated that the amounts owing to Meckelborg and Epix will be repaid before 4 p.m. tomorrow. In that event, the Anthem offer will not proceed. However, in the usual fashion, it is proposed that the offer be provisionally approved so as to preserve the offer as presented. In the event of the unlikely and unfortunate circumstance where the secured lenders are not paid, the Anthem offer can then proceed. Proceeding in

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this fashion will also alleviate the risk that Meckelborg will benefit from the order absolute becoming effective on Monday.

[19] In these circumstances, I am satisfied that the order approving the sale to Anthem should be granted. This order will only be effective if there is no redemption of the Meckelborg mortgage by the close of business tomorrow, October 10, 2014.

[20] Counsel for Meckelborg and Anthem both point out that Anthem has spent significant sums participating in this process and presenting its offer. It seems that, to some extent, this offer has assisted in bringing about the Onni restructuring agreement. However, as is apparent to all of the insolvency professionals in the courtroom, that is simply a risk that people run in terms of presenting offers. There is always the possibility of redemption by a mortgagor within foreclosure proceedings. While this has happened on the brink of the foreclosure proceedings eliminating the League Group's interests, it still is within the purview of the Colwood petitioners to redeem the mortgages as they intend to do tomorrow.

[21] As I have mentioned above, there has been no notice of the application by the petitioners to many of the stakeholders. That is not going to prevent the orders being granted here today, however, I will expect that the monitor will give some consideration as to how notice is to be given to the relevant parties beyond simply posting matters on the website. I would ask the monitor to address that matter and advise the court next Wednesday when counsel will return for the other applications. Obviously, stakeholders should be aware of this application and the results as soon as possible. I do not think posting the materials on the website is sufficient.

[22] I would direct that the unredacted restructuring agreement with Onni be filed.

[23] Finally, it is ordered that $200,000 of the amount that is claimed by Epix in its payout statement will be paid to Gowling Lafleur Henderson LLP. That amount is to be held by Gowlings, in trust, pending further court order. I will expect that the monitor and the petitioners will put their heads together and obtain a legal opinion in terms of whether that amount is properly claimed under Epix's security. Needless to

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say, the amounts to be paid to Epix must be properly claimable under its security, as opposed to perhaps being an unsecured obligation.

[24] I will expect submissions as to whether this amount is properly claimed under Epix's security. The matter can be sorted out later if Epix's counsel is correct that the Colwood entities are liable to pay $200,000 and that this amount is owing under the security.

"Fitzpatrick J."

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ledwon v. Baines,*
2021 BCCA 239

Date: 20210617
Docket: CA46049

Between:

Jane Ann Ledwon

Appellant
(Plaintiff)

And

Louise Baines, Glen George Fuller

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated March 28, 2019 (*Ledwon v. Baines*, 2019 BCSC 450, Vancouver Docket M143723).

Counsel for the Appellant:	S.D. Liesch W. Lui, Articled Student
Counsel for the Respondents:	J.P. Adrian
Place and Date of Hearing:	Vancouver, British Columbia March 1, 2021
Place and Date of Judgment:	Vancouver, British Columbia June 17, 2021

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Madam Justice DeWitt-Van Oosten

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Summary:

The appellant appeals the award of damages in her action arising from personal injuries suffered in a motor vehicle accident. She contends the judge erred in his assessment of various heads of damages and failed to award interest under the Court Order Interest Act. She also seeks to adduce fresh evidence relating to her claim for special damages and new evidence relating to her claims for past and future loss of income. Held: Applications to adduce fresh and new evidence dismissed; appeal allowed only to the extent of adding a term providing for court order interest. There is no basis upon which to interfere with the award under any head of damages. Court order interest is, generally, mandatory for pecuniary damages. The fresh evidence does not meet the test for admission. It is not likely the new evidence would have affected the result at trial, and it would not be in the interests of justice to admit the new evidence on appeal.

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Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] Ms. Ledwon appeals from the order of Mr. Justice Smith awarding her damages for personal injuries arising from a motor vehicle accident that occurred on June 21, 2012. In support of her appeal she seeks to adduce fresh evidence relating to her claim for special damages and new evidence relating to her application for reinstatement in Ontario of a licence to practise law.

[2] The order appealed gave judgment to Ms. Ledwon in the total amount of $113,425.33, apportioned $85,000.00 for non-pecuniary damages, $5,975.00 for past income loss, $11,000.00 for costs of future care, and $11,450.33 for special damages. By the order, the judge found that Ms. Ledwon had failed to prove both a loss of future income and much of the past income loss she had claimed. He also found that she had not proved most of her claim for costs of future care.

[3] Ms. Ledwon contends that the judge erred:

1) in his assessment of past income loss;

2) in failing to give full effect to his conclusion that she had a continuing injury when treating her claim for future income loss, costs of future care, and non-pecuniary damages;

3) in failing to award interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79; and

4) on the premise of admission of new and fresh evidence, in failing to base his assessment of income loss, past and future, on income she would earn as a practising lawyer.

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Circumstances

[4] Ms. Ledwon was called to the Ontario bar in 1993. She practised law there until 1997, when the Law Society of Upper Canada (now the Law Society of Ontario) found her incapable of practising law because of mental illness and suspended her licence to practise. The Law Society left open the possibility of reinstatement in the event she demonstrated that she was no longer incapable of practising law. Apart from undergoing a medical evaluation in 2008, no meaningful advance was made by her towards reinstatement in the next many years, and Ms. Ledwon formally abandoned an open file for reinstatement in 2014.

[5] Ms. Ledwon moved to British Columbia in 1998. In 2002, she started to receive disability benefit payments from British Columbia for physical disabilities arising from asthma, and neck and back pain that were sequelae of a motor vehicle accident that had occurred in 1982. In 2002 her disability income was $700 a month; at the time of trial it was $1,085 a month.

[6] On June 21, 2012, Ms. Ledwon was a passenger in a motor vehicle owned by the respondent Mr. Fuller and driven by the respondent Ms. Baines. She was in the back seat. On completion of their excursion, Ms. Baines parked the car. When Ms. Ledwon asked if it was safe to exit the vehicle, Ms. Baines said it was. Once Ms. Ledwon exited the vehicle, she reached back into it to retrieve a bag from the floor. To do so, she placed a foot immediately in front of the rear tire. As she reached into the vehicle, the vehicle rolled onto her foot. There was some evidence that the vehicle had a defect that, in the judge's words, "caused it to roll forward slightly after it was turned off and put into park gear". The judge had no difficulty

dismissing an allegation of contributory negligence and finding Ms. Baines and Mr. Fuller wholly at fault. He said:

> [12] I find that the defendants were clearly in a better position than the plaintiff to determine when it was safe to get out of the vehicle. Ms. Baines specifically told the plaintiff that it was safe for her to get out and either she or Mr. Fuller made it physically possible by unlocking her door. The defendants' argument is essentially that the plaintiff was negligent in believing their own representations. I find the plaintiff reasonably relied on those assurances and find the defendants are fully liable for the First Accident.

[7] Before the accident, Ms. Ledwon had been employed part time in a call centre but had been careful not to earn income beyond the amount that would disqualify her from receiving benefits. Her employment income before the accident had averaged approximately $4,250 a year. Ms. Ledwon was absent from work from the date of the accident until her return on the week of July 2, 2012. Upon her return, Ms. Ledwon's foot required elevation and so, it is said, she was unable to function in her position. As a result, Ms. Ledwon left her employment in early August 2012. Her employment income in 2012 was $3,093. In 2013, it had shrunk to $400. In 2014 Ms. Ledwon earned $3,801 from employment, in 2015 she earned $5,260, and in 2016 she earned $4,860.

[8] Ms. Ledwon consulted a number of doctors after her accident and at trial proffered the evidence of Dr. Knebel, her family physician, Dr. Brusson, a pain specialist to whom she had been referred in May 2013 by Dr. Knebel, and Dr. Waseem, a physiatrist whom she consulted in 2018. Ms. Ledwon also relied upon the evidence of three friends who testified to her continued immobility, complaints of pain, and personality changes following the accident. The defence tendered evidence from a physiatrist, Dr. Hirsch, who examined Ms. Ledwon at the request of the defendants, and a psychiatrist, Dr. O'Shaughnessy. The judge reviewed the medical evidence and said in respect of the injury suffered by Ms. Ledwon:

> [35] Although the plaintiff had a long pre-Accident history of neck and back pain, there is no evidence of her needing mobility aids prior to the Accident.
>
> ...

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[41] The plaintiff's complaints of right foot pain began with a very real and obviously painful trauma, but have persisted far longer than can be medically explained. I have heard and seen the plaintiff in examination and cross-examination. Based on her evidence, as well as the evidence of her friends and treating family physician, I do not accept the submission of defence counsel that she has lied to her doctors or the Court about her pain.

[42] Although I accept Dr. Hirsch's opinion that the plaintiff does not meet the clinical criteria for a medically defined chronic pain syndrome, I also accept the clinical opinion of Dr. Knebel, along with the plaintiff's own evidence, that she is genuinely feeling pain to an extent that it is disabling.

[43] Having said that, the complete lack of physical findings (other than those seen by Dr. Waseem six years after the fact) persuades me that Dr. Hirsch is probably correct when he suggests a primarily psychological component to the plaintiff's ongoing pain complaints.

[44] The apparent psychological origin of the plaintiff's complaints does not make them any less real to her and does not diminish the causative link between those symptoms and the fact that a car ran over her foot. ...

...

[46] In this case, the plaintiff was clearly in a complicated medical and psychological state even before the Accident. In particular, she had long standing neck and back pain that she attributes to a motor vehicle accident in 1982. She also had a history of psychiatric illness that led to her suspension from the practice of law and which will be discussed further in these reasons.

[47] However, there is no evidence that the plaintiff suffered from any mobility problems or required the use of mobility aids. She now is unable, or believes herself to be unable, to walk any significant distance unaided. She is now dependent on an electric scooter, walkers, or wheelchairs. Aside from any pre-existing condition, I find that change in itself to have had a major and devastating impact on the plaintiff's quality of life and her ability to carry on normal activities.

[48] Unfortunately, the plaintiff has had no treatment directed to the apparent psychological component of her condition. There is no evidence she has been referred for any pain-related assessment or treatment by a psychologist, psychiatrist or counsellor.

[49] The assessment by Dr. O'Shaughnessy was for purely forensic purposes and not directed at any treatment considerations. The only other psychiatrist who testified was Dr. Paul Janke, but his opinion dealt only with the plaintiff's general mental health as it may relate to her ability to practice law again. He did not address her pain complaints.

[50] Although Dr. Waseem believes the plaintiff's condition to be permanent, that is an opinion given from the perspective of physical medicine. He does not, and is not qualified to provide a psychological or psychiatric diagnosis or prognosis.

[51] One might assume that if the symptoms are rooted in a psychological or psychiatric condition, they would be amenable to appropriate treatment, but there is no evidence on that point. Nor is there any evidence about the

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> length of time such treatment would require. A finding that the plaintiff's condition can be successfully treated would, on the evidence, be entirely speculative, but so would a finding that her condition is permanent.
>
> [52] In the absence of evidence addressing that important question, it must be remembered that the burden of proof is on the plaintiff. The plaintiff has satisfied the burden of proving that her pain complaints are genuine and have persisted with serious effects from the time of the Accident to trial. But she has not met the burden of proving that her current condition is permanent or untreatable.
>
> [Emphasis added.]

[9] The judge then assessed damages, which I will discuss below.

[10] At trial, the question arose of Ms. Ledwon's readmission to the bar in order to earn income from the practice of law. She testified that she understood that in order to be admitted to the Law Society of British Columbia, she was required to first pursue reinstatement to the Law Society of Ontario and so had applied again for reinstatement. Ms. Ledwon testified that in 2018, at the request of the Law Society of Ontario, she had been assessed by a psychiatrist for consideration of her ability to practise law and that she expected to receive a copy of the doctor's report when completed. A lawyer assisting Ms. Ledwon with her reinstatement efforts testified at trial that, having consulted with counsel in Ontario, he understood that the doctor's report would determine whether Ms. Ledwon's reinstatement application would proceed by consent or whether a hearing would be necessary. Reinstatement in Ontario would clear the way for Ms. Ledwon to apply to the Law Society of British Columbia for a transfer. Such an application would include an appearance before the Law Society of British Columbia's Credentials Committee to discuss events in Ontario and to answer questions concerning her history and fitness to practise. The Law Society of British Columbia may impose conditions on a transfer application, including a requirement of completion of the Professional Legal Training Course and articling, and, in the event a transfer application is granted, may impose conditions on her ability to practise.

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[11] The trial concluded on February 14, 2019. Judgment was reserved. The reasons for judgment issued on March 28, 2019. The order in the action was not entered until November 3, 2020.

[12] In her application to adduce new evidence, Ms. Ledwon deposes that on the final day of trial, February 14, 2019, she received the long-awaited psychiatric report of the psychiatrist who had examined her on behalf of the Law Society of Ontario, but she was uncertain what she should do with it. She did not seek to put it before the judge before he issued his reasons for judgment, or seek to reopen the trial before the order was entered.

[13] Also in the application to adduce new evidence, Ms. Ledwon deposes that a prehearing conference memorandum was issued on May 3, 2019 in the Law Society of Ontario's reinstatement proceeding, suggesting that the Law Society agreed that her licence to practise may be reinstated, on conditions. On September 3, 2020, the Law Society of Ontario issued an order reinstating Ms. Ledwon from the suspension imposed in 1997 upon provision of certain information from a treating psychiatrist, and setting further conditions. The required report was filed with the Law Society of Ontario and the suspension accordingly was lifted on November 25, 2020, subject to conditions. Ms. Ledwon is now a non-practising member of the Law Society of Ontario. By application dated January 23, 2021, Ms. Ledwon has applied to the Law Society of British Columbia to transfer to this province. That application is outstanding.

Discussion

[14] I will first address the grounds of appeal that relate to the body of evidence heard by the judge, dealing with each head of damages engaged in the appeal separately.

[15] This court, of course, is not a trial court and so we may not interfere with the order unless there is palpable and overriding error on questions of fact or questions of mixed fact and law. In respect of an error of law, the question we must ask ourselves is whether the judge was correct: *Housen v. Nikolaisen*, 2002 SCC 33.

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[16] An appeal of an assessment of damages generally raises questions of fact or mixed fact and law. This court's approach to such a question was explained in *Ackley v. Audette*, 2017 BCCA 283:

> [50] As recently noted in *Knapp v. O'Neill*, 2017 YKCA 10:
>
> > [14] This Court will only interfere with a trial judge's assessment of damages where there "was no evidence upon which a trial judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous". This standard requires the judge to have "applied a wrong principle of law", made a "manifest error", or made an award "either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage". See *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, 114 D.L.R. (3d) 385 at 388-89, citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452.

1. Non-Pecuniary Damages

[17] Non-pecuniary damages are awarded to a plaintiff to compensate for the intangibles of pain and suffering, and loss of amenities. In *Lindal v. Lindal*, [1981] 2 S.C.R. 629, Justice Dickson (later C.J.C.) for the court explained that the assessment of non-pecuniary damages is not to be treated either on a conceptual basis "which treats each faculty as a proprietary asset with an objective value", or on a personal approach which would measure the "human happiness of the particular individual". Rather, he explained at 636:

> The Court [has] adopted the [functional] approach ... which rather than attempting to set a value on lost happiness, attempts to assess the compensation required to provide the injured person with reasonable solace for his misfortune. Money is awarded, not because lost faculties have a dollar value, but because money can be used to substitute other enjoyments and pleasures for those that have been lost.

[18] At trial, Ms. Ledwon proposed an award of $180,000, based on cases the judge distinguished as concerning a condition of established permanence or likely permanence. The respondents proposed an award of $25,000 to $35,000, based on cases the judge distinguished as being claims advanced by plaintiffs who had

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deliberately exaggerated or presented unreliable evidence about their conditions. The judge found neither set of cases met the circumstances before him.

[19] The judge noted that each case requires an individual assessment of non-pecuniary damages. He referred to *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 for a non-exhaustive list of the factors often applied, and assessed non-pecuniary damages of $85,000. He said:

> [59] In assessing non-pecuniary damages in this case, it is necessary to recognize that the plaintiff's pain-related mobility difficulties have resulted in a significant disability and have adversely affected her lifestyle for almost seven years. At the same time, an award must reflect the fact that the plaintiff has failed to prove her condition will necessarily or likely be permanent. In all the circumstances, I find $85,000 to be an appropriate award for non-pecuniary damages.

[20] As I have related, the judge assessed costs of future care at $11,000, to provide five years of counselling for Ms. Ledwon. In doing so he said:

> Having found the plaintiff's symptoms to likely be psychological, I find that some period of ongoing counselling will likely be necessary. In the absence of specific evidence of how long such treatment would be necessary, I award the cost for a five-year period. Mr. Gander estimates that cost to be between $2,280 and 2,400 a year. Applying Mr. Peever's present value tables, I award $11,000. Counselling could be needed for a longer period or a shorter one, and I, therefore, do not adjust that amount for contingencies.

[21] Ms. Ledwon interprets the reasons for judgment as compensating her only for past suffering, with no consideration for future suffering that she says the judge evidently anticipated, as shown by the award of damages for costs of future care. She describes the award of $85,000 for seven years of suffering as representing an award of about $12,000 per year, and seeks a further $60,000 to compensate for five additional years. The judgment as it now is, contends Ms. Ledwon, is internally inconsistent.

[22] I would not accede to this submission. In my view, it mischaracterizes the award. On my reading of the reasons for judgment, the judge fully recognized the effect of the accident on Ms. Ledwon's enjoyment of life but was not satisfied she had proved that all of the effects would be permanent or are untreatable. His task in

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assessing damages was, of course, limited by the record, made more difficult by this gap in evidence. Yet he was required to do the best he could on the evidence before him. It seems to me his reasons for judgment reflect the correct principles and do not include the inconsistency propounded by the appellant. The award for non-pecuniary damages, in my view, is entirely fit in the circumstances and fully meets the objectives described by Justice Dickson.

[23] I will add for clarity that I consider the approach proposed of viewing the award as an annual “allowance” for pain and suffering is at odds with the holistic and functional approach that must be applied. To accede to it would be to erroneously treat this head of damages as an exercise of arithmetic rather than, as it must be, an assessment made in the application of judicial judgment.

2. Damages for Past Wage Loss

[24] The judge awarded $5,975 for past wage loss. Ms. Ledwon contends that the judge erred by failing to reflect in that award a change effective January 1, 2013 to the disability benefits program of British Columbia, by which she could have earned around $10,000 per annum from employment without “being disqualified from her disability benefits”, an increase of around $4,000. (The previous limit was $500 per month or $6,000 per annum.) Ms. Ledwon referred to this increase as an increase in her earning capacity, and she posits that as she could have earned up to that amount without losing disability benefits, the judge should have awarded her an amount for seven years equal to $10,000 per annum, less her actual earnings.

[25] Second, Ms. Ledwon complains that the judge ordered no compensation in respect of 2017 or 2018. 2017 was, according to her 2017 T1 tax forms that were filed as an exhibit at trial, a year she had no earnings from employment.

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[26] The judge reviewed the evidence relating to Ms. Ledwon's capacity to work, including that of a vocational expert who opined that several types of work were open to her. He said:

> [89] ... The plaintiff was obviously concerned about a continuing disability because she was careful not to earn income at a level that would disqualify her from receiving those benefits.
>
> [90] Simply put, a plaintiff who was in receipt of disability benefits at the date of the Accident and had been receiving disability benefits continuously for ten years before that cannot be heard to say she was not disabled. There is no medical evidence to support a finding that the plaintiff would have recovered from her pre-existing disability absent the Accident.
>
> [91] The plaintiff has failed to prove any real and substantial possibility that, but for the Accident, she would have taken on more remunerative work and given up her claim to disability benefits.
>
> ...
>
> [94] I accept that the plaintiff was unable to continue her call centre job immediately after the Accident. However, it appears that after about a year-and-a-half, she found other sources of income that allowed her to return to her pre-Accident level of earnings. That period—from the date of the Accident to the end of 2013—is the only period for which she has established an income loss. Using the three-year pre-Accident average I have referred to, I find that her proven loss of income comes to approximately $5,975 and I award that amount, subject to any calculations necessary to produce an after-tax figure.

[27] I see no basis upon which to interfere with the award for past wage loss. The judge had before him evidence that in the years before the accident, Ms. Ledwon had not earned the maximum from employment that she could have earned without incurring loss of disability benefits. In light of both the evidence as to Ms. Ledwon's capacity for employment, and her pre-trial record of earnings, I see no error in this aspect of the judgment. There was an evidentiary basis for the judge's choice of benchmark income for the purposes of comparison and for his implicit view that as of 2015, Ms. Ledwon was capable of earning to her pre-accident levels. Accordingly, I cannot say the judge made a reviewable error in failing to find that but for the accident, Ms. Ledwon would have earned up to $10,000 a year from employment.

[28] Nor, in particular, is the judge's failure to award any amount in respect of 2017, a palpable and overriding error. It was open to the judge to conclude from the

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record that she could have re-deployed the abilities identified by the vocational expert, and replaced the pre-accident earnings to the average of $4,250 a year for those years.

3. Future Wage Loss

[29] The judge made no award for loss of future earning capacity. He said:

> [95] The plaintiff claims damages for loss of future earning capacity. My finding that she has failed to prove permanent or future long-term limitations arising from the Accident leaves no basis for such an award. Even if there was some basis, her pre-existing disability, her actual employment history for many years prior to the Accident, and my finding that she has no realistic possibility of returning to the practice of law all negate any real and substantial possibility of a future loss.

[30] Ms. Ledwon says the judge's failure to award damages for loss of earning capacity is inconsistent with his award for future care to cover the costs of counselling for five years. She contends that a correct approach required him to compensate for income she could have earned as a lawyer for the five year period following the trial. As a theory of that loss she proposes that income loss after January 1, 2013 should be assessed against the applicable earnings cap for retention of all disability benefits.

[31] I will address the issue of lost income from legal practice when I address the application to adduce new evidence, for on the record there is no evidence to support the submission that there was a real prospect of Ms. Ledwon earning such income from legal practice. Nor was there evidence that the accident limited her opportunity to earn such income.

[32] I would not accede to this ground of appeal. The judge found that Ms. Ledwon failed to prove permanent long term limitations arising from the accident. He also concluded that Ms. Ledwon was able to return to her pre-accident level of employment, which was limited by her pre-accident disability for which she received disability benefits. No error is established in these conclusions. While Ms. Ledwon points to the five years' future care award for psychological counselling, there is no established connection between the need for psychological counselling, set for five

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years, and vocational disability arising from the accident. I cannot find an error, considering the record before us, as would allow us to interfere in the judge's denial of an award for future wage loss.

4. Future Care Costs

[33] Ms. Ledwon advanced a significant claim for future care costs, including for the costs of psychological counselling and housekeeping assistance.

[34] The judge awarded a sum for the costs of psychological counselling but denied an award to cover future housekeeping costs. He did, however, award special costs to reimburse for past housekeeping expenses. On the issue of future care and past housekeeping expenses, in addition to the passage replicated above in para. 20 of the discussion on non-pecuniary damages, the judge said in respect of housekeeping:

> [101] In closing argument, defence counsel specifically addressed two aspects of the special damages claim. The plaintiff's claim includes money spent for household assistance. The defendants rely on Dr. Hirsch's opinion that there is no reason she could not have resumed the domestic duties she performed before the Accident. In view of the limitations the plaintiff was experiencing, or believed she was experiencing, I find those expenditures to be reasonable.
>
> [Emphasis added.]

[35] Ms. Ledwon contends that the judge, having accepted the claim for past housekeeping expenses and having accepted a claim for counselling expenses for five years, was bound for purposes of consistency to allow a claim for future housekeeping expenses for five years.

[36] I would not allow this ground of appeal. The judge did not find that the need for housekeeping assistance was ongoing, and there is nothing inherently contradictory in allowing a claim for housekeeping assistance rendered in a period proximate to the accident, and declining to provide such assistance going forward. Nor is the allowance for the psychological counselling in the future inconsistent with denying an allowance for the physical aspects of maintaining a household.

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5. Court Order Interest

[37] The reasons for judgment make no mention of court order interest.

[38] Ms. Ledwon seeks an order that she is entitled to interest on the pecuniary award according to the *Court Order Interest Act*.

[39] Section 1 of the *Act* makes such an award mandatory. It is not necessary that the judge address the issue in his reasons unless the parties request directions on it; entitlement flows as a matter of law: *Kellner v. Greig* (1979), 15 B.C.L.R. 126 (C.A.).

[40] There being no dispute that the *Act* generally provides for an award of court order interest in this case, Ms. Ledwon is entitled to court order interest on pecuniary damages. The order should be amended accordingly.

6. Fresh and New Evidence

[41] Fresh evidence is generally described as evidence that existed before the trial judgment but was not adduced. New evidence is evidence that relates to events that occurred subsequent to the trial judgment: *Struck v. Struck*, 2003 BCCA 623 at para. 37. The 2017 income tax assessment and additional housekeeping receipts proffered are fresh evidence. While a small portion of the evidence addressing Ms. Ledwon's application for reinstatement is fresh evidence, the bulk of it, which leads to the current outstanding application to the Law Society of British Columbia to transfer, is new evidence. For convenience I address all of the reinstatement documents together, below.

i) Fresh Evidence

[42] Admission of fresh evidence is determined by reference to the *Palmer* test: *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases….
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[43] In *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367, this court reiterated the strict standard for admission of fresh evidence in a civil case, citing *Morris v. Fletcher* (1993), 76 B.C.L.R. (2d) 283 (C.A.).

[44] Ms. Ledwon seeks to adduce her 2017 income tax assessment, which confirms she did not report any income from employment in 2017, and receipts totalling $19,805.50, which she says prove a claim for special damages for housekeeping expenses over and above those awarded by the judge, being $11,450.33. The respondents oppose admission of these documents at this late stage, saying Ms. Ledwon has not met the *Palmer* test.

[45] It is clear that all these documents were available to be adduced at trial. That is, with due diligence they could have been admitted and become part of the record; the first criterion is not met for any of these documents.

[46] In respect of the housekeeping receipts, Ms. Ledwon alleges counsel's error, explaining that her counsel had the necessary information but simply did not adduce it. That is not the entire picture however, for Ms. Ledwon identified the invoices that were admitted at trial, without comment that they represented the lesser portion of housekeeping expenses she had paid. In any event, these documents should have been provided to the defendants in the discovery process, and their absence in the evidentiary record is the result of an absence of due diligence. To admit them now would be to more than double this head of damages without an opportunity for proper exploration of them by the defence, or consideration by the trial judge of the scale of housekeeping need now advanced by Ms. Ledwon. Further, their "discovery" by Ms. Ledwon does not challenge the integrity of the award that was made. In these circumstances, I would not admit the receipts.

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[47] Nor would I admit the 2017 income tax assessment. Apart from the absence of due diligence in adducing it at trial, I consider that it does not meet the fourth *Palmer* criterion because it could not be expected to have affected the result. It does not add to the bank of information considered by the judge because the judge knew from Ms. Ledwon's T1 form, in evidence, that she had no employment earnings in 2017. As I understand the reasons for judgment, the judge did not decline to award damages in respect of 2017 because he did not believe Ms. Ledwon's 2017 form. Rather, he found that the only period for which she had established compensable income loss was from the date of the accident to the end of 2013. In other words, he found that Ms. Ledwon was capable of replacing her pre-accident employment income as of at least 2015.

ii) The Evidence Relating to Law Society Membership

[48] Ms. Ledwon seeks also to admit the documents leading up to her reinstatement to the Ontario bar and her application to transfer to British Columbia.

[49] Strictly speaking, the psychiatrist's report received on the last day of trial is fresh evidence because it was received before judgment was pronounced. So too, I would characterize the order of the Law Society of Ontario issued September 3, 2020, before the order in this case was entered and the judge became *functus officio*, as fresh evidence. However, those two pieces of evidence, in my view, are not capable of satisfying the high materiality requirement. Accordingly, I will address all of the evidence relating to Law Society membership, together. Taken as a whole, I would not admit this evidence.

[50] The scope for admission of new evidence is slimmer than for fresh evidence, in recognition of the objective of finality. It is considered vital that a trial not become a roving commission. Courts strive to keep a trial's character as an event fixed in time, providing definition to the issues at trial and giving the parties finality on entry of the court's order as is due to them, in the interests of justice.

[51] The *Palmer* test does not fully apply to new evidence; by definition, the criterion of due diligence is inapplicable. The other considerations in *Palmer*,

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however, resonate – reliability of the evidence, relevance of the evidence to a potentially decisive issue, and opportunity for the evidence to be determinative of an issue in the sense it could reasonably be expected to have affected the result when taken with the other evidence. The interests of justice are deeply engaged in the exercise of discretion to employ the limited opportunity to admit new evidence.

[52] Here, as reliability of this evidence is established, I would divide the issue of admissibility into two questions: first, relevance and materiality – would the impact of this evidence, if admitted, be likely to affect the result; second, if the answer to that first question is yes, is it in the interests of justice that the evidence be admitted?

[53] Admission of new evidence is a rare event, more rare than admission of fresh evidence. This court's decision *Barendregt v. Grebliunas*, 2021 BCCA 11, discusses admission of new evidence in the circumstances of child mobility in family litigation, a circumstance in which, accepting that the new evidence is material to determining a child's best interests, the time required to engage new trial proceedings can weigh heavily in favour of admission in this court.

[54] This is not a case raising such a question. Instead this new evidence addresses an issue raised at trial that was not then capable of greater certainty because, to everyone's knowledge, the decisions from the professional bodies had not been rendered.

[55] In advancing her claim for loss of future earnings, Ms. Ledwon sought to be compensated for a diminution in earnings as a lawyer on two premises. First she said that in time she would be allowed to practise law in British Columbia, and second, she contended that her earnings then would be diminished from that which she could earn as a practising member of the bar but for her injuries consequent on the accident.

[56] The judge denied recovery on this theory of future loss of earnings. He said:

> [60] The plaintiff's claim for damages for both past loss of income and loss of future earning capacity is largely based on the proposition that, but for the Accident, she would at some point have returned to the practice of law. She

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> says the injury has at least delayed that return and her ability to earn income will be diminished even if she can return to practice.
>
> [61] In *Perren v. Lalari*, 2010 BCCA 140, the Court of Appeal, dealing with awards for future loss of earning capacity, said at para. 30 that a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. A plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss: at para. 32.
>
> [62] In *Rousta v. MacKay*, 2018 BCCA 29 at para. 14, the Court of Appeal made clear the test of real and substantial possibility also applies to past hypothetical events.
>
> [63] The question then is whether the plaintiff's return to the practice of law was or is a real and substantial possibility.
>
> ...
>
> [80] The plaintiff still does not fully acknowledge or accept the reasons for the LSUC's 1997 decision. Even if Dr. Janke is correct that her comments about LSUC are not predictive of any difficulties she might have with the law society or lawyers in British Columbia, the fact remains that she must first satisfy the LSO before her application in this province can be considered. In view of her attitude toward and continuing comments about that organization, I cannot imagine her application being considered favourably.
>
> [81] I find the plaintiff has failed to prove that there was or is a real and substantial possibility of ending her Ontario suspension and, therefore, has failed to prove a real and substantial possibility of any return to the practice of law.

[57] The evidence now presented is contrary to the judge's expressed expectation set out in his para. 80. Nonetheless, I consider it falls short of meeting the high bar of being likely to affect the trial result on Ms. Ledwon's future earnings claim. By itself, the evidence does not establish an open path to law practice. Ms. Ledwon remains bound by conditions imposed in Ontario, and the question whether Ms. Ledwon's transfer to British Columbia will occur, and if so the limiting conditions or requirements that are likely to be imposed in order that she becomes a practising member, remain to be decided such that, in my view, her claim on this basis remains speculative. Of equal importance, this evidence does not fill the evidentiary lacuna in respect to establishing a loss of future income related to the possibility of practising law. There is no evidence in the record that would allow a judge to assess by what margin, or for how long, or to what scale, the loss asserted by Ms. Ledwon might be determined. I conclude that even with this evidence admitted, Ms. Ledwon's claim

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based on lost capacity to practise law would have been, and still is, a speculative claim for potential future economic loss. That level of uncertainty inherent in this theory of damages makes the new evidence incapable of satisfying the standard of real and substantial possibility of loss of future earnings. In other words, I do not consider that this evidence, even had it been available and admitted at trial, would have been determinative of an issue or would have affected the result.

[58] One may ask, however, whether, on the premise that this new evidence could be seen as raising more than a speculative claim, it should be admitted. Even were I to find the evidence, if introduced at trial, would have been capable of supporting Ms. Ledwon's claim for damages in respect of future earnings, I still would not admit the evidence. In my view, such admission would not be in the interests of justice for several reasons.

[59] First, Ms. Ledwon received the psychiatric report on the last day of trial, *before* the reasons for judgment issued and long before the order was entered, yet she did not seek to place it before the trial judge. Nor did she seek to place the order of the Law Society of Ontario made September 3, 2019 before the judge prior to entry of his order. In other words, Ms. Ledwon did not exhaust her avenues before the trial judge.

[60] Second, it is an inherent risk in every award for future damages that the judgment may miss the mark, either positively or negatively. Nonetheless, absent a reversible error in the judgment, generally parties do not obtain a "second go" in a case in which a possibility is raised at trial and events do not unfold in accordance with the judge's assessment of that possibility.

[61] Third, Ms. Ledwon did not seek an adjournment and proceeded to trial knowing this uncertainty hovered over her claim based on reinstatement of her licence to practise law.

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[62] On these considerations, and absent an entirely new or uncontemplated event or circumstances, I would not take the extraordinary step of reopening the judgment on the basis of this body of evidence.

Conclusion

[63] For the reasons I have given, I would dismiss the application to adduce new and fresh evidence and, with thanks to counsel, I would allow the appeal only to the limited extent of adding to the order a term in favour of Ms. Ledwon providing court order interest on the pecuniary damages.

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Marine Drive Properties Ltd. (Re),***
2009 BCSC 145

Date: 20090210
Docket: S090306
Registry: Vancouver

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

And

In the Matter of the *Business Corporations Act*,
S.B.C. 2002, c. 57

And

In the Matter of Marine Drive Properties Ltd.,
Wyndansea Hotel Inc. and 0707624 B.C. Ltd.

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

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Counsel for Gulf and Fraser Fishermen's Credit Union	Gordon M. Elliott

Counsel for Folio Hotel and Resort Architecture, Ronald Lea Architect Ltd., William J. Reid Architect Ltd., Mark Whitehead Architect Ltd., Jacques Beaudreault Architect Ltd. and Mark E.B. Thompson Architect Ltd.	Kimberly S. Campbell
Counsel for Bigleaf Ventures Ltd., Samel Holdings Ltd., Adrian Karasz, Andriana Karasz, Cy McCullough, Caralyn Patricia Bennett, Dennis Robert Ohman, Leanne Claire Ohman, Keith Charles Shearer and Shelley Rose Price-Shearer	Paul Hildebrand
Date and Place of Hearing:	January 29 and 30, 2009 Vancouver, B.C.

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[1] On January 15, 2009, I granted an initial order in this ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, ("***CCAA***") proceeding ("the Order"). The Order authorized Marine Drive Properties Ltd. ("Marine Drive"), Wyndansea Hotel Inc. ("Wyndansea"), and 0707624 B.C. Ltd. (collectively "the Petitioners") to file a formal plan of compromise or arrangement and stayed all proceedings against the Petitioners. The Petitioners appointed Ernst & Young Inc. as monitor and created a directors' charge of $75,000 and an administration charge of $500,000. The Order gave both of these charges rank in priority to the existing registered mortgage security interests against the Petitioners' real property. The Order provided that the Petitioners' application for debtor in possession ("DIP") financing be heard after service on the Petitioners' creditors of the Order and the originating materials.

[2] The Petitioners brought their application on an *ex parte* basis. A number of the Petitioners' secured creditors have now brought this application to set aside the Order on a *nunc pro tunc* basis or, alternatively, to amend its terms to limit the administrative charge to $50,000 and to require a meeting of creditors to take place on February 13, 2009. The Petitioners oppose that application. They seek an order granting $1.7 million of DIP financing having priority over all other registered charges.

[3] The Petitioners are all private companies incorporated under the laws of British Columbia. Elke Loof-Koehler is the sole director of all three companies. Marine Drive is a developer of resort and residential property on Vancouver Island. 0707624 B.C. Ltd. holds land in Rocky Point subdivision near Nanaimo as a bare trustee for Marine Drive. Wyndansea holds lands near Ucluelet, B.C. as a bare

trustee for Marine Drive ("the Wyndansea Lands"). Marine Drive intends to develop the Wyndansea Lands as a luxury resort, including a Jack Nicklaus golf course, a 275 unit hotel, a lodge with 125 units, 561 resort condominiums, a deep-water marina, and 30 exclusive oceanfront home sites, referred to as "the Signature Circle".

[4] Marine Drive has a number of additional real estate holdings. These include strata lots in the Tauca Lea Resort and Spa, unsold condominiums in The Ridge ocean view development, other oceanfront and ocean view lots on the West Coast, ocean view home sites near Nanaimo, and five 10-acre home sites in the Cariboo.

[5] The Order covered all of the business interests of the Petitioners and stayed proceedings in respect of all of the assets of the Petitioners.

[6] The Petitioners have six primarily first mortgage lenders. By far, the largest is a syndicate headed by Bancorp Financial Services Inc. (the "Syndicate"). The Syndicate mortgages secure approximately $37.5 million of debt. The loans of the other five first mortgagees total about $6.1 million. The total liabilities of the Petitioners, as set out in the petition, are $52,097,498. This includes second charges and liens of about $6.1 million and unsecured debt of about $3.3 million. The petition stated that the value of the property, based on appraisals or assessments from 2007 and 2008, was approximately $139,500,000. Based on these figures there would be equity of about $87,000,000.

