**Helga Petranik** *Appellant*;

and

**Alice Dale, Frederick W. Parker and Eugene F. Berwick** *Respondents*.

1976: May 5; 1976: October 5.

Present: Laskin C.J. and Judson, Ritchie, Spence and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Mortgages — Foreclosure — Power of sale in mortgage — Sale under power after judgment nisi in foreclosure — Right of redemption — Equity — Whether exercise of alternative remedy valid — Whether sale void — Rules of Practice, R.R.O. 1960, Reg. 396, Rule 465.*

Appellant brought an action against D, P & B claiming that a mortgage purportedly executed by her in favour of D was null and void and that P and B who purchased the property from D under the power of sale held the property in trust for appellant. D as mortgagee had started foreclosure proceedings in 1961 and a specially endorsed writ was issued against appellant as mortgagor. Appellant failed to appear and a default judgment was taken in 1962. The judgment directed a reference and when originally drawn up in typed form contained a clause providing for a reconveyance to the appellant upon payment of the amount due to the mortgagee. This reconveyance clause was struck out and the deletion initialled by the Assistant Registrar. No explanation was given for the deletion. Appellant did not however proceed with the reference directed in the default judgment but instead purported to act under the power of sale contained in the mortgage. The trial judge founding himself on *Stevens v. Theatres, Ltd.*, [1903] 1 Ch. 857, found that the direction for a reference in the default judgment was enough to preclude exercise of the power of sale without leave of the Court. The Court of Appeal reversed.

*Held* (Judson and Ritchie JJ. dissenting): The appeal should be allowed.

*Per* Laskin C.J. and Spence J.: The default judgment was a judgment *nisi* for foreclosure. The mortgagor would have been entitled to invoke the equitable jurisdiction of the Court to claim a right to redeem on payment of the amounts found owing on the reference and on such other terms as the Court might fix. The

**Helga Petranik** *Appelante*;

et

**Alice Dale, Frederick W. Parker et Eugene F. Berwick** *Intimés*.

1976: le 5 mai; 1976: le 5 octobre.

Présents: Le juge en chef Laskin et les juges Judson, Ritchie, Spence, et Dickson.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

*Hypothèques — Forclusion — Pouvoir de vente attaché à l'hypothèque — Vente en vertu du pouvoir après jugement conditionnel de forclusion — Droit de rachat — Equity — L'exercice d'un recours alternatif est-il valide? — La vente est-elle nulle? — Règles de pratique, R.R.O. 1960, Reg. 396, Règle 465.*

L'appelante a intenté une action contre D, P & B, prétendant qu'une hypothèque qu'elle aurait consentie en faveur de D était nulle et non avenue et que P et B qui avaient acheté l'immeuble à D en vertu du pouvoir de vente le détenaient en fiducie pour le compte de l'appelante. D, en sa qualité de créancière hypothécaire, avait entamé des procédures de forclusion en 1961 et un bref spécialement endossé avait été délivré contre l'appelante, débitrice hypothécaire. L'appelante n'ayant pas comparu un jugement par défaut fut rendu en 1962. Le jugement ordonnait un renvoi et, dans sa rédaction originale sous forme dactylographiée, comportait une clause prévoyant une rétrocession en faveur de l'appelante contre paiement du montant dû à la créancière hypothécaire. Cette clause était biffée, la suppression portant les initiales du registraire adjoint. Aucune explication de cette suppression n'a été fournie. Toutefois, l'appelante ne fit pas procéder au renvoi ordonné par le jugement par défaut, mais se résolut plutôt à agir en vertu du pouvoir de vente attaché à l'hypothèque. Le juge de première instance, s'appuyant sur l'affaire *Stevens v. Theatres, Ltd.*, [1903] 1 Ch. 857, a conclu que l'ordonnance de renvoi du jugement par défaut suffisait à empêcher l'exercice du pouvoir de vente sans permission de la Cour. La Cour d'appel a infirmé ce jugement.

*Arrêt* (les juges Judson et Ritchie étant dissidents): Le pourvoi doit être accueilli.

*Le* juge en chef Laskin et le juge Spence: Le jugement par défaut était un jugement conditionnel de forclusion. La débitrice hypothécaire aurait eu le droit d'invoquer la compétence d'*equity* de la Cour pour se faire reconnaître le droit de racheter, sur paiement des sommes trouvées dues lors du renvoi et aux conditions que la mortgagee was not entitled to improve her position by proceeding to a sale under the mortgage without leave when she had crystallised her remedies through a judgment *nisi* which called for a reference. Rule 460A (introduced in 1941 and now Rule 465, R.R.O. 1960, Reg. 396 of the Rules of Practice), which provides for filing of a notice of desire of opportunity to redeem if a mortgagor does not otherwise wish to defend the foreclosure action, must be read with Rule 467 [now Rule 472] which makes it clear that failure to appear or to file a D.O.R. notice enables the plaintiff to sign judgment for immediate foreclosure subject to a reference as to encumbrances. The Rule changes did not however deal with the matter on appeal.

Cour pouvait déterminer. La créancière hypothécaire n'avait pas le droit d'améliorer sa position en procédant, sans permission, à une vente en vertu de l'hypothèque, alors qu'elle avait cristallisé ses recours dans un jugement conditionnel qui imposait un renvoi. La règle 460A (mise en vigueur le 31 mai 1941, maintenant règle 465, R.R.O. 1960, Reg. 396 des Règles de pratique), qui oblige le débiteur hypothécaire à déposer un avis exprimant son désir d'avoir l'occasion de racheter D.O.R. s'il n'entend pas présenter d'autres défenses à l'action en forclusion, doit être lue avec la règle 467 [présentement la règle 472] qui indique clairement que le défaut de comparaître ou de déposer un D.O.R. habilite un demandeur à obtenir jugement en forclusion immédiate, sauf si un renvoi est exigé quant aux créanciers. Toutefois, les modifications apportées aux règles n'ont pas touché au cas faisant l'objet du pourvoi.

*Per* Dickson J.: 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. Equity has always jealously guarded the mortgagor's right to redeem. Having obtained a judgment of the type obtained by D, the mortgagee must carry out that judgment or obtain the leave of the Court to do otherwise. The failure of appellant to file a D.O.R. did not extinguish her equity of redemption.

*Le* juge Dickson: Un droit de rachat est un droit réel immobilier que le débiteur hypothécaire peut céder, léguer, attribuer, louer ou hypothéquer comme n'importe quel autre droit réel immobilier. L'*equity* a toujours jalousement protégé le droit de rachat du débiteur hypothécaire. Ayant obtenu un jugement de la nature de celui qu'a obtenu D, le créancier hypothécaire doit exécuter ce jugement ou obtenir de la cour la permission d'agir autrement. Le défaut par l'appelante de déposer un D.O.R. n'a pas éteint son droit de rachat.

*Per* Judson J., *dissenting*: Appellant was in default under the mortages, and the property was completely pledged to or claimed by others. When the foreclosure proceedings were instituted she was not able to nor did she indicate a desire to redeem the property. The judgment *nisi* effectively foreclosed her equity of redemption and directed a reference. The mortagee was entitled to pursue alternative remedies. The fact of obtaining such a judgment *nisi* did not preclude the mortgagee from exercising her power of sale under the mortgage since the sale did not prejudice any rights asserted by or accorded to appellant in the foreclosure proceeding.

*Le* juge Judson, *dissident*: L'appelante avait cessé ses paiements hypothécaires et l'immeuble était complètement obéré. Au moment où les procédures de forclusion ont été engagées, elle n'était pas à même de racheter la propriété et elle n'en a pas manifesté le désir. Le jugement conditionnel de forclusion a effectivement forclos son droit de rachat et ordonné un renvoi. La créancière hypothécaire avait plusieurs moyens à sa disposition. Le fait qu'elle ait obtenu un jugement conditionnel de forclusion ne l'empêchait pas d'exercer son pouvoir de vente résultant de l'hypothèque, puisque la vente ne portait atteinte à aucun droit reconnu ou conféré à l'appelante lors des procédures de forclusion.

*Per* Ritchie J., *dissenting*: For the reasons given by Arnup J.A. in the Court of Appeal the appeal should be dismissed.

*Le* juge Ritchie, *dissident*: Pour les motifs du jugement rendus par le juge Arnup au nom de la Cour d'appel, le pourvoi doit être rejeté.

[*Stevens v. Theatres, Ltd.*, [1903] 1 Ch. 857; *De Beck v. Canada Permanent Loan and Savings Co.* (1907), 12 B.C.R. 409; *Marshall v. Miles*, [1970] 3 O.R. 394; *Casborne v. Scarfe* (1737), 1 Atk. 603, 26 E.R. 377; *Burgess v. Wheats* (1759), 1 Eden 177, 28 E.R. 652; *Heath v. Pugh* (1881), 6 Q.B.D. 345; *Tarn v. Turner* (1888), 39 Ch. D. 456; *Campbell v. Holyland* (1877), 7 Ch. D. 166 referred to.]

[Arrêts mentionnés: *Stevens v. Theatres, Ltd.*, [1903] 1 Ch. 857; *De Beck v. Canada Permanent Loan and Savings Co.* (1907), 12 B.C.R. 409; *Marshall v. Miles*, [1970] 3 O.R. 394; *Casborne v. Scarfe* (1737), 1 Atk. 603, 26 E.R. 377; *Burgess v. Wheats* (1759), 1 Eden 177, 28 E.R. 652, *Heath v. Pugh* (1881), 6 Q.B.D. 345; *Tarn v. Turner* (1888), 39 Ch. D. 456; *Campbell v. Holyland* (1877), 7 Ch. D. 166.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Moorhouse J., declaring null and void a conveyance made in exercise of a power of sale under a mortgage. Appeal allowed, Judson and Ritchie JJ. dissenting.

*Nelles Starr, Q.C.*, and *Walter S. Gonet, Q.C.*, for the appellant.

*George T. Walsh, Q.C.*, and *Tom Pratt*, for the respondents.

The judgment of Laskin C.J. and Spence JJ. was delivered by

THE CHIEF JUSTICE—This appeal arises out of an action brought by the appellant on April 28, 1969 claiming a declaration that (1) a mortgage on certain property allegedly given by her to one Alice Dale on July 12, 1958, registered on January 8, 1959 and subsequently recorded in full on June 15, 1962, was void because the signature thereon was not hers, and (2) a conveyance of the property by Alice Dale to the respondents Parker and Berwick on June 1, 1962 under the power of sale contained in the mortgage was void and that the respondents held the property in trust for the appellant.

Neither the trial judge nor the Ontario Court of Appeal found in the appellant's favour on her contention that the mortgage was not executed by her, and this question was not pressed in this Court. What is evident from the record is that the mortgage transaction between the appellant and Alice Dale (who was not represented in this Court nor in the Court of Appeal), and other transactions in which the appellant and her husband were involved were carried out by a solicitor whose irresponsibility, incompetence and negligence are made plain in reasons of the trial judge given in a companion case which, as to the evidence and findings, was by consent of counsel, made applicable to the present case. The solicitor in question arranged the mortgage on which no more than $4,000 was advanced although it is stated to be for

[1] [1973] 2 O.R. 217.

POURVOI à l'encontre d'un arrêt de la Cour d'appel de l'Ontario[1] accueillant un appel d'un jugement du juge Moorhouse qui a déclaré nul et non avenu un transfert fait en vertu d'un pouvoir de vente attaché à une hypothèque. Pourvoi accueilli, les juges Judson et Ritchie étant dissidents.

*Nelles Starr, c.r.*, et *Walter S. Gonet, c.r.*, pour l'appelante.

*George T. Walsh, c.r.*, et *Tom Pratt*, pour les intimés.

Le jugement du juge en chef Laskin et du juge Spence a été rendu par

LE JUGE EN CHEF—Ce pourvoi a son origine dans une action intentée par l'appelante le 28 avril 1969 par laquelle elle demandait qu'il soit déclaré (1) qu'une hypothèque sur un certain immeuble prétendument consentie par elle à une nommée Alice Dale le 12 juillet 1958, enregistrée sommairement le 8 janvier 1959 et pleinement enregistrée le 15 juin 1962, est nulle parce que la signature figurant à l'acte n'est pas la sienne et (2) qu'un transfert de l'immeuble par Alice Dale aux intimés Parker et Berwick, le 1er juin 1962, en vertu du pouvoir de vente attaché à l'hypothèque est nul et que les intimés détiennent l'immeuble en fiducie pour le compte de l'appelante.

Ni le juge de première instance ni la Cour d'appel de l'Ontario n'ont fait droit à la prétention selon laquelle l'hypothèque n'avait pas été signée par l'appelante et on n'a pas insisté sur ce point devant notre Cour. Ce que le dossier montre à l'évidence, c'est que l'opération hypothécaire entre l'appelante et Alice Dale (qui n'était pas représentée devant cette Cour, ni en Cour d'appel) ainsi que d'autres opérations auxquelles étaient parties l'appelante et son mari ont été menées par un avocat dont l'irresponsabilité, l'incompétence et la négligence ressortent des motifs exposés par le juge de première instance dans une affaire connexe dont la preuve et les conclusions ont été, sur consentement des procureurs, admises dans la présente affaire. L'avocat en question a préparé une hypothèque sur laquelle il n'a pas été avancé plus

[1] [1973] 2 O.R. 217.

$5,000. He acted for both parties to the mortgage, and then took foreclosure proceedings on behalf of the mortgagee, Alice Dale. She was an elderly woman and, as found by the trial judge, relied on her daughter, who was the solicitor's secretary, and upon the solicitor, in respect of the transaction in this case. The daughter herself was involved in a mortgage transaction affecting the very property which is the subject of these proceedings.

A question arose in these proceedings whether the appellant had ever been served with the writ in the foreclosure action and, although it was left open by the trial judge who found on other grounds in the appellant's favour, I agree with the Court of Appeal that the issues in this case must be considered on the footing that there was proper service, as indeed is shown by a sheriff's officer's certificate.

Arising out of the foregoing is another matter that should be laid to rest, one which the trial judge considered favourably to the appellant and on which the Court of Appeal did not pronounce because, as it noted, no argument was addressed to that Court on it. I refer to the matter of the delay *ex facie* involved in the prosecution by the appellant of her claim herein. The proceedings out of which this appeal arises were commenced on April 28, 1969. Since they relate to the foreclosure action, which was begun on July 17, 1961, and to the exercise of a power of sale on June 1, 1962, an explanation of the delay was obviously required.

Default judgment in the foreclosure action was signed against the appellant on March 23, 1962 and a writ of possession was issued on April 17, 1962 and executed at the solicitor's behest. If the appellant did not know of the default judgment (and it appears that she did not), she certainly knew of the writ of possession; the evidence makes this clear. On learning of the sale to Parker and Berwick on June 1, 1962 pursuant to an accepted offer of May 17, 1962, the appellant took certain proceedings which proved abortive. It is enough to say that by an order of the Ontario Court of

de $4,000, bien qu'il soit déclaré qu'elle est de $5,000. Il a représenté les deux parties à l'hypothèque, puis il a intenté des procédures de forclusion au nom de la créancière hypothécaire, Alice Dale. Celle-ci était une femme âgée et, selon les conclusions du juge de première instance, elle s'en remettait à sa fille, qui était la secrétaire de l'avocat, et à celui-ci, en ce qui concerne l'opération en litige. La fille elle-même était mêlée à une opération hypothécaire portant sur l'immeuble même qui fait l'objet du présent procès.

Dans le présent procès, s'est soulevée la question de savoir si le bref d'action en forclusion avait jamais été signifié à l'appelante et, quoique cette question ait été laissée ouverte par le juge de première instance qui s'est prononcé pour d'autres motifs en faveur de l'appelante, je suis d'accord avec la Cour d'appel que les points en litige doivent être étudiés en prenant pour acquis qu'il y a eu signification régulière, comme le montre d'ailleurs le procès-verbal du fonctionnaire des services du shérif.

Ce qui précède soulève également une question qui doit être mise de côté; le juge de première instance l'a tranchée en faveur de l'appelante et sur laquelle la Cour d'appel ne s'est pas prononcée parce que, comme elle l'a noté, elle n'a pas été plaidée devant elle. Je veux parler du retard apparent avec lequel l'appelante a intenté les poursuites. Les procédures qui sont à l'origine du présent pourvoi ont été entamées le 28 avril 1969. Puisqu'elles sont relatives à une action en forclusion commencée le 17 juillet 1961 et à un pouvoir de vente exercé le 1er juin 1962, une explication de ce retard s'imposait.

Jugement par défaut dans l'action en forclusion a été rendu contre l'appelante le 23 mars 1962 et un bref de possession a été délivré le 17 avril 1962 et exécuté à la requête de l'avocat. Si l'appelante n'a pas eu connaissance du jugement par défaut (et il semble qu'elle ne l'ait pas eue), elle a certainement eu connaissance du bref de possession; la preuve le démontre. Ayant appris la vente à Parker et Berwick le 1er juin 1962 à la suite d'une offre acceptée le 17 mai 1962, elle intenta certaines procédures qui échouèrent. Il suffit de dire que par ordonnance du 10 décembre 1968, la Cour d'appel

Appeal of December 10, 1968, that Court gave leave to the appellant to re-open an action instituted by her in 1964 against Alice Dale, Parker and Berwick, or to institute such other proceedings as she might be advised, under a limiting date in either case of February 3, 1969. A motion by the appellant to re-open the former action was dismissed on April 9, 1969 and the proceedings now in appeal were begun, as already stated, on April 28, 1969. The trial judge indicated that there was no evidence to show that the motion to re-open was not commenced before February 3, 1969. Hence, he proceeded to deal with the case before him on the merits. I think, in view of all the circumstances, that was the proper course. It was the one that the Court of Appeal took, and it was on the merits that the argument proceeded in this Court.

The default judgment in the foreclosure action, which as already noted, was signed on March 23, 1962, was in the following terms:

UPON reading the Writ of Summons issued in this action, and affidavit of service of the said writ and no appearance having been entered and no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed;

I. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at the City of Toronto.

II. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith deliver to the plaintiff, or to whom she may appoint, possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendant.

When originally drawn up in typed form, the proposed default judgment consisted of three clauses, the first and third clauses being those set out above and a second clause which was as follows:

2. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith after making of the Master's report pay to the plaintiff what shall be found due her for principal money, interest and costs at the date of the said report and upon payment of the amount due to her that (subject to the provision of

de l'Ontario donna à l'appelante la permission de rouvrir une action qu'elle avait intentée contre Alice Dale, Parker et Berwick en 1964 ou d'intenter toute autre procédure qu'elle jugerait opportune, avant une date limite fixée dans les deux cas au 3 février 1969. Une requête en réouverture de l'ancienne action présentée par l'appelante fut rejetée le 9 avril 1969 et les procédures maintenant devant nous furent entamées, comme je l'ai déjà dit, le 28 avril 1969. Le juge de première instance indiqua qu'il n'y avait aucune preuve que la requête en réouverture n'avait pas été présentée avant le 3 février 1969. En conséquence, il procéda à l'audition au fond de l'affaire qui était devant lui. Je pense que c'était, eu égard à toutes les circonstances, la conduite à suivre. C'est celle qu'a suivie la Cour d'appel et c'est donc sur le fond que l'on a plaidé devant notre Cour.

Le jugement par défaut dans l'action en forclusion, rendu, comme je l'ai déjà dit, le 23 mars 1962, était rédigé en ces termes:

[TRADUCTION] VU le bref d'assignation délivré dans la présente action et l'attestation sous serment de la signification dudit bref, en l'absence de comparution et aucun avis n'ayant été déposé exprimant le désir de la défenderesse d'avoir l'occasion de racheter les lieux hypothéqués;

I. IL EST ORDONNÉ ET DÉCIDÉ que toutes les recherches nécessaires soient faites, les comptes dressés, les frais taxés et les mesures prises en vue de rachat ou de forclusion et qu'à ces fins la présente cause soit renvoyée au *Master* en la ville de Toronto.

II. ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que la défenderesse mette immédiatement la demanderesse ou la personne qu'elle peut désigner, en possession des biens-fonds et lieux en question dans la présente cause ou de toute partie de ceux-ci qui peuvent être en la possession de ladite défenderesse.

Lors de sa rédaction originale sous forme dactylographiée, le jugement par défaut proposé comportait trois clauses, la première et la troisième étant celles qui sont reproduites ci-dessus et une deuxième ainsi libellée:

[TRADUCTION] 2. ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que, après dépôt du rapport du *Master*, la défenderesse paye immédiatement à la demanderesse ce qui lui sera trouvé dû en capital, intérêts et frais à la date dudit rapport et, sur paiement du montant qui lui est dû, que (sous réserve des disposisection 2 of The Mortgages Act) the plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto.

This clause was struck out, the deletion being initialled by the Assistant Registrar. No explanation was given for the deletion. It is common ground that had this stricken clause remained in the default judgment the appellant would have been entitled to succeed and to have a proper reference at which the accounts would be taken and the amount properly owing on the mortgage ascertained. There was a contention by the respondents that their position was better than that of Alice Dale in that they were purchasers for value, but it is quite clear that they were aware of the foreclosure proceedings and of the default judgment. Since they took with notice thereof, their title would be vulnerable if the mortgagee was disentitled to act when she did under the power of sale in the mortgage.

I note also that Alice Dale swore an affidavit on May 31, 1962 in respect of the sale to the respondents in which she alleged a continuing default of interest under the mortgage to the date of the sale, which she said was May 29, 1962. The deed of June 1, 1962 also recited that there was default in interest for more than two months (this being a proviso in the mortgage permitting sale) and that it had continued to date. The record shows that the solicitor who was behind all the transactions involving the appellant's mortgaged property had in fact paid up the interest to the end of April, 1962, which was for a period beyond the date on which default judgment was signed and beyond the date of the writ of possession.

The default judgment was a judgment *nisi* for foreclosure, and para. 1 thereof directed a reference to the Master for the usual enquiries with respect to the accounts and as to redemption or foreclosure. Alice Dale did not proceed with the reference which was directed by para. 1 of the default judgment but, instead purported to act under the power of sale contained in the mortgage, and this is what raises the central issue in the present case. In short, was she entitled to exercise

tions de l'article 2 de *The Mortgages Act*) la demanderesse rétrocède les lieux hypothéqués et rende tous documents les concernant.

Cette clause a été biffée, suppression parafée par le registraire adjoint. Aucune explication de cette suppression n'a été fournie. Il n'est pas contesté que, si la clause biffée était demeurée dans le jugement par défaut, l'appelante aurait pu prétendre, avec succès, à un renvoi approprié au cours duquel les comptes auraient été dressés et le montant exact de la dette hypothécaire déterminé. Les intimés ont prétendu qu'ils étaient en meilleure position qu'Alice Dale parce qu'ils étaient des acquéreurs à titre onéreux, mais il est parfaitement clair qu'ils étaient au courant des procédures de forclusion et du jugement par défaut. L'ayant acquis en connaissance de cause, leur titre serait vulnérable, si la créancière hypothécaire n'avait pas le droit d'agir comme elle l'a fait en vertu du pouvoir de vente attaché à l'hypothèque.

Je note également qu'Alice Dale a fait, le 31 mai 1962, une déclaration sous serment lors de la vente aux intimés dans laquelle elle alléguait défaut continu de paiement des intérêts sur l'hypothèque jusqu'à la date de la vente, qu'elle disait être le 29 mai 1962. L'acte du 1<sup>er</sup> juin 1962 indique également qu'il y avait défaut de paiement des intérêts depuis plus de deux mois (il s'agit là d'une clause de l'hypothèque permettant la vente) et qu'il avait continué jusqu'à cette date. Le dossier révèle que l'avocat qui était derrière toutes les opérations relatives à l'immeuble hypothéqué de l'appelante avait, en fait, payé les intérêts jusqu'à la fin d'avril 1962, c'est-à-dire sur une période allant au-delà de la date à laquelle le jugement par défaut a été rendu et au-delà de celle du bref de possession.

Le jugement par défaut était un jugement conditionnel de forclusion et son 1er paragraphe ordonnait un renvoi au *Master*, pour les recherches habituelles relatives aux comptes et au rachat ou à la forclusion. Alice Dale ne fit pas procéder au renvoi ordonné par le 1er paragraphe du jugement par défaut mais prétendit plutôt agir en vertu du pouvoir de vente attaché à l'hypothèque, et c'est ce qui soulève la question au cœur du présent litige. En bref, avait-elle le droit d'exercer le pouvoir de the power of sale against the appellant who had not entered an appearance, had not filed a defence and had not filed a notice of her desire of an opportunity to redeem, and to do so after the judgment *nisi* for foreclosure and without the leave of the Court?

The trial judge founded himself on the principle expressed in *Stevens v. Theatres, Ltd.*[2], a case which was followed by the British Columbia Court of Appeal in *De Beck v. Canada Permanent Loan and Savings Co.*[3] and approvingly referred to by Stewart J. in *Marshall v. Miles*[4], at p. 397. Although there is language in the reasons of Farwell J. in the *Stevens* case that indicates that it was because the decree *nisi* of foreclosure directed a reference and also a reconveyance (as under the paragraph deleted from the default judgment herein) that the power of sale was suspended and could not be exercised without leave of the Court, the trial judge viewed the case in wider compass. For him, the direction in para. 1 of the default judgment for a reference was enough to preclude exercise of the power of sale without leave of the Court.

In the Court of Appeal, Arnup J.A. speaking for the Court, was of opinion that the *Stevens* case was inapplicable by reason of the omission of the deleted paragraph from the default judgment and, moreover, that his result was compelled by the change in mortgage practice that occurred in Ontario after 1941. His reasons contain the following:

> In my opinion, the *Stevens* rule did not apply in Ontario after 1941 in a situation where a defendant by writ (as mortgagor) did not enter an appearance nor file a D.O.R., even if there were encumbrancers, thus requiring a reference. There would be in such a case no judgment under which the mortgagor acquired rights that would be taken away by the mortgagee's exercising his power of sale. This conclusion is further justified by the facts of this case, namely, that the actual judgment issued is completely silent as to any right of redemption, or direction to the mortgagee to reconvey on payment. The exercise of the power of sale by the mortgagee was

[2] [1903] 1 Ch. 857.
[3] (1907), 12 B.C.R. 409.
[4] [1970] 3 O.R. 394.

vente à l'encontre de l'appelante qui n'avait pas comparu, n'avait pas produit de défense et n'avait pas déposé d'avis exprimant son désir d'avoir l'occasion de racheter? Avait-elle le droit de l'exercer après le jugement conditionnel de forclusion et sans la permission de la Cour?

Le juge de première instance s'est appuyé sur le principe exprimé dans *Stevens v. Theatres, Ltd.*[2], arrêt suivi par la Cour d'appel de la Colombie-Britannique dans *DeBeck v. Canada Permanent Loan and Savings Co.*[3] et cité avec approbation par le juge Stewart dans *Marshall v. Miles*[4], à la p. 397. Bien que le libellé des motifs du juge Farwell dans *Stevens* indique que c'est parce que le jugement conditionnel de forclusion ordonnait un renvoi et également une rétrocession (comme dans le paragraphe supprimé dans le jugement par défaut, dans l'espèce présente) que le pouvoir de vente était suspendu et ne pouvait être exercé sans permission de la Cour, le juge de première instance a vu l'affaire sous un angle plus large. Pour lui, l'ordonnance de renvoi au 1[er] paragraphe du jugement par défaut suffisait à empêcher l'exercice du pouvoir de vente sans permission de la Cour.

Parlant au nom de la Cour d'appel, le juge Arnup a été d'avis que *Stevens* était inapplicable en raison de l'omission du paragraphe supprimé dans le jugement par défaut et qu'au surplus ce résultat était imposé par les changements intervenus dans la procédure hypothécaire en Ontario depuis 1941. Ses motifs contiennent le passage suivant:

> [TRADUCTION] A mon avis, la règle *Stevens* ne s'applique plus en Ontario depuis 1941 dans la situation où un défendeur actionné en tant que débiteur hypothécaire ne fait pas acte de comparution ni ne dépose un D.O.R., même s'il y a des créanciers subséquents, obligeant ainsi à un renvoi. Il n'y a dans ce cas aucun jugement en vertu duquel le débiteur hypothécaire a acquis des droits qui lui seraient ôtés par l'exercice, par le créancier hypothécaire, de son pouvoir de vente. Cette conclusion est encore plus justifiée en l'espèce puisque le jugement effectivement rendu est complètement silencieux sur une quelconque faculté de rachat ou obligation du créancier

[2] [1903] 1 Ch. 857.
[3] (1907), 12 B.C.R. 409.
[4] [1970] 3 O.R. 394.

not in any way contrary to the order of the Court which had been issued at the behest of the mortgagee.

I would observe that the learned judge's statement in the above-quoted passage that there was no right of redemption given in the default judgment herein is not correct, unless it be taken as a specific reference to the mortgagors right of redemption as depending only on whether there was a direction to reconvey, pursuant to the deleted paragraph. In the absence of this paragraph, it was the learned judge's opinion, fortified by the change in Ontario mortgage practice, that para. 1 of the default judgment referred only to redemption by subsequent encumbrancers and, even if there were such encumbrancers, the failure to proceed to a reference was not a matter of which the mortgagor could complain.

Arnup J.A conceded that his conclusion "may seem to be a highly technical position to reach but the *Stevens* rule itself is a technical one . . .". I do not think so in the light of the regard which equity has always had for the position of a mortgagor. "Once a mortgage, always a mortgage" is not an idle maxim when even a final order of foreclosure may, in some circumstances, be set aside. Under the original draft of the default judgment containing the paragraph subsequently deleted, the only provision for redemption is in para. 1; the deleted paragraph builds upon para. 1 by referring back to it, and is based upon the assumption that a reference before the Master will take place.

Counsel for the respondent in this Court viewed the deleted paragraph as relating to judgment on the covenant for payment of the mortgage debt, but I do not think that this meets the issue here. The question in this case is whether the excision of the draft para. 2 *ipso facto* relieves the mortgagee in equity from holding the property to answer the exercise by the mortgagor of the equitable right to redeem when the legal right has been lost by a default in payment at the time prescribed in the

hypothécaire de rétrocéder après paiement. L'exercice, par le créancier hypothécaire, de son pouvoir de vente, n'était aucunement contraire à l'ordonnance que la cour avait rendue à sa requête.

Je ferais observer que l'affirmation du savant juge, dans le passage précité, selon laquelle le jugement par défaut n'accordait en l'espèce aucune faculté de rachat, n'est pas exacte, à moins de la considérer comme voulant faire dépendre uniquement la faculté de rachat du débiteur hypothécaire de l'existence d'un ordre de rétrocession, comme dans le paragraphe supprimé. En l'absence de ce paragraphe, et fortifié par les changements intervenus dans la procédure hypothécaire en Ontario, le savant juge était d'avis que le 1[er] paragraphe du jugement par défaut visait seulement le rachat par des créanciers subséquents et que, même s'il y avait de tels créanciers, le débiteur hypothécaire n'avait pas lieu de se plaindre du défaut de faire procéder au renvoi.

Le juge Arnup a reconnu que sa conclusion [TRADUCTION] «peut sembler une prise de position extrêmement procédurale mais la règle *Stevens* elle-même est une règle de procédure . . .». Je ne pense pas qu'il en soit ainsi, si l'on considère la façon dont l'*equity* a toujours considéré la position du débiteur hypothécaire. [TRADUCTION] «Une hypothèque est toujours une hypothèque» n'est pas une maxime vaine lorsque même une ordonnance définitive de forclusion peut, dans certaines circonstances, être révoquée. Selon la rédaction originale du jugement par défaut contenant le paragraphe supprimé par la suite, la seule disposition envisageant le rachat se trouve au 1[er] paragraphe; le paragraphe supprimé se fonde sur le par. 1 en s'y référant et repose sur la présomption qu'un renvoi devant le *Master* aura lieu.

Le procureur de l'intimée devant cette Cour voyait le paragraphe supprimé comme se rapportant au jugement sur l'engagement de paiement de la dette hypothécaire, mais je ne pense pas que cela réponde à la question dont il s'agit ici. La question en l'espèce est de savoir si la suppression du par. 2 du projet de jugement dispense *ipso facto* le créancier hypothécaire en *equity* de conserver l'immeuble pour faire face à l'exercice, par le débiteur hypothécaire, du droit que lui confère mortgage. The contention of the respondent, which was upheld by the Ontario Court of Appeal, is that para. 1 of the default judgment did not preserve any right of redemption by the mortgagor.

In the *Stevens* case, it does not appear that the judgment *nisi* for foreclosure was a default judgment. The recital of facts includes the statement that the order *nisi* for foreclosure was in the common form, directing accounts and directing the plaintiff to reconvey the property on payment of what should be found due. Instead of proceeding to a reference the mortgagee gave notice to the mortgagor of intention to sell, and two weeks later entered into a contract of sale which was later followed by a conveyance to the purchaser. The holding of Farwell J. that the power of sale in the mortgage was suspended in view of the judgment *nisi* for foreclosure and could not be exercised without leave of the Court "because it prejudices the rights given to the mortgagor under the direction to reconvey" relates, of course, to the actual terms of the judgment *nisi* in that case.

The question that arises is whether the *Stevens* case expresses a principle which is equally applicable where there is a provision, as here, for a reference and for redemption or foreclosure under a default judgment *nisi* which, as approved by the Registrar (or Assistant Registrar) omits the follow-up clause containing the direction to reconvey upon payment of the amounts found due on the reference. In the course of his reasons, Farwell J. made some general observations as to the relations of mortgagor and mortgagee which, I think, are relevant here. He said this (at p. 860):

> Now this question—whether a decree for foreclosure directing accounts and reconvenance, or, by parity of reasoning, a decree for redemption directing accounts and reconveyance, on payment, operates to prevent the exercise of the power of sale in the mortgage, or that given by the statute—has to be decided on principle in the absence of authority. The first proposition, which I think is plain, is this—neither the mortgagee nor the mortgagor is entitled to dismiss his action, or to discon-

l'*equity* de le racheter lorsque, faute de payer à l'échéance prescrite par l'hypothèque, il en a perdu la faculté en droit strict. La prétention de l'intimée, accueillie par la Cour d'appel de l'Ontario, est que le par. 1 du jugement par défaut ne préservait aucun droit de rachat par la débitrice hypothécaire.

Dans *Stevens*, il ne semble pas que le jugement conditionnel de forclusion était un jugement par défaut. L'exposé des faits contient l'affirmation que l'ordonnance conditionnelle était en la forme usuelle, ordonnant que les comptes soient dressés et que le demandeur rétrocède l'immeuble après paiement de ce qui lui était dû. Au lieu de faire procéder à un renvoi, le créancier hypothécaire avisa le débiteur de son intention de vendre et, deux semaines après, passa un contrat de vente suivi plus tard d'un transfert à l'acheteur. La décision du juge Farwell, selon laquelle le pouvoir de vente attaché à l'hypothèque était suspendu en raison du jugement conditionnel de forclusion et ne pouvait être exercé sans permission de la Cour [TRADUCTION] «parce qu'il porte atteinte aux droits donnés au débiteur hypothécaire en vertu de l'ordre de rétrocession», est évidemment reliée au libellé même du jugement conditionnel dans cette affaire.

La question qui se pose est de savoir si *Stevens* exprime un principe qui est également applicable lorsque renvoi et rachat ou forclusion sont prévus, comme ici, dans un jugement conditionnel par défaut qui, avec l'approbation du registraire (ou du registraire adjoint), omet la clause complémentaire contenant l'ordre de rétrocéder sur paiement des montants trouvés dus lors du renvoi. Le juge Farwell a, dans ses motifs, fait quelques observations générales sur les relations du débiteur et du créancier hypothécaires qui sont, je crois, pertinentes en l'espèce. Il dit ceci (p. 860):

> [TRADUCTION] Ceci dit, la question de savoir si un décret de forclusion ordonnant des comptes et la rétrocession ou, par analogie, un décret de rachat ordonnant des comptes et la rétrocession sur paiement a pour effet d'empêcher l'exercice du pouvoir de vente attaché à l'hypothèque ou de celui prévu par la loi, doit, à défaut de jurisprudence, être résolue compte tenu des principes. La première proposition, qui me paraît évidente, est celle-ci: ni le débiteur hypothécaire ni le créancier hypo-

tinue after judgment. The general principle on which the Court acts with regard to actions of this sort is to regard the plaintiff as dominus litis until judgment; but if, and so far as the judgment operates for the benefit, nor merely of himself but for some one else, he cannot get rid of his action mero motu after judgment. . . .

Now, if the plaintiff cannot get rid of his action after judgment because the judgment is for the benefit also of the defendants, it must follow that he cannot in any way vary the form of that judgment by doing an act which would put it out of his power to perform that which the Court has directed him to do as the condition of getting the judgment.

It is also useful to consider the British Columbia case of *DeBeck v. Canada Permanent Loan and Savings Co., supra.* There, a mortgagee obtained a judgment *nisi* for foreclosure against the mortgagor who had appeared in the action and filed a defence, and also a judgment *nisi* for foreclosure against a second mortgagee who did not (apparently) appear and did not file a defence. A reference was had, and neither the mortgagor nor the second mortgagee attempted to redeem within the six month period fixed on the reference. The foreclosing mortgagee then purported to sell the property, having given notice to the mortgagor but not to the second mortgagee, but without having obtained an order absolute for foreclosure and without having the leave of the Court. The purchaser knew of the foreclosure proceedings. Three years later the mortgagor and the second mortgagee made a tender seeking redemption, and when it was denied they sued the foreclosing mortgagee and the purchaser claiming that they were entitled to redeem.

Their claim was upheld by Hunter C.J. whose judgment, relying on the *Stevens* case, was sustained on appeal. The trial judge noted that the sale agreement was made before the expiry of the time fixed for redemption, and the foreclosing mortgagee was therefore disentitled to sell without leave of the Court. This is entirely consistent with the principle of the *Stevens* case. If a private sale is prohibited without leave of the Court where a

thécaire n'a le droit de se désister de son action ou de renoncer après jugement. Le principe général qu'appliquent les tribunaux dans des actions de cette sorte est que le demandeur doit être considéré comme le *dominus litis* jusqu'au jugement; mais dès lors que le jugement, et dans la mesure où il le fait, produit des effets en faveur non seulement du demandeur mais aussi de quelqu'un d'autre, il ne peut se défaire de son action *mero motu* après jugement. . . .

Ceci dit, si le demandeur ne peut se défaire de son action après jugement parce que le jugement profite aussi aux défendeurs, il doit s'ensuivre qu'il ne peut en aucune façon modifier la forme de ce jugement en accomplissant un acte qui se situerait en dehors de son pouvoir d'exécuter ce que la cour lui a ordonné de faire comme condition d'obtention du jugement.

Il est également utile d'examiner l'affaire de Colombie-Britannique, *DeBeck v. Canada Permanent Loan and Savings Co.*, précitée. Il s'agissait d'un créancier hypothécaire qui avait obtenu un jugement conditionnel de forclusion contre le débiteur hypothécaire qui avait comparu à l'action et produit une défense, ainsi qu'un jugement conditionnel de forclusion contre un second créancier hypothécaire qui (apparemment) n'avait pas comparu ni produit de défense. Un renvoi eut lieu et ni le débiteur ni le second créancier hypothécaire ne tentèrent de racheter durant la période de six mois fixée en renvoi. Le créancier hypothécaire saisissant entendit alors vendre l'immeuble, après en avoir avisé le débiteur, mais sans en aviser le second créancier hypothéraire et sans avoir obtenu de jugement définitif de forclusion ni la permission de la Cour. L'acheteur était au courant des procédures de forclusion. Trois ans plus tard, le débiteur et le second créancier hypothécaire firent une offre de rachat et, celle-ci ayant été refusée, ils poursuivirent le créancier hypothécaire saisissant et l'acheteur, prétendant avoir le droit de racheter.

Leur demande fut accueillie par le juge en chef Hunter dont le jugement, qui s'appuyait sur *Stevens*, fut confirmé en appel. Le juge de première instance releva que le contrat de vente avait été passé avant l'expiration du délai fixé pour le rachat et que le créancier hypothécaire saisissant n'avait donc pas le droit de vendre sans la permission de la Cour. Cela est parfaitement compatible avec le principe posé par *Stevens*. Si une vente reference is directed but has not been held, it must equally be prohibited where it is held but the period fixed thereunder for redemption has not expired.

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.

In his reasons in the Court of Appeal, Arnup J.A. emphasized the view that the reason for the suspension of the power of sale under a judgment *nisi* for foreclosure, unless leave of the Court is obtained, is that the mortgagor is given certain rights under the foreclosure judgment (for example, the right to a reconveyance on paying what is owing, as ascertained on a reference), and a sale without leave would deprive him of those rights. I think that this overlooks the fact that a mortgagor under a judgment *nisi* for foreclosure has not yet been deprived of his pre-existing equitable right to redeem; the judgment *nisi* cannot be said to have conferred new rights but rather to have prescribed a procedure by which the existing right could be pursued and the property reclaimed, so long as the foreclosure did not become absolute.

There were in the present case, subsequent encumbrancers, namely, another mortgagee and two execution creditors, and if the mortgagee had on that account proceeded to a reference instead of purporting to exercise a power of sale without leave, I am of the opinion that the mortgagor, although not entitled to notice of the reference by reason of her non-appearance, would have been entitled to invoke the equitable jurisdiction of the Court to claim a right to redeem on payment of the amounts found owing on the reference and on

privée est interdite sans la permission de la Cour quand un renvoi a été ordonné mais n'a pas eu lieu, elle doit l'être également lorsque le renvoi a lieu mais que le délai de rachat qui y est fixé n'est pas expiré.

Ce qui ressort de *DeBeck*, c'est la réaffirmation d'une théorie bien établie selon laquelle le droit de racheter en *equity* est plus qu'une simple faculté mais est, en réalité, un droit réel sur le bien-fonds hypothéqué qui ne saurait être écarté à la légère et que les cours d'*equity* pourront faire respecter: voir *Falconbridge*, Law of Mortgages (3[e] éd. 1942), pp. 50 à 53. Je me demande, en conséquence, si un tel droit peut être écarté par une règle de procédure qui empêcherait un tribunal de prendre en considération toutes les circonstances de nature à le justifier d'exercer son pouvoir discrétionnaire et d'autoriser le rachat, sous certaines conditions.

Dans ses motifs en Cour d'appel, le juge Arnup a souligné que la raison pour laquelle le pouvoir de vente est, sauf autorisation judiciaire, suspendu aux termes d'un jugement conditionnel de forclusion, est que le débiteur hypothécaire se voit conférer certains droits par le jugement de forclusion (par exemple, le droit à une rétrocession sur paiement de la dette fixée en renvoi) et qu'une vente sans autorisation le priverait de ces droits. Je pense que c'est oublier que le débiteur hypothécaire qui est sous le coup d'un jugement conditionnel de forclusion, n'est pas encore privé de son droit de rachat préexistant en *equity*. On ne peut dire que le jugement conditionnel confère de nouveaux droits mais plutôt qu'il détermine la procédure selon laquelle le droit existant peut être exercé et l'immeuble réclamé, tant que la forclusion n'est pas devenue définitive.

Dans la présente espèce, il y avait des créanciers subséquents, à savoir un autre créancier hypothécaire et deux créanciers saisissants en vertu d'un jugement. Si le créancier hypothécaire avait en conséquence procédé à un renvoi au lieu de prétendre exercer un pouvoir de vente sans permission, je suis d'avis que la débitrice hypothécaire, quoique n'ayant pas le droit d'être avisée du renvoi puisqu'elle n'avait pas comparu, aurait eu le droit d'invoquer la compétence d'*equity* de la Cour pour se faire reconnaître le droit de racheter sur paiesuch other terms as the Court might fix in view of the default of appearance. If this be so, I do not see how the mortgagee could improve her position by proceeding to a sale under the mortgage without leave when she had crystallized her remedies through a judgment *nisi* which called for a reference. To sell in such circumstances, not by order of the Court nor by its leave, is to defeat what the Court has formally directed.

The Court of Appeal would have it that Ontario Rule 460A, introduced as of May 31, 1941 and companion changes in the Rules, have altered the position of a mortgagor by obliging him to file a notice of desire of opportunity to redeem (known as a D.O.R.) if he does not otherwise wish to defend the foreclosure action; failing this (and failing defence), his previous automatic right to redemption is said to be lost. Rule 460A, which became Rule 465 in the 1960 consolidation of the Ontario Rules and which was in force at the material times herein, is as follows:

> Where a defendant by writ in an action for foreclosure or sale desires an opportunity to redeem the mortgaged premises but does not otherwise desire to defend the action, he shall within the time allowed for appearance file and serve a memorandum entitled in the action to the following effect: 'I desire an opportunity to redeem the mortgaged premises', whereupon he shall be entitled to four days notice of the taking of the account of the amount due to the plaintiff and shall have six calendar months from the time of the taking of the account to redeem the mortgaged premises.

This Rule must be read with Rule 467 which makes it clear that the failure to appear or to file a D.O.R. enables the plaintiff to sign judgment for immediate foreclosure, subject to a reference being required as to encumbrancers, and the plaintiff will be entitled to a final order of foreclosure if on the reference no encumbrancer proves a claim.

The Rule changes do not appear to have dealt with the case where, as here, a plaintiff does not proceed to final judgment for foreclosure upon a

ment des sommes trouvées dues en renvoi et aux conditions que la Cour pouvait déterminer étant donné le défaut de comparution. S'il en est ainsi, je ne vois pas comment la créancière hypothécaire pouvait améliorer sa position en procédant, sans permission, à une vente en vertu de l'hypothèque, alors qu'elle avait cristallisé ses recours dans un jugement conditionnel qui imposait un renvoi. Vendre dans de telles circonstances, sans ordre ni permission de la Cour, revient à méconnaître ce que la Cour a formellement ordonné.

La Cour d'appel a soutenu que la règle 460A de l'Ontario, mise en vigueur le 31 mai 1941, ainsi que les modifications corrélatives aux Règles de procédure ont modifié la position du débiteur hypothécaire en l'obligeant à déposer un avis exprimant son désir d'avoir l'occasion de racheter (couramment appelé D.O.R.) s'il n'entend pas présenter d'autre défense à l'action en forclusion. A défaut de cet avis (et à défaut de défense), le droit de rachat automatique qu'il avait antérieurement serait perdu. La règle 460A, qui est devenue la règle 465 dans la refonte des Règles de pratique de l'Ontario effectuée en 1960, et qui était en vigueur à l'époque des faits de l'espèce, se lit comme suit:

> [TRADUCTION] Le défendeur à une action en forclusion ou vente forcée qui désire avoir l'occasion de racheter les lieux hypothéqués mais ne désire pas présenter d'autre défense à l'action, doit, dans le délai de comparution, déposer et signifier une note portant l'intitulé de l'action et ayant la teneur suivante: «Je désire avoir une occasion de racheter les lieux hypothéqués», sur quoi il aura droit à un avis de quatre jours de l'établissement du compte du montant dû au demandeur et aura six mois à compter de cet établissement pour racheter les lieux hypothéqués.

Cette règle doit être lue avec la règle 467 qui indique clairement que le défaut de comparaître ou de déposer un D.O.R. habilite le demandeur à obtenir jugement en forclusion immédiate, sauf si un renvoi est exigé quant aux créanciers, et le demandeur aura droit à une ordonnance définitive de forclusion si, lors du renvoi, aucun créancier ne prouve son droit.

Les modifications apportées aux Règles ne semblent pas avoir touché le cas où, comme ici, un demandeur ne requiert pas un jugement définitif default by the mortgagor and on his failure to file a D.O.R., but instead seeks a judgment *nisi*. It is my opinion that such a judgment leaves open the equitable right to redeem, at least until judgment absolute is obtained, and that the plaintiff cannot sell under the power of sale without leave of the Court.

I return, too, to the observation previously made that the judgment *nisi* in this case does direct a reference, although the consequences thereof are not spelled out because of the deleted paragraph. The deletion is, however, mere form and the prevailing practice of allowing six months to redeem after the taking of accounts would be applicable.

Counsel for the appellant stressed the equities of the present case and, apart from the question of delay, they are clearly with the appellant. I refer to three matters; first, the property, mortgaged for $4,000, was sold to the respondents for $25,500; second, the solicitor, who was in complete charge of the dealings between the appellant and Alice Dale, acted on behalf of the latter to the detriment of the former; and third, there were existing subsequent encumbrancers of whom, apparently, no notice was taken by the solicitor and who were entitled to consideration in the foreclosure proceedings, and certainly, upon the reference directed by the judgment *nisi*.

I would allow the appeal, set aside the judgment of the Ontario Court of Appeal and restore the judgment of Moorhouse J. with costs to the appellant throughout.

JUDSON J. (*dissenting*)—The appellant Helga Petranik brought an action against Alice Dale, Frederick Parker and Eugene Berwick, claiming a declaration that a $5,000 mortgage on a house and lot known as 62 La Rose Avenue, Etobicoke, Ontario, which was purportedly executed by Mrs. Petranik in favour of Mrs. Dale, was null and void, and that Parker and Berwick, who purchased the property from Mrs. Dale under power of sale in the mortgage, held the property in trust for Mrs. Petranik. Mrs. Dale counterclaimed for the difference between the amount realized on the sale and

de forclusion sur défaut du débiteur hypothécaire de comparaître et de déposer un D.O.R., mais demande à la place un jugement conditionnel. A mon avis, un tel jugement laisse intact le droit de racheter en *equity*, tout au moins jusqu'à l'obtention du jugement définitif. Le demandeur ne peut exercer le pouvoir de vente sans permission de la cour.

Je rappelle également qu'en l'espèce, le jugement conditionnel ordonne expressément un renvoi, encore que les conséquences n'en soient pas précisées à cause du paragraphe supprimé. La suppression n'est cependant que pure forme et la pratique courante, qui consiste à accorder un délai de rachat de six mois après l'établissement des comptes, est applicable.

Les procureurs de l'appelante ont insisté sur les considérations d'équité dans la présente affaire et, mise à part la question du retard, elles sont nettement en faveur de l'appelante. J'en relève trois: d'abord, l'immeuble, hypothéqué pour $4,000, a été vendu $25,500 aux intimés; ensuite, l'avocat, qui était entièrement chargé des négociations entre l'appelante et Alice Dale, a agi au profit de celle-ci au détriment de celle-là; et enfin, il existait des créanciers subséquents dont, apparemment, l'avocat n'a tenu aucun compte et qui avaient le droit d'être pris en considération lors des procédures de forclusion et, en tout cas, lors du renvoi ordonné par le jugement conditionnel.

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel de l'Ontario et de rétablir le jugement du juge Moorhouse, avec dépens en faveur de l'appelante dans toutes les cours.

LE JUGE JUDSON (*dissident*)—L'appelante Helga Petranik a intenté une action contre Alice Dale, Frederick Parker et Eugene Berwick, demandant qu'il soit déclaré qu'une hypothèque de $5,000 sur une maison et un lot situés au 62, avenue La Rose à Etobicoke, en Ontario, qui avait été censément consentie par M^me^ Petranik en faveur de M^me^ Dale, était nulle et que Parker et Berwick, qui avaient acheté l'immeuble de M^me^ Dale en vertu du pouvoir de vente attaché à l'hypothèque, le détenaient en fiducie pour le compte de M^me^ Petranik. Par demande reconventionnelle, the amount owing to her on the mortgage and for expenses incurred. Parker and Berwick counterclaimed for damages suffered when a notice of claim registered on title by Mrs. Petranik prevented them from selling 62 La Rose after they had built another home on other property.

Mme Dale a réclamé la différence entre le montant réalisé lors de la vente et le montant qui lui était dû en vertu de l'hypothèque, ainsi que le remboursement des dépenses engagées. Par demande reconventionnelle, Parker et Berwick ont réclamé des dommages-intérêts pour le préjudice qu'ils avaient subi lorsqu'un avis de réclamation enregistré contre le titre de propriété par Mme Petranik les avait empêchés de vendre le 62, La Rose après qu'ils ont construit une autre maison sur un autre terrain.

Moorhouse J., in a judgment dated June 3, 1971, found that the mortgage was valid to the extent of $4000, but that the sale to Parker and Berwick, which took place after Mrs. Dale had obtained judgment *nisi* in a foreclosure action of which Parker and Berwick had notice, was null and void. The defendants Parker and Berwick appealed to the Ontario Court of Appeal which, in a unanimous judgment written by Arnup J.A., reported at [1973] 2 O.R. 217, held that the exercise of the power of sale was not invalid since the mortgagor had not given notice that she desired an opportunity to redeem and the judgment *nisi* did not confer any rights on the mortgagor which could be defeated by a sale. The plaintiff appealed to this Court.

Le juge Moorhouse, dans un jugement du 3 juin 1971, a estimé que l'hypothèque était valide à concurrence de $4,000, mais que la vente à Parker et Berwick, qui avait eu lieu après que Mme Dale eut obtenu un jugement conditionnel dans une action en forclusion dont Parker et Berwick avaient été avisés, était nulle. Les défendeurs Parker et Berwick ont fait appel à la Cour d'appel de l'Ontario qui, dans un jugement unanime rédigé par le juge Arnup, publié dans [1973] 2 O.R. 217, a décidé que le pouvoir de vente n'avait pas été irrégulièrement exercé puisque la débitrice hypothécaire n'avait pas donné avis de son désir d'avoir une occasion de racheter et que le jugement conditionnel ne lui conférait aucun droit auquel une vente puisse faire échec. La demanderesse en a alors appelé à notre Cour.

Although the case involves *The Mortgages Act*, R.S.O. 1960, c. 245, and the Rules of Practice, R.R.O. 1960, Reg. 396, both of which have been substantially amended, it raises an issue which could affect other properties sold under power of sale within the limitation period of the last ten years: *The Limitations Act*, R.S.O. 1970, c. 246, s. 4.

Bien que *The Mortgages Act*, R.S.O. 1960, c. 245 et les Règles de pratique, R.R.O. 1960, R. 396, que cette affaire met en jeu, aient été toutes deux profondément modifiées depuis, cette affaire soulève une question qui peut viser d'autres immeubles vendus en vertu d'un pouvoir de vente durant la période de prescription des dix dernières années: *The Limitations Act*, R.S.O. 1970, c. 246, art. 4.

The issue is not merely one of practice, but, as in any mortgage action, one of equity. It is well established that even a final foreclosure order can be reopened if the circumstances warrant such action. It is thus important to inquire into the dealings of the parties though they are complex and reach back many years.

La question n'est pas seulement d'ordre procédural. C'est aussi, comme dans toute action hypothécaire, une question d'*equity*. Il est bien établi en effet que même une ordonnance définitive de forclusion peut être réouverte si les circonstances le justifient. Il est donc important d'examiner les relations entre les parties même si elles sont complexes et remontent à de nombreuses années.

The appellant Helga Petranik and her husband Ludwik came to Canada from Germany in 1949 and worked industriously to establish themselves. Mr. Petranik worked on the construction of houses, at first as a carpenter and then as a self-employed contractor. In 1951 the Petraniks built a triplex at 38 Beckett Avenue. They rented two units and lived in the other until 1957 when they moved into a house which Mr. Petranik had built on Hadrian Drive. They stayed there two months until the house was sold and then moved into a house which Mr. Petranik had built at 37 Beckett Avenue. Mrs. Petranik, on the recommendation of a friend at work, consulted Mr. G. A. Howell, a solicitor, about a by-law affecting 38 Beckett Avenue. Mr. Howell had clients willing to invest in mortgages, and the Petraniks came to rely on him for some of the financing for their growing construction business.

Unfortunately, the conduct of Mr. Howell's mortgage practice was, in the words of the trial judge, "irresponsible, incompetent or negligent". It appears that as Mr. Petranik needed money, Mr. Howell would have him or Mrs. Petranik execute a mortgage on one of their properties. There is reason for suspicion that some of these mortgages may have been executed in blank to be used as needed. The trial judge did not find that Mr. Howell had acted fraudulently, but he certainly acted improperly, not only on the mortgage transactions where he acted for both parties, but at trial where he represented Mrs. Dale against Mrs. Petranik.

One of the mortgages registered against 37 Beckett Avenue was a mortgage for $5,000 in favour of Mrs. Dale, a client of Mr. Howell and the 83 year old mother of Mr. Howell's secretary. On January 11, 1956, Mrs. Dale had advanced $4,000 to Mr. Howell by a cheque marked "Re: Petranik Loan". It was alleged, but not established, that in return she received an unregistered mortgage from the Petraniks on three houses on Hadrian Drive. On January 12, 1958, Mrs. Dale

Originaires d'Allemagne, Helga Petranik et son mari Ludwik arrivèrent au Canada en 1949 et travaillèrent assidûment à s'y établir. M. Petranik travailla dans la construction domiciliaire, d'abord comme charpentier, puis comme entrepreneur indépendant. En 1951, les Petranik construisirent un triplex au 38, avenue Beckett. Ils louèrent deux des logements et vécurent dans le troisième jusqu'en 1957, date à laquelle ils emménagèrent dans une maison que M. Petranik avait construite sur la promenade Hadrian. Ils y restèrent deux mois jusqu'à ce que la maison soit vendue et emménagèrent alors dans une maison que M. Petranik avait construite au 37, avenue Beckett. M<sup>me</sup> Petranik, sur la recommandation d'une amie qui travaillait avec elle, consulta un avocat, M<sup>e</sup> G. A. Howell, à propos d'un règlement qui visait le 38, avenue Beckett. M<sup>e</sup> Howell avait des clients qui voulaient faire des placements hypothécaires et les Petranik s'en remirent à lui pour une partie du financement de leur entreprise de construction en expansion.

Malheureusement, M<sup>e</sup> Howell menait sa pratique hypothécaire, selon les propres termes du juge de première instance, de façon [TRADUCTION] «irresponsable, incompétente ou négligente». M. Petranik ayant besoin d'argent, il semble que M<sup>e</sup> Howell aurait amené M. Petranik ou M<sup>me</sup> Petranik à consentir une hypothèque sur un de leurs immeubles. Il y a quelque raison de soupçonner que certaines de ces hypothèques aient pu être signées en blanc pour être utilisées au besoin. Le juge de première instance n'a pas considéré que M<sup>e</sup> Howell avait agi frauduleusement mais qu'il avait certainement agi contre l'éthique professionnelle, non seulement en agissant pour les deux parties lors d'opérations hypothécaires mais en représentant M<sup>me</sup> Dale au procès contre M<sup>me</sup> Petranik.

L'une des hypothèques enregistrées sur le 37, avenue Beckett était une hypothèque de $5,000 en faveur de M<sup>me</sup> Dale. Cliente de M<sup>e</sup> Howell et mère de la secrétaire de celui-ci, elle était âgée de 83 ans. Le 11 janvier 1956, M<sup>me</sup> Dale avait avancé $4,000 à M<sup>e</sup> Howell avec un chèque portant l'inscription [TRADUCTION]: «Objet: prêt Petranik». Il a été allégué, mais non prouvé, qu'en retour elle avait obtenu des Petranik une hypothèque non enregistrée sur trois maisons de la promenade gave Mr. Petranik an additional $1,000 which was added to the mortgage principal. A $5,000 mortgage was then registered against 37 Beckett Avenue. The Petraniks claimed that the $1,000 was not a loan but was part payment for renovations which Mr. Petranik had completed for another client of Mr. Howell. The trial judge accepted this explanation, but since there was evidence that the Petraniks had made payments to Mrs. Dale for interest on a loan of $4,000, he rejected the Petraniks' claim that they had never borrowed money from Mrs. Dale.

In May 1958, Helga Petranik purchased municipal lots 62 and 64 La Rose Avenue for $12,800. She paid $3,500 cash and the vendor took back a mortgage for $9,800. Two months later, Mr. Petranik exchanged 37 Beckett Avenue for 50 acres of farmland in Chinguacousy Township. Mrs. Dale's mortgage on 37 Beckett was discharged before the exchange, and in its place Mrs. Petranik executed a mortgage on 62 La Rose in favour of Mrs. Dale for $5,000. This was dated July 12, 1958, but not registered until January 8, 1959. In the meantime, in order to finance the construction of a house on 62 La Rose, Mrs. Petranik arranged through Mr. Howell to mortgage the property to Mr. White for $16,000. This mortgage was executed November 1, 1958 and registered December 11, 1958. On March 10, 1959, a further mortgage was registered against both 62 and 64 La Rose Avenue to secure $3,000 which was purportedly advanced by Richard and Stella Graham, also clients of Mr. Howell. The first mortgage to the vendor was discharged on March 21, 1959, the discharge being registered on April 22, 1959. On September 23, 1960, White assigned part of his mortgage to May E. Wallace. Thus, in 1960, 62 La Rose was mortgaged to White and Wallace for $16,000, to Dale for $5,000, and to the Grahams for $3,000.

In July 1961 the Petraniks moved to Chatham, Ontario, where Mr. Petranik worked on a construction project. They rented 62 La Rose to Ivor Andrew who lived there with his family from July

Hadrian. Le 12 janvier 1958, M$^{me}$ Dale remit à M. Petranik $1,000 supplémentaires qui furent ajoutés au principal de la dette hypothécaire. Une hypothèque de $5,000 fut alors enregistrée sur le 37, avenue Beckett. Les Petranik ont fait valoir que les $1,000 ne représentaient pas un prêt mais le paiement partiel de rénovations que M. Petranik avait effectuées pour un autre client de M$^{e}$ Howell. Le juge de première instance a accepté cette explication, mais puisqu'il était prouvé que les Petranik avaient versé à M$^{me}$ Dale des intérêts sur un prêt de $4,000, il a rejeté leur prétention selon laquelle ils n'avaient jamais emprunté d'argent à M$^{me}$ Dale.

En mai 1958, Helga Petranik acheta des lots situés aux numéros 62 et 64 de l'avenue La Rose pour $12,800. Elle versa $3,500 comptant et le vendeur prit une hypothèque de $9,800. Deux mois plus tard, M. Petranik échangea le 37, avenue Beckett contre 50 acres de terre à culture dans le canton de Chinguacousy. L'hypothèque de M$^{me}$ Dale sur le 37, avenue Beckett fut purgée avant l'échange et, à sa place, M$^{me}$ Petranik consentit à M$^{me}$ Dale une hypothèque de $5,000 sur le 62, avenue La Rose. Celle-ci était datée du 12 juillet 1958, mais elle ne fut enregistrée que le 8 janvier 1959. Entre-temps, pour financer la construction d'une maison au 62, avenue La Rose, M$^{me}$ Petranik consentit, par l'intermédiaire de M$^{e}$ Howell, une hypothèque de $16,000 sur l'immeuble à M. White. Cette hypothèque fut signée le 1$^{er}$ novembre 1958 et enregistrée le 11 décembre 1958. Le 10 mars 1959, une autre hypothèque fut enregistrée sur les 62 et 64, avenue La Rose pour garantir $3,000 censément avancés par Richard et Stella Graham, également clients de M$^{e}$ Howell. La première hypothèque du vendeur fut purgée le 21 mars 1959, la purge étant enregistrée le 22 avril 1959. Le 23 septembre 1960, White céda une partie de son hypothèque à May E. Wallace. Ainsi, en 1960, le 62, avenue La Rose était hypothéqué pour $16,000 en faveur de White et de Wallace, $5,000 en faveur de Dale, et $3,000 en faveur des Graham.

En juillet 1961, les Petranik déménagèrent à Chatham en Ontario, où M. Petranik travaillait dans un projet de construction. Ils louèrent le 62, avenue La Rose à Ivor Andrew qui vécut là avec sa

15, 1961 to December 31, 1961. After the Andrews moved out, the house was left vacant. The Petraniks returned from Chatham in the fall of 1961 when the contractor for the project went bankrupt. Since the Andrews were still occupying 62 La Rose, the Petraniks moved into one of the houses Mr. Petranik was building in Oakville.

The Petraniks were in a precarious financial position. One of the houses in Oakville was foreclosed and, according to Mrs. Petranik, they had to let it go because they could not afford to redeem it. Mrs. Petranik also volunteered that their cottage was being foreclosed and that she was served with a writ of possession with respect to another Oakville house. Writs of execution amounting to $8,082.81 were registered against the lands of Helga Petranik in 1960 and 1961. Taxes on 62 La Rose were not paid after 1959, no payments were made on the White mortgage after January 1960, and the Dale mortgage was also in default.

On May 26, 1961, Mr. Howell wrote to Mrs. Petranik that, because of the continuing default under the mortgages, he would require vacant possession of both 62 and 64 La Rose. The Dale mortgage provided for repayment of principal on July 12, 1961. On July 17, 1961, payments of the interest and principal were both in default and Mrs. Dale, through Mr. Howell, commenced a foreclosure action. Mrs. Petranik denied being served with the specially-endorsed writ, but the affidavit of a sheriff's officer, who had died before trial, indicates that it was served on February 2, 1962. The trial judge expressly made no finding as to service, but as Arnup J.A. pointed out in the Court of Appeal, Mrs. Petranik has no cause of action unless the writ was served. Arnup J.A. dealt with the case on the assumption of service and his doing so was not disputed in this Court. The writ provided as follows:

... and that the mortgage may be enforced by foreclosure. And to recover from you the defendant

famille du 15 juillet 1961 au 31 décembre 1961. Après le départ des Andrew, la maison demeura vacante. Les Petranik revinrent de Chatham en automne 1961 lorsque l'entrepreneur du projet fit faillite. Comme les Andrew occupaient encore le 62, avenue La Rose, les Petranik emménagèrent dans une des maisons que M. Petranik était en train de construire à Oakville.

Les Petranik étaient dans une situation financière précaire. Une des maisons d'Oakville fut frappée de forclusion et, selon M^me^ Petranik, ils durent l'abandonner parce qu'ils n'avaient pas les moyens de la racheter. M^me^ Petranik a admis que leur chalet était en instance de forclusion et qu'un bref de possession concernant une autre maison d'Oakville lui avait été signifié. Des brefs d'exécution d'un montant de $8,082.81 furent enregistrés sur les biens-fonds d'Helga Petranik en 1960 et 1961. Les taxes du 62, avenue La Rose ne furent pas payées après 1959; aucun paiement ne fut effectué sur l'hypothèque White après janvier 1960 et l'hypothèque Dale était également en souffrance.