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Positions of the Parties

The Syndicate

[7] The Syndicate argues that the Order should be set aside because:

(a) the Petitioners failed to make full and frank disclosure at the *ex parte* hearing;

(b) the application for the Order should not have been brought on an *ex parte* basis as there was no urgency; or

(c) the Petitioners, in any event, did not meet the test under s. 11 of the ***CCAA***.

[8] The Syndicate alleges that some of the factual assertions put forward by the Petitioners at the *ex parte* hearing were not correct. As a result, it says that there was no proper underpinning for the Order. In addition, it says that the assertions failed to highlight the true status of other proceedings and wrongly characterized the Petitioners' situation as urgent. There is some overlap in these arguments, but the main features of these two arguments include:

(1) the Petitioners' assertion that there was substantial equity in their real estate holdings was incorrect. In particular, the Syndicate says that the Wyndansea Lands had no equity and that this was known to the Petitioners as a result of their futile efforts to sell the properties, or to refinance or find an equity partner for the development. The Syndicate submitted an appraisal of the Wyndansea Lands dated

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January 27, 2009, prepared by Altus Group Ltd., in support of its argument that there is no equity in the real property holdings ("the Altus appraisal");

(2) the Petitioners' assertion that it was imperative that their business and the development work on the Wyndansea Lands continue to be maintained and operated in the upcoming months was false. The Syndicate says that there is, in fact, no ongoing business or development work at the Wyndansea Lands; no such work has been carried on for more than a year. The Petitioners have almost no employees. The only ongoing work is the attempt to sell or refinance the properties;

(3) the Petitioners' assertion that the current difficulties were caused by the credit crunch that occurred in the last few months, just as the prime Signature Circle lots were being released for sale, was false. The Syndicate notes that the work on the golf course stopped in 2007. A $1.9 million lien by the golf course contractor was filed in November 2007. The Signature Circle lots have been marketed since early 2007. While a number were sold, those sales, with one exception, did not complete. The marketing consultant, S & P, has a $900,000 charge filed against the lands. The Syndicate argues that the Petitioners ran out of money long ago and it was disingenuous to blame their difficulties on the global credit crunch;

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(4) the Petitioners' assertion that any plan or arrangement would be acceptable to the creditors was simply not true. In July 2008, the Syndicate and the Petitioners came to a tentative arrangement that was predicated on the agreement of the subsequent Wyndansea chargeholders. Their agreement could not be obtained. The Syndicate also notes that at the present time, the ***CCAA*** proceedings are opposed by more than 90% of the creditors, so it is extremely unlikely that any plan could receive the necessary support;

(5) the Petitioners' assertion that there was an immediate risk of the lenders attempting to enforce their security and realize on the Wyndansea Lands to the detriment of the overall development is inaccurate. The Syndicate says that foreclosure proceedings had been commenced by all lenders between April and August 2008. The Syndicate obtained an order nisi and a $23 million judgment against the Petitioners in July 2008. No further steps had been taken, but the Syndicate advised the Petitioners that it had ordered an appraisal and that it would be applying for an order for conduct of sale. Of course, to bring that application, the Syndicate would have had to give at least 11 days' notice. The other foreclosure proceedings were at a similar stage to the Syndicate's proceedings; and

(6) while there was no urgent reason for an *ex parte* application, the Petitioners would also have had no difficulty serving the respondents.

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[9] The Syndicate argues that even if there was proper disclosure, the Petitioners cannot show that they have met the test under s. 11 of the ***CCAA***. It says that the Petitioners do not have an active business operation, only land holdings. There is no ongoing development work and no circumstances that justify ***CCAA*** protection. It says that the foreclosure proceedings provide sufficient protection to the Petitioners. The court can regulate the appropriate length of the redemption period, and oversee the conduct of sale and sale approvals. The Petitioners will continue to have the opportunity to seek joint venture partners or raise additional financing. Of course, under the foreclosure proceedings, this can be done without the additional cost of the directors' and administration charges and the DIP financing.

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The Petitioners

[10] The Petitioners argue that the Order can only be set aside on two bases: 1) non-disclosure of material facts that, had they been known, the Order would not have been made; or 2) new facts have been presented that convince the Court that the Order ought not to continue. With regard to the latter, the Petitioners say that the test is whether the restructuring is doomed to failure.

[11] The Petitioners say that the standard for disclosure is not perfection but, rather, realistic full and frank disclosure. They say that standard has been met here. In response to the suggestion that the Petitioners should not have brought the motion without notice, they argue that it would have been impractical to have done so. In support, they state at para. 13 of their argument, the fact that "none of the parties were willing to proceed last Wednesday, January 21, 2009 (six days after the

Order was pronounced), illustrates that none of the parties would have been willing to proceed on a day or two's notice of the application for the Initial Order".

[12] The Petitioners rely on the first report of the monitor of January 28, 2009. In that report, the monitor says that in its view "the Petitioners are acting in good faith and with due diligence during this ***CCAA*** proceeding". The monitor says that this is demonstrated by the Petitioners' agreement to release 0707624 B.C. Ltd. and the assets of Marine Drive from the stay of proceedings. The Petitioners ask that the Order be amended to reflect this change. This would leave only the Wyndansea Lands subject to the stay and the terms of the Order. The Petitioners acknowledge that it would be novel to have a stay order that operates only against some of the assets of a debtor company. However, they say that novelty alone is no reason to refuse to make the order.

[13] In response to the suggestion that there is no equity in the Wyndansea Lands, the Petitioners say that they have not had an opportunity to respond to the Altus appraisal, which was delivered to them only a day before this application. While they admit to knowing for some time that the Syndicate had commissioned an appraisal, they do not have funds to retain an appraiser to respond. One of the proposed uses of the DIP mortgage funds is to retain an appraiser for this purpose. They also say that it cannot be concluded that there is no equity in the Wyndansea Lands in the face of the appraisal information put forward by the Petitioners. While the Altus appraisal opines that there is little or no equity, the information relied upon by the Petitioners suggests that there is substantial equity.

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[14] In response to the suggestion that there is no possibility of a plan being acceptable to creditors, it says that a number of the unsecured creditors support the ***CCAA*** proceedings. Further, the Court is entitled to take into account the stakeholders in the community who stand to benefit from the economic activity and municipal infrastructure that the project will bring to Ucluelet.

[15] Finally, the Petitioners argue that it is appropriate for them to be given an opportunity to attempt a restructuring during the initial 30 day stay period. The intent of that initial 30 day stay is to give the debtor the chance to muster support for and justify the relief granted in the Order. It has not had the time it needs to do that, given the need to respond to the Syndicate's application. The Petitioners say that the stay should continue at least until the comeback hearing scheduled for February 12, 2009. In the meantime, the order for DIP financing should be made to allow them to respond to the Altus appraisal.

Issues

[16] There are numerous contentious issues raised by these applications. The question of whether full and frank disclosure was made would require careful examination of the materials relied upon at the hearing on January 15, 2009, and careful review of the statements made by counsel. I do have serious concerns regarding the disclosure made at the time of the initial application. However, given the conclusions I have reached on the other issues, I have not undertaken that close review. I have considered the following two issues:

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(1) Should the application for the Order have been made on an *ex parte* basis?

(2) Have the Petitioners met the test under s. 11 of the ***CCAA*** for an order such that the stay should continue?

[17] For the reasons set out below, I have concluded that the application should not have been brought without notice and that, in any event, the Petitioners cannot meet the test under s. 11 of the ***CCAA***. Accordingly, I am setting aside the Order.

Issue 1: Should the application for the Order have been made on an *ex parte* basis?

[18] The ***CCAA*** provides in s. 11(1) that an application may be made "on notice to any other person or without notice as it may seem fit". The Petitioners took the position on both applications that it is the norm for ***CCAA*** proceedings to be commenced by an *ex parte* application.

[19] While the Order on many ***CCAA*** proceedings is obtained on an *ex parte* application, that does not mean that an applicant does not have to establish that it was appropriate or "fit" to have the application heard without notice.

[20] These proceedings are brought by petition. Rule 52(12.1) of the ***Rules of Court***, B.C. Reg. 221/90, provides as follows:

> If the nature of the application or the circumstances render service of a petition or notice of motion impracticable or unnecessary, or in case of urgency, the court may make an order without notice.

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[21] The Rule sets out the circumstances under which it is appropriate or fit that an order be made without notice. In this case, the Petitioners were required to show that service of the petition was impracticable or that there was urgency requiring an immediate order.

[22] Here, there could be no suggestion that service of the petition on the respondents was impracticable. All of the secured creditors and lien claimants had counsel known to the Petitioners. The Petitioners' rationale for the *ex parte* application was the existence of an urgent situation. In Ms. Loof-Koehler's affidavit, she referred to the Syndicate's order nisi, obtained on July 14, 2008, and to the existence of orders in the other foreclosure proceedings. She described the urgency in the following way:

> Given these orders, there is immediate risk that the lenders will attempt to enforce their security and realize on the Wyndansea lands. Such an application would be very detrimental to the overall development and would prejudice all of the stakeholders from maximizing realization from the assets.

[23] While the redemption period in the order nisi was about to expire, there was no real urgency in the situation. As noted by the Syndicate, they were in a position to apply for an order for conduct of sale or for an order absolute of foreclosure, but in either case, the Petitioners would have notice and a full opportunity to respond. I was not told at the initial application that the Syndicate had advised the Petitioners that it was in the process of having the Wyndansea Lands appraised and that it would be applying for an order for conduct of sale. Indeed, the Petitioners had been supplying information to the appraiser for some time prior to the initial application.

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They had also advised the Syndicate that they would oppose the order for conduct of sale. The foreclosure proceedings were ongoing under the supervision of the court. There was no reason for the Petitioners not to give notice of the ***CCAA*** application, just as the Syndicate would have to give notice of the application for conduct of sale.

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[24] The Syndicate relies on ***Re Encore Developments***, 2009 BCSC 13, a very recent decision of Brenner C.J. that was not available at the time of the Order. In ***Encore***, an order had been obtained in circumstances similar to the present case. The debtor was a real estate developer with a number of development projects in the Okanagan area. When the order was made, "no work was underway on any of the projects: a number were substantially completed; the others consisted of bare land": ***Encore*** at para. 2.

[25] The Chief Justice set aside the order on a *nunc pro tunc* basis. He found that the application should not have been brought without notice to the respondents. His reasoning is set out at paras. 27-30, which I have set out in full:

> This application was filed and heard on an *ex parte* basis. On such an application where the relief sought affects the rights of others, the applicant must demonstrate to the court the need for urgency and the reason why those against whom relief is sought *ex parte* are not being given notice. In addition, the applicant must use utmost good faith to disclose to the court fairly and frankly all of the relevant information, particularly as to urgency and the reason as to why notice should not be given.
>
> Here there was no urgency. Encore was not operating; it was effectively shut down. Because of Encore's representation to the court that it had equity of approximately $2.5 million, the true exposure of the secured lenders to the costs of the ***CCAA*** was not disclosed. With the

> true equity being zero or negative, it is clear that this ***CCAA*** could only be run by priming the mortgage lenders.
>
> In this case where the cost of the ***CCAA*** proceeding was to fall solely on the shoulders of one creditor group, there was no justification for filing and proceeding *ex parte*. If Encore were an operating company with many employees, and if it were faced with being shutdown by the security enforcement steps of one or more of its lenders, then an *ex parte* application might have been understandable. No such circumstances exist in this case.
>
> In the absence of such factors, proceeding *ex parte* was simply unjustified. There was no evidence that any creditor had seized any assets, or was on the verge of seizing any assets. Neither was the petitioner's condition emergent, in the sense that a payroll was about to be missed or that Encore's viability was about to end.

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[26] The Petitioners say that ***Encore*** is distinguishable because, in this case, there is equity in the Wyndansea Lands and the secured creditors cannot say that they are being "primed". I will comment on the issue of equity below, but in the present circumstances, whether notice should have been given does not depend upon the existence, if any, of equity in the Wyndansea Lands. Here, as in ***Encore***, there was no operating business, no ongoing development work, and no group of employees facing the sudden loss of their jobs. There were no pending moves by the creditors that required an *ex parte* order.

[27] This application should not have been brought without notice to the respondents. Initial applications in ***CCAA*** proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation. Counsel must be careful to fairly present the situation to the court if the application is made on an *ex parte* basis.

[28] As I have determined that there is no basis for an order under the ***CCAA***, I do not have to decide what remedy flows from the failure to give notice.

Issue 2: Have the Petitioners met the test under s. 11 of the *CCAA* for an order such that the stay should continue?

[29] I do not accept the Petitioners' submission that the only two bases for setting aside the Order at this time are material non-disclosure at the time of the Order or new facts that convince me that it should not be continued. A court may set aside an order made under s. 11 of the ***CCAA*** at any time if it concludes that the circumstances do not exist, or no longer exist, to make such an order appropriate. In this case, there are particular reasons to consider the respondents' applications to set aside the Order at this time. These are:

(1) the changes to the Order that are proposed by the Petitioners are so significant that a reconsideration is appropriate;

(2) the Order was granted on an *ex parte* basis; and

(3) the application for DIP financing would result in an additional $1.7 million of debt ranking in priority to other creditors. In order to consider that application, I must determine if it is appropriate for the Order to continue.

[30] I have concluded that there are no circumstances present in this case that make it appropriate to continue the Order under the ***CCAA***. I now turn to the circumstances and factors that I considered in arriving at this conclusion.

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Purpose of the ***CCAA***

[31] The purpose of the ***CCAA*** is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to enable the company to stay in business or to complete the business that it was undertaking. The court must play a supervisory role, preserving the status quo until a compromise or arrangement is approved, or until it is evident that it is doomed to failure: ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311 (C.A.).

[32] In this case, it is evident at this stage that a compromise or arrangement is very unlikely to be acceptable to the respondents who would have to vote in favour of any arrangement if it is to be approved. The Petitioners ran out of money more than a year ago; they have been attempting, without any success, to sell their land holdings, arrange financing, and find a new partner during that time. Their inability to find financing, the subsequent falling real estate market in B.C. and the global credit crunch, have seriously impacted the Petitioners. There can be no doubt that the situation is worse now than it was six months ago. At that time, the Petitioners and the Syndicate could not get subsequent chargeholders to agree to a proposed arrangement regarding some of the Wyndansea Lands. The chances of any kind of agreement now being reached are much less. In addition, all of the first mortgagees are now opposed to any compromise. A number have brought motions to set aside the Order, while others have indicated their support for this application. They represent well over two-thirds of the secured creditors. In these circumstances,

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there is no reason to continue the Order. I am satisfied that any arrangement is doomed to fail.

Equity Situation

[33] When the Order was made the Petitioners submitted that there was likely significant equity in the Wyndansea Lands based on appraisals from 2006 and 2007. The Petitioners argued that if those appraisals were discounted by 50% and the Signature Circle lots were discounted by an additional 30%, there would still be more than $8 million in equity. It was clear that these “discount” figures were arbitrary choices. The Altus appraisal raises serious doubt about the Petitioners’ assertion. The Petitioners argue that I should not place any reliance on the Altus appraisal, in part because they have not had an opportunity to respond to it.

[34] I have reviewed the new Altus appraisal and find it to be a considered, detailed, current appraisal of the Wyndansea Lands. There is no reason for me to disregard it. I can place much more reliance on the opinion contained in the Altus appraisal than I can on the values asserted on the basis of the older appraisals discounted arbitrarily. It is evident from the length of time that the Petitioners have attempted to raise financing or sell the properties that the older appraisals should be disregarded. While I cannot conclude that there is no equity in those lands, I can conclude that there is a serious risk of that.

[35] In addition, I note that interest on the two Syndicate loans amounts to approximately $460,000 per month. Taking into account the other debt owing, the total interest charges per month will approach $500,000. The position of the

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creditors will erode rapidly with the passage of time. This is especially so in the current market. The risk that there is no equity in the assets would, of course, be increased if the DIP financing is approved. While I cannot say, as Brenner C.J. noted in ***Encore*** at para. 28, that the ***CCAA*** proceeding "could only be run by priming the mortgage lenders", I can conclude that there is a serious risk that the ***CCAA*** proceeding could only be run at the expense of many of the creditors.

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Nature of the Petitioners' Business

[36] The Petitioners argued strenuously that there is no reason why the ***CCAA*** should not apply to a real estate development company. They stressed that the decisions in ***Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp***, 2008 BCCA 327, 296 D.L.R. (4th) 577, and ***Encore*** do not prevent a real estate developer from making application for protection. I agree. As noted by Tysoe J.A. in ***Cliffs*** at para. 25, "the nature and state of [the debtor's] business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay".

[37] The present circumstances are similar to those in both ***Cliffs*** and ***Encore***. There is no development work in progress on any of the Petitioners' properties. The work on the golf course ceased long ago. The Signature Circle lots have been the subject of an extensive and expensive marketing program for at least 1 1/2 years. The hotel site is subdivided and serviced. The first subdivision plan is complete and serviced. However, the only real ongoing work is an attempt to raise new financing or sell properties. The development work on the properties, other than the

Wyndansea Lands, was completed some time ago. On those properties, the Petitioners are attempting to sell either serviced lots or completed strata lots.

[38] To put it bluntly, the Petitioners have sought ***CCAA*** protection to buy time to continue their attempts to raise new funding. As counsel for the Petitioners stated in argument, they need time to "try to pull something out of the hat". They have sought DIP financing so that they can do this at the expense of their creditors. This is not an appropriate use of the extraordinary remedy offered by the ***CCAA***.

[39] In ***Redekop Properties Inc. (Re)***, 2001 BCSC 1892, 40 C.B.R. (5th) 62, Sigurdson J. came to the same conclusion while considering the applicability of a ***CCAA*** proceeding to a company that was effectively a real estate holding and development business. He stated as follows at para. 63:

> It is also a factor that this type of company is not the classic ongoing business to which ***C.C.A.A.*** protection is often afforded. I do not say that protection might not, in appropriate circumstances, be extended to companies with few unsecured creditors and no real ongoing business, but I think that the relative absence of these things are factors to consider in determining whether to continue an order involving a company or to allow the secured creditors to foreclose.

[40] Similar observations were made by Tysoe J.A. in ***Cliffs*** at para. 36:

> Although the ***CCAA*** can apply to companies whose sole business is a single land development as long as the requirements set out in the ***CCAA*** are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior

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> creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[41] The nature of the Petitioners' business and financing arrangements are such that it is extremely unlikely that the protection of the ***CCAA*** could facilitate a compromise or arrangement between the Petitioners and their creditors.

Foreclosure Proceedings

[42] All of the Petitioners' developments are currently subject to ongoing foreclosure proceedings. The Petitioners' desires to raise new funding or sell some of their assets can be, and are being, pursued in the course of those proceedings. Their desire to buy time to do so can be the subject of application in the foreclosures. They already have sufficient protection of their interests in the existing court proceedings.

[43] This issue was dealt with in ***Redekop***, where Sigurdson J. stated at para. 61:

> ... I am satisfied that the protection the company wishes to obtain is equally available in practical terms in a foreclosure proceeding, and the foreclosure proceeding allows the secured creditors to begin to enforce their security. The options of seeking a joint venture partner or selling are just as available in a foreclosure as they are under the protection of a ***C.C.A.A.*** proceeding.

Limiting the Proceedings to the Wyndansea Lands

[44] The Petitioners sought an order amending the Order to limit it to only the Wyndansea Lands. This is opposed by the Syndicate. I am not aware of any

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precedent for such an order. I have not seriously considered how a partial stay might work in this case. Even on a cursory review, it would appear to create unnecessary disputes between creditors as the realization progressed on other assets of the Petitioners. This would complicate and prolong resolution of those proceedings. I question whether the ***CCAA*** can apply to only one part of the operations of a company rather than to all of it. I do not have to decide that issue here as I am not prepared to make such an order.

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Other Stakeholders

[45] The Petitioners have argued that the interests of the community should be a significant factor in the decision made on this application. I do not agree. While the development will bring employment and other benefits to the community of Ucluelet when it proceeds, the interests of the community are not directly engaged by the dispute that is currently before me.

[46] The Petitioners' reliance on ***Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.***, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, is misplaced. The situation here bears no similarity to the circumstances that were faced by the communities affected by the Skeena Cellulose operations. It was estimated that 8,000 direct and indirect jobs depended upon the continuation of that business. Here, there are no existing jobs that will be impacted by a failure to continue the stay of proceedings. Further, the potential of future benefits for the community remains the same whether or not the stay is continued. If the golf resort is the best use of the lands, then it is likely that the project will proceed in the future when circumstances permit.

Summary

[47] There are no circumstances present that make it appropriate to continue the Order. In addition, the Order should not have been sought on an *ex parte* basis. The Order will accordingly be set aside. As I have not found a failure to make full and frank disclosure on the part of the Petitioners, I decline to make the order effective *nunc pro tunc*.

[48] The parties are scheduled to appear before me on February 12, 2009, at 9:00 a.m. I will consider arguments regarding costs at that time.

"Butler J."

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Alberta Court of Queen's Bench
Meridian Developments Inc. v. Toronto Dominion Bank
Date: 1984-05-11

A. Z. Breitman and J. G. Shea, for Meridian Dev. Ltd.

J. L. MacPherson, Q.C., and K. J. Martens, for Toronto Dominion Bank.

P. M. Owen, Q.C., and C. Bodner, for Nu-West Group Ltd.

(Edmonton Nos. 8401-1090, 8301-09096)

May 11, 1984.

[1] WACHOWICH J.:— The applicant Meridian Developments Inc. (hereinafter called "Meridian") is an Alberta corporation which has recently been continued under the Alberta Business Corporations Act, 1981 (Alta.), c. B-15. Previously it was known as Meridian Developments Ltd. and it was in that name that Meridian sold land by agreement for sale to 233995 Alberta Ltd. on 16th March 1981. Nu-West Group Ltd. (hereinafter called "Nu-West") is the beneficial owner of all of the shares of 233995 Alberta Ltd. and on 16th March 1981 executed under seal an unconditional guarantee in favour of Meridian Developments Ltd. whereby Nu-West unconditionally guaranteed to Meridian the amounts due from 233995 Alberta Ltd. at the times and in the manner set forth in the agreement for sale.

[2] It was a term of the guarantee that if default occurred under the agreement, Nu-West would forthwith on demand pay all of the purchase moneys owed.

[3] By cl. 5 of this guarantee it was agreed that Meridian would not be bound to exhaust other resources or to act on other securities before proceeding against Nu-West.

[4] On 15th March 1983, 233995 Alberta Ltd. defaulted on the agreement for sale. On 18th March 1983 demand was made to Nu-West as was required under the terms of the guarantee.

[5] Nu-West failed to pay the amount owing on demand and, thereafter, Meridian issued a statement of claim on 31st March 1983. Nu-West did not defend this action and, as a result, Meridian obtained default judgment on 3rd May 1983 in the amount of $928,989.33 plus costs. A writ of execution was duly filed on 11th May 1983 and Meridian instructed the sheriff to seize sufficient assets of Nu-West to satisfy the judgment. Seizure of a number of pieces of furniture and office machines was effected on 16th May 1983.

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[6] Nu-West then made application by notice of motion for a declaration that Meridian was not at liberty to make execution against Nu-West until it had sold the land in question because of the provisions of s. 40(2) and (3) of the Law of Property Act, R.S.A. 1980, c. L-8. This application was dismissed by order of Kirby J. on 24th May 1983. Part of the debt was then paid but execution on the balance of $463,329.33 was stayed pending Nu-West's appeal of Kirby J.'s order. The stay of execution granted was subject to the following conditions:

1. That Nu-West post an irrevocable letter of credit issued by the Toronto-Dominion Bank in favour of Meridian Developments Ltd. in the amount of the unpaid balance of $463,239.33 with interest at 11½ per cent per annum calculated thereon from 4th May 1983 to the date of payment.

2. That Meridian's solicitors were to hold the letter on the trust conditions imposed in correspondence from solicitors for the defendant to the solicitors for the plaintiff dated 6th June 1983.

3. That the defendant would promptly prosecute the appeal of the order.

[7] The appeal was subsequently launched on 20th June 1983 and heard on 12th October 1983. The appeal was dismissed with written reasons on 29th March 1984 [31 Alta. L.R. (2d) 1, [1984] 4 W.W.R. 97(C.A.)].

[8] The irrevocable letter of credit was held in trust by solicitors for Meridian throughout the period between Kirby J.'s first order and the dismissal of the appeal. During this period several new orders were made by consent each of which had the effect of continuing the terms and conditions of the original order. The amount of the letter of credit was increased during this period in order to account for the interest on the principal which accrued during the period. The order that was in effect when the decision of the Court of Appeal was released was made by Hetherington J. on 30th January 1984.

[9] The letter of credit would have probably been honoured on presentation after 29th March were it not for the ex parte order obtained from myself by Nu-West under the Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25, as amended. This order was made as a result of Nu-West's insolvency and provided, inter alia, in cl. 2 that:

> further proceedings in any action, suit or proceeding against the Petitioner be restrained until July 31, 1984

and in clause 3 that:

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> until July 31, 1984 no suit, action, or other proceeding be proceeded with or commenced against the Petitioner, except with leave of this Court.

As a result of the bank's knowledge of this order, it has not honoured the letter of credit and has, instead, brought interpleader proceedings.

[10] Meridian has brought action against the bank alleging breach of contract in their failure to honour the letter of credit.

[11] Application for advice and directions was also made by Meridian to entitle them to present the letter of credit for payment and to determine that my order of 21st March 1984 does not enjoin and restrain Meridian from presenting the letter of credit or the bank from honouring it.

[12] From this the following issues come before me in this application:

1. Is payment of the letter of credit a "proceeding" within the meaning of cl. 2 or 3 of the 21st March order?

2. If so, is it a proceeding "against the Petitioner" [Nu-West] so as to be restrained by cl. 2 or 3 of that order?

3. If it is found to be a "proceeding" should the court in any case give leave to Meridian in the circumstances to obtain payment of the letter of credit?

[13] These are difficult issues to resolve as counsel agree that the law in the area is unclear and the cases cannot all be reconciled. Further, there are good policy arguments to be made for both sides.

[14] In order to resolve the issues raised in this application I must consider the scope and intent of my 21st March ex parte order under the Companies' Creditors Arrangement Act. This Act, though little used, is one of a number of federal statutes dealing with insolvency. In common with the various other statutes, it envisages the protection of creditors and the orderly administration of the debtor's affairs or assets: *Wynden Can. Inc. v. Gaz Metro. Inc.* (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.). In the words of Duff C.J.C. who spoke for the court in *Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que.,* [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75:

> … the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of

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> proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation.

[15] The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

[16] This aim is facilitated by s. 11 of the Act which enables the court to:

> … restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit, and the court may also make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

It was pursuant to this section that on 21st March I granted the order that restrained "further proceedings in any action, suit, or proceeding" against Nu-West and enjoined creditors and others from proceeding with or commencing any "suit, action, or proceeding".

[17] This order is in accord with the general aim of the Companies' Creditors Arrangement Act. The intention was to prevent any manoeuvers for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed.

[18] The order was obviously intended to cast a wide net and catch all creditors. Therefore Meridian can only succeed if it can establish that the payment of the letter of credit is not a "proceeding" against Nu-West as contemplated by the order.

[19] As both counsel have frankly admitted, there are no cases directly on point. One of the few cases which does deal with the meaning of the word "proceeding" in the Companies' Creditors Arrangements Act is *Gray v. Wentworth Canning Co.,* 58 Man. R. 459, 31 C.B.R. 182, [1950] 2 W.W.R. 1285, a decision of the Manitoba Court of King's Bench. In that case Kelly J. determined that the relevant statute section gave the court complete discretion to determine the kinds of proceedings it would restrain. Although because of the wording in the particular order there at issue, Kelly J. determined that it was meant to catch only proceedings, suits, or actions which had not yet been instituted, it is clear from his judgment that he sees the section as allowing orders of much wider

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range. He points out, in fact, that it is because the draftsman of the order did not see fit to follow the exact words of what was then s. 10 of the Companies' Creditors Arrangement Act, 1932-33 (Can.), c. 36 that the order as given must be seen as restraining only those proceedings commenced after the order was given.

[20] A similar provision to s. 11 may be found in the English Companies Act, 1862 (25 & 26 Vict.), c. 89, s. 85 which allowed a court at any time after the presentation of a winding-up petition to:

> … restrain further Proceedings in any Action, Suit, or Proceeding against the Company, upon such Terms as the Court sees fit: the Court may also make an order that no Suit, Action or other Proceeding shall be proceeded with or commenced against the Company except with the Leave of the Court and subject to such Terms as the Court imposes.

[21] Several cases which have interpreted this provision are useful in determining the scope of the term "proceeding". Jessel M.R. in *Re Artistic Colour Printing Co.* (1880), 14 Ch. D. 502, determined that an order made under this section could restrain the sheriff from selling goods already in his possession after seizure on the judgment of a judgment creditor. At p. 505 he concluded: "The word 'proceeding' in both sections of course includes execution under a judgment in an action." *Re Perkins Beach Lead Mining Co.* (1877), 7 Ch. D. 371, is to the same effect.

[22] Counsel for Meridian admits that "proceeding" may have a very general meaning but submits that we must confine ourselves here to proceedings which necessarily involve a court or a court official. There is certainly authority for this proposition. Black's Law Dictionary, 5th ed. (1979), defines the term in the following manner:

> **Proceeding.** In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, tribunals, bureaus, or the like.
>
> An act which is done by the authority or direction of the court, agency, or tribunal, express or implied; an act necessary to be done in order to obtain a given end; a prescribed mode of action for carrying into effect a legal right. All the steps or measures adopted in the prosecution or defense of an action. *Statter v. U.S.* (1933), 66 F. (2d) 819 (Alaska C.C.A.). The word may be used synonymously with "action" or "suit" to describe the entire course of an action at law or suit in equity from the issuance of the writ or filing of the complaint until the entry of a final judgment, or may be used to describe any act done by authority of a court of law and every step required to be taken in any cause by either party. The proceedings of a suit embrace *all* matters that occur in its progress judicially.

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> Term "proceeding" may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding. *Rooney v. Vermont Invt. Corp.* (1973), 10 Cal. (3d) 351, 110 Cal. Rptr. 353, 515 P. (2d) 297 (Cal. S.C.). A "proceeding" includes action and special proceedings before judicial tribunals as well as proceedings pending before quasi-judicial officers and boards. *State ex rel. Johnson v. Independent School Dist. No. 810, Wabasha County* (1961), 260 Minn. 237, 109 N.W. (2d) 596 **(Minn. S.C.).**

[23] Words and Phrases Legally Defined, 2nd ed. (1969), vol. 4, p. 182, similarly restricts the definition to actions before a court or other judicial body:

> **Proceedings**
>
> The term "proceeding" is frequently used to note a step in an action, and obviously it has that meaning in such phrases as "proceeding in any cause or matter". When used alone, however, it is in certain statutes to be construed as synonymous with, or including "action" (1 Hals. (3rd) 4-5, paras. 5, 6).
>
> "By s. 89 of the Judicature Act of 1873 (36 & 37 Vict.), c. 66 [repealed; see now Supreme Court of Judicature (Consolidation) Act, 1925, (15 & 16 Geo. 5), c. 49, s. 202] … it is said that every inferior court 'shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such Court, such relief, redress, or remedy' in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice … It can do so 'in any proceeding'. Now what is the meaning there of 'in any proceeding'? … Now, although if s. 89 stood by itself, there might be some difficulty in determining what is the meaning of the word 'proceeding', yet it seems to me to be clear what is its meaning in s. 90 [repealed; see now Supreme Court of Judicature (Consolidation) Act, 1925, s. 203], and that 'proceeding' in that section is a general word meant to cover every step in an action, and is equivalent to the word 'action'."*Pryor v. City Offices Co.* (1883), 10 Q.B.D. 504 (C.A.), *per* Brett, M.R., at pp. 507, 508.
>
> "Anything that precedes the final judgment or order is, in my opinion, a "proceeding" in the action." *Blake v. Summersby,* [1889] W.N. 39, *per* Kay, J. at p. 39.

[24] Although this last mentioned definition indicated *Blake v. Summersby* restricts the proceedings to steps in an action preceding judgment, there is ample authority, cited by both counsel, to indicate that the term must be taken to include execution steps taken after judgment. As I indicated earlier, counsel for Meridian would restrict "execution proceedings" to those involving a court or court official. Those cases cited by Nu-West which indicate that an order restraining proceedings restrains a sheriff from conducting a sale following seizure, I am satisfied are in accord with this view inasmuch as the sheriff is an officer of the court. Further, counsel for Meridian cites *Can. Credit Mens' Trust Assn. v. Edmonton,* 21 Alta. L.R. 160, [1925] 1 W.W.R. 747, 5 C.B.R. 589, [1925] 2 D.L.R. 525, where the Alberta Appellate Division found that a distress was not a "process against property" within the meaning of s. 11 of the Bankruptcy Act, 1919 (Can.), c. 36. He also cites another Alberta Appellate Division decision, that of *Lee v. Armstrong,* 13 Alta. L.R. 160, [1917] 3 W.W.R. 889, 37 D.L.R. 738, where the court found that the noting on the title

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by the registrar of a writ of execution was not a “proceeding” within the meaning of the phrase “no proceedings shall be had or taken in respect of any execution already issued on any personal judgment … until sale of the land mortgaged” as found in the Land Titles Act, 1906 (Alta.), c. 24, s. 62(2) [am. 1917, c. 3, s. 40(2)].

[25] Meridian argues further on the basis of the ejusdem generis rule that the interpretation of “other proceeding” in s. 11 of the Companies’ Creditors Arrangement Act is limited to proceedings which would fall within the genus indicated by the words “suit” and “action”. This, too, indicates that the term as used in the Act ought to be restricted to proceedings which necessarily involve either a court or court official.

[26] These arguments are persuasive. Nonetheless, I am mindful of the wide scope of action which Parliament intended for this section of the Act. To narrow the interpretation of “proceeding” could lesson the ability of a court to restrain a creditor from acting to prejudice an eventual arrangement in the interim when other creditors are being consulted. As I indicated earlier, it is necessary to give this section a wide interpretation in order to ensure its effectiveness. I hesitate therefore to restrict the term “proceedings” to those necessarily involving a court or court official because there are situations in which to do so would allow non-judicial proceedings to go against the creditor which would effectively prejudice other creditors and make effective arrangement impossible. The restriction could thus defeat the purpose of the Act. I must consider, for instance, the fact that it may still be possible to make distress without requiring a sheriff or his bailiff, as for example, on a chattel mortgage. It might well be necessary to find that such a distress constitutes a “proceeding” in terms of s. 11 in some future situations. As a result, in the absence of a clear indication from Parliament of an intention to restrict “proceedings” to “proceedings which involve either a court or court official”, I cannot find that the term should be so restricted. Had Parliament intended to so restrict the term, it would have been easy to qualify it by saying for instance “proceedings before a court or tribunal”.

[27] Nor is there anything within the provisions of the order given on 21st March to indicate any intention to so limit the meaning of the word. I conclude, therefore, that payment of a letter of credit drawn on the account of an insolvent company could well come within the meaning of the word “proceeding” in the order.

[28] Here we are dealing with a payment which remains contingent at the date of the order. It awaited the judgment of the Court of Appeal on 21st March and thus, did involve a court or court official. Even if, therefore, I were to accept that payment of a letter of credit is

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not a proceeding under the Act, it seems clear that a payment which awaits a decision of the court is a proceeding as contemplated by the Act.

[29] It must be noted, however, that by the terms of the 21st March 1984 order it is only "further proceedings in any action, suit, or proceeding against the Petitioner" that are restrained. Unless the payment of the letter of credit is a "proceeding against the Petitioner" (Nu-West) it was not restrained by this order. I agree with counsel for Meridian that the payment of the letter of credit cannot be termed a proceeding against Nu-West unless the money to be paid is Nu-West's property.

[30] The ownership of the funds represented by the letter of credit is dependent upon the judicial nature of the commercial instrument in question. The nature of a letter of credit has been extensively considered. 3 Hals. (4th) states at p. 100, para. 132 that letters of credit:

> … create binding contract to accept or pay bills on the specified conditions, enforceable against the banker by any person to whom the letter has been shown by the grantee, and who has acted on the faith of it.

In para. 133 at p. 102 the authors continue:

> The contract thus created between the seller and the banker is separate from, although ancillary to, the original contract between the buyer and the seller, by reason of the banker's undertaking to the seller, which is absolute.

[31] The nature of a letter of credit has been explored in both English and Canadian cases. In *Aspen Planners Ltd. v. Commerce Masonry & Forming Ltd.* (1979), 7 B.L.R. 102 at 107 (Ont. H.C.), Henry J. quotes with approval from the English Court of Appeal [who are quoting from *Malas (Hamzch) & Sons v. British Imex Indust.,* [1958] 2 Q.B. 127, [1958] 1 All E.R. 262 at 263, [1958] 2 W.L.R. 100, [1957] 2 Lloyd's Rep. 549 (C.A.)] in *Edward Owen Enrg. Ltd. v. Barclay's Bank International,* [1978] 1 All E.R. 976 at 981, [1978] 1 Lloyd's Rep. 166 (C.A.):

> … it seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute which there may be between the parties on the question whether the goods are up to the contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment it would be wrong for this court in the present case to interfere with that established practice.

[32] *Aspen Planners Ltd.,* supra, deals with a situation in which the plaintiffs arranged irrevocable letters of credit to a contractor to ensure payment of a building contract. They later alleged that the contractor had defaulted on the contract and sought to

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obtain an injunction restraining payment under the letter of credit. The Ontario Court refused, citing the irrevocable nature of the bank's obligation to pay the contractor.

[33] This case, as do the English cases cited by counsel, exemplifies the more traditional use of the letter to guarantee payment in commercial transactions where goods and services are bought and sold.

[34] Here, however, a more novel use has been made of the letter of credit as a security device and to determine whether this use affects the nature of the document we must turn to the American cases where the use of letters of credit, particularly in the way one was used here, is much more prevalent.

[35] The nature of a letter of credit was explored in numerous cases relied upon by counsel for Meridian. *East Girard Savings Assn. v. Citizens Nat. Bank and Trust Co. of Bagtown* (1979), 593 F. (2d) 598, a decision of the U.S. Court of Appeals, Fifth Circuit, sets out the nature of the letter of credit at p. 601:

> … a letter of credit typically involves three separate contracts. First, the issuing bank enters into a contract with its customer to issue the letter of credit. Second, there is a contract between the issuing bank and the party receiving the letter of credit. Third, the customer who procured the letter of credit signs a contract with the person receiving it, usually involving the sale of goods or the provision of some service. *Barclays Bank D.C.O. v. Mercantile Nat. Bank* (1973), 481 F. (2d) 1224, 1239 n. 21, cert. *dismissed,* 414 U.S. 1139, 94 S.Ct. 888, 39 L.Ed. (2d) 96; Verkuil, "Bank Solvency and Guaranty Letters of Credit," 25 Stan. L. Rev. 716 at 719.
>
> In recent years, letters of credit have been used for a variety of commerical transactions, Harfield, *The Increasing Domestic Use of the Letter* (1972), 4 U.C.C.L.J. 251. The guaranty letter of credit is one of these recent innovations. The guaranty letter of credit is designed to ensure that one or more parties to a contract will perform their duties under it. In a typical guaranty situation, the future owner of a building requires that the building contractor give him a completion bond providing for the payment of a certain sum of money if the building is not completed on schedule.

At p. 602 the court continues:

> Regardless of which form of letter of credit is used, upon compliance with the conditions contained in the letter, the recipient is entitled to full payment. This entitlement is independent of collateral obligations which may exist under the other underlying contracts. *Pringle-Assoc. Mtge. Corp. v. Southern Nat. Bank of Hattiesburg, Miss.,* 571 F. (2d) 871 (Miss. C.A.); *Barclays Bank,* supra, at 1238-39; Vernons Texas Codes, Annotated, 2 Tex. Bus. & Com. Code (1968), p. 534, s. 5.114(a).

At p. 603 the court concludes:

> If the letter of credit is to retain its utility as a commerical instrument, the rights and duties of the issuer, the beneficiary, and the procurer must remain clear. Parties to

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> commercial transactions must be able to rely on the fact that as soon as the conditions contained in a particular letter are satisfied, payment is due.

[36] This case, and others cited by counsel for Meridian, clearly indicate that the nature of a letter of credit has not been changed by its use in a greater variety of commerical transactions, notably as a guarantee. It exists as an independent contract between the bank and the person cashing or negotiating the draft and, if it is irrevocable, the bank is bound to honour it.

[37] Because of the independent contractual nature of a letter of credit, the analogy which Nu-West attempts to make between money held in court following seizure and a letter of credit cannot be maintained. Money paid into court may well remain the property of the defendants as the Saskatchewan Court of Appeal determined in *Regina Steam Laundry Ltd. v. Sask. Govt. Ins. Office,* [1971] 1 W.W.R. 96, 15 D.L.R. (3d) 121, although I note that there is also authority to the contrary: *Re Key worth; Ex parte Banner* (1874), 9 Ch. App. 379 (L.S.); *Re Hansard Spruce Mills Ltd.,* [1954] 1 D.L.R. 326 (B.C.S.C.). Security in the form of an irrevocable letter of credit is not the property of the party arranging the letter of credit. Indeed, I would go so far as to say that it has never been his money. He has contracted with his bank to require the bank to pay out a specific amount of money to a third party on the occurrence of certain events. In return he has promised to repay the bank for the funds so expended. The customer of the bank has, in my view, never had “ownership” of any funds represented by the letter of credit. He can lay claim only to the debt that has been thereby created.

[38] Thus, it is my view that even if the payment out of a letter of credit could be termed a “proceeding”, as this term is used in s. 11 of the Companies’ Creditors Arrangement Act, it cannot be termed “a proceeding against the Petitioner” so as to be caught by the order of 21st March.

[39] I am fortified in my view by a recent unreported American case cited by Meridian which seems right on point. The case is *Page v. First Nat. Bank of Maryland,* U.S. Dist. Ct., Dist. of Columbia, 30th March 1982 (not yet reported).

[40] The facts are very similar to those found here. Westinghouse Credit Corporation (“W.C.C.”) was the beneficiary of a letter of credit drawn on the First National Bank of Maryland (“bank”). The bank was enjoined from payment out on this letter after Page and Associates, a limited partnership and Virginia Page (“Page”) its sole general partner, filed voluntary petitions in bankruptcy. W.C.C. was a substantial creditor of Page, holding

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among its forms of security the letter of credit issued on the bank. W.C.C. presented its letter of credit for payment four days after the petition was filed. Page sought an injunction the next day which was granted on the ground that to pay the letter would be a transfer in violation of the Bankruptcy Code, 11 U.S.C., s. 362(3) or (4). These subsections provide:

> [A] petition [under Title 11] operates as a stay, applicable to all entities, of …
> (3) any act to obtain possession of property of the estate or of property from the estate;
> (4) any act to create, perfect or enforce any lien against property of the estate.

W.C.C. appealed the decision to grant the injunction and this appeal was allowed. The court found that cashing the letter of credit was not the type of act contemplated by the provisions of the statute since neither the letter of credit nor its proceeds are the "property of the estate" under the Bankruptcy Code.

[41] At p. 4 of the decision the court stated:

> In issuing the letter of credit the bank entered into an independent contractual obligation to pay W.C.C. out of its own assets. Although cashing the letter will immediately give rise to a claim by the bank against the debtors pursuant to the latter's indemnification obligations, that claim will not divest the debtors of any property since any attempt to enforce that claim would be subject to an automatic stay pursuant to 11 U.S.Cpara. 362(4).

[42] In my view the Toronto Dominion Bank is in the same position. It is obliged to honour its contract with Meridian even though the cashing of the letter of credit will increase Nu-West's debt to the bank and even though the bank has no method of enforcing its claim against Nu-West because of the 21st March order.

[43] It makes no difference that the letter of credit was held in trust by Meridian's solicitors and that the condition precedent for presentation had not been met on 21st March. If the moneys secured were not Nu-West property on 21st March, the order did not affect them. The letter of credit became negotiable when the condition precedent was fulfilled on 29th March with the rendering of the Court of Appeal's decision in Meridian's favour. The bank should be directed to honour it on presentation on the terms and conditions specified in the letter and it is so ordered.

Application granted.

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***New Skeena Forest Products Inc., Re,***
2005 BCCA 192

Date: 20050401
Docket: CA032484

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Between:

In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36
and
In the Matter of the *Canada Business Corporations Act*,
R.S.C. 1985, c. C-44
and
In the Matter of the *Company Act*, R.S.B.C. 1996, c. 62, as amended
and
In the Matter of New Skeena Forest Products Inc.,
Orenda Forest Products Ltd., Orenda Logging Ltd. and
9753 Acquisition Corp.

Respondents
(Petitioners)

And

Kitwanga Lumber Co. Ltd.

Respondent
(Respondent)

Before: The Honourable Mr. Justice Esson
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Smith

R.J.M. Janes and M.D.B. Paine	Counsel for the Appellant City of Prince Rupert
R.A. Millar	Counsel for the Interim Receiver and Trustee in Bankruptcy Ernst & Young Inc.
P.J. Reardon	Counsel for 646325 B.C. Ltd.
R.D. Leong	Counsel for the Attorney General of Canada

D.J. Hatter	Counsel for Her Majesty the Queen in Right of the Province of British Columbia
Place and Date of Hearing:	Vancouver, British Columbia February 28, 2005
Written Submissions Received:	March 22, 24, 29 and 30, 2005
Place and Date of Judgment:	Vancouver, British Columbia April 1, 2005

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Esson
The Honourable Mr. Justice Smith

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Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] On August 30, 2004 New Skeena Forest Products Inc. ("New Skeena"), formerly known as Skeena Cellulose Inc., brought to an end its most recent attempt at financial restructuring under the ***Companies' Creditors Arrangement Act*** ("CCAA") by filing an assignment in bankruptcy. The last CCAA proceeding had been initiated in November 2003 when the Supreme Court made an order in the usual terms, staying proceedings against the company, authorizing debtor-in-possession ("DIP") financing to rank ahead of most other charges, appointing a monitor, and granting New Skeena the right to "proceed with an orderly disposition" of its assets in order to facilitate the "downsizing and consolidation of [its] business and operations". But the strenuous efforts made by many creditors and other stakeholders to streamline and restructure New Skeena's business — a mainstay of the economy of northwestern British Columbia — ultimately failed, and the decision was made to move the company into liquidation.

[2] On September 20, 2004, the Supreme Court lifted the stay previously imposed under the CCAA, imposed a new stay under the ***Bankruptcy and Insolvency Act***, and appointed Ernst & Young Inc. as receiver to offer for sale "all or any of the Assets, including any of the properties (whether real, personal or otherwise), rights, assets, businesses, and undertakings of the Company, whether *en bloc* or on a piecemeal basis, as a going concern or otherwise, but subject to the approval of [the Supreme] Court." An auction of many of the remaining assets is scheduled for April of this year.

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[3] It is para. 17 of the September order which is significant for purposes of this case. It directed the Receiver to report to the Court concerning the "enforcement" of the so-called "Priority Charges" and the allocation of the sale proceeds of New Skeena's assets proposed to be made by the Receiver among the secured creditors. The order also specified that any proposed allocation could not defeat the priority afforded to any Priority Charges under the Court's previous orders or seek to invoke marshalling or other equitable principles applicable to creditors' remedies. In due course, the Receiver recommended a scheme of allocation of the Priority Charges and it was approved by the Chambers judge below. The discrete question raised by this appeal is whether he erred in so doing, and in particular, whether it was open to him to approve an allocation that may require one key creditor to pay as its share of the Priority Charges an amount greater than its secured charge and indeed greater than what is said to be the true value of the asset against which it holds its security.

[4] This question is complicated by two facts. First, the creditor with which we are concerned is the City of Prince Rupert, appellant in this court. Its security is a statutory tax lien and the enforcement thereof is governed by the ***Local Government Act***, R.S.B.C. 1996, c. 323. Under that Act, the local collector must in September of each year offer for sale by public auction any real estate on which taxes are delinquent. (Evidently, certain obligations under the tax sale provisions of the Act were postponed by special Act of the Legislature in response to the plight of Prince Rupert and other neighbouring municipalities affected by New Skeena's insolvency, but no further special deferments are anticipated.) The upset price at such auction is specified by s. 407(1) and in this case would exceed some

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$18,000,000, the amount of the City's unpaid taxes. If no bid is received at least equal to the upset price, s. 407(4) of the Act states that the City "must be declared the purchaser" of the property. Thus it is possible the City will not receive an offer at or above the amount of its claim, and that it will be deemed to be the purchaser of the property. In return it would receive nil proceeds, at least until it succeeds in selling the property at some future time. Obviously, this could take years, and the ***Local Government Act*** preserves for some time the owner's ability to redeem the property: see ss. 414-418. In any event, the City stands to receive only the upset price and interest thereon.

[5] The second complicating factor is that the value of the property over which the City holds its statutory lien is New Skeena's now defunct kraft pulp mill, located on Watson Island. The value of this property is unknown: although in recent years it was assessed for tax purposes at some $8,480,000, an appraisal carried out in January 2004 set its value at only $3,920,000. Now, there are indications that the property may carry a large environmental liability. There is some evidence, which the Chambers judge below did not expressly adopt, that the cost of decommissioning the mill and restoring the property to its original condition might be as much as $100,000,000 — although it seems unlikely any purchaser of the mill site would be willing to do more than restore it to "industrial" standard. Remediation to that standard is expected to cost something less, and the Province has agreed to provide up to $30,000,000 for the latter purpose. However, the possibility of a large liability remains, and to date, no private party has expressed interest in acquiring the property on terms that the Receiver has recommended for acceptance.

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[6] Together, these facts are said to place the City in a different position from that of other secured creditors: when the value of their interests falls below the amount of the secured indebtedness, most can simply accept the lesser amount, or even walk away from their secured claim. Indeed, most are lenders who have taken the business risk that their borrower will fail and that their security may prove inadequate to realize their claims. This is not true of the City, however: it is prohibited from accepting less than the statutory upset price, and "must" take the property as its own (subject to the owner's right to redeem) if no offer is received at or above the statutory minimum. This also gives rise to a general 'unfairness' argument that informs the City's other more specific arguments regarding process and jurisdiction.

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Factual Background

[7] I turn first, however, to the background of the impugned order of December 1, 2004, which adopted the method of cost allocation proposed by the Receiver. I note at the outset that the City, like all other secured creditors, had consented to the granting of "super-priority" for the DIP financing approved by the Court early on in the CCAA proceeding. The initial order of November 19, 2003 granted to one DIP lender, NWBC Timber & Pulp Inc. ("NWBC"), security in an amount up to $2,300,000, "ranking in priority to all creditors of the Petitioners and any other encumbrances, security or security interests now outstanding save and except for the Administration Charge and the Directors' Charge which shall rank in priority to the DIP Charge." Subsequent orders reduced the principal amount of NWBC's priority and approved further borrowing from Northern Savings Credit Union ("NSCU") and granted that lender a charge ranking ahead of all charges (including

NWBC's DIP Charge) other than the Administration Charge. Still further DIP financing, the "Woodbridge DIP Loan", the "MatlinPatterson DIP Charge", and the "Papyrus DIP Charge", was approved on similar terms in the summer of 2004 without any objection being made by the other secured creditors. However, the CCAA stay was, as earlier mentioned, finally lifted on September 20, 2004.

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[8] Pursuant to para. 17 of the Order of that date, Messrs. Ernst & Young prepared a report for the Court dated November 19, 2004 (the "Second Report"). The Receiver advised the Court of its progress (or lack thereof) in selling off the New Skeena assets and undertaking as a going concern. Under the heading "The Receiver's Sale Process", the Receiver stated:

> 33. At the commencement of the receivership process, the Receiver was advised by a number of significant secured creditors that they believed that the opportunities to transact with a credible *en bloc*, going concern buyer had been exhausted through what was expressed to be a lengthy and expensive CCAA process, and that they expected the Receiver to conduct a quick sale process with an emphasis on liquidation. The creditors were extremely clear in their communications with the Receiver that the administration, holding and preservation costs associated with the asset realization and receivership administration process were viewed as substantial. Their view was that a lengthy, multi-month asset marketing campaign was unnecessary and to the detriment of their recoveries.
>
> 34. The Receiver recognized the views expressed by these creditors with regard to the length of the sales process and the associated costs, but also recognized that it was important to pursue offers of an *en bloc* or operator nature, including opportunities for acquiring specific mill sites, concurrently with seeking liquidation proposals, given the very significant impact of the New Skeena assets on the economies of the local communities.
>
> 35. The Receiver commissioned an updated asset appraisal of the Company's machinery and equipment from Maynards

> Appraisals Ltd., the firm that conducted the January 2004 appraisal during the CCAA proceedings. No updated appraisal was commissioned for the Company's mill site real estate, as the Receiver considered this to be of a lower cost benefit. Appraisals of the Company's two residential properties situated in Prince Rupert were commissioned, and these properties were listed for sale with a local realtor. [Emphasis added.]

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[9] The Receiver's proposal for the allocation of the "Court Ordered Charges" was set out in detail at Appendix F to the Report. The terms "Court Ordered Charges", "Priority Charges" and "CCAA Costs" were all used to refer to the aggregate of the "Administrative Charge" (consisting of the monitor's professional fees and fees for legal services rendered to the monitor and New Skeena), the "DIP Loan Charge" (consisting of amounts advanced by the DIP lenders mentioned above), and the "Directors' Charge" (consisting of amounts for which the directors of New Skeena might have become liable as a result of the insolvency). According to the report, the Administrative Charge amounted to approximately $1,484,000; the DIP Loan Charge was some $3,250,000; and no amount was outstanding in respect of the Directors' Charge.

[10] The Receiver noted that no attempt had been made in the CCAA proceedings to track these Charges "against the various assets of [New Skeena] or the interests of any creditor or creditor group" and that there had been no discussion of the burden each group of assets might be expected to bear in relation to the costs of the CCAA process. The Receiver expressed the view that it was important for the secured creditors to be able to assess their positions reasonably when considering the potential sale of the assets and that "[w]ithout a framework that contemplates

some reasonable expectation as a basis for distributing costs, a realistic assessment of potential sales [would] be very problematic for secured creditors to undertake." This was particularly so with respect to New Skeena's real estate, since it was uncertain when those assets would be sold and, the Receiver stated, it would be "cumbersome to rely on a framework for cost allocation that takes effect only upon the full liquidation of all assets." Further, it would be "neither productive nor accurate" to try to link the CCAA Costs to any specific asset or creditor. Accordingly, the Receiver recommended that:

> 15. As a proxy for the expected values being preserved or enhanced by undertaking the CCAA proceeding, and accordingly incurring the CCAA Costs, an appropriate reference would be appraisals of real estate and equipment at the operating locations of New Skeena. The Monitor commissioned these appraisals in January 2004 as part of the sales efforts at that time. Those appraisals represent information which was current at the time that the CCAA Costs were being incurred, and formed at least some context for the potential value of the restructuring efforts.
>
> 16. The real estate appraisals did not consider potential environmental issues that may be prevalent on a given site, and so do not necessarily represent the best possible indication of value. Not all operating locations were appraised, and the real estate information is therefore incomplete insofar as the major participants in the CCAA process are concerned.
>
> 17. One alternative would be to use the values provided by the BC Municipal Assessment Authority instead of the appraised values (the "Tax Values"). The Tax Values can consist of land only, or can include the improvements on the lands as well. Use of the Tax Values as a value basis has the advantage of being a consistent measure of value, in that each property has a Tax Value for assessment purposes, and has the further advantage of matching expected values against the basis by which the municipal tax obligations are computed.

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> 18. When comparing the calculation of improvements for Tax Value purposes with the equipment appraisals performed by Maynards, it is apparent that there is opportunity for overlap between these two categories. There is not a direct method of assessing this potential overlap, or calculating a corrective measure. As well, when comparing the land portion of the Tax Value with the appraised values to the extent both are available, it would appear that the Tax Value of both lands and improvements is higher than the value attributed to the real estate in the appraisal information. Accordingly, it is the Receiver's view that preference should be given to use of the appraised value of the lands, where available, and to use Tax Values for those other properties where necessary.
>
> 19. The Receiver's proposal is to use appraised values as a basis for allocating the CCAA Costs pro rata against those operating assets for which appraisals are available, and in the cases where no land appraisals were commissioned to use the land portion only of the Tax Values, all on an interim basis as described further below. The use of Tax Values shall only apply to land at the operating locations of New Skeena.
>
> 20. Using appraised or assessed values instead of ultimate sale values to allocate costs represents, in some respects, an artificial measure by which to burden participants in the process. By using a measure that is a proxy for ultimate sales value, rather than that sales value itself, the Receiver recognizes that those who believe they may be adversely affected by this basis of allocation may question this proposal. [Emphasis added.]

This method, the Receiver stated, would provide an "independent basis" for dealing with the interests of secured creditors at an early stage of the distribution process. It would avoid "waiting for particular asset sales to occur before allocating costs", and minimize additional disputes "to the extent that actual sales of assets contain price allocations that may be arbitrary, as could occur in multi-asset sales or if secured creditors take assets using their security positions as partial satisfaction of the transaction price." In the Receiver's analysis, the certainty provided by the use of

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the appraised or assessed values would outweigh "the lack of precision inherent in using a measure other than the actual sales values obtained."

[11] Accordingly, the Receiver recommended that with respect to those operating lands and equipment for which appraisals or assessments were available, an interim allocation of the CCAA Costs in full would be carried out. But notwithstanding the use of the term "interim", no later adjustment would be made to reflect the actual sale of these assets, including the Prince Rupert mill site. In the Receiver's words:

> 26. The Receiver's proposal is to apportion the CCAA Costs pro rata against the equipment and lands appraised in January 2004, on the basis of appraised values or Tax Values, as the case may be, rather than eventual sale proceeds. It is not proposed that the calculation of allocated costs be adjusted subsequently as sales of those assets occur. [Emphasis added.]

[12] Under the heading "Distributions of Sale Proceeds", the Receiver acknowledged the possibility that certain assets could "accumulate a level of allocated costs in excess of their ultimate sales value." In such cases, the Receiver said:

> . . . it is proposed that the shortfall in cost recovery become an additional General Cost, and [be] allocated against the remaining appraised and/or sales values as the case may be.
>
> 40. In the event that a secured creditor seeks to recover the asset against which it holds security, as for example could occur in the instance of a municipality taking title to real property rather than it being sold by the Receiver, then the Receiver would ask that the Court permit such a transaction to be completed only if, and when, the secured creditor provides the Receiver with the cash equivalent of the applicable allocated costs against that asset, as calculated by the Receiver under this proposal. [Emphasis added.]

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It is this aspect of the proposal to which the City of Prince Rupert objects.

[13] It does not appear that the recommendations contained in the Second Report were the subject of a court order. Rather, the Chambers judge requested certain additional information, leading to the Receiver's Third Report, dated November 29, 2004. It dealt with various substantive matters and again returned to the subject of cost allocation, on which the Receiver had received further comments from counsel for the concerned municipalities and others. The Receiver noted that certain of the municipalities (including Prince Rupert) had objected to the use of an appraisal that failed to consider any environmental liability attaching to the mill site. Another creditor had objected to the use of asset values generally, suggesting that funds actually generated from the DIP loans be traced to the locations or assets on which such funds had been spent, and that costs be allocated on that basis.

[14] With respect to Prince Rupert's objections, the Receiver responded as follows:

> 52. The assessed value for tax purposes of the Prince Rupert land is $8.48 million, whereas the appraised value used in our cost allocation proposal is $3.92 million. The environmental remediation program currently being funded by the Province has seen almost $19 million of a total funding available of $30 million already expended, and our understanding from discussions with the professional remediation firm is that the completion of this project will render the Watson Island site comparable in condition to other industrial sites in the Province. The use of a value for the Prince Rupert lands is, in the Receiver's view, appropriate in the context of the ongoing remediation and the expectation that this likely will be a site with commercial value in the future, given its physical attributes of rail and water access to facilitate shipping and materials handling opportunities.

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> 53. The Receiver understands that any reductions by the Assessment Authority in assessed values, due to the closure of operations, will affect only the industrial improvements values and not the land values, and so the values used in the Receiver's proposal would be unaffected by that development which, in any event, is prospective. [Emphasis added.]

[15] With respect to the proposal that costs be linked to DIP loan expenditures, the Receiver predicted that hardly any costs could be directly tied to the interests of the secured creditors in real estate, which would mean that the cost burden would rest almost entirely on the secured creditors having interests in equipment and other operating assets. In conclusion, the Receiver stated:

> Using a method of allocation that simply traces costs gives no recognition to the underlying basis for the CCAA process and the restructuring effort, which is to preserve and enhance the value of all assets, including the real estate, and in the Receiver's view is therefore inappropriate.
>
> 56. The comments from counsel for the various affected creditors have been considered further by the Receiver, but the Receiver remains of the view that the process set forward in our Receiver's Report #2 provides an appropriate outcome of allocation, taking into account the multiple objectives of early certainty as to the parties' exposure to costs, the relative ability of the affected assets to absorb the allocations (or, alternatively, the various parties' abilities to fund those costs) and the roles played by the various parties during the CCAA and receivership proceedings. [Emphasis added.]

The Order of the Chambers Judge

[16] The matter came on for hearing before the Chambers judge on December 1, 2004. In his oral reasons, he briefly reviewed the Receiver's proposal as set out in

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its Second and Third Reports. With specific reference to Prince Rupert's situation, he reasoned:

> With the exception of Prince Rupert all of the parties here want to have certainty at this stage. Prince Rupert says that the value that is proposed to be used in its case, which is the appraised value of $3.92 million, is unrealistic because it is simply not known whether this property will fetch that amount, or even any amount, given the environmental contamination issues.
>
> At paragraph 52 of his report number three, the Receiver addresses the conservatism in his proposal. The Receiver points out that the assessed value of the land set by Prince Rupert for tax purposes is some $8.48 million; the appraised value used by the Receiver for the purpose of this cost allocation proposal is $3.92 million.
>
> There has been an ongoing remediation effort on the Prince Rupert mill site, which has been funded by the Province. Some $19 million of a total funding available of $30 million has been spent. While there is some issue as to the likely market value of these lands, it is the Receiver's view that, given this remediation which has taken place, and given the remediation which is going to continue, that the appraised value figure is a realistic figure to use for the purposes of his proposal.
>
> The reality is that no method, in these circumstances, is perfect. The only way to achieve perfection, as I said at the outset, is to do nothing until everything has been sold. That clearly would not serve the interests of the parties and it is one that simply does not make sense. [paras. 16-19]

In the result, the Chambers judge concluded that it was in the best interests of all the parties to accept the Receiver's recommendation with respect to the cost allocations. The entered Order provided in this regard:

> 6. the Receiver's proposal:
>
> (a) to allocate the CCAA Costs (as defined in the Report) on a preliminary basis against only those assets consisting of equipment and real property which are identified in the illustrative chart attached to Appendix F to the Report

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(the "Assets"), pro rata based upon the appraised or assessed value of the Assets at January, 2004, provided that such preliminary allocation will be subsequently adjusted based upon:

(i) the actual sale proceeds realized on the future disposition of the remaining assets of the Petitioners which do not have values attributed to them in Appendix F as aforesaid; or

(ii) such other value as may be subsequently attributed to such remaining assets by the Court; and

(b) to allocate the Receivership Costs (as defined in the Report) by:

(i) firstly, applying specific costs directly attributable against specific assets; and

(ii) secondly, applying any specifically allocated costs not fully recoverable from specific assets together with all general receivership costs which cannot be specifically allocated, pro rata against all assets on the same basis as the CCAA Costs;

is hereby approved, provided that the obligations of any affected creditor to pay its portion of the allocated costs in relation to any asset where they hold a first priority position (subject to the prior CCAA Costs and Receivership Costs) is [sic] postponed, pending further application at the time that the Receiver applies for approval to distribute any of the proceeds generated from the sale of any of the Petitioners' assets; [Emphasis added.]

[17] It is worth emphasizing that notwithstanding the reference to "preliminary" allocation in subpara. 6(a) of the Order, the only adjustment contemplated is in respect of sale proceeds received from the "remaining assets" (which I understand consist mainly of intangibles such as forestry licences) and that no adjustment is contemplated in respect of the sale proceeds of the assets with which we are here concerned — those items of equipment and real property referred to in Appendix F

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to the Receiver's Second Report. Further, the Order does not specifically incorporate the Receiver's recommendation that if and when a secured creditor seeks to recover an asset on which it holds its security, the Court will permit such a transaction to be completed "only if, and when, the secured creditor provides the Receiver with the cash equivalent of the applicable allocated costs against that asset, as calculated by the Receiver under this proposal." Instead, the Order "postpones" the obligation of any creditor to pay its portion of the allocated costs in respect of any asset on which it holds first priority, pending further application. However, the Chambers judge did approve the entire proposal for cost allocation set out in the Receiver's reports and counsel have all agreed that the Court intended to impose the condition on recovery described at para. 12 above. I will also proceed on that assumption, although it would have been preferable if the Order had been worded to reflect this important aspect of the recommendation.

On Appeal

[18] In this court, the City submits that the Chambers judge made two basic errors of law in acceding to the Receiver's recommendation regarding the allocation of CCAA Costs: first, that in exercising his discretion the Chambers judge "ignored" a relevant factor, namely, the actual value of the asset in question; and second, that it did not lie within the jurisdiction or discretion of the Chambers judge to approve an allocation that carried with it the risk that a secured creditor — i.e., the City — would have to pay to the Receiver an amount that exceeds the value of its security interest on the Watson Island property.

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[19] Counsel for the City acknowledged that the CCAA, which consists only of 22 sections, gives the court a broad discretion, in the sense that the court must consider a wide variety of competing interests which are likely to vary greatly from case to case. (See S. Waddams, "Judicial Discretion", (2001) 1 ***Cmnwth. L.J.*** 59.) As we observed in the previous *Skeena* appeal (***Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*** (2003) 13 B.C.L.R. (4th) 236, 2003 BCCA 344), the case law that has developed under the CCAA "fills the gaps" between the provisions of the statute and has been informed by the "broad public policy objectives" thereof:

> There is now a large body of judge-made law which "fills the gaps" between these provisions. Most notably, courts appear to have given full effect to the "broad public policy objectives" of the Act, which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 *Can. Bar Rev.* 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. . . .
>
> In accordance with these objectives, Canadian courts have adopted a "standard of liberal construction" that serves the interests of a "broad constituency of investors, creditors and employees" and reflects "diverse societal interests." (See *Re Smoky River Coal Ltd.* (1999) 175 D.L.R. (4th) 703 (Alta. C.A.), at 721-2.) [paras. 34-35]

[20] Consistent with this approach, Canadian courts have now accepted that their discretion may be exercised to permit DIP financing and to grant "super-priority" to DIP lenders, albeit subject to certain restrictions and safeguards: see Michael B. Rotsztain, "Debtor-in-Possession Financing in Canada: Current Law and a Preferred Approach", (2000) 33 Can. Bus. L.J. 283, at 284-87; and ***Re United Used Auto & Truck Parts Ltd.*** (1999) 12 C.B.R. (4th) 144 (B.C.S.C.), aff'd (2000) 16 C.B.R. (4th) 141 (B.C.C.A.), superseding the more restrictive approach taken in

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Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975) 59 D.L.R. (3d) 492, 21 C.B.R. (N.S.) 201 (Ont. C.A.) and ***Lochson Holdings Ltd. v. Eaton Mechanical Inc.*** (1984) 55 B.C.L.R. 54 (B.C.C.A.). Appellate courts also accord a high degree of deference to decisions made by Chambers judges in CCAA matters and will not exercise their own discretion in place of that already exercised by the court below. This court has stated that its powers should be exercised "sparingly" when it is asked to interfere with the exercise of discretion of a CCAA court: see ***Clear Creek***, *supra*, at para. 52, citing ***Re Pacific National Lease Holding Corp.*** (1992) 72 B.C.L.R. (2d) 368, and ***Re Smoky River Coal Ltd.*** (1999) 175 D.L.R. (4th) 703 (Alta. C.A.). In the more general context, I note the statement of Viscount Simon L.C. in ***Charles Osenton & Co. v. Johnston*** [1942] A.C. 130 (H.L.), which was quoted by the majority of the Supreme Court of Canada in ***Friends of the Old Man River Society v. Canada (Minister of Transport)*** [1992] 1 S.C.R. 3, at 76-77. Viscount Simon L.C. stated:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. [at 138]

At the same time, discretionary decisions are not immune from review. As Viscount Simon L.C. stated in the same case:

> But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient

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> weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [at 138]

(See also ***Harelkin v. University of Regina*** [1979] 2 S.C.R. 561 at 588, where it was said that in refusing to take into consideration a "major element for the determination of the case", the trial judge had failed to exercise his discretion on relevant grounds and thus gave the Court of Appeal "no choice" but to intervene.)

[21] The City contends that the Chambers judge in the case at bar "ignored" or failed to consider a relevant matter — the actual value of the Watson Island property — and proceeded on an irrelevant criterion — whether a previous appraisal had been carried out — in approving the allocation method he did. Mr. Janes referred us to ***Musqueam Indian Band v. Glass*** [2000] 2 S.C.R. 633, where the Supreme Court of Canada held that the Federal Court of Appeal had wrongly interfered with a trial judgment fixing the "value" of a leasehold interest in certain reserve lands. The Court of Appeal had ruled that the value should be determined on the basis of land in fee simple with no reduction for the fact that it was located on a reserve. However, the Supreme Court of Canada restored the trial judgment, Gonthier J. noting for the majority that the Indian band was bound to "accept the realities of the market". (Para. 44.) Similarly, in ***Cowichan Tribes v. Canada*** (2003) 314 N.R. 384, [2003] F.C.J. No. 1919, the Federal Court of Appeal upheld a trial judgment which, in determining the "fair market rental value" of property that was subject to flooding, took that susceptibility into account. Létourneau J.A. for the Court stated that "[i]t defies common sense to think that a prudent and reasonable

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developer or tenant would allocate the same value to a land that is partly flooded annually as it would to a land that is not so flooded and that is ready for development or occupation. This is not a question of law: this is a fact of life, a practical reality which . . . the mortgage lenders and the insurers will soon remind you of when they assess the risk they have to assume." (Para. 9.)

[22] In response to the City's submission that the Chambers judge in the case at bar erred in the same manner as the Federal Court of Appeal in ***Glass***, counsel for the Receiver says it is implicit in the Chambers judge's Reasons that he did not accept the "negative value theory" with respect to Watson Island, particularly in light of the fact that the Province has already spent more than $19,000,000 in restoring the mill site. Mr. Millar characterized the evidence of remediation liability of $100,000,000 as "entirely vague" and noted that that estimate had included the cost of decommissioning and closure (dismantling, demolition, removal, transportation, resloping and grading) of the mill site. In his submission, it is unrealistic to think that this will ever be done in the near to middle term, and the Chambers judge must be taken to have been of the opinion that the property did have commercial value by reason of its location, its facilities, and the remediation work.

[23] In my view, these are the kinds of considerations which the Chambers judge (who has heard most if not all of the Chambers applications relating to New Skeena) was especially qualified to make. Moreover, I do not agree that the Chambers judge "ignored" the issue of the true value of the Watson Island property. He specifically referred to this matter at paras. 16-18 of his Reasons (quoted above), but at the end of the day he concluded that "perfection" in terms of matching values with costs, was

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outweighed by the need for certainty and expediency. In my view, assuming for the moment that the Court had the jurisdiction to make the order it did, the Chambers judge was entitled to weigh these competing interests and to decide that the interests of all the creditors as a group overshadowed the City's particular objections.

[24] Two other factors raised by the City, however, do in my view cast greater doubt on the Court's exercise of its discretion. First, there is the fact that Prince Rupert's security and the remedies available to it are very different from those of other creditors. As has been seen, if the Watson Island property cannot be sold, the ***Local Government Act*** requires Prince Rupert to take the land, environmental liabilities and all, whether or not it will realize anything after payment of its share of the CCAA Costs. Not surprisingly, there is no case law directly on point, but in ***Re Hunters Trailer & Marine Ltd.*** (2001) 305 A.R. 175, [2001] A.J. No. 1638 (Alta. Q.B.), the Court said it would be unfair to ignore "differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from CCAA proceedings" in allocating CCAA costs. Thus the Court in ***Hunters*** approved the allocation of a share of CCAA costs to a mortgage lender that was smaller than the shares allocated to other creditors. Wachowich C.J.Q.B. commented:

> The CCAA recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of

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> UMC's security, the remedies that were available to it and the extent of its recovery.
>
> Under the circumstances, I conclude, as did the Interim Receiver, that UMC is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of CCAA costs. I agree with the Interim Receiver's proposal that UMC be charged 15 percent of the Monitor's fees and $500.00 of the Monitor's legal fees, the same percentage proposed for its share of the interim receivership costs. I note that UMC also agreed with this proposal.
>
> Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.
>
> Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors. . . .
>
> I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above. [paras. 20-23 and 26]

[25] My second concern is that the Chambers judge proceeded on the assumption that there were urgent time pressures militating in favour of cost allocations that provided immediate certainty to creditors of what they were likely to be receiving net of the CCAA Costs. Indeed, at para. 3 of his Reasons, the Chambers judge noted that "time is the enemy of enterprise value" and at para. 19 that it would clearly not serve the interests of the parties to "do nothing until everything has been sold". But at this state of New Skeena's existence, the hope of "enterprise value" has had to give way to the reality of liquidation value, all efforts at restructuring the business of

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the company as a going concern having failed. As in ***Re Weststar Mining Ltd.*** (1993) 75 B.C.L.R. (2d) 16 (B.C.C.A.), "The battle for the survival of the Company is over, at least for the time being. What remains is merely to determine priorities. . . ." (Para. 58, *per* McEachern C.J.B.C. dissenting, whose judgment was adopted by the Supreme Court of Canada on appeal at [1993] 2 S.C.R. 448.) The Chambers judge was not facing a "now or never" determination. As Mr. Janes noted, he could have elected to recognize the unusual position of the City and await any sale that might occur within a reasonable time. Failing such a sale, he could assign a value based on more up-to-date evidence. In the meantime, interim allocations and distributions could be made. In this regard, I note that para. 4 of the December 1 Order stated:

> 4. The sale proceeds from the sale of each specific asset shall stand in the place and stead of the asset sold and all liens, claims, encumbrances and other interests that are attached to an asset prior to its sale shall attach to the sale proceeds with the same validity, priority and in the same amounts, and subject to the same defences, that existed when the liens, claims, encumbrances and other interests attached to the asset;

As counsel for the Receiver suggested, this provision obviates in large measure any time pressure which might have made a more exact allocation of costs and proceeds impractical. Assets can be sold to the highest bidder free and clear of encumbrances. The charges attach instead to the proceeds held by the Receiver, and interim allocations and distributions can be made subject to final adjustment, all without unduly inconveniencing creditors.

[26] I would prefer, however, not to decide this appeal on the basis that the Chambers judge erred in the exercise of his discretion by failing to give due weight

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to the two factors I have described. Again, an appellate court should not interfere with an exercise of discretion in the present context where the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion. Instead, I turn to the more fundamental question of jurisdiction — whether it lay within the Chambers judge's authority to adopt a method of cost allocation that might require the City to pay as its share of CCAA Costs an amount greater than the value of the land over which it holds its tax lien. I note that Mr. Janes and Mr. Millar have confirmed their view that this question relates to the equitable and statutory jurisdiction of the Court under the CCAA rather than under the ***Bankruptcy and Insolvency Act***.

[27] Mr. Janes for the City submitted that the potential imposition of a "personal liability" on the City over and above its interest in the Watson Island property is fundamentally inconsistent with the entire CCAA scheme, which empowers the court to impose stays and compromise creditors' rights but not to impose further financial liabilities on creditors. He characterizes the scheme as providing a "shield, not a sword". In his submission, this principle is implicit in s. 11 of the Act, which permits a court to stay, to restrain and to prohibit various proceedings (see especially, ss. 11(3) and (4)); and it is explicit in s. 11.3, which states:

> 11.3 No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

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(b) requiring the further advance of money or credit.
[Emphasis added.]