Le 26 mai 1961, M^e^ Howell écrivit à M^me^ Petranik qu'en raison du défaut persistant de paiement des hypothèques, il exigerait la pleine possession du 62 et du 64, avenue La Rose. L'hypothèque Dale prévoyait le remboursement du principal pour le 12 juillet 1961. Le 17 juillet 1961, le paiement des intérêts et du principal n'ayant pas été effectué, M^me^ Dale, par l'intermédiaire de M^e^ Howell, intenta une action en forclusion. M^me^ Petranik a nié que le bref à endossement spécial lui ait été signifié, mais la déclaration sous serment d'un fonctionnaire du bureau du shérif, décédé avant le procès, indique qu'il a été signifié le 2 février 1962. Le juge de première instance ne s'est pas prononcé expressément sur la signification mais, comme l'a souligné le juge Arnup en Cour d'appel, M^me^ Petranik n'a de cause d'action que si le bref lui a été signifié. Le juge Arnup a étudié l'affaire en présumant que la signification avait eu lieu et son attitude n'a pas été contestée devant notre Cour. Le bref était libellé en ces termes:

[TRADUCTION] ... et que l'hypothèque peut être exécutée par forclusion. Et pour recouvrer de vous la défendepayment of the amount due under a covenant by (you)

in that behalf contained in said Mortgage.

And take notice further that the plaintiff claims to be entitled to recover immediate possession of the mortgaged premises.

And take notice that the plaintiff claims that there is now due for principal money the sum of $5,000.00 and for interest the sum of $384.30 due the 12th day of July 1961.

And that you are liable to be charged with these sums with subsequent interest to be computed at the rate of ten per cent per annum, and costs in and by the judgment to be drawn up, *and that judgment for immediate foreclosure* of your interest in the mortgaged premises *may be entered* unless you desire an opportunity to redeem the mortgaged premises and before the expiration of the time allowed you for appearance you do file in the office within named and serve a memorandum in writing entitled in this action and signed by yourself or your solicitor to the following effect: "I desire an opportunity to redeem the mortgaged premises", and give an address for service, in which case you will be entitled to four days' notice of the taking of the account of the amount due to the plaintiff and in default of payment of the amount found due within six calendar months from the time of taking of the account and the drawing up of the judgment your interest in the mortgaged premises may be foreclosed.

Mrs. Petranik was thus given notice that if she desired to defend or to redeem she must take certain steps, as provided in Rule 465 (formerly R. 460A). Mrs. Petranik did not file an appearance or a notice desiring opportunity to redeem, and on March 23, 1962, the Assistant Registrar signed judgment, directed a reference with respect to subsequent encumbrancers, and ordered Mrs. Petranik to deliver up possession of the property. The form of judgment as first drafted provided as follows:

Judgment

Friday, the 23rd day of March, 1962.

UPON reading the Writ of Summons issued in this action, and affidavit of service of the said writ and no appearance having been entered and *no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed*;

resse paiement du montant dû en vertu d'un engagement souscrit par (vous)

contenu à cet effet dans ladite hypothèque.

Et soyez avisée en outre que la demanderesse prétend avoir le droit de recouvrer la possession immédiate des lieux hypothéqués.

Et soyez avisée que la demanderesse prétend qu'il lui est maintenant dû $5,000 en capital et $384.30 en intérêts échus au 12 juillet 1961.

Et que vous êtes susceptible d'être condamnée à ces sommes qui porteront intérêt au taux de dix pour cent par an, ainsi qu'aux frais du jugement qui doit être dressé à cet effet, *et qu'un jugement de forclusion immédiate* de vos droits sur les lieux hypothéqués *peut être inscrit* à moins que vous ne désiriez avoir l'occasion de racheter les lieux hypothéqués et qu'avant l'expiration du temps qui vous est accordé pour comparaître, vous ne déposiez au bureau désigné dans les présentes et ne signifiiez une note, portant l'intitulé de l'action, signée par vous-même ou votre avocat et ayant la teneur suivante: «Je désire avoir une occasion de racheter les lieux hypothéqués» et ne donniez une adresse en vue des significations, auquel cas vous aurez droit à un avis de quatre jours de l'établissement du compte du montant dû à la demanderesse et à défaut de paiement du montant trouvé dû dans les six mois à compter de la date de l'établissement du compte et de la rédaction du jugement, vos droits sur les lieux hypothéqués peuvent être forclos.

M^me^ Petranik fut ainsi avisée que si elle désirait se défendre ou racheter, elle devait prendre certaines mesures, prévues par la règle 465 (anciennement R. 460A). M^me^ Petranik ne comparut pas et ne déposa pas avis de son désir d'avoir l'occasion de racheter et, le 23 mars 1962, le registraire adjoint signa jugement, ordonna un renvoi en ce qui concernait les créanciers subséquents et ordonna à M^me^ Petranik de remettre l'immeuble. La première rédaction du jugement était la suivante:

[TRADUCTION] Jugement

le vendredi 23 mars 1962

VU le bref d'assignation délivré dans la présente action et l'attestation sous serment de la signification dudit bref, en l'absence de comparution et *aucun avis n'ayant été déposé exprimant le désir de la défenderesse d'avoir l'occasion de racheter les lieux hypothéqués*;

1. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at the City of Toronto.

2. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith after making of the Master's report pay to the plaintiff what shall be found due her for principal money, interest and costs at the date of the said report and upon payment of the amount due to her that, (subject to the provision of section 2 of The Mortgages Act) the plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto.

3. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith deliver to the plaintiff, or to whom she may appoint, possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendant.

In the judgment as issued, paragraph 2 was struck out and the remaining paragraphs renumber I and II. No explanation was given for this deletion, but it seems clear that it was designed to comply with the possible judgments set out in Rule 472 (formerly R. 467):

472. (1) In an action for foreclosure or sale where the writ has been duly endorsed and the defendant fails to appear or fails to file a notice that he desires an opportunity to redeem the mortgaged premises, the plaintiff may sign judgment for immediate sale or for immediate foreclosure unless a reference is desired as to encumbrancers (Form 104).

(2) If a reference is desired as to encumbrancers, the plaintiff is entitled to judgment with a reference, and, if no encumbrancer, shall prove any claim the Master so certifies, and, upon confirmation of the Master's report, a final order of sale or of foreclosure shall be made.

(3) If upon the reference a subsequent encumbrancer proves a claim, the usual period of redemption shall be granted, but, if the encumbrancer consents, a final order may be made at an earlier date.

(4) In the event of a notice being filed by the defendant desiring an opportunity to redeem the mortgaged premises and no reference as to encumbrancers being required, judgment may be signed and the officer signing it may in simple cases take the account on four days'

1. IL EST ORDONNÉ ET DÉCIDÉ que toutes les recherches nécessaires soient faites, les comptes dressés, les frais taxés et les mesures prises en vue de rachat ou de forclusion et qu'à ces fins la présente cause soit renvoyée au *Master* en la ville de Toronto.

2. ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que, après dépôt du rapport du *Master*, la défenderesse paye immédiatement à la demanderesse ce qui lui sera trouvé dû en capital, intérêts et frais à la date dudit rapport et, sur paiement du montant qui lui est dû, que (sous réserve des dispositions de l'article 2 de *The Mortgages Act*) la demanderesse rétrocède les lieux hypothéqués et rende tous documents les concernant.

3. ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que la défenderesse mette immédiatement la demanderesse, ou la personne qu'elle peut désigner, en possession des biens-fonds et lieux en question dans la présente cause ou de toute partie de ceux-ci qui peut être en la possession de ladite défenderesse.

Dans le jugement réellement rendu, le paragraphe 2 fut biffé et les paragraphes restants renumérotés I et II. Aucune explication de cette suppression n'a été fournie, mais il paraît clair qu'elle fut effectuée pour se conformer aux diverses possibilités de jugement envisagées par la règle 472 (anciennement R. 467):

[TRADUCTION] 472. (1) Lorsque dans une action en forclusion ou vente forcée, le bref a été régulièrement signifié et que le défendeur fait défaut de comparaître ou de déposer un avis de son désir d'avoir une occasion de racheter les lieux hypothéqués, le demandeur peut obtenir un jugement de vente immédiate ou de forclusion immédiate à moins qu'un renvoi concernant les créanciers ne soit désiré (Formule 104).

(2) Si un renvoi concernant les créanciers est désiré, le demandeur a droit à un jugement avec renvoi et, s'il n'y a pas de créancier, doit prouver toute créance que le *Master* certifie ainsi, et, sur confirmation du rapport du *Master*, une ordonnance définitive de vente ou de forclusion doit être prononcée.

(3) Si lors du renvoi un créancier subséquent prouve une créance, la période habituelle de rachat sera accordée mais, si le créancier y consent, une ordonnance définitive peut être prononcée dans un délai plus court.

(4) Au cas où un avis est déposé par le défendeur qui désire avoir une occasion de racheter les lieux hypothéqués et où aucun renvoi concernant les créanciers n'est requis, jugement peut être délivré et le fonctionnaire qui le délivre peut, dans les cas simples, dresser les comptes

notice to the defendant. His findings are subject to an appeal to a judge in chambers in the manner prescribed for appeals from the Master. In complicated cases a judgment shall issue directing a reference (Form 103).

(5) In the event of a notice being filed by the defendant desiring an opportunity to redeem the mortgaged premises and a reference being desired as to encumbrancers, judgment may be signed directing a reference, and the account shall be taken by the Master on four days' notice to the person filing the notice (Form 102).

(6) Where the writ has not been personally served, the claim of the plaintiff shall be duly verified by an affidavit which shall be filed with the officer taking the account. (467)

If there had been no subsequent encumbrancers, a final order of immediate foreclosure would have been signed on March 23, 1962 since the mortgagor had not indicated that she desired an opportunity to redeem. However, there were subsequent encumbrancers in this case: the Grahams held a $3,000 mortgage on 62 and 64 La Rose Avenue and there were two execution creditors. According to Mr. Howell, he had purchased the Graham mortgage in 1962 and discharged it insofar as it affected 62 La Rose, but neither the assignment nor the discharge had been registered. A reference was directed to enable the encumbrancers to prove their claims. By virtue of Rule 406 (formerly R. 403), Mrs. Petranik was not entitled to any notice of the reference. Her interest in the equity of redemption was already effectively foreclosed, but others with an interest in the equity were to be given their opportunity to redeem. If, like Mrs. Petranik, they took no further steps, a final order of foreclosure would be issued.

The Rules of Practice do not prevail over the principles of equity which govern mortgage actions, and the court retains jurisdiction to exercise its equitable discretion to allow a mortgagor to redeem his property even after a final order of foreclosure is made: Falconbridge, *The Law of Mortgages* (3rd ed., 1942), at pp. 450 ff. If Mrs. Petranik had, through inadvertence or otherwise, failed to file a notice desiring opportunity to redeem when in fact she did desire to redeem and had a substantial interest in the equity to protect, a

sur avis de quatre jours adressé au défendeur. Ses conclusions peuvent être portées en appel devant un juge en chambre en la manière prescrite pour les appels des décisions du *Master*. Dans les cas compliqués, un renvoi sera ordonné par jugement (Formule 103).

(5) Au cas où un avis est déposé par le défendeur qui désire avoir une occasion de racheter les lieux hypothéqués et où un renvoi concernant les créanciers est désiré, un jugement ordonnant un renvoi peut être délivré et les comptes seront dressés par le *Master* sur avis de quatre jours adressé à la personne qui dépose l'avis (Formule 102).

(6) Quand le bref n'a pas été signifié en personne, la créance du demandeur sera attestée par une déclaration sous serment remise au fonctionnaire qui dresse les comptes. (467)

S'il n'y avait pas eu de créanciers subséquents, une ordonnance définitive de forclusion immédiate aurait été rendue le 23 mars 1962 puisque la débitrice hypothécaire n'avait pas indiqué qu'elle désirait avoir une occasion de racheter. Mais dans cette affaire, il y en avait: les Graham détenaient une hypothèque de $3,000 sur le 62 et le 64, avenue La Rose et il y avait deux créanciers saisissants. Selon M^e^ Howell, il avait acheté l'hypothèque des Graham en 1962 et l'avait purgée en ce qui concerne le 62, avenue La Rose, mais ni la cession ni la purge n'avaient été enregistrées. Un renvoi fut ordonné pour permettre aux créanciers de prouver leurs créances. En vertu de la règle 406 (anciennement R. 403), M^me^ Petranik n'avait pas le droit d'être avisée du renvoi. Son droit de rachat était déjà effectivement forclos, mais il fallait donner une occasion de racheter aux autres personnes qui avaient un droit. Si, comme M^me^ Petranik, ils ne se manifestaient pas, une ordonnance définitive de forclusion serait rendue.

Les Règles de pratique ne l'emportent pas sur les principes d'*equity* qui régissent les actions hypothécaires, et les tribunaux demeurent compétents en *equity* pour exercer leur pouvoir discrétionnaire et permettre à un débiteur hypothécaire de racheter sa propriété même après une ordonnance définitive de forclusion: Falconbridge, *The Law of Mortgages* (3^e^ éd. 1942), pp. 450 et suiv. Si M^me^ Petranik avait, par inadvertance ou autrement, omis de déposer un avis de son désir d'avoir l'occasion de racheter alors qu'elle voulait vrai-court might well have reopened the judgment and allowed her a redemption period. However, Mrs. Petranik at no time indicated a desire to redeem the property even after seeking legal advice about her rights. Her slight interest in the equity of redemption did not make it worth her while to redeem and she was not in a financial position to do so.

On the basis of the March 23, 1962 judgment, Mrs. Dale obtained a writ of possession, and in April 1962 the writ was executed. If Mrs. Petranik had not been aware of the foreclosure action, she certainly was aware that Mrs. Dale had taken possession. She immediately consulted a solicitor, but took no further action at that time.

Mrs. Dale did not proceed with a reference as to subsequent encumbrancers as ordered in the judgment. In May 1962, H. W. Anderson, a real estate broker who was looking for a house for the respondent Berwick, inquired whether 62 La Rose, which was vacant, was for sale. On May 15, 1962, Mr. Berwick offered $23,500 for the house. Mr. Howell's secretary (Mrs. Dale's daughter) advertised the house for sale in the Toronto Star on May 15-18, 1962. Mrs. Dale asked $26,800 for the property. On May 29, 1962, Mr. Berwick offered $25,500 subject to adjustments and conditional on the vendor agreeing to discharge any existing mortgages or encumbrances. Mrs. Dale accepted this offer. She sold the property by purported exercise of her power of sale under the mortgage which provided that after default of payment for two months she could sell without notice. Amendments to *The Mortgages Act* which provide that a power of sale under a mortgage cannot be exercised without 35 days' notice to the mortgagor and all subsequent encumbrancers did not come into effect until 1964 and thus Mrs. Dale was not required to give notice of the sale.

After adjustments, Mrs. Dale received $24,499.66 from Berwick and Parker, who took joint title. She paid $9,100.64 to Mr. White and $10,086.30 to May Wallace to whom White had

ment le faire et si elle avait eu vraiment un droit à protéger, un tribunal aurait fort bien pu rouvrir le jugement et lui accorder un délai de rachat. Cependant, à aucun moment M^me^ Petranik n'a manifesté le désir de racheter l'immeuble même après s'être renseignée sur ses droits auprès d'un avocat. Ce qu'elle pouvait retirer de son droit de rachat ne valait guère la peine de l'exercer et sa situation financière ne le lui permettait pas.

Se fondant sur le jugement du 23 mars 1962, M^me^ Dale obtint un bref de possession qui fut exécuté en avril 1962. Si M^me^ Petranik n'avait pas eu connaissance de l'action en forclusion, elle était certainement au courant de la prise de possession par M^me^ Dale. D'ailleurs, elle consulta immédiatement un avocat, mais ne prit pas d'autres mesures à l'époque.

M^me^ Dale ne fit pas procéder au renvoi concernant les créanciers subséquents, comme le jugement l'avait ordonné. En mai 1962, H. W. Anderson, courtier en immeubles qui cherchait une maison pour l'intimé Berwick, demanda si le 62, avenue La Rose, qui était vacant, était à vendre. Le 15 mai 1962, M. Berwick en offrit $23,500. La secrétaire de M^e^ Howell (fille de M^me^ Dale) fit paraître une annonce de maison à vendre dans le Toronto Star du 15 au 18 mai 1962. M^me^ Dale demandait $26,800 pour l'immeuble. Le 29 mai 1962, M. Berwick fit une offre de $25,500 sous réserve des ajustements et à condition que le vendeur s'engageât à purger toutes hypothèques ou charges existantes. M^me^ Dale accepta cette offre. Elle vendit l'immeuble, se réclamant de l'exercice de son pouvoir de vente attaché à l'hypothèque qui prévoyait qu'à défaut de paiement pendant deux mois, elle pouvait vendre sans préavis. Les modifications apportées à *The Mortgages Act*, qui disposent qu'un pouvoir de vente en vertu d'une hypothèque ne peut être exercé que 35 jours après en avoir avisé le débiteur hypothécaire et tous les créanciers subséquents, ne sont entrées en vigueur qu'en 1964 et M^me^ Dale n'était donc pas tenue de donner avis de la vente.

Après ajustements, M^me^ Dale reçut $24,499.66 de Berwick et Parker, qui devinrent copropriétaires. Elle paya $9,100.64 à M. White et $10,086.30 à May Wallace à qui White avait cédé une partie assigned part of his mortgage. After payment of various expenses associated with the sale, Mrs. Dale received a cheque for $2,250.39.

More than two years after the sale, on July 14, 1964, Mrs. Petranik issued a writ against Mrs. Dale, Mr. Berwick and Mr. Parker, claiming a declaration that the mortgage to Mrs. Dale was null and void and an accounting of the proceeds of the sale. Mrs. Petranik also claimed a declaration that Parker and Berwick hold the property in trust for her and filed a *lis pendens* against the lands. No further steps were taken, and on September 27, 1966, the action was dismissed by the Master for want of prosecution and the *lis pendens* vacated. Mrs. Petranik then filed a notice of claim against the property which, on May 30, 1968, Stewart J. ordered vacated. An application to set aside the order dismissing the action for want of prosecution was dismissed on April 9, 1969, but, on appeal from the order vacating the notice of claim, the Court of Appeal reinstated the notice pending commencement by Mrs. Petranik on or before February 3, 1969 of proceedings to reopen the action instituted by her in 1964 or to institute other proceedings. The Court further ordered that if no proceedings had been taken by February 3, 1969, Berwick and Parker could revive their application to vacate registration of the notice of claim. Mrs. Petranik issued the writ in this action on April 28, 1969. The defendants applied to vacate the notice of claim, and on May 28, 1969, Stark J. so ordered. In their statement of defence to this action, Parker and Berwick argued that the action should be dismissed because of the plaintiff's laches, but the trial judge dealt with the case on its merits. No argument was addressed either to the Court of Appeal or to this Court on the question of delay, but when assessing the equities, it is relevant to consider the plaintiff's delay in asserting her claim.

The refusal of Mrs. Petranik to remove the notice of claim registered on title prevented Parker and Berwick from selling the property. They had

de son hypothèque. Après paiement de diverses dépenses reliées à la vente, M[me] Dale reçut un chèque de $2,250.39.

Plus de deux ans après la vente, le 14 juillet 1964, M[me] Petranik se fit délivrer un bref contre M[me] Dale, M. Berwick et M. Parker, par lequel elle demandait une déclaration de nullité de l'hypothèque consentie à M[me] Dale ainsi qu'une reddition de compte des produits de la vente. M[me] Petranik demandait également une déclaration selon laquelle Parker et Berwick détenaient l'immeuble en fiducie pour son compte et elle enregistra un avis de litispendance contre les biens-fonds. Aucune autre mesure ne fut prise et, le 27 septembre 1966, l'action fut rejetée par le *Master* pour absence de procédures et la litispendance annulée. M[me] Petranik déposa alors un avis de réclamation contre l'immeuble, dont le juge Stewart ordonna l'annulation le 30 mai 1968. Une requête en révocation de l'ordonnance rejetant l'action pour absence de procédures fut rejetée le 9 avril 1969 mais, sur appel de l'ordonnance d'annulation de l'avis de réclamation, la Cour d'appel rétablit l'avis sous condition que, le 3 février 1969 au plus tard, M[me] Petranik entamât des procédures pour rouvrir l'action qu'elle avait intentée en 1964 ou intentât d'autres procédures. La Cour ordonna au surplus que, si aucune procédure n'était intentée le 3 février 1969, Berwick et Parker pourraient renouveler leur demande d'annulation de l'enregistrement de l'avis de réclamation. Le bref dans la présente action fut délivré à M[me] Petranik le 28 avril 1969. Les défendeurs demandèrent l'annulation de l'avis de réclamation et, le 28 mai 1969, le juge Stark prononça une ordonnance en ce sens. Dans leur défense à la présente action, Parker et Berwick ont prétendu que celle-ci devait être rejetée en raison des retards déraisonnables de la demanderesse, mais le juge de première instance examina l'affaire au fond. La question du retard n'a été plaidée ni devant la Cour d'appel ni devant cette Cour mais, s'agissant d'apprécier la situation en *equity*, il est à-propos d'examiner le retard de la demanderesse à faire valoir son droit.

Le refus de M[me] Petranik de retirer l'avis de réclamation enregistré contre le titre empêcha Parker et Berwick de vendre la propriété. Ceux-ci built a house on 30 acres in Campbellville, and planned to sell 62 La Rose. In September 1968, they received an offer to purchase 62 La Rose for $44,000, but because of the notice of claim they could not satisfy the requisitions with respect to title. A subsequent offer from another party also fell through. Finally, Berwick and Parker sold the Campbellville property. They counterclaimed for damages for abuse of process and slander of title, but did not press their claim on appeal.

The principal ground on which Mrs. Petranik sought to set aside the sale of the property to Parker and Berwick was that she had not executed a mortgage in favour of Mrs. Dale and had received no consideration for such a mortgage. As indicated above, these allegations were rejected by the trial judge and were not pursued on appeal.

The issue on which the case turned at trial and on appeal was whether Mrs. Dale was entitled to sell the property under power of sale in the mortgage or whether this power was suspended by virtue of the judgment signed by the assistant registrar in the foreclosure action. At trial Moorhouse J., relying on a judgment of Farwell J. in *Stevens v. Theatres, Limited*[5], which has been followed in *DeBeck v. Canada Permanent Loan and Savings Co.*[6] and *Marshall et al v. Miles*[7], held that after Mrs. Dale had obtained judgment *nisi* for foreclosure, she could not exercise a power of sale without leave of the court. The trial judge declared that the deed from Dale to Parker and Berwick was invalid, directed that Dale or others may proceed with the reference directed by the judgment *nisi* and ordered that Mrs. Petranik be given notice of the reference. He made certain other declarations with respect to the interest of Parker and Berwick in the moneys they paid on the invalid sale and gave direction as to how accounts were to be taken at the reference. He

[5] (1903), 1 Ch. 857.
[6] (1907), 12 B.C.R. 409 (B.C.C.A.).
[7] (1970), 3 O.R. 394 (H. Ct.).

avaient construit une maison sur un terrain de 30 acres à Campbellville et fait le projet de vendre le 62, avenue La Rose. En septembre 1968, ils reçurent une offre d'achat de $44,000 pour le 62, avenue La Rose mais, à cause de l'avis de réclamation, ils ne purent satisfaire aux exigences concernant le titre. Une offre postérieure faite par une autre personne tomba également. Finalement, Berwick et Parker vendirent leur propriété de Campbellville. Ils agirent reconventionnellement en dommages-intérêts pour abus de procédures et fausse déclaration concernant un titre de propriété, mais abandonnèrent cette prétention en appel.

Le principal motif invoqué par M^me^ Petranik pour faire annuler la vente de l'immeuble à Parker et Berwick était qu'elle n'avait pas signé d'hypothèque en faveur de M^me^ Dale et qu'elle n'avait reçu aucune contrepartie pour une telle hypothèque. Comme on l'a déjà indiqué, ces allégations ont été rejetées par le juge de première instance et n'ont pas été reprises en appel.

La question sur laquelle a porté l'affaire en première instance et en appel était de savoir si M^me^ Dale avait le droit de vendre l'immeuble en vertu du pouvoir de vente attaché à l'hypothèque ou si ce pouvoir était suspendu par le jugement signé par le registraire adjoint dans l'action en forclusion. En première instance, le juge Moorhouse, se fondant sur un jugement du juge Farwell dans *Stevens v. Theatres, Limited*[5], qui a été suivi dans *DeBeck v. Canada Permanent Loan and Savings Co.*[6] et *Marshall et al. v. Miles*[7], a décidé qu'après l'obtention du jugement conditionnel de forclusion, M^me^ Dale ne pouvait plus exercer son pouvoir de vente sans permission de la Cour. Le juge de première instance a déclaré que l'acte intervenu entre Dale et Parker et Berwick était invalide et a ordonné que Dale ou d'autres personnes procèdent au renvoi prévu par le jugement conditionnel et qu'avis du renvoi soit donné à M^me^ Petranik. Il a fait certaines autres déclarations en ce qui concerne les droits de Parker et Berwick sur les sommes payées lors de la vente invalide et donna

[5] (1903), 1 Ch. 857.
[6] (1907), 12 B.C.R. 409 (B.C.C.A.).
[7] [1970] 3 O.R. 394 (H. Ct.).

dismissed both counterclaims without costs. On an appeal taken by Parker and Berwick, the Court of Appeal reversed the trial judgment and held that the sale was valid. In reasoning which I adopt, Arnup J.A. held that since the judgment *nisi* in the foreclosure action did not confer any rights on Mrs. Petranik, it did not operate to suspend Mrs. Dale's power of sale under the mortgage.

I agree with Arnup J.A. that, as a general principle, a mortgagee can pursue all the remedies available to him, concurrently or in succession. See Falconbridge, *The law of Mortgages*, *supra*, at pp. 687-88. There are exceptions to this principle, including that specified in what is now s. 40 of *The Mortgages Act*, R.S.O. 1970, c. 279, which provides that once a demand for payment or a notice of intention to exercise a power of sale has been given in accordance with a term of the mortgage, no other proceedings can be taken by a mortgagee without leave of the court before the time limited for payment or sale has expired. A complementary exception was formulated by Farwell J. in *Stevens v. Theatres, Limited*, *supra*. In that case a mortgagee had brought foreclosure proceedings and a judgment *nisi* had directed that accounts be taken and that the property be reconveyed to the mortgagor on payment of what was found owing. Without proceeding to accounts, the mortgagee sold the property under power of sale in the mortgage. Farwell J. held that the mortgagee was not entitled to sell since the judgment *nisi*, which directed reconveyance on payment, operated for the benefit of the mortgagor as well as the mortgagee. In these circumstances, the mortgagee could not get rid of his action *mero motu* after judgment and could not vary the form of that judgment by doing an act which would put it out of his power to perform that which the Court had directed him to do as a condition of getting the judgment (at pp. 860-61). As Arnup J.A. points out, the essence of this holding is concisely stated at p. 862 where

des instructions sur la façon dont les comptes devaient être dressés à l'occasion du renvoi. Il a rejeté les deux demandes reconventionnelles sans frais. Sur appel de Parker et Berwick, la Cour d'appel a renversé le jugement de première instance et jugé que la vente était valide. Pour des motifs que j'approuve, le juge Arnup a décidé que, puisque le jugement conditionnel de forclusion ne conférait aucun droit à M^me^ Petranik, il n'avait pas pour effet de suspendre le pouvoir de vente que M^me^ Dale possédait en vertu de l'hypothèque.

Je suis d'accord avec le juge Arnup qu'en principe, un créancier hypothécaire peut exercer tous les recours dont il dispose, concurremment ou successivement. Voir Falconbridge, *The Law of Mortgages*, précité, aux pp. 687 et 688. Il existe des exceptions à ce principe, notamment celle qui est prévue à l'actuel art. 40 de *The Mortgages Act*, R.S.O. 1970, c. 279, en vertu duquel une fois qu'une demande de paiement a été faite ou un avis d'intention d'exercer un pouvoir de vente adressé conformément à une clause hypothécaire, aucune autre procédure ne peut être intentée par un créancier hypothécaire sans autorisation judiciaire avant l'expiration du délai prescrit pour le paiement ou la vente. Une exception complémentaire a été formulée par le juge Farwell dans *Stevens v. Theatres, Limited*, précitée. Dans cette affaire, un créancier hypothécaire avait intenté une action en forclusion et un jugement conditionnel avait ordonné l'établissement des comptes et la rétrocession de l'immeuble au débiteur sur paiement de ce qui serait trouvé dû. Sans faire procéder aux comptes, le créancier hypothécaire avait vendu la propriété en vertu du pouvoir de vente attaché à l'hypothèque. Le juge Farwell décida que le créancier hypothécaire n'avait pas le droit de vendre puisque le jugement conditionnel, qui ordonnait la rétrocession sur paiement de la dette, jouait autant en faveur du débiteur hypothécaire que du créancier hypothécaire. Dans ces conditions, le créancier hypothécaire ne pouvait se défaire de son action *mero motu* après jugement et il ne pouvait modifier la forme de ce jugement en accomplissant un acte qui se situerait en dehors de son pouvoir d'exécuter ce que la Cour lui avait ordonné de faire comme condition d'obtention du jugement (aux pp. 860 et 861). Comme le juge Arnup le

Farwell J. said:

I hold, therefore, that the power of sale cannot be exercised after the judgment nisi without the leave of the Court, because it prejudices the rights given to the mortgagor under the direction to reconvey.

Farwell J. went on to hold that the power of sale is suspended after judgment *nisi* rather than extinguished and that, accordingly, if the property had been bought by a purchaser for value without notice, he could get a good title under the sale. As Arnup J.A. correctly states, at p. 224, Farwell J. did not suggest that, apart from the terms of the judgment, the mortgagee would be prohibited by law (i.e. in equity) from exercising the power of sale. He was entitled to pursue all his remedies concurrently. The ratio of *Stevens v. Theatres, Limited*, *supra*, is accurately stated by Falconbridge, *The Law of Mortgages*, *supra*, at p. 888:

... a mortgagee cannot, after the usual order nisi for foreclosure and before the foreclosure is made absolute, exercise his power of sale without the leave of the court, because a sale would prejudice the rights given to the mortgagor by the Court under the direction in the judgment for reconveyance on payment, but the power of sale is suspended only, not extinguished, and a purchaser in good faith without notice may get a good title.

In the case at bar, the purchasers, through their solicitor, had notice of the foreclosure judgment when they purchased the property. Whether they have good title thus depends on whether the sale prejudiced rights conferred on the mortgagor by the judgment.

It is a well-established principle, embodied in the Rules of Practice, that where a mortgagor desires an opportunity to redeem his property after default, a court of equity will exercise its discretion to enable him to do so, unless his conduct has been such that it would be inequitable to grant the relief he claims. In exercising its equitable jurisdiction a court will protect a mortgagor from harsh or

souligne, l'essence de cette décision se trouve exprimée avec concision à la p. 862, où le juge Farwell déclare:

[TRADUCTION] Je suis donc d'avis que le pouvoir de vente ne peut être exercé après le jugement conditionnel sans la permission de la cour, parce qu'il porte atteinte aux droits conférés au débiteur hypothécaire en vertu de l'ordonnance de rétrocession.

Le juge Farwell a ensuite décidé que le pouvoir de vente est suspendu plutôt qu'éteint après le jugement conditionnel et qu'en conséquence, si la propriété avait été achetée par un acquéreur à titre onéreux ignorant le jugement, la vente pouvait conférer un titre régulier à l'acheteur. Comme l'expose avec raison le juge Arnup, à la p. 224, le juge Farwell n'a pas laissé entendre que, les clauses du jugement mises à part, le créancier hypothécaire serait empêché en droit (c.-à-d. en *equity*) d'exercer le pouvoir de vente. Il avait le droit d'exercer tous ses recours concurremment. Le motif déterminant dans *Stevens v. Theatres, Limited*, précité, est exposé avec exactitude par Falconbridge, *The Law of Mortgages*, précité, à la p. 888:

[TRADUCTION] ... un créancier hypothécaire ne peut, après l'ordonnance conditionnelle habituelle de forclusion et avant qu'elle ne soit devenue définitive, exercer son pouvoir de vente sans la permission de la cour, parce qu'une vente porterait atteinte aux droits que la cour a conférés au débiteur en ordonnant dans son jugement la rétrocession sur paiement de la dette, mais le pouvoir de vente est seulement suspendu; il n'est pas éteint et un acheteur de bonne foi qui n'aurait pas eu connaissance du jugement pourrait acquérir un titre régulier.

Dans la présente espèce, les acheteurs, par l'intermédiaire de leur avocat, avaient connaissance du jugement de forclusion quand ils ont acheté la propriété. La régularité de leur titre de propriété dépend donc du point de savoir si la vente portait atteinte à des droits conférés à la débitrice hypothécaire par le jugement.

C'est un principe bien établi, incorporé dans les Règles de pratique, que lorsqu'un débiteur hypothécaire désire avoir une occasion de racheter son immeuble après défaut, une cour d'*equity* exercera son pouvoir discrétionnaire de façon à le lui permettre, à moins qu'il ne se soit conduit de façon telle qu'il serait inéquitable de lui accorder le remède qu'il réclame. En exerçant sa juridiction oppressive action by a mortgagee, and when a court has ordered that a mortgagor be given an opportunity to redeem, a mortgagee will not be allowed to circumvent this relief by selling the property under power of sale in the mortgage. Even where there has been no judgment conferring the right to redeem, a court will prevent a sale where the mortgagor genuinely desires to redeem: *Marshall et al. v. Miles*, *supra*. However, as Arnup J.A. points out, as a result of amendments to the Rules of Practice in 1941, a mortgagor in Ontario did not have an automatic right to redeem. On receipt of a writ in a foreclosure action he must file a notice desiring an opportunity to redeem, or, if he fails to file the notice, appeal to the court to exercise its equitable jurisdiction to allow him to redeem. If the mortgagor fails to take either of these steps, and the judgment *nisi* in the foreclosure action confers on the mortgagor no right to redeem or to obtain a reconveyance on payment of the amounts found owing, the mortgagor is not prejudiced by a sale of the property for a fair price under power of sale prior to a final order of foreclosure.