Further, Mr. Janes contends that the orders made during the CCAA proceedings in this case which permitted the DIP loans and granted the "super-priority" to them, all contemplated that the CCAA Costs would be paid out of the proceeds of realization of the assets, not out of additional funds to be advanced by creditors. Certainly there was no explicit reference to the possibility that any secured creditor might have to advance or contribute funds beyond its existing exposure.

[28] Mr. Janes also notes what he calls the "perverse" effect of the cost allocation order in this case: while the unsecured creditors, who were the parties who stood to gain the most from the attempted restructuring of New Skeena, will bear none of the CCAA Costs under the proposed allocation, the City of Prince Rupert will, if the Watson Island property cannot be sold for the statutory "upset price", actually end up worse off. Its unpaid tax debt will go unpaid and it will have to pay something — likely between $1.5 and $2.5 million — in CCAA Costs. This is particularly anomalous when one considers that the Legislature intended to grant municipalities such as the City of Prince Rupert a very high level of priority for its claims for unpaid taxes.

[29] Counsel also notes the caution with which courts have approached the granting of the "extraordinary" remedy of priority for DIP financing, as illustrated by ***United Used Auto***, *supra*, at paras. 21-30 (B.C.S.C.). In that case, Tysoe J. quoted a passage from the judgment of Blair J. in ***Re Royal Oak Mines Inc.*** (1999) 6 C.B.R. (4th) 314 ((Ont. Gen. Div.) and a passage from a judgment of Farley J. in

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Royal Oak Mines Inc. (1999) 7 C.B.R. (4th) 293 (Ont. Gen. Div.). Farley J. stated in part:

> Aside from the question of the lienholders who have registered liens which but for the Initial Order granted by Blair J. (but subject to the comeback clause) would have priority over the DIP financing, I see no reason to interfere with this superpriority granted. It would seem to me that Blair J. engaged properly in a balancing act as to the $8.4 million of superpriority DIP financing as authorized. I am in accord with his views as expressed in *Re Skydome Corporation* [(1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div.)], where Blair J. stated [at para. 13]:
>
> > This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors - in the exercise of balancing the prejudices between the parties which is inherent in these situations - have been asked to make such a sacrifice. Cases such as *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C.S.C.) are examples of the flexibility which courts bring to situations such as this. See also *Re Lehndorff Gen Partner* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Olympia & York Developments Limited v. Royal Trustco* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).
>
> Implicit in his analysis and part of the equation is the reasonably anticipated benefits for all concerned which derive from these sacrifices. [para. 5; emphasis added.]

Tysoe J. in ***United Used Auto*** stated that in his view, "there should be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated." (Para. 28.) He was not so satisfied in that case and therefore declined to approve the application for a prior charge to secure DIP financing which was before him.

[30] The City emphasizes the underlined sentence in the quotation above from ***Re Skydome Corporation*** and contrasts that with the situation here, where the City

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may well be "compelled" to advance further funds from its pocket simply in order to "recover" an asset that will fall into its possession in any event as a matter of law and that has little or no market value at present. (I note parenthetically that no argument was made by the City to the effect that the imposition on the City of the condition reproduced at para. 12 of these Reasons contravenes s. 403(1) of the ***Local Government Act***, which requires that the local collector offer "each parcel of real property on which taxes are delinquent" for sale by public auction on the last Monday in September. See the discussion in ***Clear Creek***, *supra*, at paras. 40-42.)

[31] The Receiver contends on the other hand that the proposed cost allocation is simply a consequence of the original grant of priority to the DIP financing early on in the CCAA process, and that it was "implicit in any priority scenario that where a creditor took title to an asset, it would have to first satisfy the burden of the Charge." In the Receiver's analysis, the question in this case is not whether the Order was made without jurisdiction by virtue of the fact that it imposes a "personal liability" on the City, but rather whether it is appropriate that "if the City takes the property in lieu of taxes, it must as a condition of that taking, discharge or pay any priority charge that affects the property. That the City would have to discharge that liability upon taking title is a most uncontroversial and self-evident proposition. If one takes the benefit of an asset [one] must discharge the burdens associated with it."

[32] Counsel also emphasizes that under the terms of the Order and the Receiver's recommendation, the City would not be required to "ante up" any amount unless it decided to take the property into its own name — i.e., that the City's obligation to pay the share of the CCAA Costs would not apply if the Watson Island

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property were sold to a third party without the City having to "recover" it. Further, since the mill was the "primary asset" of New Skeena, the City should, Mr. Millar argues, properly bear a large portion of the costs incurred in trying to sell the business as a going concern — a possibility that had obvious potential benefits for the City and its inhabitants. As for s. 11.3 of the CCAA, Mr. Millar says that it is not aimed at the situation with which we are concerned, but rather is intended to allow creditors the right to require "C.O.D." payment under supply contracts with the insolvent company.

[33] I agree that para. (a) of s. 11.3 was intended for the purpose Mr. Millar describes, but para. (b) appears to have a wider reach that is engaged by the facts of this case, assuming the Chambers judge's order of December 1, 2004 was an order "made under s. 11" of the CCAA. (On this latter point, neither counsel for the City nor the Receiver argued to the contrary.) In my view, the effect of the Order is to require the further advance of money or credit in certain circumstances. Considering the purpose and tenor of the Act, which does generally operate as a "shield, not a sword", I am persuaded that the Chambers judge strayed beyond his authority in acceding to the recommendation of the Receiver that if a secured creditor sought to recover the asset against which it holds security, the creditor should be required as a condition of such transaction to pay to the Receiver in cash the amount of CCAA Costs allocated against that asset. To the extent that a creditor could be required to pay funds in excess of the value of its security interest, such a condition was not, in my view, an inevitable aspect of the granting of DIP priority but

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instead was an unusual feature that, in the almost unique circumstances of this case, contravenes s. 11.3(b). I would therefore allow the appeal.

[34] The question then is what order this court should make to permit the sale of New Skeena's assets to proceed as quickly and conveniently as possible, while recognizing the City's unusual situation as a secured creditor. The City sought an order to the effect that the CCAA costs should be allocated on the basis of actual values as and when they are realized, or alternatively, that the Watson Island property be treated in the same way as the "remaining assets" referred to in the Order — i.e., based upon such values as may be attributed by the court. I find the latter alternative more attractive in that it does not affect all the other assets, minimizes the accounting that will be required, and thus retains much of the efficiency of the original order. It will be clear from these Reasons, however, that if and when the time comes for the Court to allocate a value to the Watson Island property for the purposes of allocating the CCAA Costs, the effect of the order cannot be to require that Prince Rupert pay cash from its pocket as a condition of taking the property, the "value" (as determined by the Court) of which is less than the amount required to be paid.

Costs

[35] The City sought an order of costs "on a substantial indemnity scale, such costs not to form part of the Receiver's charge against the assets of the bankrupt." I would ask that the City provide us with written submissions of law concerning this

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prayer, to be filed within 15 days of the issuance of these Reasons. I would then ask the Receiver to file its written submissions within 10 days of the latter date.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Esson"

I Agree:

"The Honourable Mr. Justice Smith"

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IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

2019 NLSC 238 (CanLII)

Citation: *Norcon Marine Services Ltd., (Re)*, 2019 NLSC 238
Date: December 30, 2019
Docket: 201901G7732

IN THE MATTER OF an Application by Norcon Marine Services Ltd. for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

- AND -

Docket: 201901G7735

IN THE MATTER OF the Receivership of Norcon Marine Services Ltd.

AND IN THE MATTER OF the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

APPLICANT

AND:

NORCON MARINE SERVICES LTD.

RESPONDENT

Before: Justice David B. Orsborn

2019 NLSC 238 (CanLII)

Place of Hearing:	St. John's, Newfoundland and Labrador
Date(s) of Hearing:	December 17, 2019
Date of Oral Judgment:	December 18, 2019

Summary:

On or about November 9, 2019, Business Development Bank of Canada ("BDC"), a secured creditor of Norcon Marine Services Ltd. ("Norcon") served a Notice of Intention to enforce its security pursuant to section 244 of the *Bankruptcy and Insolvency Act* ("BIA"). In response, but more than ten days after being served with BDC's Notice of Intention, Norcon, pursuant to section 50.4 of the BIA, filed Notice of Intention to make a proposal to its creditors. On December 5, 2019, Norcon applied pursuant to section 11.02(1) of the *Companies' Creditors Arrangement Act*, ("CCAA") to transfer its proposal process to the CCAA restructuring regime. Concurrently, BDC applied pursuant to section 243 of the BIA for a court-appointed receiver. Both applications were heard together. **Held:** Both applications were dismissed. The evidence did not support a finding of "appropriate circumstances" to warrant initiating proceedings under the CCAA. Neither, in the circumstances where BDC enjoyed a contractual right to appoint a receiver, did the evidence support the conclusion that it would be just and convenient for the Court to exercise its discretion to appoint a receiver.

Appearances:

Tim Hill, Q.C.	Appearing on behalf of Norcon Marine Services Ltd.

Darren D. O'Keefe and Allison J. Philpott	Appearing on behalf of Business Development Bank of Canada
Peter Wedlake	Appearing on behalf of Grant Thornton Limited, proposed court-appointed Receiver
Geoffrey L. Spencer	Appearing on behalf of Deloitte Restructuring Inc., proposed court-appointed Monitor
Joseph J. Thorne	Appearing on behalf of Bank of Nova Scotia

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Authorities Cited:

CASES CONSIDERED: *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522; *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60; *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36; *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128; *Lemare Lake Logging Ltd. v. 3L Cattle Co.*, 2014 SKCA 35, rev'd 2015 SCC 53; *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023; *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274 (Ct. J.).

STATUTES CONSIDERED: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3; *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

TEXTS CONSIDERED: Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2013-2014 Annotated Bankruptcy and Insolvency Act* (Carswell: Toronto, Ontario 2013-2014).

REASONS FOR JUDGMENT

ORSBORN, J.:

INTRODUCTION

[1] The Court has been asked to rule on what are essentially two competing applications. One is an application by a debtor – Norcon Marine Services Ltd. ("Norcon") to transfer restructuring proceedings from the proposal track in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), to the reorganization track provided by the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The second is an application by a secured creditor – Business Development Bank of Canada ("BDC") – pursuant to section 243 of the BIA for a court-appointed receiver.

[2] The applications were heard on December 17, 2019 and a decision given on December 18 in the form of a brief summary only. Both applications were dismissed.

ISSUES

[3] Is Norcon to be permitted to continue its restructuring proceedings under the CCAA?

[4] Should a receiver be appointed by the Court?

BACKGROUND

[5] For some 20 years, Norcon has been involved in the marine transportation business, operating passenger/freight and cargo ships. Presently, it owns four vessels.

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[6] In recent times, Norcon has been hit hard by the loss of government contracts for ferry services and by problems in the aquaculture industry, an industry which provides and continues to provide a source of revenue for Norcon. Two of Norcon's vessels are presently listed for sale, and one is under arrest pursuant to proceedings in the Federal Court. The fourth vessel is working in the aquaculture business. Norcon also owns some real property.

[7] Because of the loss of the ferry contracts, the downturn in the aquaculture business and the need to write off a large debt from a related company, Norcon's financial situation is not good.

[8] BDC is owed almost $1,400,000, some $836,000 of which represents the guaranteed debt of Burry's Shipyard Inc. ("BSI"), a related company which is now bankrupt.

[9] On or about November 9, 2019, BDC served a Notice of Intention to enforce its security under section 244 of the BIA. On November 25, 2019, Norcon filed, pursuant to section 50.4 of the BIA, a Notice of Intention to make a proposal under the BIA. Such a notice may only be filed by an insolvent person.

[10] It is clear that one of the reasons, if not the primary reason, for Norcon's filing of a Notice of Intention was to impose a statutory stay on any enforcement actions by BDC. However, due to the lapse of time between November 9 and November 25, 2019, the statutory stay provision was not engaged.

[11] On December 5, 2019, Norcon filed an application seeking, in effect, to transition the BIA proceedings to CCAA proceedings. It asked for an initial order under section 11.02(1) of the CCAA, the effect of which would be to stay all proceedings – including BDC's enforcement action, for an initial ten days. Concurrently, BDC filed an application pursuant to section 243 of the BIA asking for a court-appointed receiver. These are the two applications before the Court.

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DISCUSSION

[12] I will deal first with Norcon's application for an initial CCAA order.

[13] Provided that no proposal has been filed, proceedings commenced under Part III of the BIA may be continued under the CCAA. As Justice Brown said in *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522, the BIA proposal regime and the CCAA regime "serve the same remedial purpose" (paragraph 11), with the CCAA regime being somewhat more flexible. However, the objective remains the same – to provide a window of opportunity within which, without having to deal with creditors' claims and enforcement proceedings (because of a statutory stay), a company can explore the prospect of a reorganization or a sale which would avoid or significantly lessen the harmful economic and social effects of a liquidation and cessation of the business. See, generally, *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60. I refer particularly to paragraph 59:

> 59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> [Citation omitted.]

[14] The threshold for gaining access to the CCAA process is not high. On an initial application, section 11.02(3)(a) requires an applicant to satisfy the court that "circumstances exist that make the order appropriate". When a continuation is sought in circumstances where, as here, the BIA proposal process has already been engaged, case authorities suggest the section 11.02(3)(b) criteria of good faith and diligence also come into play. See *Clothing for Modern Times* at paragraph 14; and *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36, at paragraphs 22-23.

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[15] Although the threshold of appropriate circumstances is, in my view, low, it does require the Court to consider the initial application in the context of the objectives of the CCAA. In other words, is the Court able to conclude, even at an early stage, that there is some chance that engaging the CCAA process – which brings all enforcement proceedings to a halt – will result in furthering the purposes of the legislation?

[16] To obtain this breathing room, a debtor must do more than simply plead for time. The authorities speak of the need to have "a germ of a plan" that would suggest "a reasonable possibility of restructuring". In *Industrial Properties Regina*, the Saskatchewan Court of Appeal put it this way – at paragraphs 19-21:

> 19 The evidentiary burden the debtor corporation must satisfy to establish "appropriate circumstances" for the purposes of a 30-day stay order is not exceptionally onerous*: Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.) at para 14, (2013), 8 C.B.R. (6th) 161 (Alta. Q.B.) [*Alberta Treasury*]; *Matco Capital Ltd. v. Interex Oilfield Services Ltd.* (August 1, 2006), Doc. 0601-08395 (Alta. Q.B.) [*Matco*]; *Hush Homes Inc., Re*, 2015 ONSC 370 (Ont. S.C.J.) at paras 51-53, (2015), 22 C.B.R. (6th) 67 (Ont. S.C.J.); *Redstone Investment Corp., Re*, 2014 ONSC 2004 (Ont. S.C.J.) at paras 49-50.
>
> 20 ... The debtor corporation is often in crisis-mode due to its failure to meet creditor obligations and is seeking *CCAA* protection to obtain some breathing room to enable it to get its affairs in order without creditors knocking at the door. Therefore, to obtain an initial 30-day order [now ten days], the applicant is not required to prove it has a "feasible plan" but merely "a germ of a plan": *Alberta Treasury* at para 14. The court must assess whether the circumstances are such that, with the initial order, the debtor corporation has a "reasonable possibility of restructuring": *Matco*. To require the applicant corporation to present a fully-developed restructuring plan or have the support of all its creditors at the initial stage of *CCAA* proceedings, although desirable, is not expected. To impose such a threshold to establish "appropriate circumstances" would unduly hinder the purpose of an initial order which, as the Supreme Court explained in *Century Services*, is to provide the conditions under which the debtor can *attempt* to reorganize.

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> 21 For the purposes of an initial order, the debtor corporation must convince the court that the initial order will "usefully further" its efforts towards attempted reorganization. … If, however, the debtor corporation fails to satisfy this onus and the court determines that the application is merely an effort by the debtor corporation to avoid its obligations to its creditors and postpone an inevitable liquidation, the initial application should be denied: ...

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[17] The present case is a little different than the usual CCAA initial application. Norcon's Notice of Intention to make a BIA proposal was filed on November 25, 2019, just over two weeks ago. In my view, this suggests that restructuring is not a possibility that has just appeared. Although not a lot of time has passed, the fact that the Court is being asked to continue an existing restructuring proceeding suggests that the "germ" of any plan should exhibit a slightly higher possibility of coming to life than might otherwise be the case. Further, once a debtor has engaged the BIA proposal process, there should be some reason, linked to the purpose of the restructuring/reorganization objective, to warrant continuing under the CCAA process. See, for example, the impending expiration of the maximum six-month proposal period in *Clothing for Modern Times*. The earlier in the BIA proposal process the transfer request, the more apparent should be the particular purpose precipitating the request for transition to the CCAA.

[18] What does the evidence here suggest?

[19] The evidence from Norcon consists of a pro-forma affidavit of Glenn Burry – an owner of the company – deposing as to the facts in the application. The only paragraph in the application that looks to the future is paragraph 12:

> 12. The Company is actively seeking new contracts for its vessels and services, but does not expect to enter into such new contracts until early Spring, 2020.

[20] There is no other evidence from Norcon about potential available contracts, ability to bid, chances of success, terms, efforts to date, or the like.

[21] BDC filed an affidavit of Robert Prince, Director of Business Restructuring, setting out the lengthy history of BDC's dealings with Norcon and BSI. Norcon filed a "Pre-filing Report" of Deloitte Restructuring, the proposed CCAA monitor, and also filed its "review engagement" financial statements for the year ending January 31, 2019. The monitor updated the figures to October 31, 2019.

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[22] As October 31, 2019, Norcon's current assets totaled $611,000, primarily receivables of $561,000 (rounded). Current liabilities were just over $2,660,000, not including the $836,000 liability attached to the guaranteed debt of BSI. The current liabilities include approximately $444,000 owed to the Canada Revenue Agency for unpaid source deductions and the like, income taxes of $54,000, bank indebtedness and accounts payable of over $1,290,000, and $873,000 representing the current portion of long-term debt. The long-term debt (excluding the current portion) owed to arm's-length creditors is $1,400,000. It is not contested that Norcon, as of the date of filing of the application, satisfied the $5,000,000 threshold under section 3(1) of the CCAA.

[23] The net book value of the fixed assets – primarily the vessels – is shown as $5,800,000. There is no evidence of current estimated market value.

[24] Of the efforts to date to reorganize or restructure Norcon, the Pre-filing Report says this – at paragraph 6.1:

> 6.1 [Norcon] has taken the following steps to deal with operational and financial challenges it is currently facing:
>
> (i) Reduced operating expenses, including a reduction in headcount and a redeployment of Management resources from administrative to revenue generating tasks.
>
> (ii) Actively pursuing contracts for the next operating season.
>
> (iii) Prior to the NOI Filing, the Applicant was working with CRA on an arrangement satisfactory to both parties to reduce the liability owing from the Applicant.

(iv) Engaged in discussions with Deloitte regarding a financial consulting engagement during the week beginning November 17, 2019.

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[25] The proposed monitor reviewed Norcon's projected cash flow statement for the 13 weeks ended February 28, 2020. The Pre-filing Report says:

> 7.3 The Cash Flow Forecast has been prepared by Management for the purpose described in the notes to the Cash Flow Forecast, using the probable and hypothetical assumptions set out in the notes.

[26] The assumptions referred to are the projection of the collection of accounts receivable as of November 25, 2019, and the continuation of an existing vessel crewing contract and aquaculture support contract. No evidence was given as to the particular provisions or durations of these contracts.

[27] I did not find the proposed monitor's comments on the cash flow report particularly helpful:

> 7.4 The Proposed Monitor's review of the Cash Flow Forecast consisted of inquiries, analytical procedures and discussions on the information provided by Management of the Applicant. The Proposed Monitor's involvement with respect to the hypothetical assumptions was limited to evaluating whether they were consistent with the purpose of the Cash Flow Forecast. The Proposed Monitor has also reviewed the supporting documentation provided by Management of the Applicant for the probable assumptions and the preparation and presentation of the Cash Flow Forecast.
>
> 7.5 Based on our review and the foregoing reserves and limitations, nothing has come to the attention of the Proposed Monitor that causes us to believe that, in all materials respects:
>
> (i) the hypothetical assumptions are not consistent with the purpose of the Cash Flow Forecast;
>
> (ii) as at the date of the Pre-filing Report, the probable assumptions developed by the Applicant are not suitably supported and

> consistent with the plans of the Applicant or do not provide a reasonable basis for the Cash Flow Forecast, given the hypothetical assumptions; or
>
> (iii) the Cash Flow Forecast does not reflect the probable and hypothetical assumptions.

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Counsel was not able to assist in my comprehension of these paragraphs.

[28] The projected cash flow report, on its face, shows a cash position improvement of $197,001 over the 13-week period. However, $283,476 of the cash inflow comes from the collection of existing accounts receivable. Taking these receivables out of the equation, the projected cash position will worsen by $86,475.

[29] The projected cash flow took no account of debt servicing over the 13-week period, such debt servicing estimated by BDC to be in excess of $83,000.

[30] The monitor appears to offer argument in support of Norcon's application for a CCAA process. It gives the following reasons – at paragraph 9.1:

> 9.1 As discussed herein, the Applicant wishes to convert the NOI Filing to the CCAA Proceedings on December 17, 2019 for the following reasons:
>
> (i) the CCAA will provide the Applicant with increased flexibility as it moves forward with its restructuring plan;
>
> (ii) the CCAA will provide the Applicant with additional time (if required) to prepare and present a restructuring plan, including a Plan of Arrangement, to its creditors; and
>
> (iii) if granted, the Initial Order will provide the Applicant with a stay of proceedings against all creditors, including the pending application of BDC to appoint a Receiver over the Property of the Applicant.

[31] The arguments relating to increased flexibility and additional time were not explained. The time argument is difficult to accept where, unlike the situation in *Clothing for Modern Times*, the BIA proposal process is just beginning and can potentially last for six months. I note that the situation in *Clothing for Modern Times* was where the available extensions of time to make a proposal had expired, leaving a CCAA continuation as the only means of avoiding a deemed bankruptcy.

[32] There is nothing I see in the proposed monitor's report which provides a hint of a plan for restructuring, other than, as noted, a plan to reduce operating costs in some undefined amount.

[33] The cash flow projection shows a 13-week total of compensation, occupancy and related general expenses of some $263,000, a weekly average of just over $20,000. How savings within these expenditures would realistically assist in restructuring the finances of Norcon – with a current ratio (current assets/current liabilities) of 0.23 was not explained. I think it is fair to say that, overall, the issues facing Norcon are issues of revenue and debt servicing rather than control over relatively minor expenses.

[34] The financial statements and the projected cash flow statement provide no support for Norcon's position. The report of the proposed monitor provides no support for Norcon's position. The only hope offered is one in the form of pursuing new contracts with the hope of getting one. In the circumstances of this case, that hope is not sufficient to satisfy the appropriateness threshold needed to open the door to CCAA proceedings.

[35] Assessing the matter as objectively as I can, the evidence does not disclose a germ of a reasonable possibility of reorganizing or restructuring Norcon to a position from which it can either continue its operations or be sold as a going concern or otherwise. The evidence discloses no potentially viable thread with which to begin the process of weaving a plan that will fulfill the objectives of the CCAA. The threshold of appropriate circumstances has not been crossed.

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[36] In view of this finding, it is not necessary to consider the issues of good faith and due diligence.

[37] The application for an initial CCAA application is dismissed.

[38] That leaves BDC's request for a court-appointed receiver. BDC's request is supported by the Bank of Nova Scotia, another senior secured creditor.

[39] BDC's application was brought following its November 9, 2019, Notice of Intention to enforce its security. As noted, BDC is owed almost $1,400,000 by Norcon, including the guaranteed debt of BSI, a related company which is now bankrupt. It is fair to assume that BDC initiated the enforcement mechanism to protect its own interests as a secured creditor.

[40] The appointment of a receiver by the Court engages the exercise of the Court's discretion. A receiver may be appointed when it appears to the Court to be just or convenient to do so. Any discretion must be judicially exercised.

[41] In *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128, Justice Edwards set out, from *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, factors that may be considered by a court – at paragraph 26:

> (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
> (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
> (c) the nature of the property;
> (d) the apprehended or actual waste of the debtor's assets;
> (e) the preservation and protection of the property pending judicial resolution;
> (f) the balance of convenience to the parties;
> (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;

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(h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
(i) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
(k) the effect of the order on the parties;
(l) the conduct of the parties;
(m) the length of time that a receiver may be in place;
(n) the cost to the parties;
(o) the likelihood of maximizing return to the parties; and
(p) the goal of facilitating the duties of the receiver.

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[42] In *Lemare Lake Logging Ltd. v. 3L Cattle Co.*, 2014 SKCA 35 (rev'd on constitutional grounds 2015 SCC 53), the Saskatchewan Court of Appeal suggested this analysis – at paragraph 99:

> 99 The third edition of *Bennett on Receiverships*, (Toronto: Carswell, 2011), at pp. 155-162, suggests that the following factors are typically taken into consideration in deciding whether to appoint a receiver: (a) whether irreparable harm might be caused if no order is made; (b) whether the security holder's position will be prejudiced if no receivership order is made; (c) whether it is necessary to apprehend or stop waste of the debtor's assets; (d) whether it is necessary to preserve and protect property pending a judicial resolution of matters outstanding; and (e) the balance of convenience between the parties. See also: Houlden, et al, *The 2013 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013) at p. 1005.

[43] These factors are not unlike those considered when injunctive relief is sought.

[44] It is accepted that the court's appointment of a receiver over the property of a person is an extraordinary order. It reflects the authority and jurisdiction of the court to act to protect and preserve property, often before the issues between the parties have been adjudicated.

[45] The extraordinary and intrusive nature of the order must inform what is considered to be just and convenient, although as I will point out, this aspect assumes less importance when a party already has a contractual right to appoint a receiver.

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[46] The party asking the Court to appoint a receiver must persuade the Court that the appointment would be just or convenient. The word 'just' suggests a requirement of fairness and balance while "convenient' suggests, in my view, not just an order which the applicant would find helpful, but one that is necessary for the protection of the assets in question. To put it simply, is it fair or necessary that the authority of the Court be used to pass control of, in this case, the debtor's assets to a receiver who will deal with those assets pursuant to court supervision?

[47] In this analysis, of what relevance is it that the applicant – here, BDC – has the ability and contractual authority to appoint a receiver and manager without enlisting the aid of the Court?

[48] In *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023, the Court said this at paragraph 42:

> 42 Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 (Ont. S.C.J. [Commercial List]) and *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.).
>
> [Emphasis added.]

[49] Blair J. of the Ontario Superior Court expressed it slightly differently in *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274 (Ct. J.) when he said at paragraphs 11 and 13:

> 11 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: … In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. … The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; …
>
> …
>
> 13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver … and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances … including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.
>
> [Emphasis added.]

[50] I note his use of the word "necessary" when referring to a court appointment. Thus, while the fact of a party's prior consent to a private contractual appointment may lessen or eliminate the need for caution because of the intrusive nature of the appointment of a receiver, the threshold of just or convenient must still be met. Particularly when considering whether an appointment would be convenient – an element which incorporates the practical and protective nature of the appointment – my view is that a court must consider whether court supervision of the receiver is necessary to protect and preserve the assets in question and to manage any undue complexity in the functioning of the receivership. The issue is not that far removed from situations in administrative law where the availability of an adequate alternative avenue of relief may persuade

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a court not to exercise its discretion to grant relief by way of an order in the nature of a prerogative writ.

[51] Is a court-supervised receivership order convenient in the sense of the added factor of court supervision being necessary to protect the interests of BDC and others affected by the fortunes of Norcon?

[52] Here, counsel for BDC acknowledged that a receivership of Norcon's secured property would be relatively straightforward. As noted, the assets are primarily fixed assets – four vessels and real property – covered by security. There is no suggestion that the assets are at risk of being removed from the jurisdiction. Any ongoing management of the business would not be complex. Counsel advised that two primary creditors, BDC and the Bank of Nova Scotia, have already signed an inter-creditor agreement addressing issues of relevance to them.

[53] BDC offers the following reasons to support a finding of just or convenient:

> 29. BDC submits that it is just and convenient for this Court to appoint a receiver in the present case for the following reasons:
>
> (a) BDC has the contractual right to appoint a private receiver.
> (b) The amount of the Indebtedness is not in dispute.
> (c) … Norcon has withheld information, has shown disregard for DBC's rights and has occasioned several Events of Default. A court-appointed receiver will be able to prevent and/or mitigate further defaults through greater transparency.
> (d) The arrest of one of Norcon's vessels in which BDC has a security interest establishes that BDC's security is in jeopardy. A court-appointed receiver is necessary to immediately protect and preserve BDC's security interest in Norcon's property.
> (e) A court-appointed receiver will be able to more effectively deal with and sell property in a manner that will maximize the value for the creditors of Norcon.
> (f) A court-appointed receiver will be able to provide all stakeholders with a more efficient forum for creditors of Norcon to resolve priority issues.

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> (g) A court-appointed receiver is required as the cooperation of Norcon with a private receiver is unlikely, given Norcon's conduct to date.

[54] The application continues:

> 30. The Court's refusal to grant the Receivership Application would place the interests of BDC and other creditors at significant risk.

[55] There is little, if any, evidence on these points.

[56] With respect to the conduct of Norcon, the evidence is that it did not disclose to BDC that one of its vessels had been arrested in the context of a proceeding in Federal Court. Without further evidence and argument on the point, I am not prepared to conclude, without more, that the arrest in and of itself places BDC's security in jeopardy and while this one instance of non-disclosure may be a fact, it is not sufficient to support the inference that Norcon or its management would be obstructionist so as to warrant Court supervision of a receivership. Neither, in my view, does it support the inference that Norcon's management would not cooperate with a private receiver. The evidence does support the view that the BIA-related history of the related company, BSI, and the CCAA filing by Norcon reflect efforts to delay enforcement action by creditors. But where a creditor has the ability to act expeditiously pursuant to a contractual right, the fact that a debtor may try to delay the process does not call for the intervention of the Court.

[57] The suggestion by BDC that Court supervision is necessary to more effectively deal with and sell the property and provide a more efficient forum for the resolution of priority disputes is simply that – a suggestion. I refer again to Blair J.'s comments in *Freure Village* where he suggests that an examination of all the circumstances is required to determine whether or not an appointment by the court is necessary.

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[58] A fair assessment of all of the circumstances requires evidence. I note the comprehensive nature of the evidence before Edwards J. in *Crown Jewel Resort*.

[59] Looking at the evidence as a whole, I am not satisfied that there is sufficient evidence from which to draw reliable inferences relating to, and these are examples only, (i) the potential for irreparable harm in the absence of court supervision; (ii) the risk to BDC and the need for the added factor of court supervision in the protection and preservation of the assets; (iii) the need for court supervision of the relationship between Norcon and its creditors; and (iv) the relative costs and returns of a court-supervised process.

[60] In effect, and with respect, I am being asked to assume that a court-supervised process is necessary – just or convenient – for the effective and lawful realization of BDC's security interest. I am not prepared to make such an assumption.

[61] BDC has the contractual right to appoint a receiver/manager with wide powers to take over the business, manage Norcon and its assets and, if considered appropriate, sell the assets. There is no evidence to suggest that such a receiver/manager would not act efficiently and responsibly in accordance with the law, would not properly protect BDC's security, would not act in good faith to secure maximum value for the secured property, and would not have ready access to the court process should the need arise.

[62] In summary, on such evidence as I have, I am not able to reasonably draw the inference that the circumstances are such as to render just or convenient the Court's appointment of a receiver.

[63] BDC's application for a court-appointed receiver is dismissed.

[64] The parties will bear their own costs in both matters.

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_____

DAVID B. ORSBORN
Justice

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *North American Tungsten Corporation Ltd. (Re),* 2015 BCSC 1376

Date: 20150709
Docket: S154746
Registry: Vancouver

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

And

In the Matter of the *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, as amended

And

In the Matter of North American Tungsten Corporation Ltd.

Petitioner

Before: The Honourable Mr. Justice Butler

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	John R. Sandrelli Jordan D. Schultz
Counsel for the Monitor, Alvarex & Marsal Canada Inc.:	Kibben M. Jackson
Counsel for Callidus Capital Corporation:	William E.J. Skelly
Counsel for Government of Northwest Territories:	Mary Buttery H. Lance Williams
Counsel for Wolfram Bergbau and Hütten AG:	Jonathan McLean Angela L. Crimeni
Agent for Counsel for Global Tungsten & Powders Corp.:	Jonathan McLean Angela L. Crimeni
Place and Date of Hearing:	Vancouver, B.C. July 8, 2015
Place and Date of Judgment:	Vancouver, B.C. July 9, 2015

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[1] **THE COURT:** This is my ruling on the applications I heard yesterday. The petitioner, North American Tungsten Corporation Ltd. (the "Company"), applies for an extension of the stay of proceedings which was granted in the initial order in this matter on June 9, 2015 (the "Initial Order"), and seeks approval for interim financing pursuant to s. 11.2 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

[2] I will set out the background to this matter and the parties' positions. For the reasons that follow, I am approving the Company's application to extend the stay and approving the interim financing facility on the terms proposed as those were modified during the course of argument yesterday. As always, if a transcript of this ruling is ordered, I reserve the right to amend it, but only as to form, not substance.

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Background

[3] The Company is involved in the exploration, development, mining and processing of tungsten and other minerals. The main capital assets of the Company are the Cantung Mine located in the Northwest Territories and the Mactung property, an undeveloped exploration property located on the border of the Yukon Territory and the Northwest Territories. The Mactung property is one of the largest deposits of tungsten in the world. It has received approvals from the federal and Yukon governments to proceed to the next stage of development, but a very large capital investment will be required to construct a mine.

[4] The Company sought protection under the *CCAA* as a result of circumstances mostly beyond its control, including a severely depressed world market for tungsten. At the reduced price the Company has been receiving for its tungsten, the Cantung Mine was generating sufficient cash flow to pay the majority of its operational and administrative costs but was unable to meet its financing costs. At the time of the Initial Order, the Company was experiencing significant cash flow problems.

[5] Alvarez & Marsal Canada Inc. was appointed Monitor under the Initial Order. A summary of the amounts claimed as owing by secured creditors and their respective security interests as at July 7, 2015 is set out in the Monitor's Fourth

report. I will refer to that summary because an understanding of the security interests held by the principal creditors is necessary to consider the issues raised on this application.

[6] Callidus Capital Corporation is owed approximately $13.33 million. This is secured by all present and after-acquired property not related to Mactung. That includes more than 200 pieces of mining equipment used at the Cantung Mine. The Monitor has opined that there is sufficient value in the equipment to satisfy that debt.

[7] The Government of Northwest Territories ("GNWT") is owed $24.67 million. This is secured by all present and after-acquired property related to Mactung. While there is some issue and ongoing negotiation about the actual amount of debt which arises from the Company's reclamation obligations, it is significant.

[8] Global Tungsten & Powders Corp. ("GTP") and Wolfram Bergbau and Hütten AG ("WBH") are the Company's only two customers for all of the tungsten produced from the Cantung Mine. The total indebtedness to the customers is approximately $8.16 million. They also hold security over all present and after-acquired property related to Mactung.

[9] Debenture holders are owed $13.58 million, which is secured by all present and after-acquired property of the Company.

[10] Queenwood Capital Partners II LLC ("Queenwood II") is owed approximately $18.51 million, secured by all present and after-acquired property of the Company. The principals of Queenwood II are related to Company insiders.

[11] The total amount of the secured debt is in the range of $80 million. There is also approximately $14 million in unsecured liabilities. The reported book value of the assets at the time of the Initial Order was approximately $64 million, which included a value of $20 million for the Mactung property. The fair market value or realizable value has not been determined by the Monitor.

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[12] The somewhat unique situation here is that Callidus does not have security over the Mactung property and the GNWT and the customers do not have security over the Cantung property.

[13] The stay granted by the Initial Order expired yesterday, but I extended it until July 10, 2015 to allow me to consider the arguments advanced on this application. Since the Initial Order, management of the Company has been working in good faith to develop a plan of arrangement. Management has developed an operating plan to manage cash flow through the next several months. I will not refer to the projected cash flow except to say that it anticipates receipt of the interim financing and continued revenues of more than $22 million from operations.

[14] The Company has been involved in extensive discussions with the Monitor and stakeholders to put in place a potential Sale and Investment Solicitation Process ("SISP"). To date the plan has involved re-focusing on surface mining and milling ore stockpiles rather than underground mining. Employees have been terminated. If the interim financing is obtained, the Company plans to continue operations at the mine until the end of October 2015, including management of environmental care. It plans to conduct an orderly wind down of underground mining activities, including a staged sale of equipment used in the underground work. It plans to reconfigure the mill facilities to facilitate tailings reprocessing so that it can use existing tailings stores as well as the surface extraction as a revenue source. It also plans to undertake limited expenditures on Cantung reclamation and Mactung environmental work with a view to increasing asset values. It hopes to seek court approval of a SISP in the next couple of weeks.

[15] As a result of difficulties arising from timing of receipt of payments from GTP, one of the customers, the cash flow problems for the Company became critical within the last ten days. The Company sought interim financing and received an offer from a third party. Callidus was opposed to that offer of financing and the Company eventually obtained a $500,000 loan from Callidus on June 29, 2015 on a short-term basis (the "Gap Advance"). They continued to negotiate and arrived at an agreement

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for interim financing (the "Interim Facility") and a forbearance agreement (the "Forbearance Agreement"). These form the basis for the application before this court. Terms of these agreements which are relevant to the application include:

a) the $500,000 Gap Advance would be deemed to be an advance under the Interim Facility;

b) Callidus will advance an additional $2.5 million, which along with the Gap Advance would be secured over all of the property of the Company and have priority over the secured creditors; and

c) the Company will have to make repayments to Callidus by certain dates and those payments include payments of interest and principal on the existing loan facility (the "Post-Filing Payments").

[16] At the hearing of the application, one of the more contentious issues was the Company's request that the court make the order in relation to the Gap Advance *nunc pro tunc*. This term was sought because s. 11.2(1) of the *CCAA* allows a court to make an order for interim financing but "The security or charge may not secure an obligation that exists before the order is made."

[17] Of course the Gap Advance was an obligation which existed before the making of any order for interim financing. During the course of argument yesterday, the Company withdrew the application for a *nunc pro tunc* order in relation to the Gap Advance. This occurred because Callidus agreed to modify the terms of the Interim Facility such that the Gap Advance will be treated as an advance under its existing facility. In other words, the proposed Interim Facility is now for a $2.5 million loan facility and not $3.0 million, as set out in the application.

Position of the Company

[18] The Company says that in all of the circumstances, proceeding with the Forbearance Agreement and the Interim Facility is better for the petitioner's restructuring efforts and necessary given the urgent need for funding. It stresses that

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without access to the interim financing, it will be unable to meet its ongoing payroll obligations or its negotiated payment terms for the post-filing obligations. It will be unable to continue restructuring and will likely face liquidation by its secured creditors. It also says there is greater value for all stakeholders if the Company is permitted to continue operating as a going concern. It says there would likely be no recovery for creditors other than the senior secured creditors without access to the Interim Facility. The local community of Watson Lake and local businesses would suffer significantly, as 100 employees would be out of work. Further, the Company says there is little prejudice to the secured creditors. In addition, it says if the mine site is abandoned, there would be a larger reclamation obligation, which would be to the detriment of the GNWT and other creditors with claims against an interest in the Mactung property.

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Position of the Customers

[19] The customers oppose the Interim Facility and the extension of the stay. They argue that the financing of $2.5 million at interest rates of 21% will not help the Company emerge from this process with a workable plan. They argue that putting the Cantung Mine into care and maintenance as of November and hoping that tungsten prices rise in the future is not a workable plan.

[20] The customers say the result of approval of the Interim Facility is that the security interests of WBH and GTP would be prejudiced because those interests would be subordinated to Callidus as well as the GNWT. Finally, they argue that the bankruptcy of the Company and sale of its assets is inevitable no matter what happens.

Position of the GNWT

[21] The GNWT does not oppose the extension of the stay nor the granting of the Interim Facility. However, it opposes the Forbearance Agreement which would grant the Interim Facility priority over the GNWT Mactung security, which it holds to secure the environmental and reclamation obligations of the Company. It says that it would be prejudiced as a result of the granting of that priority and that in the circumstances

here there is no reason to do so. It says that Callidus would effectively receive approximately $1.5 million in Post-Filing Payments in very short order, which essentially allows it an unfair priority.

The Monitor

[22] The Monitor provided detailed comments supporting the Company's application for interim financing as well as the stay. In doing so it made the following observations:

- Without the interim financing, the Company would have no choice but to immediately cease operations. This would negatively impact the progress of reclamation of the mine and tailings ponds and may have a negative impact on the near term market value of the Mactung property.

- The key senior management of the Company remain in place and are committed to pursuing restructuring solutions or transactions that will see an orderly transition of ownership and stewardship of the assets.

- The Interim Facility is supported by Queenwood II and the debenture holders, the creditors who potentially have the most to lose.

- Based on the confidential appraisal, it appears that the equipment values in aggregate exceed the amounts due to Callidus, which may eliminate or at least mitigate the potential prejudice to creditors having security over Mactung.

- The terms of the Interim Facility including interest rates and fees are consistent with market terms for interim financings in the context of distressed companies and are commercially reasonable in these circumstances when compared to the terms of other court approved interim financing facilities.

[23] The Monitor concludes its comments in its Fourth Report by stating that "the interim financing contemplated by the Interim Lending Facility and the Forbearance Agreement will enhance the prospects of a viable restructuring and/or a future SISP

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being undertaken by the Company. Overall… the Monitor is of the view that, balancing the relative prejudices to the stakeholders, the terms of the Forbearance Agreement and Interim Lending Facility are reasonable in the circumstances and the Monitor supports the Company's application…"

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Extension of the Stay

[24] I turn now to the reasons for granting the extension of the stay. Subsection 11.02(2) of the *CCAA* provides that the Company may apply for an extension of the stay of proceedings for a period that the court considers necessary on any terms that the court may impose. Subsection 11.02(3) provides:

> (3) The court shall not make the order unless
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[25] A number of decisions have considered whether "circumstances exist that make the order appropriate". In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, the Court emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the *CCAA*. Justice Deschamps stated at para. 70:

> … Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs.

[26] When granting an extension, it is a prerequisite for the petitioner to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the *CCAA*. The debtor company must show that it has at least "a kernel of a plan": *Azure Dynamics Corporation (Re)*, 2012 BCSC 781.

[27] It is also appropriate for the company to use the *CCAA* to effect the sale of the company's business as a going concern. While the main focus of the legislation is the reorganization of insolvent companies, a sales and investment solicitation process (SISP) may be the most efficient way to maximize the value of stakeholders' interests and minimize the harm which stems from liquidation: *Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.).

[28] When *CCAA* proceedings are in their early stages, it is appropriate for courts to give deference when considering extensions of the stay, provided the requirements of s. 11.02(3) have been met. See, for example, *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775.

[29] The good faith and due diligence requirement of s. 11.02(3) includes observance of reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process.

[30] I am satisfied that it is appropriate to grant the extension of the stay as sought by the Company. I reject the position of the customers that the Company has failed to put forward any kind of plan. The operating plan which the Company has begun to put in place responds to the existing cash flow problems and is intended to put the Company in a position to enhance the prospects of a viable restructuring and/or a future SISP.

[31] It is more than a kernel of a plan. It is a strategy to move forward in an orderly way which may provide benefits to all stakeholders. It takes into account the remedial purpose of the legislation and attempts to minimize the potential social and economic losses of liquidation of the Company. None of the parties suggested that the Company is acting with an absence of either good faith or due diligence, and I am satisfied from the evidence of Mr. Lindahl and the comments of the Monitor that the Company is indeed proceeding in a fashion which fulfills its obligations of good faith and due diligence.

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The Interim Facility

[32] I turn to my reasons for approving the interim financing. Subsection 11.2(4) of the *CCAA* sets out factors which the court must consider in determining whether to grant a priority charge to an interim lender. The factors in that section which are most relevant to this application are:

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> …
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report… if any.

[33] While the factors listed in that section should be considered, the court may also consider additional factors, which may include the following as set out in *Timminco Limited (Re)*, 2012 ONCA 552 at para. 6, and I am paraphrasing:

> a) without interim financing would the petitioner be forced to stop operating;
>
> b) whether bankruptcy would be in the interests of the stakeholders; and
>
> c) would the interim lender have provided financing without a super priority charge…

[34] In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at paras. 58 and 59, the Court approved of the following factors which had been considered by the chambers judge:

> a) the applicants needed additional financing to support operations during the period of the going concern restructuring;
>
> b) there was no other alternative available and in particular no suggestion that the interim financing would have been available without the super priority charge;

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c) the balancing of prejudice weighed in favour of approval of the interim loan facility.

[35] When I consider all of these factors, I am satisfied that it is appropriate to approve the Interim Facility. My reasons for doing so include the following:

- The cash flow projections show that the $2.5 million from the Interim Facility will be sufficient to allow the Company to satisfy obligations along with its ongoing revenues from operations through to November 2015. By that time the SISP should be well underway and perhaps concluded.

- I accept the Monitor's comments regarding the Interim Facility and Forbearance Agreement. In other words, I accept that the Company would not be able to find other interim financing on more favourable terms and that without such financing, the Company would have no choice but to immediately cease operations.

- I further accept the Monitor's comment that cessation of the operations would negatively impact the reclamation of the Cantung Mine and tailings ponds and may have a negative impact on the market value of the Mactung property.

- The Interim Facility enhances the Company's prospects of carrying out a successful SISP and presenting a viable plan to its creditors. If it is forced to shut down its operations, the Company will likely not be able to continue these proceedings and could not continue with the SISP.

- Bankruptcy and a forced liquidation of the assets is not in the best interests of any stakeholder.

- It is unlikely that any creditor will be materially prejudiced by the priority financing. There are two significant reasons for this. First, I accept the Monitor's view that the equipment security is likely to be sufficient to satisfy the existing debt to Callidus. Second, to the extent that the payments to Callidus under the Interim Facility cover Post-Filing Payments, those will likely

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be offset by the fact that the ongoing operations will result in the conversion of substantial inventories of unprocessed ore. That ore is Cantung property and so it is currently subject to the existing Callidus security. Under the operating plan, revenue from that asset will be used for ongoing operations.

- I further accept the comments of the Monitor and the submissions of the Company that keeping the Cantung Mine operating will likely assist the Company in managing its environmental obligations and thus limit the risk that the GNWT will be faced with a significant reclamation project. As counsel for the Monitor indicated, abandonment of the mine is likely to result in greater costs. The situation would undoubtedly be somewhat chaotic.

- Finally, I conclude that the Interim Facility will further the policy objectives underlying the *CCAA* by mitigating the effects of an immediate cessation of the mining operations which would result in the loss of employment for the Cantung Mine workers and negatively impact the surrounding community.

[36] Before concluding, I will make one final comment regarding the requirements of the Forbearance Agreement that the Company make the Post-Filing Payments to Callidus. The Initial Order permits such payments to Callidus. Further, there is nothing in the *CCAA* which prohibits these payments. In the circumstances I have already outlined above, the use of the inventories of unprocessed ore to fund ongoing operations would only be possible with the approval of the Interim Facility. In other words the Post-Filing Payments may be offset by the revenues earned from that asset, which would be a benefit to all creditors.

[37] In summary, I am granting the extension of the stay. I believe the request was to July 17, 2015. I will hear from counsel on that issue if there is some other date that is preferred. Further, I approve the Forbearance Agreement and the Interim Facility in the amount of $2.5 million, and as previously indicated, the Gap Advance is not included in that.

[38] What about the date for an extension of the stay?

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[39] MR. SCHULTZ: Yes, My Lord. So that'll turn a little bit on your availability actually, as was indicated by Mr. Sandrelli, the Company anticipates bringing an application to coincide with the end of the stay for a further extension and approval of a SISP. The Company is also hopeful that an application to approve as was alluded to some further financing from Callidus in respect to the GTP receivable. So I guess I am in your hands a little bit as to whether you might be available on the 17th for an hour to hear those.

[40] THE COURT: I can be available, but it would have to be by telephone. I am in Williams Lake next week.

[41] MR. SCHULTZ: Okay.

[42] THE COURT: So I think that we should proceed with that because the next couple weeks after that I am probably not available.

[43] MR. SCHULTZ: Okay. In that case then the 17th is probably the best day, and that would be the day we will be seeking the extension to for now.

[44] THE COURT: All right. The stay is extended to July 17, 2015.

"Butler J."

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *North American Tungsten Corporation Ltd. (Re),* 2015 BCSC 1382

Date: 20150730
Docket: S154746
Registry: Vancouver

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

And

In the Matter of the *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, as amended

And

In the Matter of North American Tungsten Corporation Ltd.

Petitioner

Before: The Honourable Mr. Justice Butler

Oral Reasons for Judgment

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Counsel for Government of Northwest Territories:	H. Lance Williams
Counsel for Wolfram Bergbau and Hütten AG:	Angela L. Crimeni David Brown
Counsel for Global Tungsten and Powders Corp.:	Kieran E. Siddall Scott Boucher
Place and Date of Hearing:	Vancouver, B.C. July 27 and 30, 2015
Place and Date of Judgment:	Vancouver, B.C. July 30, 2015

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[1] **THE COURT:** I am ruling on the applications I have heard on July 27 and today. As always, if anyone should order the transcript, I reserve the right to amend it. In this case, I also reserve the right to add to it as, unfortunately, I have not been able to include all of the information and case references that have been advanced in argument.

[2] There are two competing applications before me dealing with a claimed right of set-off in favour of Global Tungsten and Powders Corp. ("GTP"). The applications are brought in the context of the orders I have made in this proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, dealing with the company, North American Tungsten Corporation ("NATC"). In particular, the applications concern the terms contained in the amended and restated initial order.

[3] The relevant facts are well-known to the parties, but I will summarize them briefly. NATC produces tungsten from its Cantung Mine and sells the product to two purchasers, one of which is GTP. Pursuant to a supply agreement, NATC annually supplies a specified quantity of tungsten concentrate to GTP. At the same time the parties entered into the supply agreement, they entered into a loan agreement. The indebtedness under the loan agreement is secured by a security agreement on all property connected with the Mactung Mine. As of filing, the indebtedness under the loan agreement was well in excess of $4 million. It is approximately $4.4 million.

[4] Since the filing, NATC has continued to supply GTP with tungsten pursuant to the supply agreement. The payment terms require payment within 30 days. For a period after filing, GTP continued to make payments when due. On July 22, it gave notice to NATC that it would set off amounts owing under the loan agreement against payments due as a result of post-filing deliveries of tungsten. NATC then brought this application for a declaration that GTP was in breach of the stay provisions of the amended initial order, and for an order that GTP pay amounts due. It also sought an injunction to permanently restrain GTP from exercising rights of set-off.

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[5] GTP opposes that application and brought an application in response seeking a declaration that it does have a valid right of set-off with respect to amounts it owes NATC under the supply agreement against amounts owed by NATC to GTP under the loan agreement.

[6] On July 27, 2015, I heard part of the application by telephone. I made an order declaring that GTP was in breach of the stay provisions of the amended initial order and required it to pay for tungsten delivered to it after June 9, 2015. I found that GTP was not in contempt of the amended original order as asserted by NATC, and I indicated that I would hear more fulsome argument on both applications today. I have done that, and have also considered the application brought by GTP today asking that I reconsider the order of July 27, 2015.

Ruling

[7] GTP has delivered a detailed written argument today, and I will follow the issues raised in that argument as it provides a convenient way to consider the issues that are before the Court.

Issue 1: Is there a debt due and owing by NATC to GTP?

[8] NATC contends that there is nothing due and owing under the loan agreement because, at the time of filing, it was up to date on its payments and so GTP has nothing to set off against. That submission ignores the fact that NATC is in default under the loan agreement.

[9] Section 2.2(c) of the loan agreement provides that the entire unpaid amount of the loan, together with interest and costs, shall be repayable forthwith upon the occurrence of an event of default. An event of default under the loan agreement includes a default in payment when due of any amount owing under the agreement. NATC failed to pay the June 30, 2015 loan payment. As a result it is in default.

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Issue 2: In any event, is it immaterial that the debt has not yet fallen due for payment?

[10] I also agree with the submissions of GTP on this issue. Even if it could be said that the time for payment of the NATC debt had not arrived, that would not defeat GTP's right of set-off.

[11] As noted in Palmer, *The Law of Set-off in Canada*, (Aurora, Ontario, Canada Law Book Inc., 1993) p. 34, a debt, for the purpose of set-off, "is a sum of money which is certainly, and at all events, payable without regard to the fact whether it be payable now or at a future time." The monies owing by NATC under the loan agreement are "certainly, and at all events", payable to GTP.

Issue 3: Is legal set-off available for pre-filing and post-filing obligations?

[12] GTP relies on the provisions of s. 21 of the *CCAA* and on the decision in *Air Canada (Re)*, [2003] O.J. No. 6058 (S.C.J.).

[13] Section 21 reads as follows:

> 21. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

[14] The circumstances in *Air Canada* were different from those before this Court. The issue raised was whether the second sentence in a term in the initial order should be struck out. The term in that order read as follows:

> THIS COURT ORDERS that persons may exercise only such rights of set off as are permitted under Section 18.1 of the *CCAA* as of the date of this order. For greater certainty, no person may set off any obligations of an Applicant to such person which arose prior to such date.

[15] Air Canada took the position that there is no right to a legal set-off as between pre-filing and post-filing obligations, and that the term of the order should not be varied. Farley J. disagreed and struck the second sentence from the term of the order. Academics have accepted that the ruling stands for the proposition that

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mutuality is not severed by the granting of an initial order on a *CCAA* proceeding, such that set-off is available between pre-filing and post-filing obligations.

[16] For example, in his article "Air Canada and Stelco*:* Legal Developments and Practical Lessons" in *the Annual Review of Insolvency Law* (Toronto: Carswell, 2006), Robert Thornton summarized the decision as follows at page 14:

> … Farley, J. held that there was no loss of mutuality upon the commencement of a *CCAA* proceeding. Accordingly, legal set-off is available both in respect of debts existing as of the date of an initial order, and in respect of debts that arose after the date of the initial order.

[17] NATC says that *Air Canada* is wrongly decided and points to decisions dealing with proposals under the *Bankruptcy and Insolvency Act*. There is some merit to the policy arguments that are advanced by NATC. It says that it would make sense, from a policy perspective, to arrive at such a conclusion because: a stay of proceedings assists in preserving the status quo as of the filing date; after a filing, a company ceases to act solely in its own corporate interests and begins to operate under the mandatory scrutiny of a monitor; and, the debtor's objective ceases to be focused solely on maximizing profits.

[18] While I find there are some merits to the policy arguments, in order to arrive at the decision sought by NATC, I would have to find that *Air Canada* was wrongly decided. I am simply not prepared to do so on the basis of the material and the argument before me.

[19] In addition, given the decision I have arrived at with regard to the grant of a temporal stay, I need not wrestle with this issue, as my conclusion does not rest on this finding.

Issue 4: Does the Court have jurisdiction to stay set-off rights once those have been determined?

[20] I am using that terminology for the issue because that is how it is phrased by Mr. Siddall in his submissions today. GTP gives three reasons for its position that the Court does not have the right to stay set-off rights. It says, first of all, that the

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case law does not support or anticipate such a stay once the creditor's set-off rights have been determined; secondly, it says that a temporal stay in the case at bar would effectively extinguish GTP's set-off rights under s. 21 causing significant prejudice to GTP; and, third, that the scope of the Court's discretion under the *CCAA* does not extend to extinguishing rights which have been specifically conferred by that statute.

[21] Starting with the first of these submissions, NATC relies on *Air Canada* and on *Tucker v. Aero Inventory (UK) Limited*, 2009 CanLII 63138 (Ont. S.C.), for the argument that the court does have the power to grant a temporal stay of set-off rights. GTP says both are distinguishable. It notes that *Air Canada* was by consent and in *Tucker* and in *Air Canada*, the stay was only being put in place until a determination of the set-off rights.

[22] Here GTP says it is asking the Court to determine its set-off rights today such that any extension of the stay cannot be granted beyond an order determining that right. GTP says this would be contrary to s. 21.

[23] I disagree. This is a very narrow reading of *Tucker* and *Air Canada*. This argument places far too much emphasis on the term "determination". In fact, those cases refer to "determination and enforcement' of set-off rights.

[24] For example, at para. 25 of *Air Canada*, Farley J. said:

> With respect to the question of what I have described as a temporal stay, there does not appear to be any opposition by the Moving Creditors to the proposition that whatever their rights of set-off in substance are determined to be, that such determination and enforcement of such determined rights should await until a convenient time when AC has stabilized (or I suppose, alternatively cratered). It would seem to me that the likely time for this would be in conjunction with the formation of a reorganization plan of arrangement and compromise.

[25] It is significant that the reference in *Air Canada* was to determination and enforcement so that set-off rights would be considered when the company has stabilized or cratered. In other words, it is the enforcement that is key, not determination, and that should await the outcome of the restructuring process. In

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other words, a temporal stay of rights can be granted to further the purpose of the initial order and the purposes of the *Act*. Such a stay can apply to enforcement of set-off rights even where it is acknowledged those rights exist.

[26] I turn to GTP's argument that it would suffer significant prejudice. It says it will suffer prejudice because a temporal stay in this case would effectively extinguish its set-off rights. In other words, it may never be able to set off its debts for new tungsten purchases against NATC's pre-filing debt to GTP.

[27] In my view, that is an illusory prejudice. GTP's position post-filing has not been prejudiced in any way. It is able to purchase tungsten for which it must pay the going rate. Its financial situation, by having to pay for purchases, is exactly what it would be if it had to go to another source for tungsten. In other words, if NATC had ceased production, rather than the initial order being made, GTP's situation would be no different than it is under the temporal stay. This is not a prejudice which, in my view, has any significance.

[28] GTP also argues that I cannot grant a temporal stay now that the set-off claims have been determined in the sense that I have concluded that mutuality is not affected by the initial order. I see no reason in principle on a reading of s. 21 of the *Act* as to why there cannot be such a stay. All creditors' claims are stayed, subject to the exceptions set out in s. 11.02. Section 21, as I read it, does not exempt set-off claims from stays, determined or not. It merely confirms the rights of set-off. Exempting set-off claims would not accord with the policy of the *Act*. Sections 11 and 11.02 of the *Act* give the Court a very broad discretion which must be exercised in furtherance of *CCAA* purposes. Quite simply, it would be illogical if the Court had the discretion to broadly stay claims and proceedings and make relevant ancillary orders necessary to further the purpose of the *Act* and the purpose of the initial order, but could not do so with regard to set-off claims.

[29] Of course, the application here is made in the context of the amended initial order. That order must be considered in relation to all of the facts and circumstances. I ruled, on July 27, 2015, that the purported set-off was in breach of

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that order. As I indicated, the terms of para. 16 of the amended initial order are broad enough to include a stay of the remedy of set-off.

[30] GTP relies in part on para. 10(d) of the amended initial order and that reads as follows:

> 9. Except as specifically permitted herein the petitioner is directed until further Order of this Court
>
> (d) to not grant credit except in the ordinary course of the Business only to its customers for goods and services actually supplied to those customers, provided such customers agree that there is no right of set-off in respect of amounts owing for such goods and services against any debt owing by the Petitioner to such customers as of the Order Date.

[31] I do not read that term as supportive of GTP's position. NATC could not grant credit to GTP without its agreement. GTP says that it was up to NATC to either come to it and get agreement or go to the court and get agreement, but I take a different view. Given the stay provision of para. 16 of the initial order, the remedy of set-off was stayed. If there was any ambiguity in light of the provisions of para. 10(d), there was an obligation on the part of GTP to get the approval or consent of the petitioner and the monitor to apply the set-off or, alternatively, to come to court. Of course, this is precisely what para. 16 of the initial order requires GTP to do.

[32] Finally, I have concluded that I will exercise my discretion to continue the stay with respect to the set-off claims. I am doing so because:

1. In order to preserve the status quo to effect a restructuring, a stay of the set-off is, and was, absolutely essential.

2. The amended initial order and the extension order were based on a detailed program. I need not highlight all of the aspects of it, but these included a reduction in the underground mining, cost cutting, disposal of equipment, and an orderly closure and maintenance of the Cantung Mine, all of which was predicated on cash flow. The cash flow was

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based on the continuation of the two supply agreements. Obviously, that would be thrown into disarray if the stay was not continued.

3. GTP had notice of all steps which had been taken along the way and was indeed actively consulted. It never raised any issue about set-off for 45 days following the initial order. Indeed, its only position was that assets should be put up for sale. It said nothing about exercising its right of set-off with respect to pre-filing debt.

4. Great prejudice to the other stakeholders would flow if GTP was now permitted to exercise its set-off. The status quo would be significantly altered and the restructuring would effectively be at an end. I accept that Callidus would very likely not extend any further credit at this point.

[33] When I consider all of those factors, as well as my view that there is no prejudice to GTP, it is appropriate to continue the temporal stay of GTP's set-off rights for so long as the stay granted by the amended initial order continues, which is to October 31, 2015.

[34] That is the conclusion of my ruling.

[35] Is there any clarification needed?

[36] MR. SCHULTZ: A few points, My Lord. First off, in the petitioner's notice of application we had sought special costs against GTP given the conduct that gave rise to these applications and we continue to seek that. I do not have much to add to the submissions of Mr. Sandrelli in terms of GTP's conduct and the background, but I would remind the court that we are seeking that.

[37] THE COURT: I do not need to hear from you on that, Mr. Siddall. In my view, GTP has raised significant legal arguments. While I have not accepted them, the actions of GTP are not such as to attract special costs.

[38] MR. SCHULTZ: Thank you, My Lord.

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[39] MR. SKELLY: Just before we move off of that, if Your Lordship is not prepared to order special costs, are you prepared to order costs to the parties who had to appear?

[40] THE COURT: Yes, I am prepared to order costs. And I so order.

[41] MR. SIDDALL: Sorry, we're going a little bit quickly, My Lord. I just wanted to slow down a bit. I was not given an opportunity to make submissions on costs. I am not going to add a lot to what you have ruled, but I would seek that you limit it to the costs as between NATC and GTP where the issues raised [indiscernible] stay or not, the other parties in the courtroom who said little, and although obviously I am not criticizing them for attending, but again, the notice of application, it raised issues between NATC and GTP, so I ask Your Lordship to limit your cost order to the costs of NATC.

[42] THE COURT: It will not be so limited. The issue raised was a significant issue that affected other parties, and I certainly do not fault them for attending and making submissions, however brief.

[DISCUSSION]

[43] MR. SIDDALL: The terms of the order that my friend and I will obviously work on -- do I have it that you are prepared to declare that we have set-off rights -- that GTP has set-off rights? So one of the orders will be that we have set-off rights and then the next order will be that those rights are still stayed.

[44] THE COURT: Those rights are stayed.

[45] THE COURT: I will make the order that the signatures of the parties, other than GTP and NATC who are in attendance, are dispensed with.

"Butler J."

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DATE OF RELEASE:
November 4, 1992

No. CA016047
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COURT OF APPEAL FOR BRITISH COLUMBIA

1992 CanLII 427 (BC CA)

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE
MR. JUSTICE MACFARLANE
IN CHAMBERS

Vancouver, B.C.

October 22, 1992

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

AND:

IN THE MATTER OF THE COMPANY ACT, R.S.B.C. 1979, C.59

AND:

IN THE MATTER OF PACIFIC NATIONAL LEASE HOLDING CORPORATION, PACIFIC NATIONAL FINANCIAL CORPORATION, PACIFIC NATIONAL LEASING CORPORATION, PACIFIC NATIONAL VEHICLE LEASING CORPORATION, SOUTHBOROUGH HOLDINGS INC. and PAC NAT EQUITIES CORPORATION

PETITIONERS

H.C. Ritchie Clark and
D.D. Nugent — counsel for the petitioners (appellants)
W.E.J. Skelly — Sun Life Trust Company
M.P. Carroll — Mutual Life Assurance Company of Canada
W.C. Kaplan — Commcorp Financial Services Inc. and National Trust
H.W. Veenstra — National Bank of Canada

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1 This is an application for leave to appeal an order of Mr. Justice Brenner pronounced the 17th day of August, 1992, pursuant to the ***Companies Creditors Arrangement Act*** R.S.C. 1985, c. C-36 (the "C.C.A.A.").

2 The petitioners had become insolvent prior to July 22, 1992, when they made an application under the C.C.A.A. for a stay of all proceedings so that they might attempt a re-organization of their affairs as contemplated by the C.C.A.A..

3 Mr. Justice Brenner made an *ex parte* order on July 23, 1992. The effect of the order was to stay all proceedings against the petitioners.

4 The order permitted the petitioners to maintain in trust a sum not exceeding $1,500,000.00, to satisfy the potential liabilities of directors and officers of the petitioner companies with respect to the payment of wages under provincial legislation and remittances in connection therewith pursuant to federal legislation. The petitioners had previously established that fund to protect its directors and officers from potential personal liability under the ***Employment Standards Act*** S.B.C. 1979, c.10 for failing to make the payments mandated by that statute.

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5 On July 31, 1992, Mr. Justice Brenner heard a number of applications brought by various interested parties seeking to set aside the *ex parte* stay order or, if the stay order was not set aside, to vary its terms. Mr. Justice Brenner amended and replaced the stay order with an order on terms proposed by the parties. That order has not yet been entered and has gone through a number of amendments. The order provided that on an interim basis, pending the hearing and determination of an application on the merits of the issues, the petitioners should not, without further order of the Court, make any payment to any employee or employees of the petitioners in respect of unpaid wages, severance, termination, lay-off, vacation pay or other benefits arising or otherwise payable as a result of the termination of an employee or employees.

6 The merits were argued in August and on August 17 Mr. Justice Brenner delivered the reasons for judgment and made the order which is the subject of this application.

7 The operative portions of the order read as follows:

> THIS COURT ORDERS that the application by the Petitioners to make statutory severance payments or to maintain a trust fund to indemnify its directors and officers with respect to statutory severance payments is dismissed;
>
> THIS COURT FURTHER ORDERS that any proceedings that may be brought by employees of the Petitioners

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> to compel payment of statutory severance payments are stayed.

9 The appeal concerns the order made under the first paragraph of the order, not against the stay granted in the second paragraph.

10 The reasons for judgment of Mr. Justice Brenner are careful and detailed and are contained in 17 pages. The reasons contain a review of the essential facts, including the circumstances which gave rise to the financial difficulties of the petitioners, the competing arguments with respect to the need and the ability to make severance payments to employees whose services had been terminated, a consideration of the purposes of the C.C.A.A., the principle derived from the judgment of Mr. Justice Macdonald in ***Westar Mining Ltd.***, unreported reasons for judgment, August 11, 1992 (which dealt with a similar issue), and the application of that principle to the facts of this case.

11 The essential facts are that the petitioners are a group of inter-related companies that have carried on a leasing business for some years. Just prior to the commencement of the C.C.A.A. proceedings the petitioners had over $246,000,000.00 in lease portfolios under administration. They had a workforce of approximately 230 which, by the time Mr. Justice Brenner gave his

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reasons on August 17, 1992, had been reduced to 60. The provisions of the ***Employment Standards Act*** had not, by August 17, 1992, given rise to any actual liability with respect to the severance of the employees who had left the company. The potential liability was not known but the company said that it could be as much as $1,500,000.

12 Mr. Skelly informed me, upon the hearing of the application, that the latest information indicated a liability for severance pay in an amount of approximately $850,000.00 and for vacation pay in an amount of approximately $150,000.00 for a total potential liability of $1,000,000.00. I understand from counsel that once the Funders are repaid there may be as much as $61,000,000.00 available to meet other liabilities.

13 Mr. Clark, for the petitioners, was not prepared to concede that the potential liability had been reduced, and submits that a trust fund of about $1,300,000.00 is required.

14 The petitioners were in the business of purchasing equipment or vehicles and entering into leases with third parties. The initial purchases were financed with security on such leases granted in favour of National Bank of Canada and by way of a trust deed in favour of Canada Trust Company and Royal Trust Company. Additional financial advances were obtained from the other

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respondents, who are 27 other financial institutions, referred to in the material as the "Funders". The Funders advanced monies and took security, in part by way of assignment of the lease revenue stream. The monies advanced by the Funders exceeded the amount which the petitioners had paid for the equipment or vehicles. The difference, together with other revenue, was the petitioners' profit.

15 The arrangements with the Funders provided that the petitioners would continue the ongoing administration of the leases, including collection of the monthly lease payments, which would be forwarded to the Funders.

16 The petitioners got into financial difficulties, which they revealed to the Funders. The Funders and the petitioners were not able to agree to a plan to deal with this crisis. As a result the petitioners sought protection under the C.C.A.A..

17 The appellants seek an order of this Court setting aside the order made August 17, 1992, and authorizing the petitioners to comply with the statutes governing their operations (and in particular the ***Employment Standards Act***) and permitting them to continue to maintain the Trust Funds with respect to possible claims against directors and officers arising out of the various federal and provincial statutes.

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18 The petitioners assert that Mr. Justice Brenner erred:-

1. In ordering the appellants not to abide by the relevant mandatory statutory provisions including those under the ***Employment Standards Act***, requiring the appellants to pay all the statutory payments in full, and thereby order the appellants to breach a mandatory statute regarding statutory payments.

2. In ruling that he had the inherent jurisdiction under the ***Companies Creditors Arrangement Act*** or otherwise to order the appellants to breach the ***Employment Standards Act*** regarding statutory payments and thereby order the petitioners to commit offences under such statute.

3. In failing to properly apply the relevant legal principles applicable to a decision regarding the payment of statutory payments including such payments to former employees.

4. In ruling that the payment of unpaid wages and holiday and vacation pay accruing to the appellants' employees was to be treated in the same manner as severance pay.

5. In suspending the provisions of the July 23, 1992 order authorizing the Trust Fund.

6. In failing to provide any protection to the directors and officers of the appellants by way of the Trust Fund when ordering the petitioners to breach the ***Employment Standards Act***, thereby exposing the directors and officers of the petitioners to liabilities under that statute and to prosecution for offences thereunder.

19 I understand the submission of the respondents to be that the real issue is whether a judge, acting pursuant to the powers given by the C.C.A.A., may make an order the purpose of which is to hold all creditors at bay pending an attempted re-organization of the affairs of a company, and which is intended to prevent a

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creditor obtaining a preference which it would not have if the attempted re-organization fails, and bankruptcy occurs.

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20 I think that the answer is given in ***Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*** (1990), B.C.L.R. (2d) 84. In that case Mr. Justice Gibbs, at pp.88-89, said:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the Court is called upon to play a kind of supervisory role to preserve the status quo to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at a compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay. Hence the powers vested in the Court under Section 11.

21 In the same case, at p.92, Mr. Justice Gibbs considered whether security given under the ***Bank Act*** gave preference to the Bank over other creditors, despite the provisions of the C.C.A.A.. He said:

> It is apparent from these excerpts and from the wording of the statute, that in contrast with ss. 178 and 179 of the ***Bank Act*** which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors,

> creditors and employees. If a bank's right in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the bank signifies and collects the accounts receivable, Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; those for whom the C.C.A.A. may be irrelevant dependent upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted, it is difficult to imagine that the legislators of the day intended that result to follow.

22 Mr. Justice Brenner, after reviewing that and other authorities, said:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
> (3) During the stay period the Act is intended to prevent maneuvers (sic) for positioning amongst the creditors of the company.
> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

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> (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
> (6) The Court has a broad discretion to apply these principles to the facts of a particular case.

Counsel do not suggest that statement of principles is incorrect.

23 Mr. Justice Brenner then referred to the judgment of Mr. Justice Macdonald in ***Westar***, and concluded:

> In my view, to allow the Petitioners to make statutory severance payments or to authorize a fund out of the company's operating revenues for that purpose would be an unacceptable alteration of the status quo in effect when the order was granted.

24 He said earlier that he did not understand Mr. Justice Macdonald to be saying in ***Westar*** that in no case should a court ever authorize severance payments when a company is operating under the C.C.A.A.

25 He held, in effect, that it was a proper exercise of the discretion given to a judge under the C.C.A.A. to order that no preference be given to any creditor while a re-organization was being attempted under the C.C.A.A.

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26 It appears to me that an order which treats creditors alike is in accord with the purpose of the C.C.A.A. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the C.C.A.A. is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a re-organization is being attempted.

27 So far as the directors and officers are concerned, they were personally liable for potential claims under the ***Employment Standards Act*** before July 22. Nothing has changed. No authority has been cited to show that the directors and officers have a preferred right over other potential creditors.

28 This case is not so much about the rights of employees as creditors, but the right of the court under the C.C.A.A. to serve not the special interests of the directors and officers of the company but the broader constituency referred to in ***Chef Ready Foods Ltd.*** Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the C.C.A.A. must be served.

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29 In this case Mr. Justice Brenner reviewed the evidence and made certain findings of fact. He concluded that it would be an unacceptable alteration of the status quo for the petitioners to make statutory severance payments or to authorize a fund out of the companies' operating revenues for that purpose. He also found that there was no evidence before him that the petitioners' operation will be impaired if terminated employees do not receive severance pay and instead become creditors of the company. He said that there was no evidence that the directors and officers will resign and be unavailable to assist the company in its organization plans.

30 Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

31 A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than

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a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

32 Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

33 In all the circumstances I would refuse leave to appeal.

"A.B.M. JA"

October 28, 1992
Victoria, B.C.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pacific Shores Resort & Spa Ltd. (Re),* 2011 BCSC 1775

Date: 20111107
Docket: S117098
Registry: Vancouver

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

And

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57

And

In the Matter of Pacific Shores Resort & Spa Ltd., Westerlea Sales Consulting Ltd., Aviawest Resorts Inc., Ocean Place Holdings Ltd., Fairfield Ventures Inc. and Parkside Project Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	D.K. Fitzpatrick
Appearing on behalf of the Monitor:	S. Dvorak
Counsel for Fisgard Capital Corporation:	A.A. Frydenlund S. Stephens
Counsel for Unsecured Loan Holders:	D. Toigo
Counsel for Water's Edge Rental Pool Creditors:	K.S. Campbell
Counsel for bcIMC Construction Fund Corp.:	C.D. Brousson
Place and Date of Hearing:	Vancouver, B.C. November 2 and 4, 2011
Place and Date of Judgment:	Vancouver, B.C. November 7, 2011

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[1] **THE COURT:** This proceeding was commenced on October 21, 2011. On October 24, 2011, I granted an initial order pursuant to s. 11.02(1) of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended ("*CCAA*") which included an interim stay of proceedings and a nominal administration charge. At that time, two of the secured creditors, bcIMC Construction Fund Corporation and bcIMC Specialty Fund Corporation (collectively "bcIMC") and Fisgard Capital Corporation opposed the granting of the order. There was, however, insufficient time to fully hear the arguments against the granting of the order, notwithstanding that the statutory requirements of the *CCAA* had been met by the petitioners.

[2] This hearing was intended to stand as a comeback hearing under s. 11.02(2) of the *CCAA*, when the arguments of those secured creditors could be fully heard. At this time, the petitioners seek to extend the stay to December 11, 2011, and to increase the administration charge from $100,000 to $300,000.

[3] Further, the petitioners seek an order authorizing debtor in possession, or DIP, financing in the amount of $600,000 and the imposition of a director's charge in the amount of $700,000.

[4] bcIMC and Fisgard oppose the granting of the order sought, contending that it is not appropriate in the circumstances and that the petitioners are not acting in good faith and with due diligence; in other words, that the petitioners have not satisfied the test in respect of the granting of this further order as that test is formulated under s. 11.02(3) of the *CCAA*. Fisgard also applies to appoint a receiver over the security held by it relating to one of the developments.