The only right of the mortgagor which is shortened by the sale is that accorded by Rule 491 (formerly R. 485) which enables the defendant in a foreclosure action to stay proceedings by paying the amount due for principal, interest and costs before the final order of foreclosure. The length of time available to the mortgagor in which to make such a payment depends on whether anyone with an interest in the equity of redemption claims an opportunity to redeem. As a practical matter, it is highly unlikely that any of the encumbrancers would have claimed this opportunity in this case since the value of the property did not exceed the amounts owing on the prior mortgages. There was no evidence that the sale price of the house, $25,500, was not a fair price in 1962 for a property on the outskirts of a metropolitan area, serviced by a well and septic tank. In any event, it is clear that Mrs. Petranik was not in a position to

d'*equity*, la cour protégera le débiteur hypothécaire contre toute action abusive ou accablante du créancier hypothécaire. Quand elle aura ordonné qu'une occasion de racheter soit donnée au débiteur, il ne sera pas permis au créancier hypothécaire de faire échec au remède accordé en vendant la propriété en vertu du pouvoir de vente attaché à l'hypothèque. Alors même qu'aucun jugement n'a accordé de droit de rachat, la cour empêchera la vente si le débiteur désire sincèrement procéder au rachat: *Marshall et al. v. Miles*, précité. Toutefois, comme le souligne le juge Arnup, les modifications apportées aux Règles de pratique en 1941 ont eu pour résultat que le débiteur hypothécaire n'a pas en Ontario un droit automatique de rachat. Sur réception d'un bref d'action en forclusion, il doit déposer un avis exprimant son désir d'avoir l'occasion de racheter ou, s'il omet de déposer l'avis, il doit demander à la cour d'exercer sa juridiction d'*equity* pour l'autoriser à racheter. Si le débiteur hypothécaire omet de prendre l'une ou l'autre de ces mesures et si le jugement conditionnel de forclusion ne lui confère aucun droit de rachat ni droit d'obtenir la rétrocession du bien sur paiement des montants trouvés dus, ses droits ne sont pas atteints par la vente de l'immeuble à un juste prix en vertu du pouvoir de vente avant l'ordonnance finale de forclusion.

Le seul droit du débiteur hypothécaire qui soit diminué par la vente est celui qui est accordé par la règle 491 (anciennement R. 485) qui permet au défendeur à une action en forclusion d'arrêter les procédures en payant le montant dû en capital, intérêts et frais avant l'ordonnance finale de forclusion. Le temps dont dispose le débiteur hypothécaire pour procéder au paiement dépend du point de savoir si quelqu'un ayant un droit de rachat demande d'avoir l'occasion de le faire. En pratique, il est très improbable que l'un quelconque des créanciers l'aurait demandé en l'espèce, puisque la valeur de la propriété ne dépassait pas les montants dus en vertu des hypothèques antérieures. Il n'existe aucune preuve que le prix de vente de la maison, soit $25,500, n'était pas un juste prix en 1962, pour une propriété située aux abords d'une grande agglomération et équipée d'un puits et d'une fosse septique. En tout cas, il take advantage of Rule 491 and does not allege that she was prevented from doing so.

It is true that the sale under power of sale could have prevented the subsequent encumbrancers from claiming in the reference and exercising a power to redeem. It was not until 1964 that *The Mortgages Act*, now s. 31 of R.S.O. 1970, c. 279, prevented such prejudice to subsequent encumbrancers by requiring that they be given notice of any sale under power, and not until 1969 that the Rules gave subsequent encumbrancers the same opportunity to redeem as is given to mortgagors. As already noted, however, it seems clear that the subsequent encumbrancers in this case would not have exercised a right to redeem the property, and they have not complained that they were precluded from doing so. Even if their rights were prejudiced, that does not provide grounds for a claim by Mrs. Petranik.

Mrs. Petranik was in default under the mortgages, and the property was completely pledged to or claimed by others. When foreclosure proceedings were instituted, Mrs. Petranik was not able nor did she indicate a desire to redeem the property. The judgment *nisi* in the foreclosure action effectively foreclosed her equity of redemption and directed a reference with respect to the interests of subsequent encumbrancers. Without proceeding with this reference, the second mortgagee sold the property under power of sale for a fair price which was sufficient to pay out the first mortgage, costs incurred and half of the second mortgage. The second mortgagee has not sued for the remainder owing except by way of counterclaim in this action which was not forcefully pursued. Looking at the situation as it existed in 1962 when this cause of action arose, it is difficult to see how Mrs. Petranik has been prejudiced. The property has now appreciated greatly and Mrs. Petranik may now be in a position to redeem, but there are no grounds to justify setting aside the sale which took place in 1962. The mortgagee was entitled to pursue alternative remedies. The fact that she had obtained judgment *nisi* in a foreclosure action did

est claire que M^me^ Petranik n'était pas en position de se prévaloir de la règle 491 et elle n'allègue pas qu'on l'en ait empêchée.

Il est vrai que la vente en vertu du pouvoir de vente aurait pu empêcher les créanciers subséquents de produire leurs créances lors du renvoi et d'exercer une faculté de rachat. Ce n'est qu'en 1964 que *The Mortgages Act*, art. 31 actuel, R.S.O. 1970, c. 279, a empêché que les créanciers subséquents soient ainsi frustrés de leurs droits, en exigeant qu'ils soient avisés de tout exercice du pouvoir de vente et ce n'est qu'en 1969 que les Règles de pratique ont donné aux créanciers subséquents la même occasion de racheter que celle qui est donnée aux débiteurs hypothécaires. Comme on l'a déjà souligné toutefois, il semble clair que les créanciers subséquents n'auraient pas exercé en l'espèce leur droit de racheter la propriété et ils ne se sont pas plaints d'en avoir été empêchés. Quand bien même il aurait été porté atteinte à leurs droits, la demande de M^me^ Petranik ne s'en trouve pas mieux fondée pour autant.

M^me^ Petranik avait cessé ses paiements hypothécaires et l'immeuble était complètement obéré. Au moment où les procédures de forclusion ont été intentées, M^me^ Petranik n'était pas à même de racheter la propriété et elle n'en a pas manifesté le désir. Le jugement conditionnel de forclusion a effectivement forclos son droit de rachat et ordonné un renvoi quant aux droits des créanciers subséquents. Sans faire procéder à ce renvoi, la seconde créancière hypothécaire a vendu la propriété en vertu de son pouvoir de vente à un juste prix qui a permis de rembourser la première hypothèque, les frais engagés et la moitié de la seconde hypothèque. La seconde créancière hypothécaire n'a pas poursuivi pour le solde, sauf par voie de demande reconventionnelle dans la présente action, demande qui n'a pas été poussée plus avant. Si l'on considère la situation qui existait en 1962 lorsque la cause d'action a pris naissance, il est difficile de découvrir le préjudice qu'a subi M^me^ Petranik. La propriété a pris maintenant beaucoup de valeur et il se peut que M^me^ Petranik soit maintenant à même de la racheter, mais rien ne justifie l'annulation de la vente intervenue en 1962. La créancière hypothécaire avait plusieurs moyens not preclude her from exercising her power of sale under the mortgage since the sale did not prejudice any rights asserted by or accorded to Mrs. Petranik in the foreclosure proceeding.

I agree completely with the reasons delivered in the Court of Appeal. I would dismiss the appeal with costs.

RITCHIE J. (*dissenting*)—Like my brother Judson, I agree with the reasons for judgment delivered by Mr. Justice Arnup on behalf of the Court of Appeal for Ontario and would dismiss this appeal with costs.

DICKSON J.—I would allow this appeal. In my view, Mrs. Petranik's equity of redemption in the subject property was not extinguished by either the foreclosure proceedings commenced by Mrs. Dale but not completed, or by the purported exercise of the power of sale contained in the mortgage. An equity of redemption is a right of property. Holdsworth (*A History of English Law*, vol. VI, at p. 663) says:

> We have seen that the relief given by equity to the mortgagor originally depended on principles similar to those which underlay the relief given in cases of the breach of a condition, and in cases of penalties; but that, the regularity with which this relief was given, had altered its basis, and caused it to depend, not upon the existence of any supposed hardship, but upon a right belonging as of course to a mortgagor. The result had been to make the mortgagor's equity to redeem a right of property. He had an equitable estate in the land; and, subject to the legal rights of the mortgagee, was, in equity, regarded as its owner.

In *Casborne v. Scarfe*[8] at p. 604-5, Lord Hardwicke said:

> First, an equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only but such an estate whereof there may be seisin; the

[8] (1737), 1 Atk. 603.

à sa disposition. Le fait qu'elle ait obtenu un jugement conditionnel de forclusion ne l'empêchait pas d'exercer son pouvoir de vente attaché à l'hypothèque puisque la vente ne portait atteinte à aucun droit reconnu ou conféré à Mme Petranik lors des procédures de forclusion.

Je suis en complet accord avec les motifs de l'arrêt de la Cour d'appel. Je rejetterais le pourvoi avec dépens.

LE JUGE RITCHIE (*dissident*)—Comme mon collègue Judson, je suis d'accord avec les motifs du jugement rendu par le juge Arnup au nom de la Cour d'appel de l'Ontario et je rejetterais ce pourvoi avec dépens.

LE JUGE DICKSON—Je suis d'avis d'accueillir ce pourvoi. A mon avis, le droit que Mme Petranik avait en *equity* de racheter la propriété litigieuse n'a été éteint ni par les procédures de forclusion que Mme Dale a entamées sans les mener à terme, ni par le prétendu exercice du pouvoir de vente attaché à l'hypothèque. Un droit de rachat est un droit réel. Holdsworth (*A History of English Law*, vol. VI, p. 663) écrit:

> [TRADUCTION] Nous avons vu que le recours que l'*equity* accordait au débiteur hypothécaire dépendait à l'origine de principes semblables à ceux qui sous-tendaient le recours accordé dans les cas de violation d'une condition et dans les cas de clauses pénales, mais que la régularité avec laquelle ce recours était accordé avait modifié son fondement et l'avait amené à dépendre non plus de l'existence de quelque grave iniquité supposée mais d'un droit appartenant, comme allant de soi, au débiteur hypothécaire. Le résultat avait été la transformation du privilège de rachat du débiteur hypothécaire en droit réel. Le débiteur avait un droit de tenure en *equity* sur le biens-fonds et il en était considéré, en *equity*, comme le propriétaire, sous réserve des droits que la *common law* donnait au créancier hypothécaire.

Dans *Casborne v. Scarfe*[8], aux pp. 604-605, lord Hardwicke déclarait:

> [TRADUCTION] En premier lieu, un droit de rachat a toujours été considéré comme droit de tenure sur le bien-fonds, car il peut être légué, donné ou grevé de substitutions auxquelles on peut faire échec par amiable composition et recouvrement, et il ne peut donc être considéré comme un simple droit mais comme un droit

[8] (1737), 1 Atk. 603.

person therefore intitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.

In *Burgess v. Wheats*[9], at p. 225, Lord Mansfield said:

> In the eye of this court Lord Hardwicke thought the equity of redemption is the fee simple of the land.

In *Heath v. Pugh*[10], at p. 360, Lord Chancellor Selborne said that it was sufficient to quote the above passage on the point, and in *Tarn v. Turner*[11], at p. 460, Mr. Justice Kekewich said:

> The Court having decided that the mortgagor has that right to redeem, construes it as really an estate in the land. It is not a legal estate, but what is termed an equitable estate—as much an interest in the land as the real fee simple. It is a fee simple subject to a charge, and is vulgarly styled in legal language the equity of redemption.

An equity of redemption is an equitable estate, which can be sold or quit claimed, and which cannot be clogged or fettered.

In the case at bar, Mrs. Dale commenced a foreclosure action for the purpose of extinguishing the interest which, as owner of the equity of redemption, Mrs. Petranik held in the lands mortgaged to Mrs. Dale. Mrs. Dale issued a specially endorsed writ against Mrs. Petranik in the usual form of a writ of foreclosure. The prayer for relief stated that the plaintiff's claim was on the mortgage and continued with notice of a claim of entitlement to immediate possession and a claim for $5,000 principal money and interest. The prayer for relief also gave notice that:

> . . . judgment for immediate foreclosure of your interest in the mortgaged premises may be entered unless you desire an opportunity to redeem the mortgaged premises and before the expiration of the time allowed you for

[9] (1759) 1 Eden. 177.
[10] (1881), 6 Q.B.D. 345.
[11] (1888), 39 Ch. D. 456.

de tenure dont il peut y avoir saisine. La personne titulaire du droit de rachat est donc considérée comme propriétaire du bien-fonds et une hypothèque en fief est considérée comme des biens meubles.

Dans *Burgess v. Wheats*[9], à la p. 225, lord Mansfield déclarait:

> [TRADUCTION] De l'avis de cette cour, lord Hardwicke pensait que le droit de rachat est le droit de propriété absolue du bien-fonds.

Dans *Heath v. Pugh*[10], à la p. 360, le lord chancelier Selborne a déclaré qu'il suffisait, sur ce point, de citer le passage ci-dessus, et dans *Tarn v. Turner*[11], à la p. 460, le juge Kekewich déclarait:

> [TRADUCTION] Ayant décidé que le débiteur hypothécaire a le droit de racheter, la Cour voit celui-ci comme un véritable droit de tenure sur le bien-fonds. Ce n'est pas un droit de tenure légale, mais ce que l'on appelle un droit de tenure en *equity*—un droit réel tout autant que l'est le véritable droit de propriété absolue. C'est un droit de propriété absolue grevée d'une charge, que l'on appelle communément droit de rachat dans le langage juridique.

Un droit de rachat est un droit de tenure en *equity*, qui peut être vendu ou faire l'objet d'une renonciation et que rien ne peut entraver.

En l'espèce, M^me^ Dale a intenté une action en forclusion dans le but d'éteindre le droit que, en tant que propriétaire du droit de rachat, M^me^ Petranik détenait sur le bien-fonds hypothéqué en faveur de M^me^ Dale. M^me^ Dale a fait délivrer un bref à endossement spécial contre M^me^ Petranik en la forme habituelle d'un bref de forclusion. La demande de redressement exposait que la réclamation de la demanderesse portait sur l'hypothèque et se poursuivait avec un avis par lequel la demanderesse entendait se faire reconnaître le droit à la possession immédiate et réclamait le remboursement d'un capital de $5,000, avec les intérêts. La demande de redressement donnait également avis que:

> [TRADUCTION] . . . jugement de forclusion immédiate de vos droits sur les lieux hypothéqués peut être inscrit à moins que vous ne désiriez avoir l'occasion de racheter les lieux hypothéqués et qu'avant l'expiration du temps

[9] (1759), 1 Eden 177.
[10] (1881), 6 Q.B.D. 345.
[11] (1888), 39 Ch. D. 456.

appearance you do file in the office within named and serve a memorandum in writing entitled in this action and signed by yourself or your solicitor to the following effect: 'I desire an opportunity to redeem the mortgaged premises', and give an address for service, in which case you will be entitled to four days' notice of the taking of the account of the amount due to the plaintiff and in default of payment of the amount found due within six calendar months from the time of taking of the account and the drawing up of the judgment your interest in the mortgaged premises may be foreclosed.

qui vous est accordé pour comparaître, vous ne déposiez au bureau désigné dans les présentes et ne signifiiez une note écrite, portant l'intitulé de l'action, signée par vous-même ou votre avocat et ayant la teneur suivante: «Je désire avoir une occasion de racheter les lieux hypothéqués» et ne donniez une adresse en vue des significations, auquel cas vous aurez droit à un avis de quatre jours de l'établissement du compte du montant dû à la demanderesse et à défaut de paiement du montant trouvé dû dans les six mois à compter de la date d'établissement du compte et de la rédaction du jugement, vos droits sur les lieux hypothéqués peuvent être forclos.

Rule 465 (formerly Rule 460A) of the *Ontario Annual Practice* 1962 provided:

465. Where a defendant by writ in an action for foreclosure or sale desires an opportunity to redeem the mortgaged premises but does not otherwise desire to defend the action, he shall, within the time allowed for appearance, file and serve a memorandum entitled in the action to the following effect: 'I desire an opportunity to redeem the mortgaged premises', whereupon he is entitled to four days' notice of the taking of the account of the amount due to the plaintiff and has six calendar months from the time of the taking of the account to redeem the mortgaged premises.

La règle 465 (ancienne règle 460A) de l'*Ontario Annual Practice* de 1962 prévoit que:

[TRADUCTION] 465. Le défendeur à une action en forclusion ou vente forcée qui désire avoir l'occasion de racheter les lieux hypothéqués mais ne désire pas présenter d'autre défense à l'action, doit, dans le délai de comparution, déposer et signifier une note portant l'intitulé de l'action et ayant la teneur suivante: «Je désire avoir une occasion de racheter les lieux hypothéqués», sur quoi il aura droit à un avis de quatre jours de l'établissement du compte du montant dû au demandeur et aura six mois à compter de cet établissement pour racheter les lieux hypothéqués.

Rule 472 (1) and (2) (formerly Rule 467 (1) and (2)) then goes on to provide:

472. (1) In an action for foreclosure or sale where the writ has been duly endorsed and the defendant fails to appear or fails to file a notice that he desires an opportunity to redeem the mortgaged premises, the plaintiff may sign judgment for immediate sale or for immediate foreclosure unless a reference is desired as to encumbrancers (Form 104).

(2) If a reference is desired as to encumbrancers, the plaintiff is entitled to judgment with a reference, and, if no encumbrancer, shall prove any claim the Master so certifies, and, upon confirmation of the Master's report, a final order of sale or of foreclosure shall be made.

Le règle 472(1) et (2) (ancienne règle 467(1) et (2)) prévoit en outre que:

[TRADUCTION] 472. (1) Lorsque dans une action en forclusion ou vente forcée, le bref a été régulièrement signifié et que le défendeur fait défaut de comparaître ou de déposer un avis de son désir d'avoir une occasion de racheter les lieux hypothéqués, le demandeur peut obtenir un jugement de vente immédiate ou de forclusion immédiate à moins qu'un renvoi concernant les créanciers ne soit désiré (Formule 104).

(2) Si un renvoi concernant les créanciers est désiré, le demandeur a droit à un jugement avec renvoi et, s'il n'y a pas de créancier, doit prouver toute créance que le *Master* certifie ainsi, et, sur confirmation du rapport du *Master*, une ordonnance définitive de vente ou de forclusion doit être prononcée.

Form 104, referred to above, is of particular interest. It reads:

FORM 104

Form of Judgment on Praecipe for Immediate Foreclosure or Sale and Orders for Immediate Payment and Delivery of Possession

(Rule 472)

La formule 104, mentionnée ci-dessus, est particulièrement intéressante. Elle se lit ainsi:

[TRADUCTION] FORMULE 104

Formule de jugement sur réquisition écrite de forclusion immédiate ou de vente et d'ordonnances de paiement immédiat et de mise en possession

(Règle 472)

Upon reading the writ of summons issued in this action, and an affidavit of service of the said writ and no appearance having been entered and no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed:

1. It is ordered and adjudged (*Where judgment is for foreclosure after* 'adjudged', *add*: 'that the said defendant do stand absolutely debarred and foreclosed of and from all right, title and equity of redemption of, in and to the mortgaged premises', *where judgment is for sale, then after the word* 'adjudged', *add* 'that the said premises be sold, with the approbation of the Master, at........................................').

2. (*If judgment is for foreclosure omit this clause.*) And it is further ordered and adjudged that the purchasers do pay their purchase money into Court to the credit of this action and that the same when so paid in be applied in payment of what is found to be due to the said plaintiff for principal money, interest and costs as computed and taxed by the said Master, and that the balance do abide the further order of the Court.

3. (*Where judgment is for immediate payment, add*: And it is further ordered and adjudged that the defendant........................................do forthwith pay to the plaintiff the sum of........................................being the amount due to him at the date hereof for principal money, interest and costs.)

4. (*Where judgment is for recovery of possession, add*: And it is further ordered and adjudged that the defendant........................................do forthwith deliver to the plaintiff........................................or to whom he may appoint, possession of the mortgaged premises, or of such part thereof as may be in the possession of the said defendant.)

Mrs. Petranik failed to appear and failed to give a notice that she desired an opportunity to redeem the mortgaged premises. Judgment was signed directing a reference and ordering Mrs. Petranik to deliver up possession of the property. A draft judgment was presented in the following form:

JUDGMENT

Friday, the 23rd day of March, 1962.

UPON reading the Writ of Summons issued in this action, and affidavit of service of the said writ and no appearance having been entered and no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed;

1. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed

Vu le bref d'assignation délivré dans la présente action et l'attestation sous serment de la signification dudit bref, en l'absence de comparution et aucun avis n'ayant été déposé exprimant le désir du défendeur d'avoir l'occasion de racheter les lieux hypothéqués:

1. Il est ordonné et décidé (*S'il s'agit d'un jugement de forclusion, après* «décidé», *ajouter*: «que ledit défendeur soit absolument déchu et forclos de tout droit, titre et faculté de rachat à l'égard des lieux hypothéqués»; *quand il s'agit d'un jugement de vente, après* «décidé», *ajouter alors*: «que lesdits lieux soient vendus, avec l'approbation du *Master*, à........................................»).

2. (*S'il s'agit d'un jugement de forclusion, omettez cette clause.*) Et il est en outre ordonné et décidé que les acheteurs consignent leur prix d'achat à la cour au crédit de la présente action et que l'argent ainsi consigné soit affecté au paiement de ce qui est trouvé dû audit demandeur en capital, intérêts et frais tels que calculés et taxés par ledit *Master* et qu'il soit disposé du solde selon ordonnance ultérieure de la cour.

3. (*S'il s'agit d'un jugement de paiement immédiat, ajouter*: Et il est en outre ordonné et décidé que le défendeur........................................paye immédiatement au demandeur la somme de........................................représentant ce qui lui est dû à cette date en capital, intérêts et frais.)

4. (*S'il s'agit d'un jugement de mise en possession, ajouter*: Et il est en outre ordonné et décidé que le défendeur........................................mette immédiatement le demandeur........................................, ou la personne qu'il peut désigner, en possession des lieux hypothéqués ou de toute partie de ceux-ci qui peut être en la possession dudit défendeur.)

M[me] Petranik n'a pas comparu et n'a pas donné d'avis de son désir d'avoir l'occasion de racheter les lieux hypothéqués. Jugement a été rendu ordonnant un renvoi et ordonnant à M[me] Petranik de remettre la propriété. Le projet de jugement se présentait sous la forme suivante:

[TRADUCTION] JUGEMENT

le vendredi 23 mars 1962

VU le bref d'assignation délivré dans la présente action et l'attestation sous serment de la signification dudit bref, en l'absence de comparution et aucun avis n'ayant été déposé exprimant le désir de la défenderesse d'avoir l'occasion de racheter les lieux hypothéqués;

1. IL EST ORDONNÉ ET DÉCIDÉ que toutes les recherches nécessaires soient faites, les comptes dressés,

and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at the City of Toronto.

2. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith after making of the Master's report pay to the plaintiff what shall be found due her for principal money, interest and costs at the date of the said report and upon payment of the amount due to her that (subject to the provision of section 2 of The Mortgages Act) the plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto.

3. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith deliver to the plaintiff, or to whom she may appoint, possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendant.

At the time of signing the judgment, the paragraph numbered "2" was struck out and the remaining paragraphs renumbered "I" and "II".

The first thing to observe about the judgment is that it is not a judgment for immediate foreclosure. Form 104 states that where judgment is for immediate foreclosure the order shall state "that the said defendant do stand absolutely debarred and foreclosed of and from all right, title and equity of redemption of, in and to the mortgaged premises". The form of the judgment which was entered contains no such language. Paragraph II of the judgment as entered directs the delivery of possession but in no way affects the equity of redemption. The taking of possession by a mortgagee does not extinguish the right of the mortgagor to redeem the mortgaged premises. If the judgment as signed had contained the paragraph numbered "2" in the draft, the case would without doubt fall within *Stevens v. Theatres, Limited*[12], but I do not think the question whether Mrs. Petranik retains an equity of redemption in the subject property depends upon the presence or absence of the expunged paragraph in the judgment entered. The crucial issue in this appeal is whether the estate or interest owned by Mrs. Petranik in the mortgaged land was extinguished and if so, when and in what manner. The judgment

[12] [1903] 1 Ch. 857.

les frais taxés et les mesures prises en vue de rachat ou de forclusion et qu'à ces fins la présente cause soit renvoyée au *Master* en la ville de Toronto.

2. ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que, après dépôt du rapport du *Master*, la défenderesse paye immédiatement à la demanderesse ce qui lui sera trouvé dû en capital, intérêts et frais à la date dudit rapport et, sur paiement du montant qui lui est dû, que (sous réserve des dispositions de l'article 2 de *The Mortgages Act*) la demanderesse rétrocède les lieux hypothéqués et rende tous documents les concernant.

3. ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que la défenderesse mette immédiatement la demanderesse, ou la personne qu'elle peut désigner, en possession des biens-fonds et lieux en question dans la présente cause ou de toute partie de ceux-ci qui peuvent être en possession de ladite défenderesse.

Au moment de rendre le jugement, le paragraphe numéroté «2» a été biffé et les paragraphes restants ont été renumérotés «I» et «II».

La première chose à souligner à propos de ce jugement, c'est qu'il ne s'agit pas d'un jugement de forclusion immédiate. La formule 104 dispose que, lorsqu'il s'agit d'un jugement de forclusion immédiate, l'ordonnance doit indiquer [TRADUCTION] «que ledit défendeur soit absolument déchu et forclos de tout droit, titre et faculté de rachat à l'égard des lieux hypothéqués». La formulation du jugement rendu ne contient rien de tel. Le paragraphe II du jugement rendu ordonne la mise en possession, mais ne touche aucunement au droit de rachat. La prise de possession par un créancier hypothécaire n'éteint pas le droit du débiteur de racheter les lieux hypothéqués. Si le jugement rendu contenait le paragraphe numéroté «2» dans le projet, nul doute que la cause aurait relevé de *Stevens v. Theatres, Limited*[12], mais je ne pense pas que la question de savoir si M^me^ Petranik conserve un droit de rachat sur la propriété litigieuse dépende de la présence ou de l'absence du paragraphe supprimé dans le jugement rendu. La question cruciale dans le présent pourvoi est de savoir si la tenure ou droit réel de M^me^ Petranik sur le bien-fonds hypothéqué a été éteint et, dans l'affirmative, quant et comment. Le jugement

[12] [1903] 1 Ch. 857.

which was entered did not, nor did it purport to, extinguish that interest. Neither was that interest extinguished by Mrs. Petranik's failure to appear or her failure to give a notice that she desired an opportunity to redeem the mortgaged premises. The passage of Rule 460A and the amendment of Rule 467 (the forerunner of Rule 472), effected a major change in foreclosure practice and procedure in Ontario by authorizing the signing of final judgment for immediate foreclosure unless the defendant filed a memorandum stating that he wished to redeem the property in question. This altered the earlier practice which required the plaintiff to sign interlocutory, not final, judgment. That is the effect of the change. I do not think it can be said that Mrs. Petranik's failure to file such a memorandum extinguished her equity of redemption. The Rule does not say that such is the effect and I very much doubt that ownership of an estate in land can be swept away by a rule of practice. Rules of practice do not prevail over equitable estates. Counsel for the respondent Mrs. Dale, early in his argument submitted that the effect of the amendment to the Rules was to extinguish the right of the mortgagor to redeem upon failure to file a request for an opportunity to redeem. Before his argument concluded, however, he had altered his position and conceded that an attenuated right of redemption continued. I think the concession is correct. The judgment was not an order absolute. An equity of redemption is so intense that even after an order absolute the court on occasion has given the mortgagor the right to redeem: *Campbell v. Holyland*[13].

The Rules gave Mrs. Dale the right to enter judgment immediately for final order of foreclosure upon failure of Mrs. Petranik to appear or to give notice. Mrs. Dale did not avail herself of the opportunity to enter final judgment against Mrs. Petranik. She obtained an order for a reference because, no doubt, there were subsequent encumbrances, but whatever may have been her reason, Mrs. Dale obtained a judgment which left unextinguished Mrs. Petranik's equitable estate in the

[13] [1877] 7 Ch. D. 166.

rendu n'a pas éteint et n'avait d'ailleurs pas pour objet d'éteindre ce droit. Pas davantage ce droit n'a-t-il été éteint par le défaut de comparaître de M$^{me}$ Petranik ou son défaut de donner avis de son désir d'avoir l'occasion de racheter les lieux hypothéqués. L'adoption de la règle 460A et la modification de la règle 467 (précurseur de la règle 472) ont opéré un changement majeur dans les procédures de forclusion en Ontario en autorisant le prononcé d'un jugement final de forclusion immédiate à moins que le défendeur ne dépose un mémoire indiquant son désir de racheter la propriété en question. Cela modifie la pratique antérieure qui obligeait le demandeur à obtenir un jugement interlocutoire et non pas final. Telle est la portée du changement. Je ne pense pas que l'on puisse dire que le défaut de M$^{me}$ Petranik de déposer pareil mémoire a éteint son droit de rachat. La règle ne déclare pas que tel est son effet et je doute fort que la propriété d'un droit de tenure sur un bien-fonds puisse être écartée par une règle de pratique. Les Règles de pratique ne l'emportent pas sur les droits de tenure en *equity*. Au début de sa plaidoirie, le procureur de la défenderesse M$^{me}$ Dale a prétendu que la modification apportée aux règles avait pour effet d'éteindre le droit de rachat du débiteur hypothécaire qui omet de demander une occasion de racheter. Il a toutefois modifié sa position avant de conclure sa plaidoirie et concédé qu'il subsistait un droit de rachat atténué. Je pense que cette concession est correcte. Le jugement n'était pas une ordonnance définitive. Le droit de rachat est si fort que, même après une ordonnance définitive, il est parfois arrivé aux tribunaux d'accorder au débiteur hypothécaire le droit de racheter: *Campbell v. Holyland*[13].

Les règles donnaient à M$^{me}$ Dale le droit d'obtenir immédiatement un jugement final ordonnant la forclusion sur défaut de comparution ou de donner avis de M$^{me}$ Petranik. M$^{me}$ Dale ne s'est pas prévalue de sa faculté d'obtenir un jugement final contre cette dernière. Elle a obtenu une ordonnance de renvoi. Sans doute était-ce parce qu'il existait des créanciers subséquents mais, quelles qu'aient pu être ses raisons, M$^{me}$ Dale a obtenu un jugement qui n'éteignait pas le droit de tenure en *equity* de

[13] [1877] 7 Ch. D. 166.

land. Mrs. Dale did not proceed with the reference before the Master; instead, she sold the property to Mr. Parker and Mr. Berwick, purporting to act under the power of sale contained in the mortgage. So far as giving notice of exercising power of sale to Mrs. Petranik, the trial judge, Moorhouse J., had this to say:

The sale was carried out with little if any notice, it being now alleged Helga [Mrs. Petranik] had abandoned the property, sale was purported to be made without notice.

It is contended that Mrs. Dale was entitled to pursue all remedies available to her, concurrently or in succession. Whether this is so in the present case depends, I think, upon the effect to be given to paragraph "I" of the judgment entered on behalf of Mrs. Dale which, it will be recalled, reads:

I. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at the City of Toronto.

The form of judgment entered on behalf of Mrs. Dale should be read against the form appearing in Marriott, *Practice in Mortgage Actions in Ontario* (2nd. ed.) (1955) at p. 322 which I would like to set out in full:

FORM 20

(Form 96, C.R.)

Form of Judgment on Praecipe for Foreclosure with Reference as to Encumbrancers, etc., where the Original Defendants do not File a Notice D. O. R., and Orders for Immediate Payment and Delivery of Possession

(Court and Cause)

........day the........day of........19....

Upon reading the writ of summons issued in this action, and the statement of claim (if any), and an affidavit of service of the said writ on the defendant, and no appearance having been entered, (or, and the defendant having made default in the delivery of the defence) and no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed:

1. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed

M[me] Petranik sur le bien-fonds. M[me] Dale n'a pas fait procéder au renvoi devant le *Master*; au lieu de cela, elle a vendu la propriété à M. Parker et M. Berwick, prétendant agir en vertu du pouvoir de vente attaché à l'hypothèque. En ce qui concerne l'avis à donner à M[me] Petranik de l'exercice du pouvoir de vente, le juge de première instance Moorhouse a fait remarquer ceci:

[TRADUCTION] La vente a été conclue avec peu ou pas d'avis, et comme il est maintenant allégué qu'Helga [M[me] Petranik] avait abandonné la propriété, il semble qu'on ait entendu procéder à la vente sans avis.

Il est prétendu que M[me] Dale avait le droit d'exercer tous les recours à sa disposition, concurremment ou successivement. Le point de savoir s'il en est ainsi en l'espèce dépend, je pense, de l'effet que l'on accorde au 1[er] paragraphe du jugement rendu en faveur de M[me] Dale, paragraphe qui, rappelons-le, se lit comme suit:

[TRADUCTION] I. IL EST ORDONNÉ ET DÉCIDÉ que toutes les recherches nécessaires soient faites, les comptes dressés, les frais taxés et les mesures prises en vue de rachat ou de forclusion et qu'à ces fins la présente cause soit renvoyée au *Master* en la ville de Toronto.