[5] As at the time of the application for the initial order, the onus remains on the petitioners at this hearing to satisfy the requirements under s. 11.02(3) of the *CCAA*.

Background Facts

[6] The corporate group, or, as it is known, the Aviawest Group, began its operations in 1990 with the development of the Pacific Shores Resort near

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Parksville, British Columbia. Over the last 21 years, the business has grown substantially and includes other resort properties around B.C. Generally speaking, the business of the Group includes sales of vacation ownership products, sales of deeded ownership products and management of those interests.

[7] At the peak of its business, the Group employed over 400 people on Vancouver Island. I am advised that over 8,000 families are vacation owners or fractional owners in its property portfolio.

[8] The corporate structure is fairly complex, but for the purposes of this application I will summarize it as follows:

a) the Pacific Shores resort is owned by the petitioner Ocean Place Holdings Ltd.;

b) the units of Pacific Shores Resort, along with the resort amenities, are managed by the petitioner Pacific Shores Resort & Spa Ltd. ("PSRS"). PSRS also operates a rental pool for the owners. There are other interested parties relating to this resort, including various owner associations and strata corporations, known as PSOE, PSFRA and PS Strata, who were represented at this hearing;

c) the Parkside Resort in Victoria was developed in 2009. It is owned by the petitioner Parkside Project Inc. in trust for a limited partnership, the general partner of which is the petitioner Fairfield Ventures Inc. There are other interested parties relating to this resort, including various owner associations and strata corporations, known as PV1, PV2 and PV Strata, who were also represented at this hearing;

d) the petitioner Aviawest Resorts Inc. ("Aviawest") operates a business that manages the Parkside Resort and also other resorts in Victoria, Sun Peaks, Ucluelet (known as the Water's Edge Resort) and Vancouver. It also sells vacation interests in the Parkside Resort and the other resorts listed. In addition, Aviawest operates rentals of

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> certain vacation units in Parkside Resort and Water's Edge Resort. Aviawest sells memberships and points packages to purchasers in the Aviawest Resort Club, which is an independent company which is not part of this proceeding but who was represented at the application. Aviawest also provides management services to the Club. The points program is integrated with the various vacation properties which it manages.

[9] The Aviawest Group employs approximately 250 people at this time in respect of its various operations, with 115 employed at the Pacific Shores Resort and 80 at Parkside Resort.

[10] The causes of the Group's insolvency can be laid principally at the feet of the development of the Parkside Resort. There were significant delays and cost overruns relating to that project. In addition, the global economic downturn in 2008 has led to decreased sales, which has exacerbated the lack of working capital due to a loss of credit facilities with one of their lenders.

[11] There is a substantial amount of evidence detailing the assets of the Group and the outstanding debt against those assets. In respect of Parkside Resort, bcIMC has a first mortgage of $28.1 million, BCC Mortgage Investment Corporation has a second mortgage of $8.5 million, and bcIMC has a third mortgage of $20 million. There is also a fourth mortgage of $1.7 million. Finally, there are various priority claims, such as property taxes, and a substantial amount of unsecured debt totalling $6.6 million. The total of the priority claims and secured debt alone is $58 million.

[12] In respect of Pacific Shores Resort, Fisgard has a first mortgage of $8.7 million, and the bcIMC and BCC debt on the Parkside Resort is collaterally secured against this property as well. There are also priority claims and unsecured debt relating to this property. The total secured debt against this property is $82 million, although that includes the debt collaterally secured relating to the Parkside Resort.

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[13] Aviawest also has assets, such as its points portfolio and receivables, and also has substantial debt totalling $13.3 million. That debt includes $7.6 million owed to unsecured noteholders who were represented at the hearing.

Arguments of the Secured Creditors

[14] bcIMC and Fisgard contend that the *CCAA* order should not be granted for a number of reasons, as follows:

1. there is no equity in the assets;

2. they have no faith in current management;

3. there is no plan, in that no lender will provide sufficient financing to pay off the secured creditors since there is no equity; and

4. they will not vote for any plan that requires them to accept less than what they are owed.

I will deal with each of these arguments in turn.

No equity in the assets

[15] The total value of the assets, accepting the appraisals of the petitioners, is $88.2 million, which does not include the going-concern value of the Group. The total debt is estimated by the petitioners at $90.2 million, although I note that the monitor puts that figure at $99.4 million.

[16] Much of the argument regarding the equity situation concerned the valuations relating to the Parkside Resort, which has secured debt of $58 million. The petitioners value the Parkside Resort at $63.7 million based on appraisals obtained by them in November 2010, which would indicate some value beyond the secured debt on that asset. There are also potential tax losses in Parkside Resort of $19 million.

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[17] bcIMC says that the appraisals are suspect because the appraiser in fact had an interest in the Parkside Resort at the time. In response, Mr. Sweett, the appraiser, has filed a certificate attesting that he did not value his unit in the Resort and that he did the remainder of the appraisal given his familiarity with and expertise relating to the project before his purchase of that unit.

[18] bcIMC has introduced an appraisal of the Parkside Resort well below this first appraisal. In accordance with my order dated November 2, 2011, this appraisal was sealed given bcIMC's submission that it was highly confidential and that there could be potential detrimental effects if it was disclosed publicly.

[19] There are difficulties relating to this appraisal also. It is clear that it does not purport to provide a market value of the property, but rather an investment value to a specific investor, namely Delta Hotels, a subsidiary of bcIMC. In addition, the value indicated in this appraisal is contradicted in any event by bcIMC's own evidence in that they indicate that they have received an offer to assume their first mortgage on the Parkside Resort for the sum of $20 million.

[20] The petitioners point to other evidence of value which confirms to some extent the values in their appraisals, including assessment values and their relationship to sale prices, historical prices of the ownership interests and negotiated listing prices determined with lender input.

[21] The Monitor has also conducted a limited review of the sales of Parkside Resort units and has concluded that the values in the appraisal of the petitioners are generally supported, with the proviso that the time within which those units could be sold and the cost that would be incurred during that time would erode the overall values as at this time.

[22] For the purposes of this application and with that proviso, I accept that the value of the Parkside Resort interests as advanced by the petitioners is as set out in their appraisals.

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[23] With respect to Fisgard, it is apparent that they are well secured given the value of the Pacific Shores Resort, which is estimated by the petitioners to be $16.5 million. The $5.5 million liquidation value that was referred to by Aviawest was a liquidation value and not a going-concern value, which is particularly relevant given Fisgard's own stated intention to continue the operations of the Resort even within a receivership.

[24] There is no doubt that the petitioners are insolvent and that they face substantial challenges ahead in terms of any restructuring. However, for the purpose of this application, it is evident to me that there are substantial assets that will be a potential source of refinancing or sale with respect to both Parkside Resort and Pacific Shores Resort.

No faith in management

[25] In this respect, bcIMC says that management has shown no record of success and that there has been financial mismanagement and cash flow and financial recordkeeping irregularities. Fisgard adopts these same contentions.

[26] bcIMC says that it has not received any interest payments since 2009, although it appears that they have been receiving 100% of payments from sales and applying those proceeds to principal, which has resulted in their debt being reduced by $35 million over the last two years. I have been advised that just prior to the filing, bcIMC received approximately $1 million toward its loan, although I understand that Fisgard disputes that payment, saying that the payment was improperly diverted to bcIMC.

[27] It is clear to me that there have been substantial dealings between bcIMC and the petitioners since the loans were initially advanced and also throughout the ensuing period when financial difficulties became apparent to all concerned. I have been advised that there were a substantial number of meetings to discuss matters and also the appraisals now presented by the petitioners were provided to bcIMC some time ago.

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[28] Both parties seem to have been working together to resolve the problems, and I have not been advised that bcIMC raised any issues relating to management's abilities until now. To that extent, the lack of success on the part of the petitioners has come as no surprise to bcIMC at this time.

[29] In fact, even as early as some months ago when the appraisal evidence was known, bcIMC took no action. bcIMC's opposition and the demands for payment in relation to this proceeding only arose after the petitioners indicated their intention to seek protection under the *CCAA* in mid-October. This opposition relates to bcIMC's position that they do not object to the petitioners seeking protection provided that it is done on their terms, all in accordance with a "with prejudice" offer that they sent some days ago which gives them full control over how long these proceedings would extend and on what terms (including that no DIP financing would be sought or obtained).

[30] There are some issues concerning rental monies from Water's Edge Resort. It appears that rental monies were previously used by Aviawest contrary to an agreement, which required that those monies be held in a segregated trust account. I am advised that this has been rectified and that the segregated accounts are now in place. There may be consequences arising from this situation, although that will be sorted out in the fullness of time. In any event, counsel for Water's Edge Resort did not submit that the order should be refused for this reason.

[31] I also would note that in *Muscletech Research and Development Inc. (Re)* (2006), 19 C.B.R. (5th) 57 (Ont. Sup. Ct. J.) at para. 4, Justice Farley stated that the good faith requirement relates to conduct within the proceedings, not that relating to past activities.

[32] The Monitor has been working diligently with the petitioners during the short time of its engagement since October 24. Accordingly, its review of the matters has been limited. Nevertheless, the Monitor has concluded that the petitioners are acting in good faith and with due diligence. I also accept that the current

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management team has a great deal of expertise in this business that would be fundamental to any restructuring that may occur.

[33] In conclusion, I do not accept the submissions of bcIMC and Fisgard that there is any justification for their lack of faith in management.

There is no plan

[34] bcIMC says that there is no plan or any credible outline of a plan that makes any sense. To a large extent, this argument is that any plan is "doomed to failure" and accordingly, these proceedings should be terminated.

[35] This contention is addressed in the affidavit of James Pearson, who is the chief executive officer of the petitioners. Key elements of the plan at this time include:

a) the sale of some redundant assets, which would reduce cash flow requirements;

b) the sale and lease back of certain assets to increase working capital;

c) restructuring the income stream from the PSOE and the Club;

d) the refinance of the debt with bcIMC regarding Parkside Resort, which would in part allow some proceeds of sale to provide working capital;

e) restructuring the secured debt with Fisgard;

f) continuing sales of fractional interests and commercial units;

g) renegotiating arrangements with existing interest groups regarding the management and operation of the vacation interests;

h) resuming the points business; and

i) making a proposal to unsecured creditors regarding a share in the future income stream.

[36] In addition, I am advised by counsel for the petitioners that they have now talked to six potential investors who are either hotel entrepreneurs or financiers.

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[37] Both the petitioners and bcIMC have referred me to *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577. In that case, the Court disapproved of the granting of an initial order where there was no stated intention by the debtor to propose an arrangement or compromise to its creditors. I note, however, that this situation is markedly different than the situation addressed in that case. As Tysoe J.A. stated at para. 31, it is not a prerequisite that a draft plan be filed at the time of the stay. What is required, however, is that the creditor have a *bona fide* intention to do so while having the protections of the stay under the *CCAA*.

[38] Given the evidence of the petitioners, I am satisfied that the Group has a *bona fide* intention to present a plan. I am not convinced that, as bcIMC states, it is simply a "hope and a prayer".

[39] I am of the view that, similar to the facts under consideration in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26, 273 B.C.A.C. 271, this is a situation where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of the parties. The *CCAA* proceedings have only begun, and I have no doubt that any plan will evolve over time given the usual negotiations that one would expect to occur between the petitioners and the major stakeholders while the stay is in place.

Secured creditors will not vote in favour of any plan

[40] This argument is also part of the "doomed to failure" argument of bcIMC and Fisgard. I have been referred by bcIMC and Fisgard to *Hunters Trailer & Marine Ltd. (Re)*, 2000 ABQB 952, 5 C.B.R. (5th) 64, as authority for the proposition that unless there is equity in the assets beyond that owed to secured creditors, a *CCAA* order is only appropriate if the secured creditors are supportive of it.

[41] To the contrary, at para. 19 of that case, the Court states quite clearly that a recalcitrant creditor should not necessarily prevent the granting of an order under the *CCAA*. This approach is consistent with the comments of Madam Justice Newbury

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in *Forest & Marine* who stated, in the face of a major secured creditor's insistence that it would vote against any plan:

> [27] ... I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner.

[42] Further, bcIMC's insistence that it will not cooperate in terms of a refinancing simply does not make sense in light of what has already occurred in relation to bcIMC's debt and the positions and actions they have taken in relation to their debt. Firstly, they have already made the "with prejudice" offer to accept an amount under their first mortgage position only, which would give rise to a loss of approximately $20 million. Secondly, they have investigated the potential sale of their debt, which gave rise to an offer of $20 million.

[43] Both of these circumstances indicate to me that they are open to negotiations with the petitioners and that those negotiations may possibly result in a refinance of their debt that would allow the Group to go forward on some restructured basis.

[44] bcIMC and Fisgard are well known and sophisticated lenders doing business in this jurisdiction. As was stated by the court in *Rio Nevada Energy Inc. (Re)* (2000), 283 A.R. 146 (Q.B.) at para. 25, this is some evidence that bcIMC and Fisgard will not act against their commercial interests and that they will reasonably consider proposals. This distinguishes the case of *Royal Bank of Canada v. Fracmaster Ltd.*, 1999 ABCA 178 at para. 12, 244 A.R. 93, where there was evidence that the lender had valid commercial reasons to vote against the proposal.

DIP Financing

[45] The petitioners seek DIP financing in the amount of $600,000, which is just shy of the $620,000 which the cash flow indicates will be required to see them through to December 11.

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[46] The petitioners have in hand a term sheet from Fisgard which allows for funding to a maximum of $2.5 million. If the DIP financing is ordered, the parties are generally agreed that it will be restructured so as to separate the funding to Parkside Resort and Pacific Shores Resort given the different debt structures on those properties. There would also have to be some general funding for head office expenses.

[47] There also appears to be the possibility that PSOE and the Club will recommence paying the amounts that would normally have been billed to them by the petitioners but for the prepayments that were made in anticipation of services continuing. If so, that will provide an additional $323,000 by December 11.

[48] The granting of DIP financing is to be considered in accordance with s. 11.2 of the *CCAA*, which are relatively new provisions that came into force in September 2009:

> Interim Financing
>
> **11.2** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> Priority – secured creditors
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> Priority – other orders
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> Factors to be considered
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (*a*) the period during which the company is expected to be subject to proceedings under this Act;

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> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[49] I will address each of the factors listed in s. 11.2(4):

a) at this time the petitioners are seeking to continue the stay for a further five weeks until December 11, 2011, which is not an inordinate amount of time given the ambitious task ahead of them. Nevertheless, in my view it is essential that they be given this breathing room to explore restructuring options. The parties and the Monitor can assess their progress by that time to determine whether a continuation from that time forward is appropriate.

b) regarding management, as I have stated above, in my view the current management of the business is acting in good faith and with due diligence. They appear to be in the best position to potentially come to a solution given their expertise and the complexities involved. They have taken immediate steps to address cash flow difficulties in terms of the operational costs. I would also add that no party has submitted that the present management team be replaced by, for example, a Chief Restructuring Officer or that the Monitor should be granted further powers to address any deficiencies in that respect.

c) it goes without saying that bcIMC does not support current management. However, a substantial number of other stakeholders do support the management team, including BCC, who has a significant financial stake in the matter given its second mortgage on Parkside Resort. Fisgard does

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not support management either. However, I am of the view that this position should be discounted substantially given that it is fully secured on Pacific Shores Resort.

d) the DIP financing is necessary in the circumstances to allow the Group's operations to continue. Without it, this proceeding cannot go forward. In that respect, it will enhance the prospects of a viable compromise or arrangement.

e) I have already discussed the nature and value of the Group's assets. Allowing the Group to continue can only serve to maintain the existing goodwill in the Group's business. It is well acknowledged that a receivership would have disastrous consequences in relation to the ability to market the units.

f) material prejudice is the most substantial argument of bcIMC and Fisgard in opposition to the DIP financing. I accept that the imposition of the charge may prejudice them in the event that the assets are not sufficient to pay their first mortgages, although that seems more unlikely in respect of Fisgard. Nevertheless, the materiality of the charge is questionable, particularly since the secured lenders have expressed an intention to continue the operations of Pacific Shores and Parkside Resorts respectively – which would in turn result in any receiver obtaining priority borrowings and which would erode the security in the same manner as DIP financing. The DIP financing will allow operations to continue, which will maintain the goodwill and enhance values in the meantime. In these circumstances, I am satisfied that the benefits of DIP financing outweigh any potential prejudice to the secured creditors, particularly bcIMC: see *United Used Auto & Truck Parts Ltd. (Re)* (1999), 12 C.B.R. (4th) 144 (B.C.S.C.), Tysoe J. at para. 28.

I would note that material prejudice to secured creditors is only one factor and is to be considered in equal measure with the others listed in

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s. 11.2(4). It is not, as submitted by Fisgard, the case that as a matter of law the court cannot impose DIP financing over the objections of a secured creditor if there is prejudice to that secured creditor, particularly in light of the statutory test.

g) I would note that the Monitor in its first report, dated October 31, 2011, agrees that the current offer of Fisgard is the most favourable to the petitioners and the Monitor supports the granting of an Order approving DIP financing and the imposition of a DIP charge for that purpose.

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Conclusions

[50] I wish at this time to address the argument of Fisgard that a *CCAA* proceeding is not appropriate in respect of these Resorts since they are real estate developments.

[51] There are numerous cases which have considered this issue including *Cliffs Over Maple Bay*; *Encore Developments Ltd. (Re)*, 2009 BCSC 13, 52 C.B.R. (5th) 30; and *Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145, 52 C.B.R. (5th) 47, to name a few. Yet those cases are clearly distinguishable from the present circumstances. In those cases, there were undeveloped or partially completed real estate projects and the courts found that it was more appropriate for the secured creditors to realize on those assets in the usual manner.

[52] In *Forest & Marine*, at para. 26, the Court of Appeal clearly drew the distinction between that situation and one where there is an active business being carried on within a complicated corporate group. The latter situation is exactly what we are dealing with here.

[53] Despite the setbacks in their business, the petitioners wish to continue their operations within the *CCAA* for the purpose of developing and presenting a plan to their creditors. This is consistent with the fundamental purpose of the *CCAA* as has been expressed in many cases of this court and our Court of Appeal: see, for

example, *Sharp-Rite Technologies Ltd. (Re)*, 2000 BCSC 122 at para. 23; and *Cliffs Over Maple Bay* at paras. 27-29.

[54] The petitioners say they have a proven track record in terms of sales and that they remain in the best position to maintain operations while they seek a more permanent solution to their financial troubles. They say that this will be advantageous for a number of reasons: the business is complex; the businesses are linked together such that each depends on each other, such that the whole will be weakened by a receivership; the buying of fractional interests is driven by the relationship with Aviawest; a stay will protect other stakeholders beyond the first secured creditors; and management has the skills to continue the sales of fractional interests.

[55] These points concerning the complexity and interconnectedness of the petitioner parties, which I accept, meet the suggestion by bcIMC and Fisgard that somehow the proceeding should be bifurcated – although this argument is, for the most part, made by each of them against the other in that each says that their main security should be released from the proceedings and that the other businesses and properties can remain within the *CCAA* proceedings. There was also a suggestion by bcIMC that Aviawest should be released from the *CCAA* proceedings, although it is not clear to me what benefit might be gained in that respect.

[56] In my view, this is a highly integrated group and the protections under the *CCAA* must be for the entire group in order that they can seek a solution to their financial problems as a whole. It may be that individual solutions will be found for particular assets or debts, but that can be accommodated within the *CCAA* proceedings as currently sought by the petitioners for that integrated group.

[57] I do not wish to end without noting the obvious. There are a substantial number of stakeholders involved: the petitioners themselves and the related corporate entities, the secured creditors, the unsecured creditors, the owner groups and strata corporations, the thousands of homeowners, and the hundreds of employees. Many of the hundreds of parties holding unsecured debt in Aviawest are

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retirees who have invested their life savings into the enterprise, although it is also apparent that many pensioners have also invested through bcIMC.

[58] There can be no doubt that a receivership will result in a complete obliteration of every financial interest save for the first and possibly second secured lenders. On this point there is no disagreement, save for Fisgard's somewhat inexplicable argument that a receivership of Pacific Shores Resort would prejudice no one. The prejudice to the other stakeholders in relation to that resort is palpable in the event of a receivership.

[59] In conclusion, it is my opinion that the petitioners have satisfied the onus upon them to establish that they are acting in good faith and with due diligence and that the making of a further order extending the stay is appropriate. The order will go as sought, including that the administration charge is increased to $300,000 and that a director's charge is imposed to a maximum of $700,000 in respect of potential obligations that might be incurred post-filing.

[60] In addition, I am satisfied that the requested DIP financing order is appropriate in the circumstances and that it can be structured as has already been discussed between the parties.

[61] Fisgard's application to appoint a receiver is dismissed.

"The Honourable Madam Justice S.C. Fitzpatrick"

2011 BCSC 1775 (CanLII)

Douglas Garnet Palmer and Donald Palmer *Appellants*;

and

Her Majesty The Queen *Respondent*.

1979: June 26, 27; 1979: December 21.

Present: Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Appellants convicted of conspiring to traffic in heroin — Subsequent declarations by principal Crown witness asserting his trial evidence untrue — Refusal of Court of Appeal to admit this new evidence — No error in law on part of Court of Appeal — Criminal Code, R.S.C. 1970, c. C-34, s. 610(1)(d).

This was an appeal against the refusal of the British Columbia Court of Appeal to admit fresh evidence in the appeal of the appellants Palmer against their conviction in the Supreme Court of British Columbia before Macfarlane J. sitting without a jury upon an indictment charging a conspiracy to traffic in heroin. A separate appeal relying on the same grounds was taken by Thomas Maxwell Duncan, John Albert Smith and Robert Porter who were named conspirators in the same indictment with the Palmers and who were convicted at the same trial. (See [1980] 1 S.C.R. 783.)

One of the important witnesses called for the Crown, both at the preliminary hearing and at the trial, was one Ford, an admitted heroin trafficker and a disreputable character with a criminal record. His evidence was accepted by the trial judge and clearly played a significant part in the result. After the trial, Ford, in a series of declarations, asserted that his trial evidence was untrue, that it had been fabricated in its entirety, and that he had been influenced by threats and inducements, including the promise of payments of money, by the police. When this material came into the hands of the legal advisers of the appellants, they applied in the Court of Appeal, under s. 610(1)(*d*) of the *Criminal Code*, to adduce this new evidence in affidavit form. The application was dismissed by the Court of Appeal and the appeals of all the appellants, which raised other grounds of appeal as well, were dismissed. The present appeal was taken by leave of this Court upon two points as follows:

Douglas Garnet Palmer et Donald Palmer *Appelants*;

et

Sa Majesté La Reine *Intimée*.

1979: 26, 27 juin; 1979: 21 décembre.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte et McIntyre.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit criminel — Appelants déclarés coupables de complot pour faire le trafic d'héroïne — Déclarations ultérieures du principal témoin à charge quant à son faux témoignage au procès — Refus de la Cour d'appel d'admettre ce nouvel élément de preuve — Aucune erreur de droit de la Cour d'appel — Code criminel, S.R.C. 1970, chap. C-34, art. 610(1)d).

Il s'agit d'un pourvoi à l'encontre du refus de la Cour d'appel de la Colombie-Britannique d'admettre de nouveaux éléments de preuve dans l'appel qu'ont formé les appelants Palmer; ils attaquaient par là leur déclaration de culpabilité prononcée en Cour suprême de la Colombie-Britannique par le juge Macfarlane siégeant sans jury sur un acte d'accusation imputant un complot pour faire le trafic d'héroïne. Thomas Maxwell Duncan, John Albert Smith et Robert Porter, qui étaient désignés comme conspirateurs avec les Palmer dans le même acte d'accusation et qui ont été déclarés coupables au même procès, ont interjeté un pourvoi distinct fondé sur les mêmes moyens. (Voir [1980] 1 R.C.S. 783.)

Un des témoins importants cités par le ministère public, à l'enquête préliminaire et au procès, est un nommé Ford, un trafiquant d'héroïne reconnu et un individu de mauvaise réputation avec un casier judiciaire. Le juge du procès a accepté son témoignage qui a manifestement joué un rôle important sur l'issue du procès. Après le procès, Ford a affirmé dans une série de déclarations que son témoignage était faux, entièrement fabriqué, et qu'il avait été influencé par des menaces et des incitations, y compris la promesse de paiements d'argent par la police. Lorsque ces documents sont venus aux mains des conseillers juridiques des appelants, ils ont demandé à la Cour d'appel, en vertu de l'al. 610(1)*d*) du *Code criminel*, l'autorisation de produire ces nouveaux éléments de preuve sous forme d'affidavit. La Cour d'appel a rejeté la requête ainsi que les appels de tous les appelants qui soulevaient également d'autres moyens. Ce pourvoi est interjeté sur autorisation de cette Cour sur les deux questions suivantes:

1. Did the Court of Appeal of British Columbia err in refusing to allow the appellants to adduce fresh evidence before it based on the affidavits and statements of the principal Crown witness Frederick Thomas Ford who received $25,000 from the police "in payment for services" about a week after the trial judgment herein?

2. Did the trial judge err in rejecting the testimony of the appellant Douglas Garnet Palmer with respect to three incidents concerning the observed movements of Frederick Thomas Ford on July 18, 1972, November 8, 1972 and January 23, 1973, when the said Ford gave no evidence on those incidents and the appellant Palmer was not cross-examined thereon, and did the Court of Appeal err in not quashing the convictions accordingly?

Held: The appeal should be dismissed.

Parliament has given the Court of Appeal a broad discretion in s. 610(1)(*d*). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them. The following principles have emerged: (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial. (3) The evidence must be credible in the sense that it is reasonably capable of belief. (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. The approach thus taken follows that of this Court in *McMartin v. The Queen*, [1964] S.C.R. 484.

In the present case it was evident that the Court of Appeal applied the test of credibility and found the evidence tendered as to the validity of Ford's trial evidence to be wholly unworthy of belief. It therefore refused the motion and in so doing made no error in law which would warrant interference by this Court. Also, although it might not be necessary to do so in view of this conclusion, the view was expressed that the Court of Appeal was fully justified in reaching the conclusion it

1. La Cour d'appel de la Colombie-Britannique a-t-elle erré en refusant aux appelants le droit de lui soumettre de nouveaux éléments de preuve appuyés sur des affidavits et des déclarations du principal témoin du ministère public, Frederick Thomas Ford, à qui la police avait versé $25,000 «pour services rendus» environ une semaine avant le jugement de première instance en l'espèce?

2. Le juge du procès a-t-il erré en rejetant le témoignage de l'appelant Douglas Garnet Palmer à l'égard des faits et gestes de Frederick Thomas Ford, remarqués à trois reprises, les 18 juillet 1972, 8 novembre 1972 et 23 janvier 1973, incidents sur lesquels Ford n'a pas témoigné et l'appelant Palmer n'a pas été contre-interrogé? La Cour d'appel a-t-elle erré en n'annulant pas les condamnations en conséquence?

Arrêt: Le pourvoi est rejeté.

Par l'alinéa 610(1)*d*), le législateur a donné à la Cour d'appel un grand pouvoir discrétionnaire. On doit donner la prépondérance, dans cette disposition, à l'expression «l'intérêt de la justice» et il ne serait pas dans l'intérêt de la justice de permettre à un témoin, par la seule répudiation ou modification de ses dépositions au procès, de rouvrir des procès à volonté au détriment général de l'administration de la justice. Les demandes de cette nature sont fréquentes et les cours d'appel de diverses provinces se sont prononcées à leur égard. Les principes suivants s'en dégagent: (1) On ne devrait généralement pas admettre une déposition qui, avec diligence raisonnable, aurait pu être produite au procès, à condition de ne pas appliquer ce principe général de manière aussi stricte dans les affaires criminelles que dans les affaires civiles. (2) La déposition doit être pertinente, en ce sens qu'elle doit porter sur une question décisive ou potentiellement décisive quant au procès. (3) La déposition doit être plausible, en ce sens qu'on puisse raisonnablement y ajouter foi. (4) Elle doit être telle que si l'on y ajoute foi, on puisse raisonnablement penser qu'avec les autres éléments de preuve produits au procès, elle aurait influé sur le résultat. La façon dont on a abordé la question suit donc celle adoptée par cette Cour dans *McMartin c. La Reine*, [1964] R.C.S. 484.

En l'espèce, il est évident que la Cour d'appel a appliqué le critère de crédibilité et a jugé que la preuve soumise quant à la validité du témoignage de Ford au procès n'était absolument pas digne de foi. Elle a donc rejeté la requête et, ce faisant, n'a commis aucune erreur de droit qui justifierait l'intervention de cette Cour. Aussi, bien que ce ne soit peut-être pas nécessaire de le dire compte tenu de cette conclusion, on a exprimé l'opinion que la Cour d'appel était tout à fait justifiée de

did upon a consideration of all the evidence adduced on the motion before it and the evidence appearing in the trial transcripts.

With respect to the matter of affording protection to witnesses, in cases where the courts are, after careful examination, satisfied that only reasonable and necessary protection has been provided and that no prejudice or miscarriage of justice has resulted in consequence, they should not draw unfavourable inferences against the Crown, by reason only of this expenditure of public funds.

As to the second point raised in the appeal, the trial judge, as stated by McFarlane J.A. for the Court below, gave a careful explanation for his acceptance of the story of Ford and rejecting that of Douglas Palmer. The finding against the credibility of Palmer was made upon much more than the evidence of the three events in question. It was based upon a consideration of the whole of the evidence including the full examination and cross-examination of Palmer.

R. v. Stewart (1972), 8 C.C.C. (2d) 137; *R. v. Foster* (1977), 8 A.R. 1; *R. v. McDonald*, [1970] 3 C.C.C. 426; *R. v. Demeter* (1975), 25 C.C.C. (2d) 417; *McMartin v. The Queen*, [1964] S.C.R. 484, referred to.

APPEAL against the refusal of the Court of Appeal for British Columbia to admit fresh evidence in the appeal of the appellants Palmer against their conviction in the Supreme Court of British Columbia before Macfarlane J. sitting without a jury upon an indictment charging a conspiracy to traffic in heroin. Appeal dismissed.

Harry Walsh, Q.C., for the appellants.

Mark M. de Weerdt, Q.C., for the respondent.

The judgment of the Court was delivered by

McINTYRE J.—This is an appeal against the refusal of the British Columbia Court of Appeal to admit fresh evidence in the appeal of the appellants Palmer against their conviction in the Supreme Court of British Columbia before Macfarlane J. sitting without a jury upon an indictment charging a conspiracy to traffic in heroin. A separate appeal relying on the same grounds was taken by Thomas Maxwell Duncan, John Albert

conclure comme elle l'a fait après un examen de toute la preuve produite à l'occasion de la requête qu'on lui adressait et de la transcription des dépositions faites au procès.

Quant à la question d'accorder une protection aux témoins dans les affaires où, après un examen minutieux, les cours sont convaincues que l'on a seulement accordé une protection raisonnable et nécessaire et qu'aucun préjudice ou déni de justice n'en a résulté, elles ne devraient pas tirer de conclusions défavorables contre le ministère public du seul fait de cette utilisation de fonds publics.

Quant à la seconde question posée dans ce pourvoi, le juge du procès, comme l'a dit le juge McFarlane en Cour d'appel, a soigneusement expliqué pourquoi il acceptait la version de Ford et rejetait celle de Douglas Palmer. La conclusion à l'encontre de la crédibilité de Palmer était fondée sur bien plus que la preuve relative aux trois événements en question. Elle s'appuyait sur un examen de l'ensemble de la preuve, y compris l'interrogatoire et le contre-interrogatoire complets de Palmer.

Jurisprudence: *R. v. Stewart* (1972), 8 C.C.C. (2d) 137; *R. v. Foster* (1977), 8 A.R. 1; *R. v. McDonald*, [1970] 3 C.C.C. 426; *R. v. Demeter* (1975), 25 C.C.C. (2d) 417; *McMartin c. La Reine*, [1964] R.C.S. 484.

POURVOI à l'encontre du refus de la Cour d'appel de la Colombie-Britannique d'admettre de nouveaux éléments de preuve dans l'appel qu'ont formé les appelants Palmer qui attaquaient par là leur déclaration de culpabilité prononcée en Cour suprême de la Colombie-Britannique par le juge Macfarlane siégeant sans jury sur un acte d'accusation imputant un complot pour faire le trafic d'héroïne. Pourvoi rejeté.

Harry Walsh, c.r., pour les appelants.

Mark M. de Weerdt, c.r., pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE McINTYRE—Il s'agit d'un pourvoi à l'encontre du refus de la Cour d'appel de la Colombie-Britannique d'admettre de nouveaux éléments de preuve dans l'appel qu'ont formé les appelants Palmer; ils attaquaient par là leur déclaration de culpabilité prononcée en Cour suprême de la Colombie-Britannique par le juge Macfarlane siégeant sans jury sur un acte d'accusation imputant un complot pour faire le trafic d'héroïne.

Smith and Robert Porter who were named conspirators in the same indictment with the Palmers and who were convicted at the same trial. Although the appeals were heard together, these reasons will deal with the Palmers only.

The indictment dated November 24th, 1975, charged in count 1 a conspiracy to traffic in heroin between the 1st day of February 1969 and the 30th day of April 1975. This count is the only one in issue on this appeal. A preliminary hearing commenced in February of 1975, after a postponement from September 1974, because the witness Ford, of whom much more will be said, had then absented himself. The trial, which lasted several weeks, commenced on January 12, 1976. The appellants were found guilty on March 23, 1976.

One of the important witnesses called for the Crown, both at the preliminary hearing and at the trial, was Frederick Ford, referred to above, an admitted heroin trafficker and a disreputable character with a criminal record. His evidence was accepted by the trial judge and clearly played a significant part in the result. After the trial, Ford, in a series of declarations, asserted that his trial evidence was untrue, that it had been fabricated in its entirety, and that he had been influenced by threats and inducements, including the promise of payments of money, by the police. When this material came into the hands of the legal advisers of the appellants, they applied in the Court of Appeal to adduce this new evidence in affidavit form. The application was dismissed by the Court of Appeal and the appeals of all the appellants, which raised other grounds of appeal as well, were dismissed. This appeal is taken by leave of this Court upon two points which are set out hereunder:

1. Did the Court of Appeal of British Columbia err in refusing to allow the appellants to adduce fresh evidence before it based on the affidavits and statements of the principal Crown witness Frederick Thomas Ford who received $25,000.00 from the police "in payment for services" about a week after the trial judgment herein?

Thomas Maxwell Duncan, John Albert Smith et Robert Porter, qui étaient désignés comme conspirateurs avec les Palmer dans le même acte d'accusation et qui ont été déclarés coupables au même procès, ont interjeté un pourvoi distinct fondé sur les mêmes moyens. Bien que les pourvois aient été entendus ensemble, ces motifs ne portent que sur le cas des Palmer.

L'acte d'accusation daté du 24 novembre 1975 impute au premier chef un complot pour faire le trafic d'héroïne entre le 1er février 1969 et le 30 avril 1975. Seul ce chef est en litige dans ce pourvoi. Une enquête préliminaire a débuté en février 1975, après une remise accordée en septembre 1974, parce que le témoin Ford, dont on va longuement parler, était alors absent. Le procès qui a duré plusieurs semaines a commencé le 12 janvier 1976. Les appelants ont été déclarés coupables le 23 mars 1976.

Un des témoins importants cités par le ministère public, à l'enquête préliminaire et au procès, est Frederick Ford, susmentionné, un trafiquant d'héroïne reconnu et un individu de mauvaise réputation avec un casier judiciaire. Le juge du procès a accepté son témoignage qui a manifestement joué un rôle important sur l'issue du procès. Après le procès, Ford a affirmé dans une série de déclarations que son témoignage était faux, entièrement fabriqué, et qu'il avait été influencé par des menaces et des incitations, y compris la promesse de paiements d'argent par la police. Lorsque ces documents sont venus aux mains des conseillers juridiques des appelants, ils ont demandé à la Cour d'appel l'autorisation de produire ces nouveaux éléments de preuve sous forme d'affidavit. La Cour d'appel a rejeté la requête ainsi que les appels de tous les appelants qui soulevaient également d'autres moyens. Ce pourvoi est interjeté sur autorisation de cette Cour sur les deux questions suivantes:

1. La Cour d'appel de la Colombie-Britannique a-t-elle erré en refusant aux appelants le droit de lui soumettre de nouveaux éléments de preuve appuyés sur des affidavits et des déclarations du principal témoin du ministère public, Frederick Thomas Ford, à qui la police avait versé $25,000 «pour services rendus» environ une semaine avant le jugement de première instance en l'espèce?

2. Did the trial Judge err in rejecting the testimony of the appellant Douglas Garnet Palmer with respect to three incidents concerning the observed movements of Frederick Thomas Ford on July 18, 1972, November 8, 1972 and January 23, 1973 when the said Ford gave no evidence on those incidents and the appellant Palmer was not cross-examined thereon, and did the Court of Appeal err in not quashing the convictions accordingly?

The principal point argued in this Court was point 1. It will, of course, be seen at once that this point raises no question as to the conduct of the trial and attacks no determination made by the trial judge. The sole issue raised relates to the disposition made by the Court of Appeal.

Ford gave evidence both at the preliminary hearing and at the trial that in June of 1971 he had approached Douglas Palmer, whom he had known for some fifteen years, and asked for a job in the drug business. After some delay, he was introduced into the business and he worked with the Palmers in the trafficking of heroin during the period covered by the indictment. He said that on numerous occasions he had received bulk heroin from Douglas Palmer. It was then his task, with the assistance of others, to put the heroin into gelatin capsules and bundles of the capsules into glass containers and to bury the containers at locations, particulars of which he would give to Palmer. As the heroin was sold, Palmer, or others under his direction, were thus enabled to direct purchasers to the hidden heroin to complete the sales. During this period, Ford was paid for his services by Douglas Palmer.

Ford said that during the summer of 1972 he had employed his nephew to plant out caches of heroin for him. The nephew was caught by the police and Ford was able, by giving the police information which led to the arrest of one of his associates named DeRuiter, to procure the release of his nephew and have the prosecution dropped. It seems that it was this contact with the police which led Ford at or about that time to furnish information concerning the activities of the Palmers to the police.

Ford said that he received a call from Douglas Palmer on January 20, 1973, in which he was

2. Le juge du procès a-t-il erré en rejetant le témoignage de l'appelant Douglas Garnet Palmer à l'égard des faits et gestes de Frederick Thomas Ford, remarqués à trois reprises, les 18 juillet 1972, 8 novembre 1972 et 23 janvier 1973, incidents sur lesquels Ford n'a pas témoigné et l'appelant Palmer n'a pas été contre-interrogé? La Cour d'appel a-t-elle erré en n'annulant pas les condamnations en conséquence?

La principale question plaidée devant cette Cour est la question nº 1. Il appert clairement tout de suite, bien sûr, que cette question ne met pas en jeu la conduite du procès et n'attaque pas la décision rendue alors par le juge. Le seul point litigieux a trait à la décision de la Cour d'appel.

A l'enquête préliminaire et au procès, Ford a témoigné qu'en juin 1971 il s'était adressé à Douglas Palmer, qu'il connaissait depuis environ quinze ans, pour obtenir un boulot dans le commerce des stupéfiants. Quelque temps plus tard, il a commencé à travailler et, avec les Palmer, il a fait le trafic d'héroïne pendant la période visée dans l'acte d'accusation. Il a dit avoir reçu, à plusieurs occasions, de grandes quantités d'héroïne de Douglas Palmer. Sa tâche consistait alors, avec l'aide d'autres personnes, à verser l'héroïne dans des capsules de gélatine, à les mettre par poignées dans des contenants de verre qu'il enterrait à des endroits dont il donnait les coordonnées à Palmer. Ainsi à la vente, Palmer, ou d'autres personnes sous ses ordres, pouvaient indiquer aux acheteurs où l'héroïne était cachée pour compléter l'opération. Pendant cette période, Douglas Palmer payait Ford pour ses services.

Ford a déclaré que pendant l'été 1972 il avait retenu les services de son neveu pour «planquer» l'héroïne pour lui. Le neveu s'est fait surprendre par la police et Ford a pu obtenir la libération de son neveu et l'abandon de la poursuite en donnant à la police des renseignements qui ont mené à l'arrestation de l'un de ses associés nommé DeRuiter. Il semble que c'est cette rencontre avec la police qui a amené Ford, à cette date ou peu après, à lui fournir des renseignements sur les activités des Palmer.

Ford a dit avoir reçu un appel de Douglas Palmer le 20 janvier 1973; ce dernier lui a donné

instructed to get together all the heroin in his possession and to meet another member of the organization for the purpose of getting rid of the heroin all at once so a purchase of newer stock could be made. In compliance with these instructions, the heroin was disposed of at night by throwing it from a moving car in a garbage bag. When this was completed, Ford reported to Palmer who told him that he was fired. He gave evidence at trial of the conversation which passed between them on this occasion in these words:

> A. Well, I said "What do you mean?" He said, "Well, I found out that you are the one that set up De Ruiter for the bust" he said, "So you are fired." And I just said, you know, "I don't know what you are talking about." And then I said, "Well, what about my money you owe me?" and he said, "You are not getting any money." And I said, "Well, you know, you owe me the money" and he said, "Tough", you know.
>
> Q. How much money did he owe you at that time?
> A. Oh, 12,500 or something.
>
> Q. Did you ever receive that from him?
> A. No.
>
> Q. Was there any further conversation on that occasion when he terminated your services?
> A. Well, other than "If I ever find out for sure it was you . . .", you know, that's all. Other than that. I am lucky to be alive, that's all.
>
> Q. I am sorry, would you speak up?
> A. He said that I am lucky to be alive. If he finds out for sure that it's me that set up DeRuiter, I am in big trouble.

Ford continued trafficking independently until on January 6, 1975, he was shot in the street near his home. A police officer, one Steer, a member of the Vancouver City Police and not connected with the investigation of this case, attended at the scene of the shooting and had a conversation with Ford just before he was taken to hospital. Steer asked "Who shot you?". Ford replied "Pick up Doug Palmer". The officer then said "Did Palmer shoot you?". Ford said "Just pick up Doug Palmer". Ford was taken to hospital and while still in the emergency section had another conversation with a

instructions de ramasser toute l'héroïne en sa possession et de rencontrer un autre membre de l'organisation afin de s'en débarrasser immédiatement pour pouvoir acheter un nouveau stock. Conformément à ces instructions, ils se sont débarrassés de l'héroïne la nuit en la mettant dans un sac à déchets qu'ils ont jeté d'une voiture en marche. Ceci fait, Ford s'est présenté chez Palmer qui lui a dit qu'il était renvoyé. Au procès, il a rendu le témoignage suivant sur leur conversation à cette occasion:

> [TRADUCTION] R. Eh bien, j'ai dit «Que veux-tu dire?» Il a dit, «Eh bien, j'ai découvert que c'est toi qui a monté le coup contre De Ruiter pour le faire pincer» il a dit, «Donc tu est renvoyé.» Et j'ai seulement répondu, vous savez «Je ne sais pas de quoi tu parles.» Et j'ai dit ensuite, «Bon, et l'argent que tu me dois?» Et il a dit, «Tu n'auras pas d'argent.» Et j'ai dit, «Eh bien, tu sais, tu me dois l'argent», et il a dit «C'est bien de valeur», vous savez.
>
> Q. Combien d'argent vous devait-il à l'époque?
> R. Oh, 12,500 ou à peu près.
>
> Q. Vous a-t-il remis ce montant?
> R. Non.
>
> Q. Avez-vous parlé d'autres choses à cette occasion lorsqu'il vous a renvoyé?
> R. Eh bien, à part de «Si jamais j'apprends que c'est vraiment toi . . .», vous savez, c'est tout. A part ça. Je suis chanceux d'être vivant, c'est tout.
>
> Q. Excusez-moi, pouvez-vous parlez plus fort?
> R. Il a dit que j'étais chanceux d'être vivant. Si jamais il apprend avec certitude que c'est moi qui a monté le coup contre DeRuiter, j'aurais de graves ennuis.

Ford a continué à faire seul le trafic de stupéfiants jusqu'à ce que le 6 janvier 1975, il soit atteint par une balle dans la rue près de chez lui. Steer, un agent de police de la ville de Vancouver, qui était sans lien avec l'enquête en l'espèce, est venu sur les lieux de la fusillade. Il a eu une conversation avec Ford juste avant qu'on ne l'emmène à l'hôpital. Steer a demande [TRADUCTION] «Qui a tiré sur vous?». Ford a répondu [TRADUCTION] «Arrêtez Doug Palmer». L'agent a alors dit [TRADUCTION] «Est-ce Palmer qui a tiré sur vous?». Ford a dit [TRADUCTION] «Arrêtez simple-

Vancouver police officer named Caros. The version given by the police officer follows:

CAROS: "Who shot you?"

FORD: "I don't know."

CAROS: "You mentioned a man at the scene of the shooting."

FORD: "Yes, Doug Palmer. He didn't do it, he's too chicken. He hired someone."

CAROS: "Why did he do it?"

FORD: "Guess he didn't like me."

CAROS: "How many men involved?"

FORD: "One."

CAROS: "Did he have two guns?"

FORD: "Yes."

CAROS: "Did you see a car?"

FORD: "No."

CAROS: "What did he look like?"

FORD: "He had a dark mask, a toque and a dark coat on."

CAROS: "Did you know him?"

FORD: "No."

I consider it significant that moments after the shooting Ford identified Palmer as either his assailant or the instigator of the attack. The circumstances of the shooting, the earlier dismissal from the organization coupled with the disagreement about money, furnish a motive for Ford's later conduct.

After Ford's dismissal by Palmer, he agreed to testify for the Crown. The precise date of such agreement is unclear. He gave evidence at the preliminary hearing and at the trial, and on each occasion his evidence was essentially the same. He was cross-examined closely on both occasions. He admitted that in return for his agreement to give evidence against Douglas Palmer, and for the actual giving of the evidence, he had been promised immunity from prosecution on certain charges which were outstanding against him and protection for himself and his family. To that end he said he had been paid an allowance of $1,200 per month up to the time of the trial. He said the

ment Doug Palmer». Ford a été amené à l'hôpital et alors qu'il était encore à l'urgence, il a eu une autre conversation avec un agent de la police de Vancouver nommé Caros. Voici la version relatée par l'agent de police:

[TRADUCTION] CAROS: «Qui a tiré sur vous?»

FORD: «Je ne sais pas.»

CAROS: «Vous avez mentionné un homme sur les lieux de la fusillade.»

FORD: «Oui, Doug Palmer. Il ne l'a pas fait, il est trop froussard. Il a payé quelqu'un pour le faire.»

CAROS: «Pourquoi a-t-il fait cela?»

FORD: «J'imagine qu'il ne m'aime pas.»

CAROS: «Combien d'hommes sont dans le coup?»

FORD: «Un.»

CAROS: «Avait-il deux armes?»

FORD: «Oui.»

CAROS: «Avez-vous vu une voiture?»

FORD: «Non.»

CAROS: «De quoi avait-il l'air?»

FORD: «Il portait un masque foncé, une toque et un manteau foncé.»

CAROS: «Le connaissez-vous?»

FORD: «Non.»

Je considère significatif que peu après la fusillage Ford ait identifié Palmer comme son assaillant ou comme l'instigateur de l'attaque. Les circonstances de la fusillade, le renvoi antérieur de l'organisation et le désaccord sur l'argent, fournissent un motif pour la conduite subséquente de Ford.

Après son renvoi par Palmer, Ford a accepté de témoigner pour le ministère public. La date précise de cette entente n'est pas claire. Il a témoigné à l'enquête préliminaire et au procès et à chaque occasion son témoignage est essentiellement le même. Il a subi dans les deux cas un contre-interrogatoire serré. Il a admis qu'en retour de son consentement à témoigner contre Douglas Palmer et de son témoignage proprement dit, on lui avait promis l'immunité pour certaines accusations qui pesaient contre lui ainsi que la protection de sa famille et la sienne. Il a dit qu'à cette fin on lui a versé une allocation de $1,200 par mois jusqu'au moment du procès. Il a dit que la police avait

police had agreed as well to provide for relocation and maintenance expenses after the trial for himself and his family until they were re-established in life and secure from danger.

The defence was a flat denial by Palmer of any involvement with drugs and with Ford. It was asserted that Ford's evidence was completely fabricated.

At the outset of the appeal, in which various other grounds were raised, the appellants moved under s. 610(1)(*d*) of the *Criminal Code* to have the Court receive evidence in the form of declarations from Douglas Palmer, Donald Palmer, Edith Twaddell and Thomas Ford. Section 610(1)(*d*) of the *Criminal Code* is set out hereunder:

> 610. (1) For the purposes of an appeal under this Part the court of appeal may, where it considers it in the interests of justice,
>
> . . .
>
> (*d*) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

On this motion, the Court of Appeal had before it the various declarations referred to above and in addition affidavits in reply from Crown counsel and several police officers including affidavits from officers of the Vancouver Police Force concerning the words spoken by Ford after the shooting incident. Upon a consideration of this material, the Court refused the motion and disposed of the other grounds raised and dismissed the appeal.

The argument in this Court centered on the declarations made by Ford and the Crown affidavits in reply. The declaration of Edith Twaddell is of no significance and requires no further mention. The other declarations produced in support of the motion are largely explanatory of the events leading to the production of Ford's documents. Ford made four declarations dated, respectively, April 20, 1976, May 21, 1976, October 7, 1976, and October 13, 1976. In his first declaration, he said that he received $25,000 in cash from the R.C.M.P. in April 1976 for services rendered which he described as testifying in the Palmer drug conspiracy trial. He exhibited a receipt to the

également accepté de payer ses frais de réinstallation et d'entretien et ceux de sa famille après le procès jusqu'à ce qu'ils soient repartis dans la vie et à l'abri du danger.

En défense, Palmer a formellement démenti avoir eu quelque rapport avec Ford et avec le commerce des stupéfiants. On y a affirmé que le témoignage de Ford était complètement fabriqué.

Au début de l'appel, où ils invoquaient plusieurs autres moyens, les appelants ont présenté une requête conformément à l'al. 610(1)*d*) du *Code criminel* pour que la Cour reçoive les dépositions de Douglas Palmer, de Donald Palmer, d'Edith Twaddell et de Thomas Ford faites sous forme de déclarations. Voici le texte de l'al. 610(1)*d*) du *Code criminel*:

> 610. (1) Aux fins d'un appel prévu par la présente Partie, la cour d'appel peut, lorsqu'elle l'estime dans l'intérêt de la justice,
>
> . . .
>
> *d*) recevoir la déposition, si elle a été offerte, de tout témoin, y compris l'appelant, qui est compétent pour témoigner mais non contraignable;

A l'audition de cette requête, la Cour d'appel avait devant elle les différentes déclarations susmentionnées et, en plus, les affidavits produits en réponse par le substitut du procureur général et plusieurs agents de police, y compris des agents de la police de Vancouver, sur ce qu'avait dit Ford après la fusillade. Après avoir examiné ces documents, la Cour a refusé la requête, elle a considéré les autres moyens invoqués et a rejeté l'appel.

Les plaidoiries devant cette Cour sont centrées sur les déclarations faites par Ford et les affidavits du ministère public en réponse. La déclaration d'Edith Twaddell ne revêt aucune importance et il n'est pas nécessaire d'en parler davantage. Les autres déclarations produites à l'appui de la requête viennent surtout expliquer les événements qui ont mené à la production des documents de Ford. Ford a fait quatre déclarations datées, respectivement, des 20 avril 1976, 21 mai 1976, 7 octobre 1976 et 13 octobre 1976. Dans la première déclaration, il dit avoir reçu $25,000 comptant de la GRC en avril 1976 pour services rendus; il s'agissait, a-t-il dit, de son témoignage au procès

declaration prepared by the R.C.M.P. which he had signed. It was on a printed form acknowledging the receipt of $25,000 from R.C.M.P. Inspector Eyman. The printed words "Payment in full for services rendered" had been struck out and the words "Payment for services" had been written in.

In his second declaration, he referred to and verified a hand written statement which he had signed dated May 21, 1976, in these terms:

May 21, 1976.

To whom it may concern

Any evidence I gave at the Douglas Palmer trial in 1976 was not of my own free will. I was pressured into saying what I said and also promised payment of $60,000 dollars. I never had any drug dealings with Doug Palmer, Don Palmer, Tom Duncan or Jake Smith. Any drug dealings I had were on my own and had nothing whatsoever to do with the above mentioned names. In April 1976 I rec. $25,000 Cash from the R.C.M.P.

Fred Ford

Also I had dealings with Roy Twaddell and he asked me to introduce him to Doug Palmer and I said I knew nothing about him and as far as I know he only dealt with me in drugs until he went to jail. Fred Ford.

Witnessed: J. Wood
J. B. Clarke

In his third declaration dated October 7, 1976, he swore to the truth of another statement he had prepared and which bears date October 7, 1976, and which is in these terms:

Oct. 7/1976

To whom it may concern.

My name is Frederick Thomas Ford of Vanc. B.C. Everything I am about to write in this statement is the truth and I am writing it of my own free will without any threats or inducements from anyone! I started dealing in Heroin (drugs) in 1972. My nephew worked for me burying drugs and got caught, I went to the police and made a deal to turn someone in if they gave him a stay of proceedings (which they did). I talked with R.C.M.P. Staff Sgt. Jim Locker. He asked me if I knew a person named Doug Palmer, I said Yes and he said we

de Palmer sur l'accusation de complot pour faire le trafic de stupéfiants. Il a produit avec sa déclaration un reçu rempli par la GRC et signé de sa main. Il s'agit d'une formule imprimée dans laquelle il reconnaît avoir reçu $25,000 de l'inspecteur Eyman de la GRC. Les mots imprimés [TRADUCTION] «Paiement complet pour services rendus» y sont remplacés par les mots [TRADUCTION] «Paiement pour services».

Dans sa deuxième déclaration, il mentionne et confirme une déclaration écrite à la main qu'il a signée le 21 mai 1976, dont voici le texte:

[TRADUCTION] Le 21 mai 1976.

A qui de droit

Le témoignage que j'ai rendu au procès de Douglas Palmer en 1976 n'était pas volontaire. J'ai été contraint de dire ce que j'ai dit et on m'a également promis de me verser $60,000. Je n'ai jamais fait le trafic de stupéfiants avec Doug Palmer, Don Palmer, Tom Duncan ou Jake Smith. Tout trafic de stupéfiants que j'ai fait, c'est seul que je l'ai fait et je n'ai absolument rien à voir avec les personnes susmentionnées. En avril 1976 j'ai reçu $25,000 comptant de la G.R.C.

Fred Ford

J'ai également fait du trafic avec Roy Twaddell et il m'a demandé de le présenter à Doug Palmer et je lui ai dit que je ne le connaissais pas et, autant que je sache, il n'a fait le trafic de stupéfiants qu'avec moi jusqu'au moment de son incarcération. Fred Ford.

Témoins: J. Wood
J. B. Clarke

Dans sa troisième déclaration datée du 7 octobre 1976, il affirme sous serment la véracité d'une autre déclaration qu'il a rédigée et qui est datée du 7 octobre 1976 et dont voici le texte:

[TRADUCTION] Le 7 octobre 1976

A qui de droit.

Je m'appelle Frederick Thomas Ford de Vancouver, C.-B. Tout ce que je vais écrire dans cette déclaration est vrai et je l'écris de mon propre chef sans aucune menace ou incitation! J'ai commencé à faire le trafic d'héroïne (stupéfiants) en 1972. Mon neveu qui travaillait pour moi, enterrait des stupéfiants et s'est fait prendre, je suis allé à la police et j'ai proposé de dénoncer quelqu'un s'ils suspendaient les poursuites contre lui (ce qu'ils ont fait). J'ai parlé avec Jim Locker, un sergent d'état major de la G.R.C. Il m'a demandé si

want him for dealing in drugs and we will let you deal in drugs without getting caught if you can help us nail Doug Palmer. I didn't really know a thing about Doug Palmer but I saw an easy way for me to stay on the street and make money. I kept telling them different stories about Palmer none of them true! In Jan. 1975 I was shot in front of my home 3475 Triumph St. The R.C.M.P. (Neil McKay) came and saw me at the hospital he said it was a hired killer paid for by Doug Palmer. I knew this was not so but in order for me to get their protection I played along with what they said. In Feb. or Mar. 1975 I went to a Preliminary hearing concerning a drug case against Doug Palmer and some assoc. I got up on the stand and made up a bunch of lies only because I didn't want to go to jail also I was promised a large cash settlement new I.D. and transportation to anywhere I wanted to go. Naturally I would not turn this down.

The R.C.M.P. kept me and provided myself and family with $1200.00 per month to live on. In Jan. 1976. They took me to the Plaza 500 Hotel on 12th Ave Vanc. There Staff Sgt. Almrud, Neil McKay and other R.C.M.P. officers kept harrassing me and threatening me to get on the stand and say some things about Doug Palmer. By then I was in so deep I had to go along. Niel McKay said he could not tell me personally how much I would get but he told Corp. Hoivik to tell me I would get $60,000 some I.D. and relokate me. The Prosecutor Art McLennan and Neil McKay came to see me and threatened me with all kinds of charges if I did not give evidence at the trial of Doug Palmer. They said make sure I brought up Doug Palmer's name any chance I got. So I gave the same evidence was before (All Lies) After the trial they took me and my family to Victoria B.C. At the end of April 1976 they took me to there office on Heather St. and offered me $25,000 so I said no. Finally I went to the Bank of Commerce (Main Branch) Hastings St. with Inspector Elman and got $25,000. He said I would have to wait for the other $35,000 and take it up with Neil McKay when he got back from holidays. I'm still waiting! In regards to "Roy Twaddell" I sold him drugs for months and months. He owed me $2,000 I had him beat up to make him pay me. It was the day after that I was shot. I believe he had it done! There is no proof, but I heard through the grape vine it was him! He couldn't possibly have been getting drugs from anyone else as he had no money. I had to give him credit every time he got heroin off of me. I believe like me he was scared and promised lots of things

je connaissais une personne du nom de Doug Palmer, j'ai dit oui et il m'a dit qu'il le recherchait pour trafic de stupéfiants et qu'on me laisserait faire le trafic de stupéfiants sans m'arrêter si je les aidais à pincer Doug Palmer. Je ne savais vraiment rien de Doug Palmer mais j'ai vu là un moyen facile de rester libre et faire de l'argent. J'ai continué à leur raconter des histoires différentes sur Palmer, dont aucune n'était vraie! En janvier 1975 j'ai été blessé par un coup de feu devant ma maison 3475, rue Triumph. La G.R.C. (Neil McKay) est venu me voir à l'hôpital et il a dit que c'était un tueur à gages payé par Doug Palmer. Je savais que ce n'était pas vrai mais afin d'obtenir leur protection j'ai opiné à ce qu'ils disaient. En février ou mars 1975 je suis allé à une enquête préliminaire sur une affaire de stupéfiants visant Doug Palmer et compagnie. Je suis allé à la barre des témoins et j'ai inventé un tas de mensonges seulement parce que je ne voulais pas aller en prison et aussi parce qu'on m'avait promis un paiement comptant important, de nouveaux papiers d'identité et mon transport où je voudrais. Naturellement, je ne pouvais pas refuser.

La G.R.C. m'a pris sous sa protection et a versé une allocation d'entretien de $1,200 par mois pour ma famille et moi-même. En janvier 1976 ils m'ont amené à l'hôtel Plaza 500, sur la 12e av. à Vancouver. Là le sergent d'état major Almrud, Neil McKay et d'autres agents de la G.R.C. m'ont systématiquement harcelé et menacé pour que je témoigne contre Doug Palmer. J'étais alors tellement impliqué que j'ai dû céder. Neil McKay a dit qu'il ne pouvait m'informer personnellement du montant que je recevrais mais il a demandé au caporal Hoivik de me dire que je recevrais $60,000, des papiers d'identité et une réinstallation. Art McLennan, l'avocat de la poursuite, et Neil McKay sont venus me voir et m'ont menacé de toutes sortes d'accusations si je ne témoignais pas au procès de Doug Palmer. Ils m'ont demandé de prononcer le nom de Doug Palmer aussi souvent que je le pouvais. J'ai donc rendu le même témoignage qu'auparavant (rien que des mensonges). Après le procès ils m'ont amené avec ma famille à Victoria, C.-B. A la fin d'avril 1976 ils m'ont amené à leur bureau rue Heather et m'ont offert $25,000 et j'ai refusé. Finalement, je suis allé à la Banque de Commerce (succursale principale), rue Hastings, avec l'inspecteur Elman et j'ai reçu $25,000. Il m'a dit que je devrais attendre pour le solde de $35,000 et de le réclamer à Neil McKay à son retour de vacances. J'attends toujours! En ce qui concerne «Roy Twaddell» je lui ai vendu des stupéfiants pendant des mois et des mois. Il me devait $2,000. Je l'ai fait tabasser pour qu'il me paie. C'est le lendemain qu'on m'a tiré dessus. Je crois que c'est lui qui l'a fait! Il n'y a aucune preuve,

to induce him to take the stand against Doug Palmer. The Police (R.C.M.P.) told me time and again they would do anything to nail Doug Palmer.

This Statement is all true—

His final declaration dated October 13, 1976, contains serious charges against the police and Crown counsel. It takes the form of answers to a series of questions put to him in writing by solicitors acting for the appellants in the matter. The questions were not leading in nature, they merely directed Ford's attention to matters and incidents that he had apparently raised. Since the answers are contained in the declaration, and provide such evidence as the declaration is capable of giving, I have omitted the questions. I reproduce the declaration hereunder:

CANADA
PROVINCE OF
BRITISH COLUMBIA

IN THE MATTER OF FREDERICK THOMAS FORD AND DONALD PALMER, DOUGLAS GARNET PALMER, THOMAS DUNCAN, JOHN ALBERT SMITH, ROBERT PORTER AND CLIFFORD LUTHALA

TO WIT:

I, FREDERICK THOMAS FORD, of the City of Vancouver, in the Province of British Columbia, DO SOLEMNLY DECLARE:

1) I think I met Twaddell late 1973 or early 1974. Sold him drugs of and on for 1 yr. Was introduced to him through Oscar Hansen on the 1900 Turner St. I sold him drugs on credit!

2) Neil McKay and Art Mclennan [Crown counsel] came to the Plaza 500 Hotel in January 1976 and told me I had better testify at Doug Palmer's trial or I would have so many charges against me I would never see day light. Also they said you'll be killed as soon as you get in the Pen (jail). Also they said to use Doug P. name every chance I got!

mais la rumeur veut que ce soit lui! Il n'aurait pas pu obtenir de stupéfiants de quelqu'un d'autre puisqu'il n'avait pas d'argent. Je devais lui faire crédit chaque fois qu'il me prenait de l'héroïne. Je crois que, comme à moi, on lui a fait peur et qu'on lui a promis beaucoup de choses pour l'inciter à témoigner contre Doug Palmer. La police (G.R.C.) m'a dit maintes et maintes fois qu'elle ferait n'importe quoi pour pincer Doug Palmer.

Cette déclaration est entièrement vraie—

Sa dernière déclaration datée du 13 octobre 1976 contient de sérieuses accusations contre la police et le substitut du procureur général. Elle se présente sous forme de réponses à une série de questions que lui ont posées les procureurs représentant les appelants en l'espèce. Les questions ne sont pas de nature suggestive, elles ne font qu'attirer l'attention de Ford sur des points et des incidents qu'il avait apparemment soulevés. Puisque les réponses se trouvent dans la déclaration et fournissent toute la preuve que la déclaration est susceptible de donner, j'ai omis les questions. Je reproduis ci-après la déclaration:

[TRADUCTION]
CANADA
PROVINCE DE LA
COLOMBIE-BRITANNIQUE

DANS L'AFFAIRE DE FREDERICK THOMAS FORD ET DONALD PALMER, DOUGLAS GARNET PALMER, THOMAS DUNCAN, JOHN ALBERT SMITH, ROBERT PORTER ET CLIFFORD LUTHALA

SAVOIR:

Je, FREDERICK THOMAS FORD, de la ville de Vancouver, province de la Colombie-Britannique, DÉCLARE SOLENNELLEMENT:

1) Je crois avoir rencontré Twaddell à la fin de 1973 ou au début de 1974. Lui ai vendu occasionnellement des stupéfiants pendant un an. Lui ai été présenté par Oscar Hansen au 1900, rue Turner. Je lui ai vendu des stupéfiants à crédit!

2) Neil McKay et Art Mclennan [substitut du procureur général] sont venus à l'hôtel Plaza 500 en janvier 1976 et m'ont dit que j'avais intérêt à témoigner au procès de Doug Palmer sinon je devrais répondre à tellement d'accusations que je ne verrais plus la lumière du jour. Ils m'ont dit également que je serai tué dès que je me retrouverai en taule (prison). Ils m'ont dit également d'utiliser le nom de Doug P. chaque fois que je le pouvais!

3) They said not to mention money promised only to answer that I would be relocated elsewhere not to elaborate any further. This was said to me many times.

4) They came to me in Jan. 1976, at Plaza 500 and showed me pictures of Doug P., his brother, Roy Dorn, Tom Duncan, and many others and the same thing as before. Kept insisting I take stand and give evidence against Doug P. They said they really wanted him.

5) It was in 1975 Jan. I was shot! They put me into protective custody. I was really scared! I would have done or said almost anything at that point. They said they would pay me $25,000 and relocate me. I agreed! They are—Neil McKay and Art Mclennan.

6) Stayed at Plaza 500 1 wk. before and 1 wk. after. Corporal Art Hoivik was instructed to make sure I read transcripts and to memorize. He read me questions and I answered them.

7) Neil McKay came to see me after and kept on insisting I testify or I would be charged with many charges. He kept saying Doug P. had me shot and it was my only way to get even.

8) My nerves were shot. So the R.C.M.P. on Neil McKay's orders went to a doctor and get me sleeping pills (I was taking 3 at once) also I had codine pills 1 wk. before and 1 wk. after trial.

9) Same as question (2).

10) I had 2 robbery and poss. jewellery against me they said these would be dropped. But if I did not testify I would be charged with alot more than that!

11) Art Mclennan came to see me 2 or three times at Plaza 500. He also said I had no choice but to testify at Doug P. trial. He said you will make money and be clear of all charges. If you don't testify you will have many charges against you.

12) Neil McKay and Art Mclennan both told me I would be paid the date after I gave my evidence!

13) After I gave my evidence Neil McKay Art Hoivik and other R.C.M.P. officers were in room with me. They all said we have got Palmer for sure now.

14) While at Plaza 500 I told Staff Sgt. Almrud I would not testify for $25,000. He said how much do you

3) Ils m'ont dit de ne pas mentionner l'argent qui m'était promis, de simplement dire qu'on m'installerait ailleurs et de ne pas élaborer davantage. Cela m'a été répété plusieurs fois.

4) Ils sont venus me voir en janvier 1976, au Plaza 500 et m'ont montré des photos de Doug P., de son frère, de Roy Dorn, de Tom Duncan, et de beaucoup d'autres et la même chose qu'auparavant. Même insistance pour que j'aille témoigner contre Doug P. Ils ont dit qu'ils le voulaient vraiment.

5) C'était en janvier 1975. On m'a tiré dessus! Ils m'ont placé en détention par mesure de protection. J'avais vraiment peur! J'aurais fait ou dit presque n'importe quoi à ce moment-là. Ils ont dit qu'ils me verseraient $25,000 et me réinstalleraient. J'ai accepté! Ils, c'est-à-dire Neil McKay et Art Mclennan.

6) Suis demeuré au Plaza 500 une semaine avant et une semaine après. Le caporal Art Hoivik avait reçu instruction de s'assurer que je lise les transcriptions et que je les apprenne par cœur. Il me lisait les questions et j'y répondais.

7) Neil McKay est venu me voir par la suite et a encore insisté pour que je témoigne sinon plusieurs accusations seraient portées contre moi. Il répétait toujours que Doug P. m'avait fait descendre et que c'était ma seule chance d'être quitte.

8) J'étais à bout de nerfs. Aussi, la G.R.C. sur les ordres de Neil McKay est allée voir un médecin et a obtenu des somnifères (j'en prenais 3 à la fois) j'ai également pris des pilules de codéine une semaine avant et une semaine après le procès.

9) Voir la question 2).

10) Deux accusations de vol qualifié et de possession de bijoux pesaient contre moi et ils ont dit qu'ils n'y donneraient pas suite. Mais si je ne témoignais pas je serais accusé de beaucoup plus que cela!

11) Art Mclennan est venu me voir deux ou trois fois au Plaza 500. Il m'a également dit que je n'avais pas le choix, que je devais témoigner au procès de Doug P. Il m'a dit que je ferai de l'argent et serai libre de toute accusation. Si je ne témoignais pas plusieurs autres accusations seraient portées contre moi.

12) Neil McKay et Art Mclennan m'ont dit tous les deux que je serais payé le lendemain de mon témoignage!

13) Après mon témoignage, Neil McKay, Art Hoivik et d'autres agents de la G.R.C. étaient dans une pièce avec moi. Ils ont tous dit que maintenant Palmer était bel et bien coincé.

14) Alors que nous étions au Plaza 500 j'ai dit au sergent d'état major Almrud que je ne témoignerais pas

want? I said $60,000. He said I do not have the authority to authorize it, I'll be back later with answer. He came back a couple of hours later and said okay you can have $60,000 if you give evidence, Art Hoivik was there at the time. He also told me Neil McKay said $60,000 but for me not to mention money on stand.

15) Neil McKay told Corp. Hoivik to tell me about money as if he told me himself and was asked directly on stand about money and me he would have to answer truthfully, but if someone else told me he could say I never talked with Mr. Ford regarding any monies.

16) Same as No. (14).

17) Art Mclennan gave the transcripts to Neil McKay and he gave them to me. They both said to read trans. and to be more specific!

18) Neil McKay Art Mclennan and every R.C.M.P. officer I came in contact with kept saying I should testify against D. Palmer.

19) As I've said before—I was in 24 hr. contact with R.C.M.P. they all kept at me to testify and nail D. Palmer.

20) Went to Heather St. as it is main office. Inspector Ehman was there. He took me to Main Branch of C. Imperial Commerce on Hastings. Signed money draft and I was paid right in Bank. Cash and travellers cheques. I told him I was to get $60,000 not $25,000. He said he was not aware of this but to take it up with Neil McKay and Inspector White when they returned from holidays in 2 wks. Which I did. They said they were sorry but Ottawa would not pay anymore than $25,000. I'm still waiting for my other $35,000.00.

21) Met White after I was shot. He said in his office that any deals I was to make would be through Neil McKay.

22) Have telephoned Art Mclellan and he said he told R.C.M.P. to pay me the other $35,000. He can't understand why they haven't kept up there part of bargain!

23) Whenever I refer to D. Palmer or Doug P. in this statutory declaration I am in fact referring to Douglas Palmer.

AND I make this solemn declaration, conscientiously believing it to be true and knowing that it is of the same

pour $25,000. Il m'a dit combien voulez-vous? J'ai répondu $60,000. Il m'a dit qu'il n'avait pas le pouvoir de l'autoriser, mais qu'il reviendrait plus tard avec une réponse. Il est revenu environ deux heures plus tard et a dit que c'était d'accord, que j'aurais $60,000 si je témoignais, Art Hoivik était présent à ce moment-là. Il m'a également dit que Neil McKay avait dit $60,000 mais que je ne devais pas mentionner d'argent à la barre des témoins.

15) Neil McKay a dit au caporal Hoivik de me dire ce qu'il en était de l'argent parce que, s'il me le disait lui-même et qu'on lui posait une question directe à la barre des témoins sur l'argent et moi, il devrait répondre la vérité, mais si quelqu'un d'autre me le disait il pourrait dire qu'il n'avait jamais parlé d'argent avec M. Ford.

16) Voir le nº 14).

17) Art Mclennan a donné les transcriptions à Neil McKay qui me les a remises. Ils m'ont tous les deux dit de les lire et d'être plus précis!

18) Neil McKay, Art Mclennan et chaque agent de la G.R.C. avec lesquels j'ai été en contact ont dit avec insistance que je devrais témoigner contre D. Palmer.

19) Comme je l'ai déjà dit—j'étais en rapport avec la G.R.C. 24 heures sur 24, ils étaient tous après moi pour que je témoigne et qu'ils puissent pincer D. Palmer.

20) Suis allé rue Heather puisque c'est leur bureau principal. L'inspecteur Ehman y était. Il m'a amené à la succursale principale de la Banque Impériale de Commerce rue Hastings. Signature des traites et j'ai été payé à la banque. Argent comptant et chèques de voyage. Je lui ai dit que je devais recevoir $60,000 et non pas $25,000. Il m'a dit qu'il n'était pas au courant mais de le réclamer à Neil McKay et à l'inspecteur White à leur retour de vacances dans deux semaines. C'est ce que j'ai fait. Ils ont dit qu'ils étaient navrés mais qu'Ottawa ne paierait pas plus de $25,000. J'attends toujours mes $35,000.

21) Ai rencontré White après la fusillade. Il m'a dit, dans son bureau, que pour toute entente que je voulais faire je devais passer par Neil McKay.

22) J'ai téléphoné à Art Mclennan et il a dit qu'il avait demandé à la G.R.C. de me verser le solde de $35,000. Il ne peut pas comprendre pourquoi elle n'a pas respecté son engagement!

23) Lorsque je parle de D. Palmer ou de Doug P. dans cette déclaration je veux dire en fait Douglas Palmer.

JE fais cette déclaration solennelle croyant en toute conscience qu'elle est vraie et sachant qu'elle a la même

force and effect as if made under oath and by virtue of the "Canada Evidence Act".

DECLARED before me at the City of Vancouver, in the Province of British Columbia, this 13th day of October, A.D. 1976.

"Fred Ford"

Frederick Thomas Ford

" "

A commissioner for taking
Affidavits for British Columbia

In reply to this motion, the Crown filed extensive material. Arthur MacLennan, Crown counsel, denied, in his affidavit, all improprieties alleged by Ford. He swore that he saw Ford in the Plaza Hotel only once. They had an interview lasting three or four minutes during which he showed Ford some photographs and left a transcript of Ford's evidence taken at the preliminary hearing so any mistakes could be corrected. He explained his actions regarding money in paras. 6, 7 and 8 in these words:

6. THAT I at no time, nor did Sgt. McKay at any time in my presence, say to Ford that he would receive $25,000.00 or any sum whatsoever, nor that Ford would be paid the day after he gave his evidence, or at any time;

7. THAT in or about the month of May 1976, Ford telephoned me to request that I assist him in obtaining a further $35,000.00 from the RCM Police. At that time I had become aware that Ford had already received $25,000.00 in lieu of the re-location arrangements to which he had testified at the trial. I told Ford that notwithstanding he had himself elected after the trial to receive $25,000.00 instead of the re-location he had been promised, I had already tried to get for him some additional money because I felt he might come to harm if he remained in the Vancouver vicinity; that a lump sum payment totalling $60,000.00 was perhaps not excessive to keep him out of danger until he could establish himself elsewhere. I also informed Ford on that occasion that a superintendent of the RCM Police had refused to recommend payment of any further money as considered Ford's insistence on a further payment to be close to blackmail. Ford replied that he would never try to blackmail the RCMP; that he had already given his evidence and was not about to change that;

force et le même effet que si elle était faite sous serment en vertu de la "Loi sur la preuve au Canada".

DÉCLARATION faite devant moi en la ville de Vancouver, province de la Colombie-Britannique, ce 13 octobre 1976.