La formulation du jugement rendu en faveur de M[me] Dale doit être rapprochée de la formule que l'on trouve dans Marriott, *Practice in Mortgage Actions in Ontario* (2[e] éd.) (1955), à la p. 322, que je reproduis en entier:

[TRADUCTION] FORMULE 20

(Formule 96, R.C.)

Formule de jugement sur réquisition écrite de forclusion avec renvoi quant aux créanciers, etc., quand les défendeurs originaires n'ont pas déposé d'avis de D. O. R., et d'ordonnance de paiement immédiat et de mise en possession

(Cour et cause)

Le.................................... 19....

Vu le bref d'assignation délivré dans la présente action, et la déclaration (le cas échéant), et une attestation sous serment de la signification dudit bref au défendeur, en l'absence de comparution (ou, le défendeur n'ayant pas produit de défense) et aucun avis n'ayant été déposé exprimant le désir du défendeur d'avoir l'occasion de racheter les lieux hypothéqués:

1. IL EST ORDONNÉ ET DÉCIDÉ que toutes les recherches nécessaires soient faites, les comptes dressés,

and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at...........................

2. (*Where judgment is for immediate payment add:*) AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant...............do forthwith pay to the plaintiff the sum of $...........being the amount due to him for principal money, interest and costs at the date hereof; and upon payment of the amount due to the plaintiff that (subject to the provisions of section 2 of *The Mortgages Act*) the plaintiff do asign (sic) and convey the mortgaged premises and deliver up all documents relating thereto.

2. (*Or where judgment is for the amount found due by the Master substitute this paragraph for the one above:*) AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith after making of the Master's report pay to the plaintiff what shall be found due him for principal money, interest and costs at the date of the said report and upon payment of the amount due to him that, (subject to the provision of section 2 of *The Mortgages Act*) the plaintiff do assign and convey the mortgaged premises, and deliver up all the documents relating thereto.

3. (*Where judgment is for recovery of possession add:*) AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith deliver to the plaintiff, or to whom he may appoint, possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendant.

Judgment signed this........day of.................... 19....

REGISTRAR

The following points might be noted particularly (i) that the form of judgment in the instant case adopted, practically verbatim, the language of the recital and of paragraphs "1" and "3" of Form 20; (ii) that form 20 is a Form of Judgment for Foreclosure; (iii) that it is not a judgment for immediate foreclosure but in the nature of a judgment *nisi*; (iv) that the judgment entered on behalf of Mrs. Dale does not include paragraph "2" of Form 20 ordering immediate payment.

Marriott, *supra*, says at p. 76:

In a combined action for foreclosure, possession and payment, it should be kept in mind that in reality there

les frais taxés et les mesures prises en vue de rachat ou de forclusion et qu'à ces fins la présente cause soit renvoyée au *Master* à...........................

2. (*Quand il s'agit d'un jugement de paiement immédiat, ajouter:*) ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que le défendeur.................... paye immédiatement au demandeur la somme de $............... représentant le montant qui lui est dû en capital, intérêts et frais à cette date; et que, sur paiement du montant dû au demandeur (sous réserve des dispositions de l'article 2 de *The Mortgages Act*), le demandeur rétrocède les lieux hypothéqués et rende tous documents les concernant.

2. (*Ou s'il s'agit d'un jugement pour le montant établi par le Master, substituer le paragraphe suivant au précédent:*) ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que, après dépôt du rapport du *Master*, le défendeur paye immédiatement au demandeur ce qui lui sera trouvé dû en capital, intérêts et frais à la date dudit rapport et, sur paiement du montant qui lui est dû, que (sous réserve des dispositions de l'article 2 de *The Mortgages Act*) le demandeur rétrocède les lieux hypothéqués et rende tous documents les concernant.

3. (*S'il s'agit d'un jugement de mise en possession, ajouter:*) ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que le défendeur mette immédiatement le demandeur, ou la personne qu'il peut désigner, en possession des biend-fonds et lieux en question dans la présente cause, ou de toute partie de ceux-ci qui peuvent être en la possession dudit défendeur.

Jugement signé ce...........jour de............................... 19....

REGISTRAIRE

On peut relever notamment les points suivants: i) que la formulation du jugement rendu en l'espèce a repris, presque mot pour mot, les termes de l'exposé introductif et des paragraphes 1 et 3 de la formule 20; ii) que la formule 20 est une formule de jugement de forclusion; iii) qu'il ne s'agit pas d'un jugement de forclusion immédiate mais d'un jugement de nature conditionnelle; iv) que le jugement rendu en faveur de M[me] Dale ne contient pas le paragraphe 2 de la formule 20 ordonnant le paiement immédiat.

Marriott, précité, déclare à la p. 76:

[TRADUCTION] Dans une action combinée en forclusion, possession et paiement, il faut garder présent à are three actions and the judgment when entered gives three remedies. If no notice D. O. R. [desire opportunity to redeem] is filed in effect three judgments are obtained, one for immediate foreclosure, one for possession and another for payment.

Where a notice D. O. R. is filed and the defendant is given three months to redeem, or a reference is required as to encumbrancers, the foreclosure action is not concluded and the right to redeem is still outstanding until a final order is obtained. However, as the other two actions have been completed and the plaintiff has the right to pursue his remedies thereon without regard to the foreclosure action he may at once obtain an execution on the judgment for payment and issue a writ of possession and place them in the Sheriff's hands: *Euclid Avenue Trusts Co. v. Hohs* (1911) 24 O.L.R. 447 at 452.

[The emphasis is mine.]

The effect of the judgment taken out by Mrs. Dale on March 23, 1962 was (i) to leave outstanding Mrs. Petranik's right of redemption until a final order of foreclosure could be obtained; (ii) not to take judgment for immediate payment; (iii) to obtain the right of immediate possession.

It is contended on behalf of Mrs. Dale that the omission from the judgment of the order for immediate payment (which embodied an express obligation to reconvey on payment) served to distinguish this case from *Stevens v. Theatres, Ltd., supra*, and that in consequence Mrs. Dale was free to disregard the judgment which had been obtained at her behest from the Supreme Court of Ontario ordering a reference to the Master, and free to sell the mortgaged lands by private sale without notice to Mrs. Petranik. With respect, I think that that is taking too narrow a view of what was said by Mr. Justice Farwell in the *Stevens* case. I do not regard *Stevens* as a technical rule. Once the court has given judgment in foreclosure proceedings the mortgagee's power of sale is suspended pending implementation of that judgment. Although there is language in *Stevens* which might suggest that the suspension of the exercise of the power of sale depended upon an obligation to reconvey being expressly set forth in the judgment *nisi*, there is other language which can be read

l'esprit qu'en réalité il y a trois actions et que le jugement, une fois inscrit, fournit trois remèdes. Si aucun avis de D. O. R. [désir d'occasion de racheter] n'est déposé, ce sont en fait trois jugements qui sont obtenus, un de forclusion immédiate, un de possession, et un autre de paiement.

Quand un avis de D. O. R. est déposé et que le défendeur se voit accorder trois mois pour racheter, ou quand un renvoi est exigé quant aux créanciers, l'action en forclusion n'est pas terminée et le droit de racheter subsiste encore jusqu'à l'obtention d'une ordonnance finale. Toutefois, comme les deux autres actions sont achevées et que le demandeur a le droit d'exercer les recours qu'elles lui ont ouverts sans égard à l'action en forclusion, il peut aussitôt obtenir un bref d'exécution en vertu du jugement de paiement et faire émettre un bref de possession et les mettre entre les mains du shérif: *Euclid Avenue Trusts Co. v. Hohs* (1911) 24 O.L.R. 447, p. 452.

[C'est moi qui souligne.]

L'effet du jugement obtenu par M^me^ Dale le 23 mars 1962 était i) de laisser subsister le droit de rachat de M^me^ Petranik jusqu'à ce qu'une ordonnance finale de forclusion puisse être obtenue; ii) de ne pas obtenir jugement de paiement immédiat; iii) d'obtenir un droit de possession immédiate.

On a prétendu, en faveur de M^me^ Dale, que l'omission dans le jugement, de l'ordonnance de paiement immédiat (à laquelle était incorporée une obligation expresse de rétrocession sur paiement) permettait de distinguer la présente affaire de *Stevens v. Theatres, Ltd.*, précité. En conséquence, M^me^ Dale était libre de ne pas tenir compte du jugement prononcé à sa demande par la Cour suprême de l'Ontario, ordonnant un renvoi au *Master*, et de vendre privément les biens-fonds hypothéqués sans en aviser M^me^ Petranik. Avec égards, je pense que c'est interpréter trop étroitement les déclarations du juge Farwell dans *Stevens*. Je ne vois pas la règle *Stevens* comme une règle de procédure. Dès lors qu'un tribunal a prononcé jugement dans des procédures de forclusion, le pouvoir de vente du créancier hypothécaire est suspendu tant que l'exécution du jugement est elle-même pendante. Bien qu'il y ait, dans *Stevens*, certains passages qui pourraient laisser entendre que la suspension de l'exercice du pouvoir de vente est subordonnée à la présence, dans le jugement more broadly and as being apposite in the case at bar. I have in mind, for example, the following:

> When the parties have once taken the judgment of the Court neither party, in my opinion, is entitled without the leave of the Court to put it out of his own power, by any act of his own, to obey the judgment of the Court.

Whatever may be the reach of the *Stevens* decision, I am in no doubt that when a mortgagee seeks the aid of the court in the enforcement of a remedy against a mortgagor and engages the court system to the extent of obtaining a judgment of the nature of that obtained by Mrs. Dale, the mortgagee must carry out that judgment or obtain leave of the court to do otherwise. Having resorted to the Queen's justice, he can not resort to his own.

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.

I would allow the appeal, set aside the judgment of the Ontario Court of Appeal and restore the judgment of Moorhouse J. with costs to the appellant throughout.

*Appeal allowed with costs,* JUDSON *and* RITCHIE JJ. *dissenting.*

*Solicitors for the appellant: Black, Osborne, Black & Bassel, Toronto.*

*Solicitor for the respondents, Parker and Berwick: George T. Walsh, Toronto.*

*Solicitor for the respondent, Dale: G. L. Howell, Toronto.*

conditionnel, d'une obligation expresse de rétrocession, il en est d'autres qui peuvent être considérés comme plus larges et applicables à la présente espèce. Je pense, par exemple, à celui-ci:

> [TRADUCTION] Une fois que les parties ont obtenu jugement de la cour, aucune d'elles, à mon avis, n'a le droit, sans permission de celle-ci et par quelque acte unilatéral, de se mettre hors de mesure d'obéir audit jugement.

Quelle que puisse être la portée de *Stevens*, je n'ai aucun doute que, lorsqu'un créancier hypothécaire s'adresse à la cour pour obtenir un redressement contre un débiteur hypothécaire et engage le système judiciaire au point d'obtenir un jugement de la nature de celui qu'a obtenu M[me] Dale, il a la stricte obligation d'exécuter ce jugement ou d'obtenir de la cour la permission d'agir autrement. Ayant eu recours à la justice de la Reine, il ne peut se faire justice lui-même.

Je conclus en répétant qu'un droit de rachat est un droit réel immobilier, que le débiteur hypothécaire peut céder, léguer, attribuer, louer ou hypothéquer comme n'importe quel autre droit réel immobilier (Megarry et Wade, *The Law of Real Property* (3[e] éd.), p. 885 et Cheshire's *Modern Real Property* (10[e] éd.), p. 568) et que l'*equity* a toujours jalousement protégé le droit de rachat du débiteur hypothécaire.

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel de l'Ontario et de rétablir le jugement du juge Moorhouse avec dépens en faveur de l'appelante dans toutes les cours.

*Pourvoi accueilli avec dépens, les juges* JUDSON *et* RITCHIE *dissidents.*

*Procureurs de l'appelante: Black, Osborne, Black & Bassel, Toronto.*

*Procureur des intimés, Parker et Berwick: George T. Walsh, Toronto.*

*Procureur de l'intimée, Dale: G. L. Howell, Toronto.*

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Port Capital Development (EV) Inc. (Re),* 2021 BCSC 1272

Date: 20210630
Docket: S205095
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 a Plan of Compromise and Arrangement of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership**

Before: The Honourable Madam Justice Fitzpatrick

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioners: | D. Gruber<br>K. Cameron |
| Counsel for the Monitor, Ernst & Young Inc.: | P. Rubin |
| Counsel for CMLS Financial Ltd. and Desjardins Financial Security Life Assurance Company: | C. Brousson |
| Counsel for 1296371 B.C. Ltd. and Marcario Reyes: | J. Schultz<br>E. Watson |
| Counsel for Aviva Insurance Company of Canada: | W. Roberts |
| Counsel for Landa Global Acquisition Ltd.: | S.A. Turner |

| | |
|---|---|
| Counsel for Solterra Acquisitions Corp. and Centura Building Systems (2013) Ltd.: | K. Jackson<br>G. Nesbitt |
| Counsel for Domain Mortgage Corp.: | A. Frydenlund, Q.C. |
| Place and Date of Hearing: | Vancouver, B.C.<br>May 25, June 8 and 10, 2021 |
| Place and Date of Decision with Written Reasons to Follow: | Vancouver, B.C.<br>June 15, 2021 |
| Place and Date of Written Reasons: | Vancouver, B.C.<br>June 30, 2021 |

## INTRODUCTION

[1] The Petitioners are owners of an uncompleted residential tower in downtown Vancouver, British Columbia, known as the "Terrace House Project".

[2] The Petitioners entered into these *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") proceedings to allow them to undertake a process toward a resolution of their financial difficulties that would allow them to complete the Project. That overall objective is no longer feasible.

[3] However, numerous parties have now advanced offers or bids to acquire the Project. The Court's task is to consider these offers or bids and, if appropriate, decide which one should be approved.

[4] On June 15, 2021, I granted an order approving the acquisition of the project by Solterra Acquisitions Corp. ("Solterra") dated June 4, 2021, with reasons to follow. These are my reasons.

## BACKGROUND FACTS

[5] The Petitioners are subsidiaries of the Port Capital Group, which is in the business of real estate development and management in British Columbia and Ontario. Port Capital Development (EV) Inc. is the General Partner (GP) of the Limited Partnership.

[6] The "Terrace House Project" is a 19-storey high-rise luxury residential and commercial strata development located at 1250 West Hastings Street, Vancouver, British Columbia (the "Project"). The intention was to provide for 20 residential units and 2 commercial retail units above a 3-level underground parkade. The Project is unique in that its primary structural material is timber.

[7] In September 2017, pre-sales of the units began. In late 2018, construction began. The construction lender is CMLS Financial Ltd. ("CMLS"), who holds a first mortgage against the Project. Aviva Insurance Company of Canada ("Aviva") provided deposit protection insurance for the pre-sale depositors in order to allow

the Petitioners to use the deposit monies for the Project. Aviva holds a second mortgage against the Project to secure any claims under the insurance.

[8] As of mid-2020, the parkade and structure for the first level of the building were substantially complete; approximately 20% of the Project was finished. At that time, approximately $16 million of pre-sales were in place for 17 residential units and both commercial units.

[9] In May 2020, CMLS stopped funding and demanded payment of its secured debt.

[10] In late May 2020, the Petitioners filed these *CCAA* proceedings, supported by the evidence of Macario Reyes, a director and officer of the Port Capital Group and Port Capital Development (EV) Inc. At the time, the evidence was that the Petitioners owed approximately $34.8 million secured debt and $8 million unsecured and lien debt. One of the lienholders is Centura Building Systems (2013) Ltd. ("Centura"), who is owed $473,277. Centura is related to Solterra.

[11] At the start of these proceedings, Mr. Reyes was of the opinion that there was sufficient security in the value of the Project such that a restructuring might be achieved, perhaps either by an equity investment or liquidation of the assets. Mr. Reyes faces considerable personal exposure from the failure of the Project, as he is a covenantor of the CMLS debt and a guarantor of the Aviva debt.

[12] On May 29, 2020, I granted the Initial Order. In that Order, I granted an Administration Charge ($250,000). I also appointed Ernst & Young Inc. as monitor (the "Monitor") with enhanced powers to assume control of the Petitioners and the Project. Specifically, the Monitor was directed to implement a sales and investment solicitation plan ("SISP") with input from CMLS and Aviva. The SISP sought a "dual track" process to either produce bids or offers for a sale of the Project or an investment in the Petitioners on a going concern basis, such as in the form of a restructuring, reorganization or refinancing of the Project.

[13] On June 8, 2020, I granted the Amended and Restated Initial Order ("ARIO") extending the stay and other relief under the Initial Order and authorizing interim financing of $1.25 million (now $1.8 million) from Desjardins Financial Security Life Assurance Company, a company affiliated with CMLS (the "Interim Lending Facility").

[14] In June 2020, the SISP began with high hopes. Unfortunately, for many reasons, the results of the SISP were disappointing and there was considerable delay in advancing the process. The reasons included the complexity of the Project and the various stakeholder interests at play, some of which are in conflict and only potentially resolved though litigation.

[15] By late 2020, the SISP had produced a number of offers. The Monitor received proposed asset purchases from Solterra, Landa Global Acquisitions Inc. ("Landa") and Bosa Properties (OC) Inc. ("Bosa"). In addition, the SISP produced a bid from the Port Capital Group (fronted by Mr. Reyes) toward a refinance or restructuring in conjunction with the approval of a plan of arrangement to the unsecured creditors.

[16] In its Third Report dated November 27, 2020, the Monitor recommended acceptance of Bosa's offer as the best viable option, despite the fact that the offer was highly conditional.

[17] On December 1, 2020, I approved Bosa's offer, including a $100,000 Break Fee payable if another offer was court approved in its place. By February 2021, Bosa had satisfied certain pre-conditions and put forward a revised offer; however, that revised offer was not acceptable to CMLS and the offer collapsed.

[18] The Monitor returned to the drawing board.

[19] At some point, Landa became aware that Bosa's offer had collapsed. Given Landa' continued interest in the Project, on March 25, 2021, Landa and the Monitor executed a purchase and sale agreement ("Landa Offer #1").

[20] Landa Offer #1 was in the form of an asset purchase, although the parties allowed for the possibility of completion pursuant to a Reverse Vesting Order (“RVO”). That scenario was seen as beneficial in order to allow the existing Petitioners to continue under Landa’s ownership and control while preserving existing contractual rights, such as the building permit (but not the pre-sale contracts). The RVO structure also avoided payment of substantial property transfer tax.

[21] Under either an outright sale or an RVO, all parties were aware that the net sale proceeds under Landa Offer #1 were insufficient to repay the Interim Lending Facility and the CMLS indebtedness (approximately $21.1 million).

[22] On April 16, 2021, I approved Landa Offer #1 and a Break Fee. Various aspects of Landa Offer #1 were not made public at the time, despite Mr. Reyes’ initial opposition (later withdrawn) and Aviva’s opposition. I sealed Landa Offer #1 to remove the purchase price and amount of the Break Fee.

[23] In approving Landa Offer #1, I accepted the Monitor and Landa’s stated intentions (per Landa Offer #1) that the Monitor would have a short period of time (15 days) to re-activate the SISP and obtain any other superior offers that might be available from a party other than Landa.

[24] Landa Offer #1 specifically provided:

> **1.1** … “**Bona Fide Offer**” means a binding offer to purchase all or part of the Purchased Assets from a Prospective Purchaser, which offer contains no conditions that are not capable of being satisfied or waived by the parties within fifteen (15) Business Days or less of the date on which such offer is accepted by both parties …
>
> **8.7 Satisfaction and Waiver of Vendor’s Conditions**. Notwithstanding anything to the contrary set out herein, from the date of issuance of the [April 16, 2021 Order] until the Final Offer Date, the Vendor … may engage in further marketing of and negotiations in connection with the Purchased Assets for the purpose of soliciting Bona Fide Offers from prospective purchasers that are not party to this Agreement (each, a “**Prospective Purchaser**”). In the event that the Vendor receives one or more Bona Fide Offers from Prospective Purchasers which provide for a superior offer to that of the Purchaser under this Agreement (a “**Superior Offer**”), the Vendor shall notify the Purchaser in writing….

[25] Accordingly, if no other "Superior Offers" arose, the Monitor expected to return to Court to seek either a Vesting Order or RVO to implement Landa Offer #1. A tentative Court hearing date of May 25, 2021 was booked. If one or more "Superior Offers" arose, and accepted by the Monitor, Landa Offer #1 became null and void, the deposit was to be returned to Landa and the Break Fee paid. In its report, the Monitor stated that, in that latter event, it would determine a process to select the transaction (i.e. the "Superior Offer") that would be brought before the Court for approval.

[26] In its Fifth Report, the Monitor described this later sales process as "akin to a final sealed bid process". In its Sixth Report dated May 20, 2021, the Monitor confirmed the unique features of this last effort to obtain bids, describing it as a "hybrid between a Stalking Horse procedure and Sealed Bid procedure". This was all indicative of the intention (at least initially) to maintain confidentiality of the purchase price in the Landa Offer #1 and any later bids.

**THE "SUPERIOR OFFERS"**

[27] The Monitor's return to the market to solicit offers for the Project was successful.

[28] Before the new bid deadline of May 7, 2021, the Monitor received two offers, both for consideration higher than that of Landa Offer #1. These offers were outlined in the Monitor's Sixth Report:

a) An unconditional cash offer from Solterra ("Solterra Offer #1"); and

b) A highly conditional offer from 1296371 B.C. Ltd. ("129"), a company controlled by Mr. Reyes which was incorporated to facilitate the proposed transaction. 129 proposed to repay the Interim Lending Facility and refinance and take an assignment of the CMLS debt (the "129 Offer"). This refinancing was to arise from new advances from Domain Mortgage Company ("Domain"), use of the approximate $8 million in cash deposits held and a loan from 1260780 B.C. Ltd. ("126"), a company owned by Mr. Reyes' mother, Luz Consuelo Reyes. Essentially, the 129 Offer was to allow the Petitioners to continue in the *CCAA* proceedings, but without the Monitor's enhanced powers and with control provisions in favour of Domain.



[29] In its Sixth Report, the Monitor outlined that it considered Solterra Offer #1 to be a "Superior Offer" to Landa Offer #1; CMLS also supported this offer. The Monitor did not consider the 129 Offer as a "Superior Offer" since it remained conditional (and would continue to be so until after the deadline for conditions being satisfied/waived — May 31 — under Landa Offer #1). CMLS did not support the 129 Offer.

[30] On May 14, 2021, the Monitor and Solterra signed a purchase and sale agreement. The Monitor then began the process of preparing the necessary application materials to have the Court approve the Solterra Offer #1 at the hearing scheduled for May 25, 2021.

[31] However, just days after the execution of Solterra Offer #1, the confidentiality aspects of the Monitor's unique sales process began to unravel.

[32] On May 17, 2021, the Monitor advised Landa as to the purchase price under Solterra Offer #1 ($21 million). This was an unfortunate disclosure from Solterra's point of view; however, it was done based on the Monitor's reasonable understanding that Landa did not intend to further participate in the sales process. Indeed, that intention is arguably evident from the Landa Offer #1 itself, particularly clause 8.7 above (about offers from *other parties*) and the fact the Court approved a Break Fee for Landa.

[33] In fact, Landa was still interested in increasing its offer for the Project and it immediately enquired as to whether it could submit yet another bid to the Monitor. The Monitor advised that it contractually obliged to put Solterra Offer #1 before the Court; however, any further offer from Landa would also be put before the Court, if received.

[34] On May 24, 2021, the Monitor provided a Confidential Supplement to the Sixth Report. The Monitor outlined that Landa had submitted a revised offer ($21.5 million) ("Landa Offer #2"). This was an increase from the price under Landa Offer #1 ($19 million). In addition, the Monitor indicated that the 129 Offer contemplated total consideration of approximately $22.5 million, assuming the various pre-conditions still outstanding could be satisfied.

[35] On May 25, 2021, the application to approve Solterra Offer #1 came before the Court. At that time, there was considerable controversy as to how to proceed. Solterra was not represented at the hearing by legal counsel although principals of Solterra who attended stated that it would be unfair to consider further unconditional cash offers, including Landa Offer #2. Landa wanted a further bidding process, stating that Landa Offer #2 would realize a better return of about $850,000 above Solterra Offer #1.

[36] In addition, at the May 25, 2021 hearing, 129 still expressed interest in acquiring the Project. On May 25, 2021, 129 filed its own application seeking Court approval of the 129 Offer together with Mr. Reyes' Affidavit #2 sworn May 21, 2021.

[37] At the conclusion of the May 25, 2021 hearing, I adjourned the matter until June 8, 2021. The Monitor, with the concurrence of CMLS and Aviva, supported such a result. In part, the adjournment was necessary because there had been minimal notice of the application to approve Solterra Offer #1. At the time, I indicated to the array of bidders that I was not directing any further process to allow for new bids; however, if any party wished to submit further offers, those offers should be received by the Monitor by noon June 4, 2021.

## PRE-HEARING BIDS / OFFERS

[38] The Monitor did receive new offers or bids.

[39] At the June 8, 2021 hearing, the Monitor provided its Confidential Seventh Report. The Monitor indicated that, on June 4, 2021, it received two additional cash offers:

a) Landa submitted a third revised offer ($22 million) ("Landa Offer #3"); and

b) Solterra submitted a second "backup" revised offer on a "without prejudice" basis (the "Solterra Backup Offer"). This rider was in relation to Solterra's argument that the Court should have approved Solterra Offer #1 on May 25, 2021. The Solterra Backup Offer was sealed and not publicly made available, save to CMLS and Aviva. However, the Monitor advised all stakeholders that the Solterra Backup Offer was superior in value to Landa Offer #3.

[40] In addition, on June 4, 2021, the Monitor received a revised offer from 129 (the "129 Revised Offer"). In support, Mr. Reyes provided his Affidavits #3 and #4 sworn June 4 and 7, 2021, essentially referring to revisions to the 129 Offer and the removal of further conditions, as I will describe in greater detail below. In the Seventh Report, the Monitor reported that the 129 Revised Offer would result in a "materially better" outcome for the stakeholders than both Solterra Offers and Landa Offer #3.

[41] At the hearing, Landa conceded that Landa Offer #3 should not be approved in the face of the 129 Revised Offer. Landa proposed that Landa Offer #3 should stand as a backup offer in the event that the 129 Revised Offer was court approved, but failed to close for any reason.

[42] In broad strokes, as of June 8, 2021, the financial consequences to the two major secured creditors of the various offers before the Court were as follows:

a) Under the Solterra and Landa cash offers, the Interim Lending Facility and priority professional fees would be paid. In addition, CMLS would suffer a shortfall to varying degrees: Solterra Offer #1 — $3.2 million shortfall; Landa Offer #3 — $1.7 million shortfall; and Solterra Backup Offer — a shortfall in excess of $500,000;

b) Under any of the cash offers, the Petitioners would disclaim the $16 million of pre-sale agreements. Aviva would immediately crystalize its exposure (estimated at $8.6 million). Both CMLS and Aviva hold security against the $8 million cash deposits. CMLS/Aviva would then potentially advance arguments that these pre-sale purchasers had forfeited the right to a return of those cash deposits such that CMLS/Aviva could claim those amounts toward satisfaction of their loans; and

c) Under the 129 Revised Offer, the material benefits, as noted by the Monitor were: 1) the Interim Lending Facility and CMLS would be paid in full; 2) Aviva's security position would be "improved" with the prospect of full or material recovery; and 3) the parties would avoid litigation with respect to the $8 million in pre-sale cash deposits by converting them into a secured position against the Project.



## ISSUES

[43] The parties agree that the issues to be decided are:

a) Should the Court approve the 129 Revised Offer?

b) If the 129 Revised Offer is not approved, which Offer should be considered and/or approved as between Solterra and Landa?

## THE 129 REVISED OFFER

### Description of the 129 Revised Offer

[44] It is important at the outset to emphasize that the Petitioners do not put 129's offers forward; rather, Mr. Reyes presents them through 129, a new company specifically formed by him for this proposed transaction.

[45] The salient details of the 129 Revised Offer are as follows:

a) $24.96 million would be raised, as follows:

   i. $14.7 million from Domain;

   ii. $8 million in pre-sale deposits (including a $2.8 million deposit held for Ms. Reyes) to be released and advanced to 129;

   iii. $2.15 million to be loaned from 126 (Ms. Reyes) to 129;

   iv. 129, as the Junior Lender, then loans these amounts to “Newco”, a company to be incorporated by Domain to hold the CMLS security;

   v. Pre-payments to Domain ($105,000),

b) $24.96 million would be used, as follows:

   i. Payment in full of the Interim Lending Facility ($1.3 million) and *CCAA* secured professional fees ($507,000);

   ii. Purchase and assignment of the CMLS loan and security ($21.3 million) to Newco, thus saving Mr. Reyes from his covenant;

   iii. Fees and various holdbacks ($1.5 million), including a six-month interest reserve for Domain ($851,250); and

   iv. Payment of Break Fee/Expense Reimbursement to Landa and Solterra (total $250,000).

[46] It is quite apparent that the 129 Offer has evolved substantially since May 7, 2021 until its current iteration on June 4, 2021 under the 129 Revised Offer (including by an increased consideration amount). The Monitor confirms that most of the conditions relating to the 129 Revised Offer have now been satisfied, save for customary funding conditions. That was not the case as of May 25, 2021 and, indeed, some conditions were only satisfied on the eve of this hearing.

[47] There are some unique features under the 129 Revised Offer relevant to the existing stakeholder interests:

a) The $16 million in pre-sale contracts are to remain intact (unlike the Landa and Solterra Offers);

b) Subordinate security interests after Domain in first ranking position are: second, 129 as the Junior Lender to hold security in respect of the pre-sale deposits in a sharing arrangement with Aviva; third, Aviva for any balance owed; fourth, 126 for the $2.15 million loan; and fifth, 129 for the balance owed to it. Effectively, this allows Aviva to maintain some hope of recovery under its secured loan as opposed to an immediate exposure of $8.6 million (subject to any recovery against the $8 million cash deposits held) under the Landa/Solterra Offers. Mr. Reyes benefits from this potential reduction or elimination of his personal exposure to Aviva; Ms. Reyes avoids litigation with Aviva over her pre-sale deposit;

c) The proposed structure will not leave the Petitioners with any excess cash. Accordingly, 129 proposes to have 126 advance a further unsecured convertible loan to the Petitioners of up to $750,000 as "working capital", to be converted into some new equity structure of the Petitioners. The Monitor has prepared a cash flow forecast for the next six months to December 2021 indicating funding requirements of approximately $600,000; and

d) Mr. Reyes says that this later conversion of 126's working capital loan will "likely" require the creation of new limited partner units that would have preferential rights over the existing limited partners.

[48] The crux of the issues relating to the 129 Revised Offer lies in the *CCAA* relief that Mr. Reyes and 129 say they must obtain from the Court. They seek the following Court approval and orders, said to be necessary to implement the 129 Revised Offer:

a) an extension of the stay of proceedings to December 11, 2021;

b) Authorization to release the pre-sale deposits to 129 to allow 129 to pay $8 million to CMLS for the purchase and assignment of the CMLS security, to stand as an advance by 129 to the Petitioners secured by the

CMLS security. All of these pre-sale purchasers consent to the release of the deposits;

c) Authorization to borrow up to $750,000 from 126 for the "working capital" loan and approval of the terms of the commitment letter. Contrary to Mr. Reyes' statement that this would "likely" require a restructuring of the partnership interests, the Court is being asked to bless the commitment letter to seemingly grant 126 the "right, in its sole discretion" to convert the debt into limited partnership units that *will be* preferential to all classes of existing units in the limited partnership;

d) The "Refinancing Transaction" involves granting Court approval to the Petitioners to borrow money from Domain to fund the Interim Lending Facility and repay CMLS in full and take an assignment of the CMLS security, up to $25 million. This "Refinancing" or "New Loan Facility" is to be documented in the usual fashion, with the significant proviso that the Petitioners are authorized to agree to amendments so as to provide that the CMLS security would secure *all obligations* of the Petitioners to both Domain, 126 and 129 (i.e. about $25 million) and stand as a first secured charge on the Project.

[49] In addition, the proposed order sought by Mr. Reyes and 129 would provide significant controls in this *CCAA* proceeding to Domain. Domain may act on its secured loan upon default and without Court approval or oversight; Domain is to be unaffected by any plan of arrangement or proposal; no order can be granted approving interim financing in priority to the New Loan Facility (essentially, the CMLS security, as amended); the Monitor's enhanced powers are removed; and:

> 15. While the New Loan Facility remains outstanding, no further step shall be taken by the Petitioners in these proceedings without the consent of Domain.

[50] 129 says that the transaction is designed to create an opportunity to secure new construction financing that will allow the Petitioners to repay the New Loan Facility, exit *CCAA* proceedings and ultimately proceed with the Project as intended.

**Section 11 of the *CCAA***

[51] 129 brings its application and rests its arguments on s. 11 of the *CCAA* as the jurisdictional basis upon which it asks the Court to grant the relief sought. Section 11 allows the Court a broad discretion to grant relief that is "appropriate in the circumstances." The jurisprudence that assists the Court in addressing the exercise of its discretion under s. 11 is not in dispute.