"Fred Ford"

Frederick Thomas Ford

" "

Commissaire à l'assermentation pour la Colombie-Britannique

En défense à cette requête, le ministère public a déposé une somme de documents. Arthur MacLennan, le substitut du procureur général, a nié dans son affidavit toutes les manœuvres incorrectes alléguées par Ford. Il a affirmé sous serment n'avoir vu Ford à l'hôtel Plaza qu'une fois. Ils ont eu un entretien de trois ou quatre minutes au cours duquel il lui on montré des photographies et lui a laissé une transcription du témoignage qu'il avait fait à l'enquête préliminaire afin que toute erreur puisse être corrigée. Dans les paragraphes 6, 7 et 8, il a expliqué sa façon d'agir au sujet de l'argent:

[TRADUCTION] 6. QUE je n'ai jamais dit à Ford, pas plus que le sergent McKay en ma présence, qu'il recevrait $25,000 ou quelque autre somme d'argent, ni qu'il serait payé le lendemain de son témoignage ou à un autre moment;

7. QUE pendant le mois de mai 1976, ou vers ce moment, Ford m'a téléphoné pour me demander de l'aider à obtenir un montant supplémentaire de $35,000 de la GRC. A ce moment, je savais que Ford avait déjà reçu $25,000 à la place du paiement des frais de réinstallation au sujet desquels il avait témoigné au procès. J'ai dit à Ford que, bien qu'il ait lui-même choisi de recevoir $25,000 après le procès au lieu de la réinstallation qu'on lui avait promise, j'avais déjà essayé d'obtenir pour lui une somme d'argent additionnelle parce que je pensais qu'il pouvait être en danger s'il demeurait dans la région de Vancouver; qu'une somme globale de $60,000 n'était peut-être pas excessive pour assurer sa sécurité jusqu'à ce qu'il puisse s'établir ailleurs lui-même. J'ai également informé Ford à cette occasion qu'un surintendant de la GRC avait refusé de recommander le paiement de toute somme supplémentaire parce qu'il considérait que l'insistance de Ford à obtenir un autre paiement s'apparentait à du chantage. Ford a répondu qu'il n'essaierait jamais de faire chanter la GRC, qu'il avait déjà témoigné et qu'il ne retirerait pas ce qu'il a dit;

8. THAT I never at any time told Ford I could not understand why the RCMP had not "kept up their part of the bargain;"

The various police officers mentioned by Ford in his declarations denied any impropriety in their affidavits. They denied any harassing of Ford or the putting of any pressures upon him. From their affidavits the Crown position is made clear. There was an arrangement with Ford that he would give evidence against the Palmers. At the preliminary hearing as at the trial Ford admitted the particulars of this arrangement. A condition of the arrangement was that the police would provide protection, and maintenance payments in the amount of $1,200 a month, until the trial was over. Thereafter provision would be made for the maintenance and relocation of Ford and his family, as well as for their protection until he could re-establish himself elsewhere. The payments made for relocation would have included travelling and moving expenses and, if necessary, a down payment on a new house. Pursuant to this arrangement, Ford gave evidence at the preliminary and no difficulties arose until just before the trial.

According to the police affidavits, at that time Ford seemed to have changed his mind. He decided that he wanted a cash payment rather than relocation expenses as agreed. He requested a sum in the neighbourhood of $50,000 and indicated that he would go to England to live after the trial and from this cash payment he would cover his own expenses. The police officers who were responsible for the immediate custody and protection of Ford agreed to take the matter up with superior officers and, in discussions between themselves, considered that a $60,000 payment would not be unreasonable in the circumstances. This figure would presumably have replaced all payments for maintenance, moving and relocation expenses until Ford was re-established after trial and what could be required for a down payment on a house. It is not clear from the evidence what recommendations were made to superior officers on this subject but the Crown, after the trial, was prepared to pay only $25,000. This payment was arranged by R.C.M.P. Inspector Eyman who met

8. QUE je n'ai jamais dit à Ford que je ne comprenais pas pourquoi la GRC n'avait «pas respecté son engagement;»

Dans leurs affidavits, les différents officiers de police mentionnés par Ford dans ses déclarations ont nié toute manœuvre incorrecte. Ils ont nié l'avoir harcelé ou avoir exercé des pressions sur lui. La position du ministère public se dégage clairement de leurs affidavits. Il y avait une entente avec Ford aux termes de laquelle il devait témoigner contre les Palmer. A l'enquête préliminaire et au procès, Ford a admis les détails de cette entente. Une condition de cette entente était que la police assurerait sa protection et lui verserait une allocation d'entretien de $1,200 par mois jusqu'à la fin du procès. Par la suite, des dispositions seraient prises pour assurer l'entretien et la réinstallation de Ford et de sa famille et leur protection jusqu'à ce qu'il puisse s'établir ailleurs. Les paiements de réinstallation auraient compris des dépenses de voyage et de déménagement et, au besoin, le paiement initial sur une nouvelle maison. Conformément à cette entente, Ford a témoigné à l'enquête préliminaire et aucune difficulté n'a surgi jusqu'à la veille du procès.

Selon les affidavits des policiers, Ford semblait alors avoir changé d'idée. Il avait décidé qu'il voulait un paiement comptant plutôt que le paiement de ses frais de réinstallation comme convenu. Il a demandé un montant d'environ $50,000 et a dit qu'il irait vivre en Angleterre après le procès et que ce paiement comptant servirait à couvrir ses dépenses. Les officiers de police directement responsables de la garde et de la protection de Ford ont accepté de soumettre l'affaire à des officiers supérieurs et, en discutant entre eux, ils ont jugé qu'un montant de $60,000 ne serait pas excessif dans les circonstances. Ce montant aurait, semble-t-il, remplacé tous les paiements pour l'entretien, le déménagement et la réinstallation jusqu'à ce que Ford soit à nouveau établi après le procès et le paiement initial éventuel sur une maison. La preuve n'indique pas clairement quelles recommandations ont été faites aux officiers supérieurs à cet égard mais le ministère public, après le procès, n'était pas disposé à payer plus de $25,000. L'inspecteur Eyman de la GRC s'est organisé pour

Ford, took him to the bank, procured $25,000 by cashing a cheque, and gave it to Ford in cash and travellers cheques. At the time of payment, he procured the receipt from Ford exhibited to Ford's first declaration. The Crown submits that Ford, dissatisfied by the payment of $25,000, and no doubt influenced by fear as well, has changed his story.

The Court of Appeal, when dealing with the motion, had before it in addition to the materials already referred to some fifty-four volumes of evidence from the preliminary hearing and the trial and therefore had a much greater knowledge of the evidence than could be drawn from the brief summary I have set out above. In dealing with the motion, McFarlane J. A., speaking for the Court, said:

> Section 610(1) provides that for the purposes of an appeal under Part XVIII of the Code the Court of Appeal may, if it considers it in the interests of justice, receive the evidence of any witness. Parliament has here given the Court a broad discretion to be exercised having regard to its view of the interests of justice. In my opinion it would not serve the interests of justice to receive the tendered evidence of Ford and Twaddell because it is simply not capable of belief. I am satisfied that it is untrue and that any intelligent adult would reject it as wholly untrustworthy. Moreover, the trial Judge was well aware of the weaknesses in the testimony of Ford and Twaddell. He had not found them to be honourable, upright witnesses but he accepted testimony which they gave because it was consistent with, and in harmony with, other testimony placed before him. He found the testimony, not the witnesses, to be credible. In my opinion the tendered evidence if adduced before the trial Judge or other tribunal of fact could not possibly affect the verdict. This view is in accord with the decision of this Court in *R. v. Stewart* (1972), 8 C.C.C. (2d) 137.

I have considered the judgments of the Supreme Court of Canada in *McMartin v. The Queen* [1964] S.C.R. 484 and *Horsburgh v. The Queen* [1967] S.C.R. 746. I find nothing in those judgments which requires me to accept this evidence. With particular reference to the latter judgment, I should add that I do not reject the evidence of Ford on the ground that he testified and was cross-examined at the trial.

effectuer ce paiement; il a rencontré Ford, l'a amené à la banque où il a encaissé un chèque de $25,000 qu'il a remis à Ford en espèces et en chèques de voyage. Au moment du paiement, il a obtenu le reçu de Ford qui est annexé à la première déclaration de ce dernier. Le ministère public prétend que Ford, mécontent du paiement de $25,000 et, indubitablement aussi influencé par la crainte, a changé sa version des faits.

Lorsqu'elle a examiné la requête, la Cour d'appel avait devant elle, en plus des documents déjà mentionnés, quelque cinquante-quatre volumes sur la preuve recueillie à l'enquête préliminaire et au procès; elle avait donc une bien meilleure connaissance de la preuve que ce que peut fournir le bref résumé que j'ai présenté plus haut. En statuant sur la requête, le juge McFarlane a dit au nom de la Cour:

> [TRADUCTION] La paragraphe 610(1) prévoit qu'aux fins d'un appel prévu par la Partie XVIII du Code, la Cour d'appel peut, lorsqu'elle l'estime dans l'intérêt de la justice, recevoir la déposition de tout témoin. Ici, le législateur a donné à la Cour un grand pouvoir discrétionnaire qu'elle doit exercer suivant sa conception de l'intérêt de la justice. A mon avis, il ne serait pas dans l'intérêt de la justice de recevoir les dépositions de Ford et de Twaddell parce qu'elles ne sont tout simplement pas dignes de foi. Je suis convaincu qu'elles sont fausses et que tout adulte intelligent les rejetterait comme pas du tout dignes de foi. De plus, le juge du procès était bien conscient des faiblesses du témoignage de Ford et de Twaddell. Il ne les a pas considérés comme des témoins respectables et intègres, mais il a accepté leurs témoignages parce qu'ils étaient compatibles et en harmonie avec les autres témoignages devant lui. Il a ajouté foi au témoignage mais non aux témoins. A mon avis, si les dépositions offertes avaient été produites devant le juge du procès ou un autre juge du fond, elles n'auraient vraisemblablement pas influé sur le verdict. Cette opinion est conforme à l'arrêt de cette Cour dans *R. v. Stewart* (1972), 8 C.C.C. (2d) 137.

J'ai examiné les arrêts de la Cour suprême du Canada *McMartin c. La Reine* [1964] R.C.S. 484 et *Horsburgh c. La Reine* [1967] R.C.S. 746. Je n'y trouve rien qui m'oblige à accepter ces dépositions. En ce qui concerne particulièrement le dernier de ces arrêts, j'ajouterai que je ne fonde pas mon rejet de la déposition de Ford sur le motif qu'il a témoigné et a été contre-interrogé au procès.

Parliament has given the Court of Appeal a broad discretion in s. 610(1)(*d*). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them—see for example *Regina v. Stewart*[1]; *Regina v. Foster*[2]; *Regina v. McDonald*[3]; *Regina v. Demeter*[4]. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*[5].

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The leading case on the application of s. 610(1) of the *Criminal Code* is *McMartin v. The Queen*, *supra*. Ritchie J., for the Court, made it clear that while the rules applicable to the introduction of new evidence in the Court of Appeal in civil cases should not be applied with the same force in criminal matters, it was not in the best interests of justice that evidence should be so admitted as a matter of course. Special grounds must be shown to justify the exercise of this power by the appel-

[1] (1972), 8 C.C.C. (2d) 137 (B.C.C.A.).
[2] (1977), 8 A.R. 1 (Alta. C.A.).
[3] [1970] 3 C.C.C. 426 (Ont. C.A.).
[4] (1975), 25 C.C.C. (2d) 417 (Ont. C.A.).
[5] [1964] S.C.R. 484.

Par l'alinéa 610(1)*d*), le législateur a donné à la Cour d'appel un grand pouvoir discrétionnaire. On doit donner la prépondérance, dans cette disposition, à l'expression «l'intérêt de la justice» et il ne serait pas dans l'intérêt de la justice de permettre à un témoin, par la seule répudiation ou modification de ses dépositions au procès, de rouvrir des procès à volonté au détriment général de l'administration de la justice. Les demandes de cette nature sont fréquentes et les cours d'appel de diverses provinces se sont prononcées à leur égard—voir par exemple *Regina v. Stewart*[1]; *Regina v. Foster*[2]; *Regina v. McDonald*[3]; *Regina v. Demeter*[4]. Les principes suivants se dégagent de ces arrêts et d'autres dont plusieurs sont cités dans la jurisprudence susmentionnée:

(1) On ne devrait généralement pas admettre une déposition qui, avec diligence raisonnable, aurait pu être produite au procès, à condition de ne pas appliquer ce principe général de matière aussi stricte dans les affaires criminelles que dans les affaires civiles: voir *McMartin c. La Reine*[5].

(2) La déposition doit être pertinente, en ce sens qu'elle doit porter sur une question décisive ou potentiellement décisive quant au procès.

(3) La déposition doit être plausible, en ce sens qu'on puisse raisonnablement y ajouter foi, et

(4) elle doit être telle que si l'on y ajoute foi, on puisse raisonnablement penser qu'avec les autres éléments de preuve produits au procès, elle aurait influé sur le résultat.

L'arrêt fondamental sur l'application du par. 610(1) du *Code criminel* est *McMartin c. La Reine*, *supra*. Au nom de la Cour, le juge Ritchie y dit clairement que, bien que les règles applicables à la production de nouvelles preuves devant la Cour d'appel dans les affaires civiles ne doivent pas être appliquées aussi rigoureusement dans les affaires criminelles, il n'est pas dans l'intérêt de la justice que des dépositions soient ainsi admises automatiquement. Des motifs spéciaux doivent

[1] (1972), 8 C.C.C. (2d) 137 (C.A. C-B.).
[2] (1977), 8 A.R.1. (C.A. Alta.).
[3] [1970] 3 C.C.C. 426 (C.A. Ont.).
[4] (1975), 25 C.C.C. (2d) 417 (C.A. Ont.).
[5] [1964] R.C.S. 484.

late court. He considered that special grounds existed because of the nature of the evidence sought to be adduced and he considered that it should not be refused admission because of any supposed lack of diligence in procuring the evidence for trial. The test he applied on this question was expressed in these terms at p. 493:

> With the greatest respect, it appears to me that the evidence tendered by the appellant on such an application as this is not to be judged and rejected on the ground that it "does not disprove the verdict as found by the jury" or that it fails to discharge the burden of proving that the appellant was incapable of planning and deliberation, or that it does not rebut inferences which appear to have been drawn by the jury. It is enough, in my view, if the proposed evidence is of sufficient strength that it might reasonably affect the verdict of a jury.

The evidence was admitted and a new trial ordered.

In my view, the approach taken in the authorities cited above follows that of this Court in *McMartin*. The evidence in question in the case at bar was not available at trial and it would be, if received, relevant to the issue of guilt on the part of the Palmers. The evidence sought to be introduced in *McMartin* was evidence of an expert opinion not of matters of fact and therefore no issue of credibility in the ordinary sense arose. It is clear, however, that in dealing with matters of fact a consideration of whether, in the words of Ritchie J., the evidence possessed sufficient strength that "it might reasonably affect the verdict of the jury" involves a consideration of its credibility as well as its probative force if presented to the trier of fact.

Because the evidence was not available at trial and because it bears on a decisive issue, the inquiry in this case is limited to two questions. Firstly, is the evidence possessed of sufficient credibility that it might reasonably have been believed by the trier of fact? If the answer is no that ends the matter but if yes the second question presents itself in this form. If presented to the trier of fact and

être établis pour justifier l'exercice de ce pouvoir par une cour d'appel. Il a jugé que des motifs spéciaux existaient en raison de la nature de la preuve que l'on voulait produire et qu'on ne devait pas la refuser à cause d'un prétendu manque de diligence à la produire au procès. Le critère qu'il a appliqué sur cette question est énoncé dans les termes suivants à la p. 493:

> [TRADUCTION] Avec égards, je crois que la déposition offerte par l'appelant à l'occasion d'une requête comme celle-ci ne doit pas être jugée et rejetée au motif qu'elle «ne réfute pas le verdict prononcé par le jury» ou qu'elle ne réussit pas à établir que l'appelant était incapable de projeter et de commettre son acte de propos délibéré ou qu'elle ne réfute pas les déductions que le jury paraît avoir faites. Il suffit, à mon avis, que la déposition offerte ait suffisamment de poids pour qu'elle puisse raisonnablement influer sur le verdict du jury.

La déposition fut admise et un nouveau procès ordonné.

A mon avis, la façon dont les arrêts précités ont abordé la question suit celle adoptée par cette Cour dans *McMartin*. En l'espèce, la déposition en question n'était pas disponible au procès et, si on l'admettait, elle serait pertinente à la question de culpabilité des Palmer. La déposition que l'on voulait produire dans l'affaire *McMartin* était un témoignage d'expert et ne portait pas sur des points de fait de sorte qu'aucune question de crédibilité ne se posait au sens ordinaire de ce mot. Il est clair toutefois que lorsqu'il s'agit de points de fait, un examen de la question de savoir si la déposition a suffisamment de poids (pour reprendre les mots du juge Ritchie) «pour qu'elle puisse raisonnablement influer sur le verdict du jury» implique un examen de la crédibilité et de la force probante de pareille déposition si on la soumettait au juge du fond.

Puisque la déposition n'était pas disponible au procès et qu'elle porte sur une question décisive, l'étude en l'espèce se limite à deux points. Premièrement, la déposition présente-t-elle suffisamment de vraisemblance pour que le juge du fond ait raisonnablement pu la croire? Si la réponse est négative, la question est réglée, mais si elle est affirmative, il faut se poser la seconde question en

believed, would the evidence possess such strength or probative force that it might, taken with the other evidence adduced, have affected the result? If the answer to the second question is yes, the motion to adduce new evidence would have to succeed and a new trial be directed at which the evidence could be introduced.

It is evident that the Court of Appeal applied the test of credibility and found the evidence tendered as to the validity of Ford's trial evidence to be wholly unworthy of belief. It therefore refused the motion and in so doing made no error in law which would warrant interference by this Court. While it may not be necessary to do so in view of this conclusion, I express the view that the Court of Appeal was fully justified in reaching the conclusion it did upon a consideration of all the evidence adduced on the motion before it and the evidence appearing in the trial transcripts.

It was argued for the appellants that Ford's trial evidence was totally fabricated as a result of police pressures and inducements. In his declarations, Ford says that he was frightened and under pressure and accordingly when the time for the preliminary hearing came he merely got in the witness box and made up a bunch of lies. It should be noted, however, that at the trial, almost a year later, he gave the same evidence and, despite strenuous cross-examination on both occasions, no assertion is made that there was any significant difference in the evidence. The accurate repetition of extemporaneous inventions after such a long interval would be a remarkable performance on Ford's part under any circumstances but, when one adds the fact that the trial judge considered that his evidence was in harmony with the general picture of events which emerged from the evidence of many other witnesses, it becomes impossible to believe that the evidence was fabricated on the spur of the moment. Furthermore, it should be observed that the modification of the financial arrangements with Ford occurred, according to Ford's own declaration, after the preliminary hearing where he had given evidence and before the

ces termes. Si la déposition est présentée au juge du fond qui y ajoute foi, aura-t-elle un poids et une force probante tels qu'elle puisse, compte tenu des autres éléments de preuve produits, influer sur le résultat? Si la réponse à la seconde question est affirmative, la requête en production de nouveaux éléments de preuve doit être accueillie et un nouveau procès ordonné au cours duquel la déposition pourra être produite.

Il est évident que la Cour d'appel a appliqué le critère de crédibilité et a jugé que la preuve produite sur la validité du témoignage de Ford au procès n'était absolument pas digne de foi. Elle a donc rejeté la requête et, ce faisant, n'a commis aucune erreur de droit qui justifierait l'intervention de cette Cour. Bien que ce ne soit peut-être pas nécessaire de le dire compte tenu de cette conclusion, je suis d'avis que la Cour d'appel était tout à fait justifiée de conclure comme elle l'a fait après un examen de toute la preuve produite à l'occasion de la requête qu'on lui adressait et de la transcription des dépositions faites au procès.

On a allégué au nom des appelants que le témoignage de Ford au procès était entièrement fabriqué en raison des pressions et des incitations des policiers. Dans ses déclarations, Ford dit avoir eu peur et avoir été soumis à des pressions de sorte qu'au moment de l'enquête préliminaire, il est simplement allé à la barre des témoins et a inventé un tas de mensonges. Il faut remarquer toutefois qu'au procès, presqu'un an plus tard, il a rendu le même témoignage et, en dépit d'un contre-interrogatoire serré à ces deux occasions, on ne souligne aucune différence importante dans ses dépositions. Une répétition exacte de versions improvisées après un aussi long délai serait un exploit de la part de Ford dans n'importe quelle circonstance, mais lorsque l'on tient compte du fait que le juge du procès était d'avis que son témoignage concordait avec le tableau général des événements qui se dégage de plusieurs autres témoignages, il devient impossible de croire que la preuve a été fabriquée sous l'impulsion du moment. De plus, il faut remarquer que, selon la propre déclaration de Ford, les modifications des ententes financières ont été apportées après l'enquête préliminaire où il a rendu témoignage et avant le procès où, de l'aveu

trial when, it is conceded, he repeated it. It is impossible to believe that the nature of his evidence given at trial was affected by the payment or promise of money. Considering the suggestion that this arrangement was undisclosed and that the trial judge could therefore have been misled in his assessment of Ford's credibility, reference may be made to a passage in his reasons for judgment where he said:

> Ford testifies that the police promised to protect him and his family if he gave evidence on behalf of the Crown, and that they have fulfilled this promise by paying for the cost of relocating him and his family, and of maintaining them since February 1975. The cost of such maintenance said to have been $1,200 a month.

A careful review of the police evidence drawn from the affidavits filed confirms the version of the agreement made with Ford which he himself described in evidence at the trial. The police contention that Ford changed his mind shortly before the trial and wanted cash in lieu of unspecified relocation expenses is confirmed, at least in part, by Ford's later acceptance of the sum of $25,000 and his insistence upon more. It seems clear that he abandoned the original arrangement in favour of a sum of money as contended by the police. It was argued that the police had offered $60,000 when all that Ford had sought was $50,000. The police affidavits confirm that Ford requested a sum in the neighbourhood of $50,000. It also appears from the affidavits that the police officers themselves said, after some discussion between themselves, that they would recommend $60,000 to their superior officers. When it is considered that this payment was to be in lieu of all other provision for Ford after the trial and that it would serve to cover all the expenses involved in maintenance for Ford and his family including travel and relocation expenses and even a possible down payment on a new house, it does not seem an unreasonable amount.

The manner of payment of the $25,000 to Ford, which involved no secrecy and was done openly by cheque, negates improper motives on the part of the police. The use of the words "services rendered" and "services" on the receipt has, in my

général, il l'a répété. Il est impossible de croire que le paiement ou la promesse d'argent a influé sur la nature du témoignage qu'il a rendu au procès. Puisque l'on prétend que vu cette entente cachée, le juge du procès a donc pu être induit en erreur dans son appréciation de la crédibilité de Ford, il y a lieu de se reporter à un passage des motifs de son jugement où il dit:

> [TRADUCTION] Ford témoigne que la police lui a promis de protéger sa famille et lui-même s'il témoignait pour le ministère public, et qu'elle a respecté cette promesse en payant le coût de leur réinstallation ainsi que celui de leur entretien depuis février 1975. On a dit que ce dernier s'élevait à $1,200 par mois.

Un examen attentif des dépositions des policiers extraites des affidavits produits confirme la version de l'entente conclue avec Ford que ce dernier décrit dans son témoignage au procès. La prétention de la police que Ford a changé d'idée peu avant le procès et qu'il voulait de l'argent comptant au lieu d'un montant indéterminé pour ses frais de réinstallation est confirmée, du moins en partie, par l'acceptation subséquente par celui-ci d'un montant de $25,000 et son insistance pour obtenir davantage. Il semble clair qu'il a abandonné l'entente initiale en faveur d'un montant d'argent comme le prétend la police. On a allégué que la police avait offert $60,000 alors que Ford n'avait demandé que $50,000. Les affidavits des policiers confirment que Ford a demandé un montant d'argent d'environ $50,000. Il se dégage également des affidavits que les officiers de police eux-mêmes ont dit, après discussion entre eux, qu'ils recommanderaient le montant de $60,000 à leurs officiers supérieurs. Lorsque l'on considère que ce paiement devait remplacer toute autre aide pour Ford après le procès et qu'il devait servir à couvrir toutes les dépenses engagées pour l'entretien de Ford et de sa famille, y compris les frais de voyage et de réinstallation et possiblement le paiement initial sur une nouvelle maison, ce montant ne semble pas déraisonnable.

Le mode de paiement des $25,000 à Ford, qui n'a pas été fait en secret, mais ouvertement par chèque, fait échec à la thèse des motifs blâmables de la police. L'utilisation des mots «services rendus» et «services» sur le reçu n'a, à mon avis,

opinion, no sinister significance. It is evident that these words were employed to describe the arrangement here discussed. In my opinion, the rejection of Ford's evidence by the Court of Appeal was amply justified.

I cannot leave this part of the case without making some general remarks upon the situation it reveals. There can be no doubt that from time to time the interests of justice will require that Crown witnesses in criminal cases be protected. Their lives and the lives of their families and the safety of their property may be endangered. In such cases the use of public funds to provide the necessary protection will not be improper. When the need arises, the form of protection and the amount and method of the disbursement of moneys will vary widely and it is impossible to predict the precise form the required protection will take.

The dangers inherent in this situation are obvious. On the one hand, interference with witnesses cannot be tolerated because the integrity of the entire judicial process depends upon the ability of parties to causes in the courts to call witnesses who can give their evidence free from fears and external pressures, secure in the knowledge that neither they nor the members of their families will suffer in retaliation. On the other hand, the courts must be astute to see that no steps are taken, in affording protection to witnesses, which would influence evidence against the accused or in any way prejudice the trial or lead to a miscarriage of justice. However, in cases where the courts are, after careful examination, satisfied that only reasonable and necessary protection has been provided and that no prejudice or miscarriage of justice has resulted in consequence, they should not draw unfavourable inferences against the Crown, by reason only of this expenditure of public funds.

It must be recognized that when cases of this nature arise, charges of bribery of witnesses will, from time to time, be made. It is for this reason that the courts must be on guard to detect and to deal severely with any attempt to influence or corrupt witnesses. The courts must discharge this duty with the greatest care to ensure that while no impropriety upon the part of the Crown will be

aucune signification fatale. Il est évident que ces mots ont été employés pour décrire l'entente en question ici. A mon avis, la Cour d'appel était amplement justifiée de rejeter le témoignage de Ford.

Je ne peux clore le débat sur cet aspect de l'affaire sans faire des commentaires généraux sur la situation qu'il révèle. Il n'y a aucun doute qu'à l'occasion, les intérêts de la justice nécessitent la protection des témoins du ministère public dans les affaires criminelles. Leur vie, celle de leur famille et la sécurité de leurs biens peuvent être en danger. En pareils cas, l'utilisation de fonds publics pour assurer la protection nécessaire ne sera pas inappropriée. Lorsque le besoin se fait sentir, le mode de protection, le montant et la méthode de paiement varieront largement et il est impossible de prédire la forme précise que prendra la protection qui s'impose.

Les dangers inhérents à cette situation sont évidents. D'une part, on ne saurait tolérer l'intervention auprès des témoins parce que l'intégrité de tout le processus judiciaire dépend de la capacité des parties aux instances judiciaires de citer des personnes qui peuvent témoigner sans craintes ni pressions extérieures et dans l'assurance que leur famille et elles-mêmes ne subiront pas de représailles. D'autre part, les cours doivent être assez perspicaces pour s'assurer qu'en accordant une protection aux témoins, on ne fasse rien qui puisse influencer les témoignages à charge, nuire de quelque façon au procès ou entraîner un déni de justice. Toutefois, dans les affaires où, après un examen minutieux, les cours sont convaincues que l'on a seulement accordé une protection raisonnable et nécessaire et qu'aucun préjudice ou déni de justice n'en a résulté, elles ne devraient pas tirer de conclusions défavorables contre le ministère public du seul fait de cette utilisation de fonds publics.

Il faut reconnaître que, dans des affaires de cette nature, il arrivera que des accusations de corruption de témoins soient portées. C'est pourquoi les cours doivent faire preuve de vigilance dans la détection et la punition sévère de toute tentative d'influencer ou de corrompre des témoins. Les cours doivent s'acquitter de ce devoir avec le plus grand soin pour s'assurer que tout en

permitted, the provision of reasonable and necessary protection for witnesses is not a prohibited practice. In the United States, there are statutory provisions expressly contemplating such expenditure under the authority of the Attorney General.

I now turn to the second point raised in this appeal. There was evidence at trial, resulting from police surveillance, that Ford and Douglas Palmer met on three separate occasions. It was presumably led to afford some evidence of association between them. On July 18, 1972, Ford was seen to leave a car and walk up Palmer's driveway then return to the car in three or four minutes and depart. Ford, in giving evidence in chief, was not asked about this incident and he was not cross-examined about it. Palmer disclaimed any knowledge of Ford's visit. On November 8, 1972, Palmer was seen travelling in Ford's automobile as a passenger with Ford driving. Ford was not examined or cross-examined on this incident. Palmer said that he had been waiting at a bus stop near his home because he was going to pick up a truck which was under repair and Ford happened by in his car and gave him a lift. The event he said was not prearranged. On January 23, 1973, at 11:30 p.m., Ford was observed leaving his automobile from which he went down a driveway to Palmer's house and spoke to Douglas Palmer for a few minutes then returned to his car and left. Ford, as before, gave no evidence relating to this event and was not cross-examined upon it. Palmer said that Ford had come to his house and offered to sell some tires at a reasonable price and Palmer had merely sent him away. Palmer was not cross-examined on his evidence relating to the three meetings.

The trial judge found that Palmer was not a credible witness and indicated that he was not willing to accept his testimony on important matters. In dealing with this question, he made reference to these incidents as well as much other evidence. Counsel for Palmer objects to this on the basis that Palmer's version of what occurred on these occasions stands uncontroverted and, particularly in view of the Crown's failure to examine Ford upon these matters, it is argued that the trial

ne permettant aucune manœuvre incorrecte de la part du ministère public, la protection raisonnable et nécessaire des témoins ne soit pas une pratique interdite. Aux États-Unis, des textes de loi prévoient expressément ce genre de dépenses sous le contrôle du procureur général.

J'aborde maintenant la seconde question posée dans ce pourvoi. Il a été mis en preuve au procès, suite à la surveillance de la police, que Ford et Douglas Palmer se sont recontrés à trois reprises. Cela était possiblement destiné à fournir des éléments de preuve sur leur association. Le 18 juillet 1972, on a vu Ford descendre de sa voiture et emprunter l'allée de Palmer puis revenir à sa voiture trois ou quatre minutes plus tard et repartir. Dans son témoignage principal, Ford n'a pas été interrogé sur cet incident et il n'a pas été contre-interrogé à ce sujet. Palmer a nié toute connaissance de la visite de Ford. Le 8 novembre 1972, Palmer a été vu comme passager dans la voiture de Ford avec ce dernier au volant. Ford n'a pas été interrogé ni contre-interrogé sur cet incident. Palmer a dit qu'il attendait à un arrêt d'autobus près de chez lui parce qu'il allait chercher un camion en réparation et que Ford était passé en voiture et l'avait ramassé. Il a dit que ce n'était pas prévu. Le 23 janvier 1973 à 23h30, on a vu Ford descendre de sa voiture, emprunter l'allée de la maison de Palmer, lui parler pendant quelques minutes puis revenir à sa voiture et partir. Comme auparavant, Ford n'a fourni aucun témoignage sur cet événement et n'a pas été contre-interrogé à ce sujet. Palmer a dit que Ford était venu chez lui et avait offert de lui vendre des pneus à un prix raisonnable et qu'il l'avait simplement renvoyé. Palmer n'a pas été contre-interrogé sur son témoignage relatif à ces trois rencontres.

Le juge du procès a conclu que Palmer n'était pas un témoin digne de foi et a indiqué qu'il n'avait pas l'intention d'accepter son témoignage sur des points importants. En examinant cette question, il a fait référence à ces incidents et à plusieurs autres éléments de preuve. L'avocat de Palmer objecte que la version de Palmer sur ce qui s'est produit à ces occasions n'est pas contestée et, compte tenu particulièrement de l'omission du ministère public d'interroger Ford sur ces points, il

judge should have accepted Palmer's version of events and not drawn inferences adverse to him. The point was summarized in the appellants' factum in these words:

> It is submitted that the Court of Appeal for British Columbia erred in concluding that it was not necessary for the prosecution to have examined Ford in-chief with respect to the three incidents and that it was not necessary to cross-examine the Appellant Douglas Garnet Palmer when he testified with respect to the said three incidents. Had the Court of Appeal for British Columbia found that the learned trial Judge had erred in rejecting the testimony of Douglas Garnet Palmer with respect to the said three incidents then the basis for the learned trial Judge's acceptance of Ford's testimony would have disappeared and the Court of Appeal would then have quashed the convictions against the Appellants.

In dealing with this argument in the Court of Appeal, McFarlane J.A. said for the Court:

> The second ground of appeal argued was that the trial Judge should have found that the evidence of Douglas Palmer raised at least a reasonable doubt of his guilt. With particular reference to the three occasions to which I have just referred, it was said that Palmer's evidence was not shaken in cross-examination and it is suggested he was not specifically questioned about one or two of them. Reference was made to *Browne v. Dunn* (1894) The Reports 67 and to *Rex v. Hart* (1932) 23 C.A.R. 202. I respectfully agree with the observation of Lord Morris in the former case at page 79:
>
> > I therefore wish it to be understood that I would not concur in ruling that it was necessary in order to impeach a witnesses' credit, that you should take him through the story which he had told, giving him notice by questions that you impeached his credit.
>
> In my opinion the effect to be given to the absence or brevity of cross-examination depends upon the circumstances of each case. There can be no general or absolute rule. It is a matter of weight to be decided by the tribunal of fact, vide: *Sam v. Canadian Pacific Limited* (1976) 63 D.L.R. (3d) 294 and cases cited there by Robertson, J.A. at 315-7. In the present case Douglas Palmer was cross-examined extensively. It seems to me the circumstances are such that it must have been foreseen his credit would be attacked if he testified to his innocence. In any event, this was made plain when he was cross-examined. The trial Judge gave a careful explanation for his acceptance of the story of Ford and

prétend que le juge du procès aurait dû accepter la version des événements donnée par Palmer et ne pas en tirer de conclusions défavorables à ce dernier. Le point est résumé comme suit dans le mémoire des appelants:

> [TRADUCTION] Nous soutenons que la Cour d'appel de la Colombie-Britannique a commis une erreur en concluant qu'il n'était pas nécessaire que la poursuite interroge Ford sur les trois incidents en interrogatoire principal, et qu'il n'était pas nécessaire de contre-interroger l'appelant Douglas Garnet Palmer, lorsqu'il a témoigné, sur les trois incidents susmentionnés. Si la Cour d'appel de la Colombie-Britannique avait conclu que le savant juge du procès avait commis une erreur de droit en rejetant le témoignage de Douglas Garnet Palmer sur les trois incidents susmentionnés, le fondement sur lequel s'est appuyé le savant juge du procès pour accepter le témoignage de Ford aurait disparu et la Cour d'appel aurait alors annulé les déclarations de culpabilité prononcées contre les appelants.

En examinant cet argument, le juge McFarlane a dit au nom de la Cour d'appel:

> [TRADUCTION] Selon le second moyen d'appel, le savant juge du procès aurait dû conclure que le témoignage de Douglas Palmer soulevait au moins un doute raisonnable sur sa culpabilité. Pour ce qui est en particulier des trois occasions susmentionnées, on a dit que le témoignage de Palmer n'a pas été ébranlé en contre-interrogatoire et on a prétendu qu'il n'a pas été spécifiquement interrogé sur l'un ou l'autre de ces événements. On a cité *Browne v. Dunn* (1894) The Reports 67 et *Rex v. Hart* (1932) 23 C.A.R. 202. Avec égards, je souscris à la remarque de lord Morris dans le premier de ces arrêts à la p. 79:
>
> > Je veux donc qu'il soit clair que je ne souscris pas à la conclusion qu'il est nécessaire, pour attaquer la crédibilité d'un témoin, qu'on l'interroge sur l'histoire qu'il a racontée, en le prévenant par des questions qu'on met en doute sa crédibilité.
>
> A mon avis l'effet à donner à l'absence de contre-interrogatoire ou à sa brièveté dépend des circonstances de chaque affaire. Il ne peut y avoir de règle générale ou absolue. C'est une question de poids à être tranchée par le juge des faits, voir: *Sam v. Canadian Pacific Limited* (1976) 63 D.L.R. (3d) 294 et la jurisprudence citée par le juge Robertson de la Cour d'appel aux pp. 315 à 317. En l'espèce, Douglas Palmer a fait l'objet d'un contre-interrogatoire en profondeur. Il me semble que les circonstances sont telles qu'on doit avoir prévu que sa crédibilité serait contestée s'il protestait de son innocence. Quoi qu'il en soit, c'est devenu évident pendant son contre-interrogatoire. Le juge du procès a soigneuse-

rejecting that of Douglas Palmer. I cannot give effect to this ground of appeal.

I am in full agreement with these words and I do not consider it necessary to add to them save to emphasize that the finding against the credibility of Palmer was made upon much more than the evidence of these three events. It was based upon a consideration of the whole of the evidence including the full examination and cross-examination of Palmer. I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Walsh, Micay & Co., Winnipeg.

Solicitor for the respondent: Roger Tassé, Ottawa.

ment expliqué pourquoi il acceptait la version de Ford et rejetait celle de Douglas Palmer. Je ne peux donner effet à ce moyen d'appel.

Je souscris entièrement à cette opinion et je n'estime pas nécessaire d'y ajouter quoi que ce soit, sauf pour souligner que la conclusion à l'encontre de la crédibilité de Palmer était fondée sur bien plus que la preuve relative à ces trois événements. Elle s'appuyait sur un examen de l'ensemble de la preuve, y compris l'interrogatoire et le contre-interrogatoire complets de Palmer. Je suis d'avis de rejeter le pourvoi.

Pourvoi rejeté.

Procureurs des appelants: Walsh, Micay & Co., Winnipeg.

Procureur de l'intimée: Roger Tassé, Ottawa.