[52] The court must exercise its discretion with a view to the statutory objectives and remedial purposes of the *CCAA*: *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70:

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

[53] The parameters of the Court's discretion were recently discussed in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 [*Callidus*]. At that time, the Court confirmed the fundamental principle that a *CCAA* court must always exercise that discretion toward the statutory policy objectives and that the ability of a court to be innovative and creative in that respect is not "boundless":

> [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).

[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:

…

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

…

[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). . . .

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).

…

[70] . . . 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.

…

[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.
>
> [Underline emphasis added; italic emphasis in original.]

[54] No person appearing on this application disputes that I have the jurisdiction under s. 11 to grant the relief sought by 129. The issue raised by Centura, as a creditor, lienholder and stakeholder of the Petitioners, is whether I *should* exercise that discretion.

[55] Before turning to an analysis under s. 11 of the *CCAA* in relation to what the 129 Revised Offer is, I will first address what the 129 Revised Offer is not.

**The 129 Revised Offer is not a redemption**

[56] 129 describes the transaction in its application materials as a "redemption financing" and counsel submits that it is "effectively" a redemption of the CMLS mortgage. Centura refers to well-settled law that the right of redemption in these circumstances allows the subordinate mortgagee (Aviva), not the mortgagor (the Petitioners), to redeem the CMLS mortgage by paying it out and taking an assignment of the security: *Classic Mortgage Corporation v. 0768723 B.C. Ltd.*, 2017 BCSC 1100 at paras. 13-16.

[57] This transaction is not a redemption of the CMLS mortgage. The Petitioners are not paying CMLS. Aviva is not paying CMLS, although I acknowledge that Aviva consents to CMLS being paid out by 129/Domain and the assignment of the CMLS mortgage to Domain/Newco. While there are features of this transaction that one might see in a redemption scenario, this is well beyond a redemption by which the CMLS security is simply assigned to Domain. In fact, Domain is not content with the existing terms of the CMLS security; it requires that the terms of the CMLS security be amended.

### The 129 Revised Offer is not brought as Interim financing

[58] The proposed transaction is described by Mr. Reyes as a “refinancing”. 129 argues that the “refinancing” allows the Petitioners further “breathing room” to continue their restructuring efforts.

[59] Financing issues in the midst of *CCAA* proceedings are not new and are commonplace. The Court in *Callidus* described the rationale behind interim financing in *CCAA* proceedings:

> [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 [Case citation omitted]. 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.

[60] Centura, citing *Callidus,* argues that the proposed transaction is a restructuring that confiscates the rights of subsequent encumbrancers’ (ie. lien holders) and is therefore a “plan of arrangement” which requires approval by the requisite majorities of creditors’. 129 says that the transaction does not seek to compromise any other claims against the Petitioners and argues that the alternative transactions result in a greater shortfall to CMLS and no recovery for any subsequent stakeholders.

[61] In *Callidus*, there was considerable discussion as to whether the imposition of a litigation financing charge to support a litigation funding agreement (LFA) was a plan of arrangement compromising creditors’ rights (requiring a creditor vote) or whether it could be justified as a financing mechanism (para. 102). The Court held that, although the litigation financing charge had the effect of placing certain secured creditors behind the litigation funder, the LFA was not a plan of

arrangement because it did not propose any compromise of the creditors' rights. At para. 111, the Court stated:

> 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).

[62] Having found that the LFA was not a plan of arrangement, the Court held that the supervising judge had the authority to approve those charges without a creditors' vote pursuant to s. 11.2 (para. 114).

[63] 129 (in place of the Petitioners) seeks to authorize the Petitioners to not just refinance the existing debt with the existing priorities, but increase that secured debt against the Project. The net effect of the "refinancing" is to convert the debt under the Interim Lending Facility and the professional fees into the CMLS secured charge and also add millions of dollars of secured debt on the Project (to be accommodated within the increased limit of $25 million).

[64] The New Loan Facility also significantly alters the commercial terms of the CMLS debt and security, including by substantially increasing the interest rate on the secured loan. Without a court order, any modifications to the CMLS security have no effect on existing charges: *Land Title Act*, R.S.B.C. 1996, c. 25, ss. 1 (definitions of "charge" and "encumbrance") and 206(2).

[65] In my view, it is not necessary to make a finding in relation to Centura's arguments that the proposed transaction under the 129 Revised Offer

compromises the rights of the creditors including Centura and goes beyond a "refinancing". Even if the 129 Revised Offer could be characterized as a "refinancing" in these *CCAA* proceedings, another issue arises.



[66] 129 does not seek court approval pursuant to s. 11.2 of the *CCAA*, being the express statutory provision that allows this Court to approve interim financing in *CCAA* proceedings and grant priority over existing secured creditors, such as 129 (on behalf of the Petitioners) proposes here. Further, the Petitioners are not the entities arranging this refinancing and seeking court approval of it. This is an outside party (129) that seeks to refinance the debt. Section 11.2(1) specifically provides that the debtor company may apply for interim financing.

[67] 129 refers to my decision in *League Assets Corp. (Re)*, 2014 BCSC 2589 as authority to approve this complex transaction. That decision involved a complex tax-driven restructuring transaction that had both sale and refinancing aspects. In my view, 129's reliance on this decision is misplaced, as this transaction is quite different. In any event, I would note that I considered the "financing" piece of the *League Assets* transaction and approved it within the context of s. 11.2 of the *CCAA*.

[68] In *Callidus,* as previously noted, the Court upheld the supervising judge's approval of the litigation financing charge pursuant to s. 11.2 (para. 114).

[69] Accordingly, in the event that 129 is correct that this transaction does not compromise Centura's rights and is akin to an interim financing, the requirements of s. 11.2 of the *CCAA* must be considered.

[70] 129, either directly or through the Petitioners, does not make any effort to specifically address and provide a proper evidentiary foundation for the Court's consideration of the various factors under s. 11.2(4) of the *CCAA*. Under s. 11.2(4)(d), the court is to consider "whether the loan would enhance the prospects of a viable compromise or arrangement being made" by the Petitioners. As I will discuss below, no evidence exists that would support a consideration of

this factor. Further, under s. 11.2(4)(g), the court is to consider the Monitor's views. The Monitor outlines the terms of the 129 Revised Offer and its benefits, but does not provide any specific recommendations on the "financing aspects" of it.

[71] In addition, any application under s. 11.2 must be on notice to "secured creditors" who are likely to be affected. I am not aware that proper notice has been given to all of the secured creditors who might be affected by the proposed transaction. Without notice and the opportunity to make submissions, it is difficult to properly assess whether any creditor would be materially prejudiced in consideration of s. 11.2(4)(f). Centura alleges "material" prejudice, noting that despite being presently "out of the money" under its lien, the lien claimants may have a preference that a new developer acquire the Project. Centura argues that, in some instances, suppliers can have leverage aside from their lien claims, including because they are required to sign off on completion for engineering reports and permits, or because their work is sufficiently advanced that hiring a replacement is economically impractical.

[72] I would digress at this point to note that similar difficulties arise with respect to the proposed court approval of the working capital loan to endorse the granting of rights to 126 in relation to the rights of the existing limited partners. I see no basis upon which I might make such an order, under s. 11 or otherwise. I am not aware that notice has been given to these limited partners and they have not agreed to such a provision, such as in a plan of arrangement or compromise that they might have considered and voted upon: *Calpine Canada Energy Limited (Re)*, 2007 ABQB 504 at para. 41.

[73] Again, as already stated, 129 does not seek relief under s. 11.2 of the *CCAA*. 129's counsel only suggests that its "refinancing" is appropriate in disregarding the interests of the other creditors, including the lienholders, since they are currently "out of the money". I agree with 129's counsel's assessment of the likely current monetary value of the other creditor's interests. However, in my

view, that is a very unprincipled basis upon which to argue that this “refinancing” is an “appropriate” outcome in the balancing exercise with regard to all stakeholders.

**The 129 Revised Offer is not a sale**

[74] The transaction under the 129 Revised Offer is also not described as a sale, akin to what to what Landa and Solterra propose.

[75] As a commercial transaction toward assuming control and effective ownership of the Project, there is nothing objectionable about the business aims under the 129 Revised Offer. Mr. Reyes could have used 129 as a corporate vehicle to purchase the Project — just as Landa and Solterra wish to do — via an outright sale or a RVO structure. In doing so, 129 could have arranged for the Domain financing, by either refinancing the CMLS security or simply paying it out and placing new security on title. In that event, Mr. Reyes could proceed with his vision of completing the Project, just as any other developer might do. That could include keeping the pre-sales in place if he wished and implementing this hopeful side deal with Aviva and the pre-sale purchasers to see if those interests could be resolved in the fullness of time. Mr. Reyes could have advanced a cash offer — given the Domain financing and the use of the pre-sale deposits with the consents — to compete with the offers of Landa and Solterra.

[76] If that had taken place, I cannot see that anyone would quarrel with the structure of the transaction. In essence, Mr. Reyes would be assuming control of the Project and proceeding with his commercial gambit, just as Landa and Solterra propose to do.

[77] However, Mr. Reyes has not put forward the 129 Revised Offer as a “sale” of the Project. Instead, as noted, 129 seeks a suite of relief under the *CCAA*, including approval of an increase of the secured debt against the Project, which will rank in priority over the other encumbrances. Further, 129 seeks to alter the commercial terms of the existing CMLS debt and security including increasing the interest rate on the secured loan. Crucially, as I will explain below, 129 also seeks an extension on the stay of creditors' rights without any indication that it will put

forward a plan of arrangement or compromise on which the Petitioners' creditors may vote.

**Is the 129 Revised Offer appropriate in the circumstances?**

[78] The anchor on which Mr. Reyes argues that the 129 Revised Offer and extended stay of proceedings is appropriate is the suggestion that it will allow the Petitioners to secure new construction financing to repay the New Loan Facility and proceed with the Project as intended. Mr. Reyes suggests in argument that there is a "realistic prospect" in the future that 129 will be able to secure new construction financing to permit some, or potentially full, recovery by the "Other Creditors".



[79] 129's proposed "Restructuring Plan" is set out in its Notice of Application:

> 27. [129's] offer is a refinancing, it is not seeking to terminate any pre-sale contracts or vest off or compromise any claims against the Petitioners.
>
> 28. The transaction is designed to create an opportunity to secure new construction financing that will allow the Petitioners to repay the New Loan Facility and exit *CCAA* proceedings. As a result, [129's] offer is coupled with an extension to the Stay of Proceedings to allow the Petitioners time to secure new construction financing.
>
> 29. [129] is confident that, following refinancing, the Petitioners will secure new construction financing. The Petitioners are in advanced discussions with at least one lender. Additional lenders have conducted extensive due diligence.
>
> 30. These *CCAA* proceedings have, to date, been focused on repayment of the CLMS Facility. The New Loan Facility, along with cooperation from Domain, will provide the opportunity to shift the focus to a long-term restructuring.
>
> 31. Securing new construction financing requires interim steps that are predicated on having control of the Terrace House Project. The steps include:
>
> > (a) Review of all trades and consultants. This includes confirm drawings and specifications with lead consultants, architects and engineers; updating contracts with existing trades and consultants; and replacing contracts as necessary;
> >
> > (b) Confirm construction schedule and budget;
> >
> > (c) Renew and extend permits; and
> >
> > (d) Review and continue pre-sale program. This includes reviewing the existing contracts; engaging new marketing partners

> and sales group, and may require re-drafting the disclosure statement and updated purchase contracts.
>
> 32. Interim working capital will be funded by existing limited partners and new third party investors. This working capital is expected to be in the range of $3 to $5 million, which will be sourced, externally and will not encumber the Lands or other assets.
>
> 33. With control of the Terrace House Project and the breathing room provided by the New Loan Facility, it is estimated that completing the interim steps outlined above and finalizing a term sheet a new construction lender will take 30 to 60 days.
>
> [Emphasis added.]



[80] In essence, 129's plan is to use the proposed six-month stay extension to secure construction financing with the intention then of exiting these *CCAA* proceedings and completing the Project. This makes sense from a business point of view — that way, Mr. Reyes satisfies his obligations to Aviva by allowing the pre-sale purchasers to obtain their units by crediting their deposits, thus avoiding a call on Aviva's deposit insurance.

[81] Centura argues that 129 seeks to implement this "restructuring" transaction without the consent of the affected creditors. Further, Centura says that there is no indication that any party intends to put forward a plan of arrangement or compromise on which the Petitioners' creditors may vote.

[82] Centura says the present circumstances are similar to those considered in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327. I agree. In that case, the debtor had obtained a *CCAA* stay of proceeding and approval of interim financing to continue to pursue development of a real estate project. There was no suggestion that the debtor intended to propose a plan of arrangement to the creditors (para. 35).

[83] Consistent with the comments in *Callidus* 12 years later, Justice Tysoe emphasized that the imposition of the stay must be consistent with the fundamental statutory objectives of the *CCAA,* including "to facilitate compromises and arrangements between companies and their creditors" as expressed in the statute's long title: *Cliffs Over Maple Bay* at paras. 26-29.

[84] Tysoe J.A. held that a stay was not appropriate in those circumstances, stating:

> [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 restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.
>
> [Emphasis added.]

[85] In *North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376, this Court stated:

> [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.

[86] I agree that it is not necessary for a debtor to put forward a fully fleshed out plan of arrangement in order to justify a continuation of the stay in *CCAA* proceedings. What will constitute a "kernel of a plan" will depend on the overall circumstances, including the status of the proceedings.

[87] Centura emphasizes that there is no suggestion — let alone a "kernel of a plan" — anywhere in Mr. Reyes' Affidavits #2, #3 or #4 to support that 129, the Petitioners or any other party intend to put forward a plan of arrangement or compromise on which the Petitioners' creditors may vote. Having reviewed those affidavits carefully, I agree. All Mr. Reyes speaks of is securing the new construction financing and then restructuring the limited partnership interests.

[88] Specifically, there is no evidentiary foundation in Mr. Reyes' Affidavits to support the statement at para. 34 of 129's notice of application that 129 will use the "breathing space" under a further stay of proceedings to "permit some, or potentially full, recovery by Aviva and the Other Creditors".

[89] Centura also points to other issues arising from the feasibility of completing the Project with the pre-sale purchase contracts intact. Centura notes that, even if the “new construction financing” is obtainable, which is speculative at best, Mr. Reyes will also have to solve his liability problems with Aviva in that context. It is anyone’s guess that the completion of the Project is still feasible while also allowing for a full credit of over $16 million from the pre-sale deposits (which would reduce sale revenues). There is no evidence as to how that might be addressed.

[90] It is apparent from the entire circumstances here that Mr. Reyes is only seeking to allow *himself* some “breathing space” by borrowing money against the Project, by satisfying or keeping the secured creditors at bay while he seeks a better overall resolution than an outright sale that would crystallize his exposure to CMLS and Aviva. He seemingly requires that this Court assist him in freezing the rights of the Petitioners’ creditors while he seeks to do so. There is nothing to suggest that Mr. Reyes is seeking to obtain relief from this Court for the purposes of resolving the current creditor claims against the Petitioners within the context of these *CCAA* proceedings.

[91] In other words, Mr. Reyes seeks the benefit of these proceedings — including the continuation of a stay against all creditors and with the potential for further relief, with the consent of Domain – with no true intention to address those creditor claims in the future.

[92] In all of these circumstances, and for the above reasons, I conclude that the relief sought by 129 is not appropriate, including the stay and the refinancing approvals in 129’s draft order. I decline to exercise my statutory discretion under s. 11 of the *CCAA* to grant the requested relief.

## **WHICH OFFER SHOULD BE APPROVED?**

[93] Without the 129 Revised Offer, the remaining issue is what other offers should be considered by the Court and, if appropriate, approved.

[94] Solterra takes the position that the Court should disregard the offers received after May 25, 2021 and that the Court should approve Solterra Offer #1 ($21 million). Solterra argues that it adhered to the sales process implemented by the Monitor and that it would be unfair if the Court approved any other offer. Solterra particularly objects to Landa Offer #2, arguing that Landa Offer #1 essentially stood as a stalking horse bid. Solterra refers to Landa Offer #2 as only slightly "beating" Solterra Offer #1 (about 4%), having had the benefit of disclosure of the price under Solterra Offer #1.

[95] The authority of this Court to approve a sale is found in s. 36 of the *CCAA*. Section 36(3) sets out a list of non-exhaustive factors to be considered by the court:

> a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> d) the extent to which the creditors were consulted;
>
> e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[96] In addition, the parties refer to the principles identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (O.N.C.A.) as helpful in considering whether to approve a sale:

> 1. Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;
>
> 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 sales process.

[97] Various authorities support that, in considering the test under s. 36 of the *CCAA*, the *Soundair* principles remain relevant and indeed overlap with some of the specific s. 36(3) factors: *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at paras. 22-25; *8450025 Canada Inc. and Teliphone Data Centers Inc. (Re)*, 2017 BCSC 1291 at paras. 9-13.

[98] The tension that exists at this hearing, as commonly arises, is between the twin objectives of 1) fairness in the process and 2) outcome or price with regard to the interests of the Petitioners' stakeholders. In framing the issue in this way, I do not mean to suggest that the test is a simple one to apply. The issues here require a consideration of all the s. 36 factors in these unique and unusual circumstances.

[99] Solterra refers to *Cox v. Seymour Village Management Inc.*, 2015 BCSC 275 and *Bank of Montreal v. Renuka Properties Inc.*, 2015 BCSC 2058.

[100] In *Cox*, I was addressing a sales process in partition and sale proceedings. Solterra in particular relies on my statements concerning the fairness of the process. In that case, an early participant in the sales process had advanced a late bid, said by Solterra to be similar to what it describes as Landa's unfair attempt to re-enter the sales process at a late stage: *Cox* at para. 27-28. At para. 29 in *Cox*, I remarked that late offers may be considered by the Court where the price has been substantially increased such that it is likely "indicative of the fact that the sales process did not work…"

[101] Similarly, in *Renuka*, in a receivership, the Court was considering the results of a sales process and a late bid with a substantially increased offer price. I adopt Justice Blok's statement of two of the general principles arising from *Soundair* that were in issue:

> 4. late offers may be considered by the Court on an application to approve a sale only for the limited purpose of considering whether the price obtained by the receiver was a reasonable one. In some cases a disparity may be so great as to call into question the adequacy of the sale process: *Soundair* at paras. 26 and 30.
>
> 5. the primary interest to be considered by the Court is that of the creditors, and to see that the best possible price is obtained, though the interests of all

> parties, including the debtor and the receiver's recommended purchaser, must also be considered: *Soundair* at paras. 39-40. While the primary concern is the interests of the creditors, as noted earlier a secondary but still important consideration is the integrity of the process. Integrity of the process includes the object of reasonably ensuring that there is certainty and finality in sales by receivers: *Soundair* at paras 42-46.

[102] I would begin by stating that the Monitor's fashioning of the sales process was reasonable in all the circumstances. The SISP had many challenges and the collapse of the Bosa transaction was disappointing indeed. I accept that the Monitor intended that Landa Offer #1 would essentially stand as a stalking horse bid, intended to flush out any further cash offers for the Project. The Monitor's disclosure of Solterra Offer #1 was completely understandable give that it considered that Landa had made its best and final offer in Landa Offer #1.

[103] The Monitor properly brought Landa Offer #2 to the attention of the Court at the May 25, 2021 hearing. However, Landa's submission of Landa Offer #2 certainly has the hallmarks of wanting a "second kick at the can". In my view, Solterra's objection to Landa's approach being unfair has some merit.

[104] However, Solterra's submissions in this respect rests on the proposition that the Court should have approved Solterra Offer #1 on May 25, 2021. I agree that, if on that date, the Court had proceeded to consider both Solterra Offer #1 and Landa Offer #2, the result would likely have been approval of Solterra Offer #1. However, that is not what happened. As I have said, the May 25 date was scheduled for the approval of Landa Offer #1 and an adjournment was required in order to give the parties sufficient time after service of the application materials. In addition, the 129 application was then extant and needed to be addressed in relation to the 129 Offer.

[105] On the issue of fairness, Solterra itself acknowledged in Solterra Offer #1 that there was some chance in the later court approval process that the Court might proceed otherwise than to simply approve that offer. That risk is one taken by every participant in a court approved sale process where the possibility of late bids can arise: *Cox* at para. 25. Solterra very much recognized the risk that its offer

might not be accepted. Solterra would have been aware that the Court may have approved another offer or even directed a continuation of the sales process, perhaps with further sealed bidding. In fact, Solterra Offer #1 provided in clause 8.5 that, if the Court approved another bid, it would be reimbursed for its costs up to $50,000.

[106] Needless to say, the landscape changed quite significantly in the two-week period leading up June 4, 2021. Leaving aside the 129 Revised Offer with its ongoing improvements and removal of subjects, there was further jockeying between Landa and Solterra with their June 4, 2021 offers. In short, the submission of Landa Offer #3 and the Solterra Backup Offer to the Monitor are matters that, in my view, the Court should not ignore in terms of considering the various offers.

[107] I have concluded that, although there has been some unfairness in the sales process in relation to Solterra, it is not appropriate that I approve Solterra Offer #1 at this time. Faced with the substantial interest and increasingly higher bids from both Landa and Solterra leading to May 25, 2021, I may have been inclined to order one last round of sealed bids for Landa and Solterra. However, by and large, Landa and Solterra embarked themselves upon a further sealed bid process leading to the June 8, 2021 hearing.

[108] The Monitor emphasizes in its Confidential Seventh Report that the price under Solterra Backup Offer was increased by a significant sum, in the millions of dollars and well above that of Landa Offer #3. It will satisfy the priority debt - the professional charges and the Interim Lending Facility - and provide almost full payment to CMLS.

[109] The Monitor has not expressed any specific recommendation to the Court in respect of which bids should be considered, or approved, choosing to remain agnostic as between the options open to the Court (including in relation to the 129 Revised Offer with or without a backup offer).

[110] I appreciate that this sales process has charted a very long and crooked path, through no fault of anyone. This is a complex asset and the stakeholder interests are equally complex.

[111] The time has come to end the process. I am satisfied that the Monitor has now explored all available options. Those options have been put before the stakeholders and now the Court. I am also satisfied that Solterra Backup Offer should now be approved as reasonable and indicative of the fair market value of the Project. It is unfortunately a result that does not see any immediate recovery for Aviva, although neither did the 129 Revised Offer. In my view, Solterra Backup Offer represents the best outcome for the stakeholders in all the circumstances.

## CONCLUSION

[112] Solterra Backup Offer is approved.

[113] I am also satisfied Solterra Backup Offer should be approved with the RVO structure. No person objected to the sale being completed in this fashion. This is not surprising as it is evident that the RVO structure will garner significant benefits to the stakeholders: *Quest University Canada (Re)*, 2020 BCSC 1883; leave denied *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

"Fitzpatrick, J"

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.,* 2021 BCCA 319

Date: 20210820
Docket: CA47585



**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) 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)

Before: The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Voith
The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated June 15, 2021 (*Port Capital Development (EV) Inc. (Re)*, 2021 BCSC 1272, Vancouver Docket S-205095).

## Oral Reasons for Judgment

| | |
|---|---|
| Counsel for the Appellant: | J.D. Schultz<br>E. Watson |
| Counsel for the Respondents, Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp.: | K.M. Jackson<br>T.A. Posyniak<br>G.P. Nesbitt |
| Counsel for the Respondents, Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership: | D.E. Gruber |
| Counsel for CMLS Financial Ltd. and Desjardins Financial Security Life Assurance Company: | C.D. Brousson<br>A.L. McCawley |
| Counsel for Ernst & Young Inc. in its capacity as the Monitor: | P. Bychawski |
| Counsel for Aviva Insurance Company of Canada: | W.L. Roberts |
| Place and Date of Hearing: | Vancouver, British Columbia<br>August 17, 2021 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>August 20, 2021 |

***Summary:***

*The petitioners owned a commercial strata development that experienced financial difficulties when the construction lender stopped funding and demanded repayment of its secured debt. The petitioners sought and received an order under the Companies' Creditors Arrangement Act, staying proceedings against them and implementing a sales and investment solicitation plan. Several offers were forthcoming, including one by the appellant. The chambers judge rejected the appellant's offer but approved the project's acquisition by one of the respondents. The appellant seeks leave to appeal and a direction that the appeal be heard by a five-justice division to allow reconsideration of Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp.,* 2008 BCCA 327 [*Cliffs*]..

*Held: Leave to appeal granted; appeal directed to be heard by a five-justice division. How the equity of redemption should be treated in an analysis under the Companies' Creditors Arrangement Act when faced with competing transactions and whether the intention to propose a plan of arrangement to creditors is a necessary precondition to relief were issues of significance. Whether the holding in Cliffs barred the appellant's proposal was highly relevant to the appeal. It was in the interests of justice for the division hearing the appeal to be able to reconsider the decision if necessary.*

## INTRODUCTION

[1] 1296371 B.C. Ltd. ("129") seeks leave pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*] to appeal the June 15, 2021 orders of Justice Fitzpatrick, which dismissed 129's application to approve a proposed refinancing and granted the application of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (together, "the Petitioners") for the sale to Solterra Acquisition Corp. ("Solterra") of the Terrace House Project (the "Project"), a residential strata development located in downtown Vancouver. The chambers judge's reasons are indexed at 2021 BCSC 1272. If leave is granted, 129 seeks a direction that the appeal be heard by a five-justice division to allow reconsideration of *Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp.,* 2008 BCCA 327 [*Cliffs*].

[2] When the decision being challenged is based on binding authority from the court, a single justice cannot grant leave. In such circumstances, the leave application is heard by a division of the court and the division has the authority, in turn, to direct the appeal be heard by a five-justice division: *Sangha v. Reliance*

*Investment Group Ltd.,* 2010 BCCA 340 (Chambers); *R. v. Zora,* 2018 BCCA 34 (Chambers); *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.). For this reason, this leave application was heard by a division of the Court rather than a single justice.



[3] There is some urgency attached to this proceeding. The sale of the Project approved by the chambers judge is scheduled to close on September 30, 2021. If leave is granted, the parties have arranged that the appeal will be heard on September 21, 2021.

**BACKGROUND**

[4] The Project is a proposed 19-storey high-rise luxury residential and commercial strata development located at 1250 West Hastings Street, Vancouver. The Project provides for 20 residential units and two commercial retail units above a three-level underground parking arcade. The Petitioners are the owners of the Project.

[5] The Petitioners entered into these *CCAA* proceedings to allow them to undertake a process towards resolution of their financial difficulties that would allow them to complete the Project. In her reasons, the chambers judge set out in detail the history of the Project and the *CCAA* proceedings leading up to the orders for which leave is now sought: at paras. 5–42. In these reasons, I will refer to that background information only to the extent necessary to give context to the issues arising on this application.

[6] In September 2017, presales of the units began. In late 2018, construction began. The construction lender is CMLS Financial Ltd. (“CMLS”), which holds a first mortgage against the Project. Aviva Insurance Company of Canada (“Aviva”) provided deposit protection insurance for the presale depositors in order to allow the Petitioners to use the deposit money for the Project. Aviva holds a second mortgage against the Project to secure any claims under the insurance.

[7] As of mid-2020, the parkade and structure for the first level of the building were substantially complete, and approximately 20% of the Project was finished. At that time, approximately $16 million in presale deposits was in place for 17 residential units and both commercial units. Approximately $8 million of the deposit money has been spent on the Project.

[8] In May 2020, CMLS stopped funding and demanded payment of its secured debt. In late May 2020, the Petitioners filed these *CCAA* proceedings, supported by the evidence of Macario Reyes, a director and officer of the Petitioners. At that time, the evidence was that the Petitioners owed approximately $34.8 million secured debt and $8 million unsecured and lien debt. One of the lienholders is Centura Building Systems (2013) Ltd. (“Centura”), which is owed $473,277.

[9] On May 29, 2020, the chambers judge granted the initial order in the *CCAA* proceedings. The initial order stayed all proceedings against the Petitioners, granted an Administration Charge of $250,000, and appointed Ernst & Young Inc. as monitor (the “Monitor”), with enhanced powers to assume control of the Petitioners and the Project. Specifically, the Monitor was directed to implement a sales and investment solicitation plan (“SISP”) with input from CMLS and Aviva. The SISP sought a “dual-track” process to either produce bids or offers for a sale of the Project, or an investment in the Petitioners on a going-concern basis, such as in the form of a restructuring, reorganization, or refinancing of the Project.

[10] On June 8, 2020, the chambers judge granted the Amended and Restated Initial Order, extending the stay and other relief granted under the initial order and authorizing interim financing of $1.25 million—now $1.8 million—(the “Interim Lending Facility”) from Desjardins Financial Security Life Assurance Company (“Desjardins”), a company affiliated with CMLS.

[11] Over the next several months, as detailed in the judge’s reasons, various offers were forthcoming. Ultimately, at the time of the June 8, 2021 hearing, the chambers judge had before her two offers from Solterra (“Solterra Offer #1” and “Solterra Backup Offer”), an offer from Landa Global Acquisitions Inc. (“Landa Offer

#3”), and an offer from 129 (“129 Revised Offer”). 129 is a company controlled by Mr. Reyes and was incorporated to facilitate the proposed refinancing.

[12] The Solterra and Landa offers were asset purchase agreements. The 129 proposal contemplated a complex refinancing of the Project that would repay the Administration Charge, the Interim Lending Facility, and CMLS in full and take an assignment of the CMLS security. 129 said that the transaction was designed to create an opportunity to secure new construction financing that would allow the Petitioners to ultimately repay the new loans, exit *CCAA* proceedings, and proceed with the Project as intended.

[13] The chambers judge said that the crux of the issues relating to the 129 Revised Offer lay in the *CCAA* relief that Mr. Reyes and 129 say they must obtain from the court. She summarized that relief as follows:

> [48] The crux of the issues relating to the 129 Revised Offer lies in the *CCAA* relief that Mr. Reyes and 129 say they must obtain from the Court. They seek the following Court approval and orders, said to be necessary to implement the 129 Revised Offer:
>
> a) an extension of the stay of proceedings to December 11, 2021;
>
> b) Authorization to release the pre-sale deposits to 129 to allow 129 to pay $8 million to CMLS for the purchase and assignment of the CMLS security, to stand as an advance by 129 to the Petitioners secured by the CMLS security. All of these pre-sale purchasers consent to the release of the deposits;
>
> c) Authorization to borrow up to $750,000 from [1260780 B.C. Ltd. (“126”)] for the “working capital” loan and approval of the terms of the commitment letter. Contrary to Mr. Reyes’ statement that this would “likely” require a restructuring of the partnership interests, the Court is being asked to bless the commitment letter to seemingly grant 126 the “right, in its sole discretion” to convert the debt into limited partnership units that *will be* preferential to all classes of existing units in the limited partnership;
>
> d) The “Refinancing Transaction” involves granting Court approval to the Petitioners to borrow money from Domain to fund the Interim Lending Facility and repay CMLS in full and take an assignment of the CMLS security, up to $25 million. This “Refinancing” or “New Loan Facility” is to be documented in the usual fashion, with the significant proviso that the Petitioners are authorized to agree to amendments so as to provide that the CMLS security would secure *all obligations* of the Petitioners to both Domain, 126 and

> 129 (i.e. about $25 million) and stand as a first secured charge on the Project.
>
> [Emphasis in original.]

[14] The Monitor reported that if the 129 Revised Offer completed, it would result in a materially better outcome for the stakeholders than either the Solterra or Landa offers.

[15] The chambers judge summarized the financial consequences to the major secured creditors of the various offers as follows:

> [42] In broad strokes, as of June 8, 2021, the financial consequences to the two major secured creditors of the various offers before the Court were as follows:
>
> a) Under the Solterra and Landa cash offers, the Interim Lending Facility and priority professional fees would be paid. In addition, CMLS would suffer a shortfall to varying degrees: Solterra Offer #1 — $3.2 million shortfall; Landa Offer #3 — $1.7 million shortfall; and Solterra Backup Offer — a shortfall in excess of $500,000;
>
> b) Under any of the cash offers, the Petitioners would disclaim the $16 million of pre-sale agreements. Aviva would immediately crystalize its exposure (estimated at $8.6 million). Both CMLS and Aviva hold security against the $8 million cash deposits. CMLS/Aviva would then potentially advance arguments that these pre-sale purchasers had forfeited the right to a return of those cash deposits such that CMLS/Aviva could claim those amounts toward satisfaction of their loans; and
>
> c) Under the 129 Revised Offer, the material benefits, as noted by the Monitor were: 1) the Interim Lending Facility and CMLS would be paid in full; 2) Aviva's security position would be "improved" with the prospect of full or material recovery; and 3) the parties would avoid litigation with respect to the $8 million in pre-sale cash deposits by converting them into a secured position against the Project.

[16] 129 brought its application and rested its arguments on s. 11 of the *CCAA* as the jurisdictional basis upon which it asked the court to grant the relief sought. Section 11 allows the court broad discretion to grant relief that is "appropriate in the circumstances."

[17] At the hearing on June 8, the 129 application to approve the 129 Revised Offer was supported by CMLS and Aviva. CMLS' support was conditional on the

court approving either the Landa or Solterra offers as a backup in case the 129 Revised Offer did not complete. The Petitioners and the Monitor took no position on the 129 application. The 129 application was opposed by Centura and Solterra.

## THE CHAMBERS JUDGE'S REASONS

[18] The chambers judge first considered whether she should approve the 129 Revised Offer. She found that the relief sought by 129 was not appropriate, including the stay and the refinancing approvals in 129's draft order. She declined to exercise her statutory discretion under s. 11 of the *CCAA* to grant the requested relief. In reaching this decision, she concluded, among other things:

a) the 129 refinancing was not a redemption of the CMLS mortgage;

b) comparing the 129 refinancing with the outcome if the Solterra or Landa offers were approved would be a "very unprincipled basis" upon which to argue the 129 financing was appropriate;

c) the 129 refinancing might not have been objectionable if it had been structured as a sale, whether via an outright sale or a reverse vesting order; and

d) the circumstances of this case were similar to those in *Cliffs*, and since there was no evidence of an intention to propose a plan of arrangement or compromise to creditors, the 129 financing was not appropriate.

[19] Having found the 129 offer was not appropriate, the chambers judge then went on to consider the two competing cash offers. She found that the Solterra Backup Offer should be approved as reasonable and indicative of the fair market value of the Project. That offer would satisfy the priority debt, the professional charges, and the Interim Lending Facility—and provide almost full payment to CMLS. Aviva would face a shortfall of $8.6 million with limited prospect of any recovery. All other creditors would also be "out of the money."

## GROUNDS OF APPEAL

[20] 129 now seeks leave to appeal. It submits the chambers judge erred:

a) in fact and law by concluding the 129 refinancing was not a redemption;

b) in fact and law by determining that it was not appropriate to grant the 129 application because there was no evidence of an intention to propose a plan of arrangement or compromise to creditors, despite the application being on notice to all creditors and supported by the two senior secured creditors; and

c) in law by approving the Solterra offer in the face of the 129 refinancing, which would clearly result in a better outcome for all stakeholders and is consistent with the remedial purposes of the *CCAA*.

[21] Aviva supports the leave application. It is opposed by Centura, Solterra, CMLS, and Desjardins. The Monitor takes no position on the application. The Petitioners, notwithstanding that on July 30, 2021, they entered into a revised interim financing agreement with 129 and that they and 129 are controlled by Mr. Reyes, oppose the leave application. When questioned in regards to the contradictory nature of those positions, counsel for the Petitioners advised that in opposing the application for leave, he was acting on the Monitor's instructions. The Monitor acknowledged it had given such instructions but was unable to provide the basis on which it was entitled to do so.

## POSITIONS OF THE PARTIES

### A. 129

[22] 129 submits that the chambers judge erred in concluding that the 129 refinancing was not a redemption of the CMLS mortgage. In this regard, the chambers judge said:

> [56] 129 describes the transaction in its application materials as a "redemption financing" and counsel submits that it is "effectively" a redemption of the CMLS mortgage. Centura refers to well-settled law that the

> right of redemption in these circumstances allows the subordinate mortgagee (Aviva), not the mortgagor (the Petitioners), to redeem the CMLS mortgage by paying it out and taking an assignment of the security: *Classic Mortgage Corporation v. 0768723 B.C. Ltd.,* 2017 BCSC 1100 at paras. 13-16.
>
> [57] This transaction is not a redemption of the CMLS mortgage. The Petitioners are not paying CMLS. Aviva is not paying CMLS, although I acknowledge that Aviva consents to CMLS being paid out by 129/Domain and the assignment of the CMLS mortgage to Domain/Newco. While there are features of this transaction that one might see in a redemption scenario, this is well beyond a redemption by which the CMLS security is simply assigned to Domain. In fact, Domain is not content with the existing terms of the CMLS security; it requires that the terms of the CMLS security be amended.



[23] While 129 does not quarrel with the broad proposition that the right of redemption allows only the subordinate mortgagee, not the mortgagor, to redeem, it submits that rule is subject to an exception that allows the mortgagor to redeem the first mortgage if it is done with the consent of the second mortgagee: *Classic Mortgage Corporation v. 0768723 B.C. Ltd.,* 2017 BCSC 1225 at para. 43. In this case, Aviva consents to the redemption.

[24] 129 submits that an owner's right to redeem is a core principle of real estate law: *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge, Inc.,* 2020 ONSC 3659 at paras. 37–40. 129 submits it was an error in principle for the chambers judge not to consider the right of redemption in weighing whether it was appropriate to approve the 129 Revised Offer. 129 submits that if the chambers judge had correctly determined that the 129 offer was a redemption, the appropriateness analysis may have been significantly different.

[25] 129 further submits that the chambers judge erred in principle in concluding that the 129 refinancing was not appropriate. In this regard, she failed to consider all of the circumstances and instead focused her analysis on only one issue, namely, the lack of evidence of an intention to propose a plan of arrangement or compromise to all the creditors.

[26] 129 submits that the chambers judge's analysis is premised on the basis that *Cliffs* stands for the broad principle that a debtor must provide evidence of its

intention to propose a plan of arrangement to creditors in order to obtain relief under the *CCAA.* In support of this submission, it points to the judge's comment at para. 77, where she said, "Crucially … 129 also seeks an extension on the stay of creditors' rights without any indication that it will put forward a plan of arrangement or compromise on which the Petitioners' creditors may vote."



[27] 129 submits that if the chambers judge is correct and that *Cliffs* stands for that broad principle, a five-justice division should reconsider *Cliffs*. In support of its submission that the remedial objectives of the *CCAA* are broader than articulated in *Cliffs*, 129 relies on the subsequent decisions of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 and *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10 [*Callidus*]. In the alternative, 129 submits that, if *Cliffs* does not stand for that broad proposition, the chambers judge erred in her interpretation of *Cliffs.*

[28] 129 submits, in the circumstances of this case, the chambers judge's concerns for the rights of creditors ranked below Aviva was misplaced because those creditors will not recover anything from either of the proposals. It submits the appropriateness analysis should have centred on the outcome for parties who stood to benefit from the 129 Revised Offer. In particular, it notes that under the 129 Revised Offer, CMLS will be paid in full, Aviva may escape any exposure, and the pre-purchasers will not lose their rights to purchase a unit in the Project.

[29] 129 says the chambers judge's error is clearly illustrated by her comments at para. 73:

> [73] Again, as already stated, 129 does not seek relief under s. 11.2 of the *CCAA*. 129's counsel only suggests that its "refinancing" is appropriate in disregarding the interests of the other creditors, including the lienholders, since they are currently "out of the money". I agree with 129's counsel's assessment of the likely current monetary value of the other creditor's interests. However, in my view, that is a very unprincipled basis upon which to argue that this "refinancing" is an "appropriate" outcome in the balancing exercise with regard to all stakeholders.

**B. Aviva**

[30] Aviva supports 129’s application for leave and adopts its submissions. It submits the issues raised in the proposed appeal have merit and are significant to the parties and to the practice. Aviva submits it may not be necessary to reconsider *Cliffs*, as the chambers judge erred in law and fact by failing to recognize that *Cliffs* is distinguishable and further erred in law in her interpretation of *Cliffs* by failing to consider the expanded formulation of the *CCAA*’s remedial purpose in more recent and binding authorities. Aviva submits, however, that if this Court finds *Cliffs* is binding authority in British Columbia for the principle that a debtor must provide evidence of their intention to propose a plan of arrangement to creditors in order to obtain relief under the *CCAA*, then Aviva agrees with 129 that *Cliffs* ought to be reconsidered by a five-justice division.

[31] Aviva submits that the chambers judge erred in her analysis by focusing on the structure of the 129 offer instead of its impact on the various stakeholders.

[32] Aviva submits the appeal is of particular significance to it. If the sale to Solterra completes, Aviva will immediately lose $8.6 million with limited prospects of recovery. This result may be avoided entirely if the 129 refinancing is approved.

[33] Aviva further submits that the chambers judge erred by failing to appreciate the two-staged nature of the 129 plan. In the first stage, CMLS would be paid in full, and the Project would remain in *CCAA* protection as it attempted to raise new construction financing that, if received, would allow the Project to be completed as originally contemplated. In those circumstances, Aviva and other creditors may have the chance of escaping unscathed.

[34] Aviva submits the judge failed to consider other countervailing factors in her appropriateness analysis, including Aviva’s right to redeem and the Petitioners’ right to compel an assignment of the CMLS mortgage. Aviva submits that the chambers judge’s emphasis that the 129 offer does not deal with the claims of other creditors is misplaced. In that regard, Aviva points out that the concern for the creditors other

than CMLS and Aviva is artificial because those creditors will not recover anything under the approved Solterra offer.

**C. Centura/Solterra**

[35] Centura and Solterra are related companies. Solterra's offer to purchase the assets of the Project was approved subsequent to the judge dismissing the application of 129. Centura is a creditor who will receive nothing under either proposal. Notwithstanding their very different roles, they are represented by the same counsel.

[36] In their submissions before the chambers judge, Centura/Solterra opposed the 129 offer, and on this application, they oppose the granting of leave. On this application, they noted that leave is granted sparingly in *CCAA* proceedings. They submit that the appeal is without merit. They submit that the chambers judge was entitled to and did take note of the fact that there was no evidence of any intention on the part of 129 or the Petitioners to resolve or even address the claims of creditors affected by their proposed refinancing transaction, let alone seek approval of those transactions from affected creditors by proposing a plan on which the creditors could vote. They submit the judge was properly concerned about the commercial viability of the overall restructuring plan and found that the new construction financing 129 intended to secure at a later date was "speculative at best."

[37] Centura/Solterra submit that 129's arguments conveniently ignore the interest of all other stakeholders, including lienholders, which would be prejudiced by the order sought by 129. They submit that, in these circumstances, there is no basis on which one could suggest that 129 had found common ground amongst the stakeholders, notwithstanding that both CMLS and Aviva, the two parties directly affected by the proposals, were generally supportive of the 129 offer.

[38] Centura/Solterra submit that the proposed appeal raises no points of interest to the practice and that the judge's decision involved the exercise of her discretion with reference to established authorities. They submit there is no precedent for the

*CCAA* relief that 129 sought from the court and that the chambers judge did not err in refusing the application.

[39] Centura/Solterra put particular emphasis on the fact that the appeal will unduly hinder the progress of the action. They point out that the Solterra sale must close before the end of September 2021 and that if the appeal is allowed to go forward, there is a risk that either the Petitioners or Solterra may terminate the sales agreement. They submit leave, if granted, will create uncertainty as to the time of completion of the Solterra sale or whether it can be completed at all.

[40] Centura/Solterra also point out that there is no certainty that 129's plan will come to fruition, let alone in a timely fashion. In this regard, they note there is no assurance that anyone other than CMLS will make any recovery. In these circumstances, they submit that it is not in the interest of justice to grant leave.

[41] Centura/Solterra submit the Court should refuse the request for a five-justice division. In that regard, they submit that the judge could have exercised her discretion in the same way without reference to *Cliffs*. They further submit that *Cliffs* is not inconsistent with the subsequent Supreme Court of Canada authorities.

**D. CMLS and Desjardins**

[42] CMLS and Desjardins also oppose the request for leave. They do so because they doubt the ability of 129 to complete the proposed refinancing, notwithstanding that if the 129 financing completes, CMLS will be made whole. They submit that if leave is granted, it will unduly hinder the progress of the action. In this regard, they submit that if leave is granted and a five-justice division is allowed to hear the appeal, there is no certainty of a decision being reached before the September 30, 2021 closing date of the sale to Solterra. Even if a decision was reached in favour of 129 before September 30, 2021, the 129 refinancing is not set to fund until late October 2021. In these circumstances, CMLS submits there is jeopardy that the Solterra sale could be lost.

[43] In addition, CMLS submits that any delay will cause it significant prejudice. In that regard, it notes that priority funding ahead of CMLS includes payment of professional fees of the Monitor and its legal counsel as well as the Petitioners' counsel. The appeal will necessitate further payment to these groups of professionals, as well as CMLS and Desjardins incurring their own increased legal fees. These additional expenses will reduce the amount of funds available for recovery to CMLS if ultimately the appeal is dismissed or if the 129 Revised Offer is approved but 129 does not complete.



### E. The Petitioners

[44] As noted, the Petitioners, although taking no position in the court below on this application, opposed leave on the basis it would unduly hinder the progress of the action. In this regard, it echoed the submissions of CMLS that the appeal would serve only to divert limited resources and also risk the closing of the Solterra transaction. The submissions of the Petitioners are, however, somewhat artificial. The Petitioners have entered into the interim financing agreement with 129. Mr. Reyes is a principal of both the Petitioners and 129. The Petitioners' submissions on this application were apparently dictated to them by the Monitor, which itself refused to take a position. In these circumstances, the weight to be given to these submissions is limited.

## TEST FOR LEAVE

[45] The test to be applied in determining whether leave to appeal should be granted is set out in *Goldman, Sachs & Co. v. Sessions,* 2000 BCCA 326:

1. Is the point on appeal of significance to the practice?

2. Is the point raised of significance to the action itself?

3. Is the appeal *prima facie* meritorious or frivolous?

4. Will the appeal unduly hinder the progress of the action?

[46] The criteria for leave are “all considered under the rubric of the interests of justice”: *Vancouver (City) v. Zhang,* 2007 BCCA 280 at para. 10.

[47] Where leave is sought to appeal a discretionary order, the third factor requires an assessment of “whether there is an arguable case that the chambers judge erred in principle, made an order that is not supported by the evidence, or whether the order appealed will result in an injustice”: *Hagwilneghl v. Canadian Forest Products Ltd.,* 2011 BCCA 478 at para. 31. The applicants must establish a reasonable possibility that a division of the Court of Appeal would grant the appeal on its merits: *Webb v. Canada (Attorney General),* 2019 BCCA 288 at para. 15.

[48] For reasons explained by Justice Tysoe in *Edgewater Casino Inc. (Re),* 2009 BCCA 40, leave to appeal from *CCAA* orders is given sparingly. This is because in most cases the orders are discretionary in nature, and if leave is granted, it might unduly disrupt the ongoing *CCAA* proceedings.

## DISCUSSION

### A. Is the appeal significant to the practice?

[49] I agree with the appellant that the questions concerning how the equity of redemption should be factored into an analysis under the *CCAA* when faced with competing transactions and whether an intention to propose a plan of arrangement or compromise to creditors is a necessary precondition to relief under the *CCAA* raise issues of significance to the practice. While I agree with Centura/Solterra that there is no precedent for some of the relief sought, that in itself is not a basis to deny leave. To paraphrase Justice Fitzpatrick in *Quest University Canada (Re),* 2020 BCSC 1883 at paras. 153–154, leave to appeal ref’d *Southern Star Developments Ltd. v. Quest University Canada,* 2020 BCCA 364, the history of *CCAA* jurisprudence under the court’s broad statutory discretion is littered with court approval of innovative solutions. The question is whether the particular solution meets the remedial objectives of the *CCAA*: *Callidus* at para. 49.

**B. Is the point of significance to the action itself?**

[50] The appeal is obviously of significance to the parties. On the one hand, Solterra is currently the approved purchaser of the Project. On the other hand, 129 seeks to refinance the Project and proceed with the Project for the benefit of all creditors. The appeal is of particular significance to Aviva. If leave is denied, it stands to lose $8.6 million with little hope of recovery.

**C. Is the appeal *prima facie* meritorious or frivolous?**

[51] The answer to this question requires a consideration of the grounds of appeal. In this case, the parties are not in agreement as to whether the orders were strictly discretionary. If the decision below is considered a purely discretionary order, there must be an arguable case that the chambers judge erred in principle, made an order that was not supported by the evidence, or made an order that would result in an injustice. Even if the order is considered to be discretionary, the appellant has raised an arguable case that the chambers judge erred in principle. In this regard, I refer to the submissions concerning the equity of redemption, *Cliffs,* and the failure to compare the competing offers. I find the appellant has established a reasonable possibility that a division of this Court would grant the appeal on its merits.

**D. Will the appeal unduly hinder the action?**

[52] As to whether an appeal would unduly hinder the progress of the action, I acknowledge and recognise the concerns of CMLS concerning its potential prejudice if the appeal is allowed to go forward. If the appeal is ultimately dismissed, CMLS will recover less money than at present. Its position will be further prejudiced if, for any reason, the Solterra offer is withdrawn. Balanced against this potential prejudice, there is, of course, the possibility that the appeal might succeed and, if the 129 offer is funded, CMLS will indeed end up in a better position than they are at present. The prejudice to CMLS has to be balanced against the prejudice to Aviva and the pre-purchasers. Aviva stands to lose $8.6 million if leave is denied, and the pre-purchasers will be denied the units they purchased.

[53] In my view, in the present circumstances, the appeal will not unduly hinder the action's progress. While under the terms of the Solterra Backup Offer, the closing of the sale is to take place September 30, 2021, the appeal itself is scheduled to be heard on September 21, 2021. Solterra and the Monitor can agree under the terms of the sale agreement to extend the date for closing. While there is no assurance they will do so, given that Solterra, in the course of the bidding process, significantly raised its offer, it seems highly unlikely that, less than two months later, it would now withdraw from the transaction.

[54] Given all of the above, I am satisfied that it is in the interests of justice to grant leave to appeal.

## FIVE-JUSTICE DIVISION

[55] The chambers judge found that a crucial consideration was that 129 was seeking an extension of the stay of creditor's rights without any indication it would put forward a plan of arrangement or compromise upon which the Petitioners' creditors may vote. She accepted the argument of Centura that the circumstances were similar to those in *Cliffs.* She quoted Justice Tysoe's comment in *Cliffs* that:

> [38] … 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 that does not involve an arrangement or compromise upon which the creditors may vote.

[56] Whether those comments in *Cliffs* extend to and effectively prohibit the proposal of 129 is a matter of general import. While I appreciate the division hearing the appeal could conclude that *Cliffs* is distinguishable, it may hold otherwise, in which case it would be important that the division have the power, if they considered it appropriate, to reconsider *Cliffs*. Accordingly, in my view, a five-justice division is appropriate.

## SUMMARY

[57] In summary, therefore, I would grant leave to appeal and direct the appeal be heard by a five-justice division. The appeal will proceed on September 21, 2021. The

chambers judge's order with respect to the Solterra Backup Order is stayed pending the hearing of the appeal. It will be up to the division hearing the appeal to determine whether the stay should or should not be continued. 129 will, by consent, post $10,000 for security for Solterra's costs of the appeal.



[58] **VOITH J.A.**: I agree.

[59] **MARCHAND J.A.**: I agree.

[Discussion with counsel re: timing of payment of the security]

[60] **GOEPEL J.A.**: The posting of security for costs in the sum of $10,000 will coincide with the date when the appellant's factum is due (September 1, 2021). A term of the order should include that if the security for costs is not posted, the appeal will be stayed and the stay of the sale will be lifted. By consent, security for costs will be held in counsel's the trust account.

[Further discussion with counsel re: filing schedule]

[61] **GOEPEL J.A.**: I would propose the appeal record and appeal book be filed separately. The filing of the certificate of readiness is dispensed with. The appellant will file its factum, appeal record, and appeal book by September 1, 2021. All of the respondents will file their factums, individual appeal books, and condensed books by September 13, 2021. If there is to be a reply filed, it will be filed by September 17, 2021. Any further evidence to be filed by the parties should be filed by their respective factum filing date.

"The Honourable Mr. Justice Goepel"

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re),*
2020 BCSC 318

Date: 20200306
Docket: S200586
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 *SEA TO SKY UNIVERSITY ACT*, S.B.C. 2002, C. 54**

- and -

**In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA**

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioner: | J.R. Sandrelli<br>V.L. Cross |
| Counsel for the Monitor PricewaterhouseCoopers Inc.: | V.L. Tickle |
| Counsel for Capilano University: | K. Mak |
| Counsel for SESA-BC Holding Ltd. and RCM Capital Management Ltd.: | K.M. Jackson |
| Counsel for Vanchorverve Foundation: | W.W. MacLeod |
| Counsel for Bank of Montreal: | S.A. Poisson |
| Counsel for The Toronto Dominion Bank: | B. Dumanowski, A/S |

| | |
|---|---|
| Counsel for Her Majesty The Queen In Right of Province of British Columbia: | L.V. Mauro |
| Place and Date of Hearing: | Vancouver, B.C.<br>January 27, 2020 |
| Place and Date of Judgment: | Vancouver, B.C.<br>January 27, 2020 |
| Place and Date of Written Reasons: | Vancouver, B.C.<br>March 6, 2020 |

**INTRODUCTION**

[1] On January 16, 2020, the petitioner, Quest University Canada ("Quest"), filed this proceeding, seeking creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[2] On that date, there was limited attendance at the hearing. Two secured creditors, Capilano University ("CapU") and Vanchorverve Foundation ("VF"), were represented by counsel. I rejected VF's application for an adjournment of the hearing and granted an initial order (the "Initial Order").

[3] In accordance with new amendments to the *CCAA*, the relief granted in the Initial Order was limited to matters that were reasonably necessary until the comeback hearing in 10 days' time after all stakeholders had received notice of the proceedings: *CCAA*, ss. 11.02(1) and 11.001.

[4] At this comeback hearing, Quest applied for an amended and restated initial Order (ARIO) to provide for a further extension of the stay. Quest also sought approval of interim financing from RCM Capital Management Ltd. ("RCM") for its continued operations during this proceeding, consistent with what Quest's counsel had foreshadowed when the Initial Order was granted.

[5] VF opposed the proposed interim financing and brought a cross-application to approve interim financing that it has secured with Burley Capital Inc. ("Burley"). Concurrently, VF applied for orders removing four governors from Quest's board and replacing them with its own nominees. In the alternative, if the Burley financing was not approved and the governors not removed, VF applied for an order directing a sales and investment solicitation process (SISP) in respect of Quest and its assets.

[6] At the hearing on January 27, 2020, I granted the relief sought by Quest and dismissed VF's application, with reasons to follow. These are my reasons.

**BACKGROUND FACTS**

[7] In the early 2000s, Quest was formed as a private, not-for-profit, post-secondary institution, pursuant to the *Sea to Sky University Act*, S.B.C. 2002, c. 54.

[8] Quest is governed by a board of governors (the "Board"), whose members are elected in accordance with Quest's bylaws (the "Bylaws"). Pursuant to Bylaw 8.1, the Board appoints a president, who is the university's chief executive officer, to supervise and direct Quest's operations.

[9] Quest was founded in association with a federal society, the Sea to Sky Foundation ("SSF"). Funding for the development of Quest was initially provided through donations. Various individuals were involved in this endeavour, including Dr. David Strangway, Blake Bromley and Peter Ufford.

[10] In 2001, SSF acquired a 97 hectare (240 acre) property outside of Squamish, BC. Those lands were then subdivided and partially sold to fund, along with ongoing donations, the construction costs for the university campus on the portion still then held by Quest. In 2006, SSF transferred the remaining lands to Quest.

[11] In 2007, Quest accepted its first class of 73 students. By 2019, that complement had grown to include 510 students. All students are required to reside on campus in the present four student housing buildings, which also accommodate some faculty. Plans for the fifth student residence building are underway.

[12] Quest employs approximately 100 full-time persons in Squamish as staff or faculty.

[13] Quest's main assets include the real property on which the campus is located (12 acres) and the remaining development lands (presently 38 acres) which surround the campus. In addition, Quest is part of certain joint ventures which were formed to develop the current and proposed residences located on the campus. The book value of Quest's assets is estimated to be more than $80 million.

[14] Over the years since its inception, Quest has received various loans to fund the development of the campus and cover operating losses. Quest has never generated sufficient revenue to fund its expenses, in that it has always, to this time, operated at a deficit. Quest anticipates that an increase in student enrollment will assist in resolving that difficulty, at least in part.

[15] As of December 2019, Quest's outstanding liabilities (save for capital leases) were approximately $37 million, including $28.6 million owing to the five secured lenders. The two most significant secured creditors include CapU (owed $2.2 million) and VF (owed $23.6 million), both holding mortgage security against Quest's real and/or personal property interests.

[16] Mr. Bromley is an advisor to VF and various other foundations. In addition, Mr. Bromley is the president and director of Benefic Group Inc. ("Benefic"), whose offices are also the offices of VF. Employees of Benefic serve as directors of VF and other foundations in which Mr. Bromley is involved.

[17] Mr. Bromley served on Quest's Board from 2002-2010/2011. During that time, Mr. Bromley was actively involved in overseeing Quest's finances and he introduced programs that were described as financings. From 2011-2015, foundations associated with Mr. Bromley, including VF, entered into or took assignments of at least nine loan agreements with Quest.

[18] The evidence also establishes that Mr. Bromley has had deep ties to Quest and its operations over the years. PricewaterhouseCoopers Inc. (the "Monitor") indicates that there are a large number of complex transactions involving Quest and Mr. Bromley and his organizations. The Monitor has not yet reviewed those details to understand them.

[19] In prior years, certain of Quest's land transactions involved organizations with which Mr. Bromley is associated. In addition, Mr. Bromley's organizations purchased the naming rights to certain campus buildings and took control of the leases for several Quest residence buildings.

[20] Also relevant to Mr. Bromley's involvement in Quest and this proceeding is another lawsuit. In early 2018, two foundations in which Mr. Bromley is involved sued Quest, asserting claims arising from the development of certain lands held by Quest. In essence, these foundations seek injunctive relief to prevent Quest from developing its own lands. This litigation is being defended by Quest.



**QUEST'S INSOLVENCY**

[21] Quest's financial difficulties came to a head in the fall 2019.

[22] In the months leading to that time, Quest sought some concessions from VF that would see some portion of the debt forgiven or restructured. These efforts were not successful. VF's loans came due on November 1, 2019.

[23] On November 22, 2019, VF demanded payment of its loans and issued a notice of intention to enforce its security, pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

[24] Also, on November 22, 2019, Mr. Bromley wrote to the Board indicating that he was of the view that four members of the Board (then comprised of seven persons) should resign and that his nominees should be appointed in their place. His nominees included persons with roles at Benefic and other foundations in which he is involved.

[25] In December 2019, the Board sought some clarity from VF as to its intentions with respect to Quest, given Mr. Bromley's view that the Board should cede majority control of it to his representatives. The Board also sought further information as to what VF had in mind in terms of future transactions or plans for Quest. No information was forthcoming from VF or Mr. Bromley. As a result, on December 19, 2019, the Board declined Mr. Bromley's proposal.

[26] At the time of the initial hearing, I was satisfied that Quest was insolvent, as required by the *CCAA*: *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.); leave to appeal to C.A. refused, [2004] O.J. No. 1903 ; leave to appeal to SCC

refused, [2004] S.C.C.A. No. 336. As Justice Farley held, an “insolvent person” as defined in the *BIA* includes a financially troubled corporation that is “reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring”.



[27] In particular, Quest was facing the imminent requirement to make payments for payroll and leases; Quest was unable to satisfy these amounts without further financing. At this hearing, Quest indicated that it had initiated discussions with potential lenders for interim financing and that a term sheet was expected to be received shortly for its overall funding requirements in this proceeding.

[28] Given the new restrictions regarding the approval of interim financing during the initial 10-day stay period now found in s. 11.2(5) of the *CCAA*, it was appropriate to allow all stakeholders to be given notice before such relief was considered and possibly granted at the comeback hearing.

[29] The overall intention of Quest to seek relief in this *CCAA* proceeding is to allow it to continue with its operations and complete at least the existing academic year (ending April 2020). I agree that this objective has, at the very least, provided some certainty to the students and their families and preserved considerable value for Quest and its stakeholders while a more long term solution was sought.

[30] The “kernel of a plan” presented at the initial hearing was toward a consideration of one or a combination of:

a) Increasing the current student body;

b) Reducing expenses;

c) Seeking fundraising;

d) Seeking potential academic partners; and

e) Pursuing a transaction with respect to the remaining development lands.

[31] By the time of the *CCAA* filing, Quest had already made significant efforts toward a resolution of its financial difficulties.

[32] In March 2019, it had commenced a process toward the development of its excess lands and a potential bidder was selected. Unfortunately, that bidder did not proceed, in part because of the uncertainty about the level of support it would receive from the secured lenders, including VF.

[33] In addition, on December 16, 2019, Quest retained Halladay Education Group Inc. ("Halladay"), a private educational consultant. Halladay was tasked with marketing and soliciting interest from other post-secondary institutions toward a transaction with Quest.

**ISSUES AND PARAMETERS**

[34] Quest and VF agree that Quest requires interim financing in order to complete its restructuring efforts within this proceeding. The crux of the matter, however, is *who* should be the person to provide that financing, RCM (per Quest) or Burley (per VF)

[35] Quest submits that it is appropriate to approve the RCM financing and grant a charge in favour of RCM, pursuant to s. 11.2 of the *CCAA*.

[36] Section 11.2 of the *CCAA* grants this Court jurisdiction to approve an interim financing charge over Quest's assets in an amount considered appropriate having regard to its cash-flow statement. Factors to be considered in granting such an order are set out in s. 11.2(4) and include, but are not limited to:

a) the period during which the debtor is expected to be subject to *CCAA* proceedings;

b) how the debtor's business and financial affairs are to be managed during the proceedings;

c) whether the debtor'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 debtor;

e) the nature and value of the debtor's property;

> f) whether any creditor would be materially prejudiced as a result of the charge; and
>
> g) the monitor's report, if any.

[37] The above factors are also engaged in respect of VF's interim financing application, with the addition of other considerations as they relate to VF's concurrent application to remove four governors from Quest's Board and appoint four of its nominees as new governors in their place.



[38] With respect to the removal of four of Quest's governors on the Board and their replacements, VF relies on s. 11.5(1) of the *CCAA*:

> (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.
>
> (2) The court may, by order, fill any vacancy created under subsection (1).

[39] Finally, with respect to VF's application to approve a SISP, the Court must exercise its statutory discretion in light of the statutory objectives under the *CCAA* toward granting an order that is appropriate in the circumstances: *CCAA*, s.11.

## <u>THE COMPETING FINANCING PROPOSALS</u>

[40] The competing proposals by Quest and VF are similar in most respects, but also differ in very material ways. In this context, I will also outline the relief sought by VF in relation to the removal of some of Quest's governors, since that relief is integrally tied to the financing proposed by Burley.

### RCM's Proposal

[41] After the Initial Order was granted, with the assistance of the Monitor, Quest sourced interim financing from several parties. Quest's President, George Iwama, states that two proposals for interim financing were received from well-recognized

and experienced lenders in the field of interim financing who are independent of Quest.

[42] Both Quest and the Monitor concluded that RCM's offer was more competitive and involved the least risk. On January 18, 2020, Quest entered into a commitment letter with RCM with respect to a $5 million secured loan. Quest intends to use the RCM funds to fund its operational deficit for the current academic year and to continue to meet its normal course obligations while a plan is implemented in the course of these proceedings. The cash-flow statement before me supports that the amount of this financing is appropriate.

[43] The RCM financing does not contain any unusual features. The terms of the commitment letter and the now settled loan documentation include what are normal commercial terms.

[44] In addition, the RCM loan and charge would rank in priority only subject to the Administration Charge and certain secured interests, such as PMSIs. It would rank behind the D&O Charge granted in the Initial Order.

**VF's Proposal**

[45] As previously stated, the Burley financing has similar financial terms to that of RCM. However, one important difference is that the Burley commitment letter contains a condition precedent, namely:

> The board of governors of [Quest] being comprised of individuals that are acceptable to the Lender in its sole and unfettered discretion.

[46] As part of the Burley financing proposal, VF seeks an order removing four governors from Quest's Board (Mary Jo Larson, Chief Dale Harry, Stuart Louie and Claude Rinfret). In addition, VF seeks an order appointing four governors to Quest's Board (Christopher Richardson, Bill Woodson, David McMillan and Alpha Bugembe).

[47] The result of granting this relief would be to appoint VF's nominees to act as the majority of Quest's governors. The other present governors are Anna Lippman,

Sheila Biggers and David Kerr. Mr. Kerr was just appointed on January 21, 2020 and brings considerable business and finance expertise to his role.

**DISCUSSION RE FINANCING / GOVERNANCE PROPOSALS**

[48] I will address the issues within the context of the ss. 11.2(4) factors and s. 11.5 of the *CCAA*.

**Period of *CCAA* proceedings**

[49] Both financing proposals anticipate the same timeline for the completion of the restructuring process. Both financings provide for sufficient funding over the cash-flow period to the end of May 2020, a date when Quest anticipates that a much clearer picture will emerge as to what options are before it and its stakeholders.

**Management of Quest's affairs / Confidence of Quest management**

[50] These are the most substantial factors to be considered in light of the allegations raised by VF in respect of Quest's Board. I will consider the s. 11.2(4) factors together with VF's application to remove four of the governors under s. 11.5 of the *CCAA*.

[51] VF does not allege that the governors they seek to remove have acted inappropriately. Rather, VF contends that Quest's Board is "unreasonably impairing … the possibility of a viable compromise or arrangement" within the meaning of s. 11.5 of the *CCAA*.

[52] VF's evidence in support is found in the Affidavit #1 of Leslie Brandlmayr sworn January 23, 2020. Ms. Brandlmayr is a director of VF and a managing director, compliance, of Benefic.

[53] Ms. Brandlmayr states that VF has lost faith and confidence in Quest's board. She points to the annual operating deficits and negative cash flows due to Board "incompetence". She says that the Board has failed to take any meaningful steps to improve Quest's financial position on a long term basis, including by increasing student enrollment and decreasing subsidies to students. She also refers to what

she alleges were related party transactions within the three years before the *CCAA* filing.

[54] VF asserts that it is prepared to support Quest continuing in these proceedings and toward implementing a plan to achieve a sustainable long term model, but only if VF is allowed to control the Board. If not, VF baldly states that it will not support any plan developed by the current Board that might be presented in this proceeding.

[55] Yet, VF does not, in its evidence, provide any detailed reason why it has chosen to specifically remove Ms. Larson, Chief Harry, Mr. Louie and Mr. Rinfret as governors as part of its proposal. To the contrary, the evidence supports that all of these individuals, in addition to Ms. Lippman, Ms. Biggers and Mr. Kerr, are reputable and competent people and independent of Quest. There is no suggestion other than that they all bring considerable skill and knowledge to their positions as governors, in the areas of business, law, tax and finance.

[56] The evidence also contradicts VF's allegation that the Board has failed to take any steps to address the ongoing financial concerns that have persisted since Quest's inception. Based on the Monitor's recent and limited review of matters, there would appear to have been valid reasons for the continuing deficits, which did include periods of steady improvement in some years. In particular, the value of donations declined substantially after 2011 when Mr. Bromley left the Board. Finally, enrollment did increase each year after Mr. Bromley's departure from the Board until 2017, when it declined for various reasons not directly attributable to the Board's decisions.

[57] Ms. Larson states that, over the last two years, the Board has pursued a variety of avenues to address the financial situation, including negotiations with potential academic partners, significant discussions with its lenders, pursuing fundraising avenues, hiring various advisors (including Halladay), developing a proposal process with respect to the development lands and, attempting to bolster enrollment.

[58] Since the *CCAA* filing, the Board has also formed a Restructuring Committee (the "RC") to bring considerable focus to the need to move expeditiously in these proceedings toward a resolution. The RC is tasked with evaluating proposals, working with Halladay, soliciting interest for the development lands and making recommendations to the Board regarding its decisions in these proceedings. Members of that Committee include Mr. Rinfret, who VF seeks to remove.

[59] Section 11.5 of the *CCAA* has received little judicial attention.

[60] In *Unique Broadband Systems Inc. (Re)* (25 January 2012), Toronto CV-11-9283-00CL (O.N.S.C.), Justice Wilton-Siegel considered this provision. At para. 32, he held that the wording of s. 11.5 suggests that the proponent must meet a "significant threshold" before it is entitled to relief.

[61] Further, Wilton-Siegel J. stated:

> [33] A determination as to whether conduct is impairing, or is likely to impair, a restructuring requires a careful examination of the actions of the directors in the context of the particular restructuring proceedings, the interests of the stakeholders and the feasible options available to the debtor. … I note, in particular, that given this language, <u>the fact that a shareholder or creditor may not agree with a decision of a director is far from being a sufficient ground for the director's removal</u>. As a related matter, there is nothing in s. 11.5 that evidences an intention to displace the "business judgment rule".
>
> [34] Further, the language of s. 11.5 expressly requires that the actions of a director "unreasonably" impair, or are likely to "unreasonably" impair, a viable restructuring …
>
> [35] In addition, two other considerations also argue in favour of a significant threshold, although they may also be relevant to a determination regarding the exercise of judicial discretion where the necessary factual determinations have been made.
>
> [36] First, <u>removing and replacing directors of a corporation, even a debtor corporation, subject to the CCAA, is an extreme form of judicial intervention in the business and affairs of the corporation</u>. The shareholders have elected the directors and remain entitled to bring their own action to remove or replace directors under the applicable corporate legislation. At a minimum, in determining whether it should exercise its discretion, the court can take into consideration the absence of any such action by the other shareholders.
>
> [37] Similarly, in a CCAA restructuring, the Monitor performs a supervisory function that provides a form of protection to the corporation's stakeholders. In determining whether to exercise its discretion in s. 11.5(1), a court would

> ordinarily take into consideration the presence or absence of any recommendation from the Monitor.
>
> [Emphasis added.]

[62] I would adopt the reasoning of the court in *Unique Broadband* as applicable here. While there are no shareholders *per se* to take action to remove the governors, Quest's Bylaw 2.10 provides that the Board may remove a governor before his or her term with a 2/3 majority vote. No such action has been taken by the Board.



[63] The only other decision brought to my attention on this issue was *Crystallex International Corp. (Re)*, 2012 ONSC 2125, where Justice Newbould was similarly considering competing financing offers. His only comment on s. 11.5 is found at para. 71, where the court emphasized that the remedy exists and must be considered in the context of all the circumstances and with the objectives of the *CCAA* in mind.

[64] Having considered the entirety of the evidence, I do not consider that VF has met its burden in establishing, on a balance of probabilities, that Quest's Board is unreasonably impairing the possibility of achieving a successful restructuring in this proceeding. At bottom, VF points to the ongoing deficits which the Board has made good faith efforts to address over the years. The fact that the governors have not yet been successful does not mean that they are incompetent; nor does it translate into a finding that they are now unreasonably impairing the restructuring efforts. Indeed, Mr. Bromley himself was part of those efforts in years past, when some of those unsuccessful efforts were made.

[65] In addition, reading between the lines, VF's main complaint is that the Board disagrees with its vision as to how Quest's financial difficulties may be solved. This disagreement is not a basis upon which to overhaul the Board's composition under s. 11.5 so as to give VF control of it: *Unique Broadband* at para. 33.

[66] The governors have been duly appointed under Quest's Bylaws. Their business judgment is to be considered and is to be afforded, where appropriate, considerable deference: *Unique Broadband* at para. 33, 36; *Crystallex* at para. 33;

and, *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459 at para. 186. If the governors have conflicts arising in their duties, as VF now suggests, Quest's internal procedures under its Conflict of Interest Policy are in place to address any issues, just as those procedures were employed when Mr. Bromley was on the Board.

[67] This is not a situation where Quest's Board will be taking steps on its own in this restructuring without significant input and oversight. The Initial Order granted and the ARIO sought impose certain restrictions on the decisions to be made by Quest in the future. In addition, the Monitor is specifically tasked to monitor the restructuring efforts and assist and advisee Quest in those efforts. To this point in time, the Monitor fully supports the ongoing efforts of all members on Quest's Board, including those of Ms. Larson, Chief Harry, Mr. Louie and Mr. Rinfret: *Unique Broadband* at para. 37.

[68] Finally, the Court retains an overall supervisory function to address any steps taken by Quest that are not appropriate in the circumstances. That may include a reconsideration of an application under s. 11.5 if circumstances change.

[69] In summary, I do not consider that VF's concerns regarding Quest's Board are proven or justified under the s. 11.2(4) factors. Also, I do not find that VF has met the significant threshold under s. 11.5. Certainly, VF has not established any basis upon which to justify the removal of Ms. Larson, Chief Harry, Mr. Louie and Mr. Rinfret from the Board under s. 11.5 so that the majority of the Board can be populated by persons under the control of VF/Burley.

[70] As I will discuss below, there are also significant concerns arising with respect to VF's true intentions in putting forward Burley's financing proposal. These concerns arise in the context of Burley's lack of independence from Mr. Bromley/VF and the control provisions that are found in Burley's proposal, both of which may affect the course of this restructuring proceeding.

### Would the loan enhance prospects of viable compromise/arrangement?

[71] With respect to this factor, I am more than satisfied that RCM's loan would enhance the prospects of a successful restructuring. RCM is an independent lender whose interests are plain and understandable – they want to advance a loan at a price and recover those amounts in due course.

[72] The same cannot be said for Burley's proposal. There are substantial concerns regarding inherent conflicts that are apparent from a closer review of Burley and its proposal.

[73] I have already outlined Mr. Bromley's considerable involvement in Quest since its inception, whether on its Board or through VF or other organizations who have transacted with Quest, including with respect to considerable loans. As noted above, Mr. Bromley's organizations hold naming rights to certain buildings and they control certain of Quest leases. One of Mr. Bromley's organizations is suing Quest in the 2018 litigation concerning the development property.

[74] Quest argues that VF has made numerous attempts in the past to take over Quest's Board and that the Burley proposal is simply the latest iteration of those efforts. The evidence supports that this indeed is VF's intention.

[75] Members of Quest's Board and/or its executive team met with Mr. Bromley and/or his advisors on November 27 and December 5, 2019 and January 10, 2020. By as early as November 2019, Mr. Bromley had clearly signalled that VF was looking to assume control of the Board through his nominees.

[76] On January 10, 2020, Mr. Rinfret met with Mr. Bromley and VF/Burley's nominee governor, Mr. Richardson, to discuss a restructuring opportunity suggested by Mr. Richardson. Mr. Richardson stated at the meeting that the proposal was dependent on the replacement of the majority of the Board with VF's nominees. However, Mr. Bromley was not able to provide specifics with respect to significant aspects of the proposal. This proposal was later rejected by the Board on the basis that it was vague and uncertain. The Board also considered that Mr. Bromley was

seeking to advance only his and his organization's best interests, without regard to those of Quest.

[77] Both Mr. Richardson and Mr. Woodson have considerable ties to Mr. Bromley. Mr. Richardson has been a director of several of Mr. Bromley's organizations and he has been involved in Mr. Bromley's attempted real estate developments. Mr. Bromley also put Mr. Richardson forward to Quest as a consultant to be hired as part of a loan proposal. Mr. Woodson was formerly Mr. Bromley and/or VF's lawyer and worked in transactions involving Quest's land in that capacity.

[78] Who, then, is Burley and what are its intentions in becoming involved in this restructuring?

[79] Burley is a BC company incorporated in May 2018. Shan Trouton is the sole registered director. One difficulty that arises – which Burley chose not to address at this court hearing – was that Burley, at this time, is not in good standing. The Monitor has not yet had time to assess Burley's capability to fund the required financing amount and no evidence has been presented by VF/Burley to support that conclusion.

[80] Mr. Trouton is also a director of Rostrum Developments (2015) Ltd. ("Rostrom"), a company not in good standing.

[81] Mr. Trouton is known to Quest's Board and management.

[82] Ms. Larson states that, based on personal discussions with Mr. Trouton and a review of records and Rostrom's website, Mr. Trouton has been involved in Mr. Bromley's foundations since 2015. She further states that Mr. Trouton has been actively involved in seeking to develop Quest's development lands. Ms. Larson's evidence is also supported by that of Flora Ferraro, Quest's Vice President of Finance and Operations.

[83] On November 27, 2019, when VF disclosed possible financing by Burley/Mr. Trouton, Ms. Ferraro received a request from Mr. Trouton to meet. A meeting was scheduled for later that day. Mr. Trouton seemed to be well aware of earlier discussions between Ms. Ferraro, Mr. Iwama and VF's counsel. Mr. Trouton advised Ms. Ferraro that he would be "in charge" of real estate transactions for Quest and that he was putting a land transaction together. He declined to advise Mr. Ferraro of the details. At that meeting, Mr. Trouton clearly stated that he would discuss the transaction with the Board only if VF's proposed changes were made to the Board's composition. Mr. Trouton indicated to Ms. Ferraro that, if the Quest's executive team did not support Mr. Bromley and/or VF's proposed changes to Quest's Board, the executive team would be replaced.

[84] Finally, at that meeting, Mr. Trouton described himself as Mr. Bromley's friend and stated that they had been in business for many years.

[85] The uncontradicted evidence strongly supports that Burley/Mr. Trouton are working together with Mr. Bromley on this matter and are not truly "independent" of each other. I can only conclude that the motivation behind Burley's financing proposal is to protect VF/Mr. Bromley's own interests by securing control of Quest's Board through Mr. Bromley's business associates so that it can direct Quest's activities in this proceeding.

[86] It might be assumed that Mr. Trouton has put forward Burley's financing proposal, requiring that Burley be given full control of the composition of Quest's Board, with the intention of implementing Mr. Bromley's intentions to populate the Board with his nominees, for the reasons advanced by Ms. Brandlmayr, which I have rejected. However, it bears repeating at this stage that Burley's proposal is not only that four of the governors be replaced with VF nominees, but is dependent on Burley having the ability to replace the *entire* Board as it sees fit in its sole discretion.

[87] Accordingly, if the Burley proposal was approved, Mr. Trouton would have the ability to remove even Ms. Lippman, Ms. Biggers and Mr. Kerr. No doubt that would

extend to the officers and other management, such as Mr. Trouton threatened at his meeting with Ms. Ferraro on November 27, 2019.

[88] It is an open question as to how the Quest Board, if controlled by VF/Mr. Bromley's nominees, would even vote on a transaction that involved VF/Mr. Bromley, either directly or indirectly. The four VF nominees have close ties to VF/Mr. Bromley and certainly, the prospect of a conflict would have to be considered.



**Nature and value of Quest's property**

[89] I agree that Quest's property and "business" are unique. It is a not-for-profit operation with aspirations not to make money, but to provide a valuable and unique learning experience for young adults.

[90] In addition, there are other challenges in forging a new path here, including dealing with the very unique nature of the assets which presently comprise the campus and its building. The development lands are more straightforward but, given their proximity to the campus, Quest's aspirations and the District of Squamish's requirements, they also pose some challenges.

**Material Prejudice**

[91] Both Quest and the Monitor state that no secured creditor would be materially prejudiced as a result of a charge to secure either the RCM or Burley loans. This is abundantly the case since, based on the apparent market value of Quest's lands, there is in excess of $50 million of equity in the lands.

**The Monitor's Report**

[92] The Monitor has filed its First Report to the Court dated January 24, 2020.

[93] The Monitor confirms that the RCM proposal was negotiated by Quest, with its support, after considering several proposals from different independent lenders. The Monitor supports the RCM proposal.

[94] The Monitor does not support the Burley proposal, essentially echoing my own concerns as to the independence of Burley/Mr. Trouton from Mr. Bromley and Quest. In addition, on the matter of the replacement of the four governors, the Monitor disagrees with that relief, stating that the Board is very focussed on the task ahead, including improving enrollment and addressing the cash deficits.



[95] The Monitor states in its First Report that removal of the governors may significantly impair the ability of Quest to put forward any restructuring proposal:

> 6.7.3 … In this case, Burley is stipulating who the new board members would be and is effectively seeking control of the board. Further, Burley is seeking the replacement of specific board members: Mary Jo Larson, Claude Rinfret, Stuart Louie and Chief Dale Harry. The Monitor notes that the first three of these board members have significant legal and financial training which is in contrast to the composition of the remaining board members. Removal of these board members seems counter-productive to the interests of Quest and appears would be potentially crippling at a time when Quest requires this expertise to navigate these CCAA proceedings. The Monitor also notes that these are the same four governors that Mr. Bromley had requested be replaced in November 2019.

[96] The Monitor recommends that the Court approve the RCM financing as representing the best option in terms of pursuing a successful restructuring. It is the Monitor's view that the interim financing facility should be provided by an independent lender with no association to VF/Mr. Bromley or Quest.

**The Court as Gatekeeper**

[97] In *Great Basin Gold Ltd.*, I also addressed the situation where there were competing applications to approve interim financing. In that case, I commented on the need to consider financing proposals carefully to ensure that they are reasonable and appropriate. The court must closely scrutinize any such proposal that it put forward as a means to advance the interests of one particular stakeholder, or which may have that effect. I stated:

> [179] I recognize that in some restructuring proceedings, certain stakeholders may use existing leverage, to the extent that they have it, to take advantage of the chaos and uncertainty that are inherent in these situations. Strategies might be employed to secure for themselves advantages that they would not otherwise obtain. These advantages inevitably come at the expense of other stakeholders in the proceedings.

> These advantages are also almost always court approved so that they cannot be later revisited. In those circumstances, the court must be constantly vigilant against such strategies. ...
>
> …
>
> [181] Even so, the Court remains the gatekeeper in terms of ensuring that the terms of any such agreements are reasonable and appropriate in the circumstances. Input from stakeholders participating in the process will be critical although the entire stakeholder group must be considered. Critical to the court's analysis will be evidence of the debtor company's actions in the face of these proposals. What is the underlying reason for these transactions? What due diligence was done in the face of these proposals? What negotiations took place? What are the true consequences of not obtaining this relief? What alternatives, if any, are available?

[98] To similar effect are the comments of Newbould J. in *Crystallex*:

> [63] The noteholders also contend that Tenor has been given control over Crystallex and the restructuring process by reason of the changes in the corporate governance required by the Tenor DIP facility. There is no doubt that Tenor has been given substantial governance rights, including the right to name two of the five directors and the right to agree on who the independent director shall be. An issue is whether the governance provisions are too intrusive for a DIP loan, which according to the case law relied on by the noteholders should not be excessive or inappropriate. …

[99] I readily conclude that VF's motivation in making its application to approve Burley's financing proposal is a not-so-transparent attempt to seize control of Quest's Board. While not supported by any direct evidence, there is sufficient evidence here to support a reasonable inference that those efforts are at least intended to secure control of the future sale and development of Quest's development lands for VF's own benefit or the benefit of other organizations with which VF or Mr. Bromley are involved.

[100] In my view, such a strategy in unreasonable and inappropriate in the circumstances and it may significantly disadvantage others interests in this proceeding. Quest clearly has other options, namely with RCM, which will better serve its interests and the interests of its stakeholders as a whole. I agree with the Monitor that the RCM financing represents the most appropriate option here.

[101] I approve the RCM financing proposal, on the terms sought.

**THE SISP**

[102] In the alterative to VF's application to approve Burley's financing proposal and remove four of Quest's governors, VF seeks an order that the Court order an immediate implementation of a SISP.



[103] The proposed SISP is to be conducted by the Monitor. However, consistent with the Burley financing and VF's earlier demands to Quest, the SISP terms also include significant involvement by VF in the SISP process. Those terms require that VF be included in:

a) The preparation of a list of bidders, the "teaser" or initial offering summary and the confidentiality and non-disclosure agreements; and

b) The preparation of a confidential information memorandum and development of procedures for access to the data room and other due diligence by bidders.

[104] The proposed SISP also provides that no amendments or termination of the procedures would be made unless with the consent of Quest and VF or as might be ordered by the Court.

[105] I have no difficulty here concluding that the ordering of a SISP, as sought by VF in this respect, is not appropriate at this time.

[106] Despite the fact that this proceeding has only just begun, Quest, as directed by the Board and the executive team, presents a picture of a debtor company who is well aware of its present circumstances and the need to act quickly to stabilize matters and move this restructuring along. In fact, much has already been accomplished by Quest toward this end since January 16, 2020, when I granted the Initial Order.

[107] At this time, Quest has formulated concrete options to pursue, all of which are supported by the Monitor as being valid ones in the circumstances. Those efforts will continue, now aided by RCM's financing that has been secured.

[108] The “kernel of a plan” established by Quest to support these efforts is valid and reasonable. The objectives of the *CCAA* are met by allowing the plan to continue: *North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376 at para. 26 citing *Azure Dynamics Corporation (Re)*, 2012 BCSC 781.

[109] It is simply too early to set this restructuring on a path – through the SISP and its strict deadlines – that would likely foreclose other possible solutions that may better serve Quest’s stakeholders and be acceptable to them and the Court through the *CCAA* process.

[110] I agree with Quest that, at this time, a SISP would be antithetical to the purposes and objectives of the *CCAA* which is intended to afford financially troubled companies with the breathing room to address, within appropriate constraints, its financial difficulties as opposed to sending the company into liquidation of its assets, no doubt having significant negative impacts on many stakeholders: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 59.

## CONCLUSION

[111] Since the *CCAA* filing, Quest’s Board and its management have moved quickly to stabilize matters and expedite their efforts toward a solution in the best interests of all of Quest’s stakeholders.

[112] There is considerable interest and concern in the community as to these efforts, particularly evidenced by the number of people who attended on this court application. Many of those people were students, no doubt concerned about the viability of their school and education, particularly to the end of the present term in late April 2020.

[113] We are in the very early stages of this restructuring, with the Initial Order having been granted only 10 days ago. Despite that short time, I am satisfied that Quest is moving expeditiously and in good faith toward exploring options that might be considered by its stakeholders.

[114] The RCM financing presents the best option to fund those efforts in the meantime. I am full satisfied at this time that there is no basis upon which to question the ability or intentions of Quest's Board, management and the RC in those efforts, all as assisted by their legal counsel, the Monitor and other advisors, as appropriate.

[115] Quest seeks an extension of the stay to May 29, 2020, which is supported by the Monitor. No person opposes the stay, including VF. I agree that an extension of the stay to that date is appropriate in the circumstances: *CCAA*, s. 11.02(3).

"Fitzpatrick J."

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re),* 2020 BCSC 1883

Date: 20201202
Docket: S200586
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 *SEA TO SKY UNIVERSITY ACT*, S.B.C. 2002, c. 54**

- and -

**In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA**

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

## Reasons for Judgment (Sale Approval)

| | |
|---|---|
| Counsel for the Petitioner: | J.R. Sandrelli<br>V. Cross |
| Counsel for the Monitor PricewaterhouseCoopers Inc.: | V.L. Tickle |
| Counsel for Primacorp Ventures Inc.: | P. Rubin<br>G. Umbach |
| Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.: | K. Jackson<br>G. Nesbitt |
| Counsel for Southern Star Developments Ltd.: | P. Reardon<br>K. Strong |
| Counsel for Vanchorverve Foundation: | C.D. Brousson |
| Counsel for Dana Hospitality LP: | D.V. Bateman |

| | |
|---|---|
| Counsel for Halladay Education Group: | D. Lawrenson |
| Counsel for Capilano University: | K. Mak |
| Counsel for Landrex Ventures Inc.: | J. D. West |
| Counsel for Quest University Faculty Union: | J. Sanders<br>S. Rogers |
| Counsel for Bank of Montreal: | K. Davies |
| Counsel for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training: | A. Welch |
| Counsel for 1114586 B.C. Ltd.: | K.E. Siddall |
| Counsel for Association for the Advancement of Scholarship: | L. Hiebert |
| Place and Date of Hearing: | Vancouver, B.C.<br>November 12-13, 16, 2020 |
| Place and Date of Decision with Written Reasons to Follow: | Vancouver, B.C.<br>November 16, 2020 |
| Place and Date of Written Reasons: | Vancouver, B.C.<br>December 2, 2020 |

## INTRODUCTION

[1] On November 3, 2020, the petitioner, Quest University Canada ("Quest"), applied for various orders in these *Companies' Creditors Arrangement Act,* R.S.C. 1985 c. C-36 ("*CCAA*") proceedings. Orders sought by Quest included approval of a sale transaction with Primacorp Ventures Inc. ("Primacorp") and orders necessary to facilitate that transaction, namely allowing Quest to implement a claims process and calling a meeting to consider its plan of arrangement.

[2] On November 3, 2020, I granted the Claims Process Order and a Meeting Order to allow the creditors to consider Quest's plan of arrangement dated November 1, 2020 (the "Plan"). I also approved Quest's agreement to pay Primacorp a Break Up Fee and granted a charge to secure that amount: *Quest University Canada (Re)*, 2020 BCSC 1845.

[3] I adjourned Quest's application for a Transaction Approval and Vesting Order (TAVO) to approve the Primacorp transaction to these hearing dates to allow opposing parties to consider the matter further and prepare necessary materials.

[4] Southern Star Developments Ltd. ("Southern Star") has since formalized its opposition to the granting of the TAVO. Indeed, its opposition has since increased in force because Quest and Primacorp have now changed the relief sought to approve the Primacopr transaction within the context of a "reverse vesting order" ("RVO"), as explained below. Southern Star also now applies for an order prohibiting Quest from disclaiming certain subleases, as is required in order for the Primacorp transaction to proceed.

[5] In the meantime, other parties have joined in opposing the approval of the Primacorp transaction for a variety of reasons, including those advanced by Southern Star in relation to the RVO.

[6] At the conclusion of this hearing, I granted the RVO and dismissed Southern Star's application, with written reasons to follow. These are my reasons for those orders.

## BACKGROUND FACTS

[7] This *CCAA* proceeding has been underway for almost ten months, after the granting of the Initial Order on January 16, 2020.

[8] Since that time, the Court has extended the stay of proceedings a number of times, to allow Quest to undertake efforts to find a restructuring solution to its financial difficulties that would allow it to continue its educational endeavours. Many stakeholders have been actively involved in these proceedings, including secured creditors who, collectively, will be owed approximately $30.7 million by the end of December 2020.

[9] I have also approved interim financing to allow Quest to continue its operations while in this proceeding, with that debt now approaching $11 million.

[10] Quest's assets include lands in Squamish, BC, being Lot 1, on which the campus is located (the “Campus Lands”), as well as the surrounding 38 acres (the “Development Lands”.) Lot 1 is encumbered by various charges, liens, interests, mortgages and assignments of rent, including a mortgage held by Capilano University (“CapU”). In addition, CapU holds various rights of first refusal, including a right of first refusal to purchase, a right of first refusal to lease and rights of first refusal to acquire the charges of Quest’s major secured creditor, Vanchorverve Foundation (“VF”) (collectively, the “ROFR”).

[11] Quest is also the registered owner of five real property lots (Lots A-E), four of which are the sites of its university residences (on Lots A-D) (collectively, the “Residences”).

[12] One of the significant flashpoints in this proceeding has been, and continues to be, in relation to the Residences that Quest leases from Southern Star. After the Residences became vacant in March 2020 following the onset of the COVID-19 pandemic, Quest attempted to defer payment of the substantial lease payments owed to Southern Star. On June 19, 2020, I denied that relief: *Quest University Canada (Re)*, 2020 BCSC 921 (the “Rent Deferral Reasons”).

[13] Quest's principal focus in these proceedings has been toward identifying a partner/investor to purchase its land assets and/or identifying an academic partner/investor that would permit Quest to continue as a post-secondary institution.

[14] Since January 2020, Quest's Board of Governors and its Restructuring Committee have been working with a private educational consultant, Halladay Education Group Inc. to find a prospective academic partner. In addition, since March 2020, Quest has been working with Colliers Macaulay Nicolls Inc. to find prospective purchasers for Quest's real property assets.

[15] There is no dispute that the sale and partner search process (SISP) has been extensive, as confirmed by the Monitor. Quest submits, and I accept that its management, the Restructuring Committee, and the Board analyzed all proposals based on a number of factors, including:

a) Creditor recovery from the purchase price or other consideration under the proposal;

b) That the proposal would result in a completed transaction;

c) That the proposal offered allowed for Quest's long-term continuation as a post-secondary academic institution; and

d) That the proposal would lead to the continuation of a school on Quest's lands that aligned with Quest's current vision and academic quality.

[16] The SISP resulted in a number of academic and real estate organizations approaching Quest to express interest in pursuing a transaction. Quest engaged with a number of potential purchasers or partners from Canada, the United States and other countries. Some parties executed Non-Disclosure Agreements (NDAs) and Quest received numerous Letters of Intent (LOIs) and other proposals.

[17] On May 28, 2020, this Court granted an extension of the stay of proceedings. At that time, Quest stated that there was a realistic potential of a transaction with the

party identified as the “Academic Partner”. Unfortunately, that transaction did not proceed.

[18] On August 7, 2020, this Court granted a further extension of the stay of proceedings to December 24, 2020 to allow Quest to continue seeking proposals towards a transaction by that deadline and to allow Quest to offer the fall term to its students. Quest was still in discussions with various interested parties at that time. By then, Quest had received LOIs, including one from Primacorp (identified as “Academic Partner #2) as of July 29, 2020.

[19] Since August 7, 2020, Quest and Primacorp have worked extensively to negotiate the definitive documents toward completing a transaction. On September 16, 2020, Quest and Primacorp executed a Purchase and Sale Agreement (the “Primacorp PSA”).

[20] The Primacorp transaction, as originally presented, provided for:

a) Sufficient funds to pay Quest’s secured creditors’ claims, including claims secured by the *CCAA* charges;

b) Funding for a plan of arrangement to be voted on by Quest’s unsecured creditors;

c) Funds for these insolvency proceedings; and

d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

[21] The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They were complete by October 28, 2020 and included, as defined in the Monitor’s Fourth Report, the Primacorp PSA, the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms included:

a) Primacorp will purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the residence Lands (Lots A-E; four of which involve Southern Star's subleases), chattels and vehicles;

b) Primacorp will lease specific Campus Lands back to Quest under a long-term lease arrangement;

c) Primacorp will provide marketing and recruiting expertise to support Quest as a university;

d) The Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales;

e) Primacorp will fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and $1.35 million under Quest's Plan; and

f) Primacorp will provide Quest with a $20 million secured working capital facility to support its operations.

[22] The Primacorp transaction was subject to a number of significant conditions:

a) Quest's disclaimer of the four Southern Star subleases of the Residences or an agreement with Southern Star. On October 23, 2020, Quest disclaimed those subleases;

b) Court approval of the Primacorp transaction including approval of a Break Up Fee and Break Up Fee Charge to secure Primacorp's costs. On November 3, 2020, I approved the Break Up Fee and granted a charge to secure this amount;

c) Creditor approval of Quest's Plan under the *CCAA*. On November 3, 2020, I granted the Meeting Order to allow Quest to present the Plan, after having completed a claims process under the Claims Process Order, also granted on that date; and

d) Court approval of the Plan under the *CCAA*.

[23] On November 3, 2020, when Quest sought the TAVO (which was adjourned), Quest asserted that the Primacorp transaction was beneficial in many respects. Quest argued that it maximized the value of Quest's assets, offered the greatest benefit to stakeholders, had a high likelihood of completing, provided a recovery for secured and unsecured creditors, and had the highest likelihood that Quest will continue to operate within its current academic model.

[24] The Monitor concurred. In its Fourth Report dated November 2, 2020, the Monitor referred to the fact that there were only two viable proposals, with Primacorp's offer being the superior one. The Monitor's Supplemental and Confidential Report dated November 2, 2020 (the "Confidential Report") is also before the Court, although filed under seal. That Confidential Report referred to four other proposals received by Quest that were "not currently at a stage such that they are capable of being accepted by Quest".

[25] Quest and Primacorp both see the closing of the Primacorp transaction as very time sensitive. Pursuant to agreements with the Interim Lender, Quest was required to enter into a transaction by October 30, 2020 with an anticipated closing of November 30, 2020. The Interim Lender has since agreed to amend that requirement to extend the necessary closing date to December 24, 2020 in accordance with the Primacorp transaction.

[26] In addition to satisfying increasing pressure to repay its secured creditors, Quest seeks to exit these *CCAA* proceedings as soon as possible to allow it to recruit and plan for the upcoming 2021/22 academic year. Finally, there are other more financially driven and critical concerns. The Interim Lender has indicated that it will not fund its loan past December 2020. Without funding of some sort, Quest has no liquidity or financial ability after that time to continue operations.

**ISSUES**

[27] The paramount issue for consideration is, of course, whether the Court should approve the Primacorp transaction under s. 36 of the *CCAA*. A number of subsidiary issues also emerged at this hearing, as a result of submissions from various stakeholders:

a) Lot E: Southern Star objects to the TAVO (now RVO), as vesting off any interest it may have under an unregistered lease of Lot E;

b) ROFR: CapU objects to the sale to Primacorp, asserting that Quest is ignoring its rights under the ROFR that allows CapU to purchase/lease Quest's lands;

c) Other Offer: Landrex Ventures Inc. ("Landrex"), together with CapU, assert that they should be given further time to finalize their offer for Quest's assets;

d) Disclaimers: Southern Star, supported by its secured creditor, Bank of Montreal (BMO), applies for an order that the subleases of the Residences not be disclaimed by Quest; and

e) RVO: Southern Star and another unsecured creditor, Dana Hospitality LP ("Dana"), object to the TAVO (now RVO), as being inappropriate and unfair in the circumstances and contrary to the spirit of the *CCAA*.

[28] I will address the subsidiary issues in the first instance, before turning to an overall assessment of the Primacorp transaction and whether the Court should approve that transaction.

**Lot E**

[29] As I described in the Rent Deferral Reasons (at para. 62), Quest, Southern Star and other parties are involved in a complex suite of agreements concerning the Residences that were built some time ago.

[30] Quest is the limited partner in a limited partnership agreement with Southern Star, who is the General Partner (GP). They formed the Southern Star Developments Limited Partnership (the “LP”) to build the Residences. Quest, as the owner of Lots A-D, leases those lands under Ground Leases to Southern Star (as the GP of the LP). The ground leases are at a nominal rate. In turn, Southern Star (the GP), as landlord, and Quest, as tenant, entered into Subleases for the Residences, once they were built.

[31] The initial arrangements between Quest and Southern Star anticipated that a fifth student residence would be built on Lot E, the lot adjacent to Lot D.

[32] In September 2017, as part of those arrangements, Quest and Southern Star executed certain Land Title documents (Form C Charges) attaching a Ground Lease and a Sublease with respect to Lot E. When the parties executed the Form C Charges, the Ground Lease was incomplete in many respects; it did not include any legal description because Lot E was created after the execution of the Form C Charges; and, it did not specify the applicable dates of the 99-year term. Finally, the Schedules to the Ground Lease included various documents between Quest, Southern Star and Southern Star’s lender intended to be later executed once the Ground Lease, the Sublease and the mortgage were finalized and registered at the Land Title Office.

[33] The parties delivered to Form C Charges to a law firm to be held in escrow pending the commencement of construction of the Lot E residence. Only recently, in response to this application, did a lawyer of the law firm complete the legal description for Lot E. Quest authorized this addition some time ago and I do not consider that matter as determinative of Southern Star’s rights, if any, under the Lot E Ground Lease.

[34] At present, Quest’s title to Lot E remains clear of any registration relating to Southern Star’s Ground Lease so there is no need for Quest to obtain a vesting order to remove it from the title. However, Quest and Primacorp seek an order that any claims that arise from the yet incomplete and unregistered Ground Lease on

Lot E shall not attach to Quest's assets that are to be vested in Primacorp. They also seek an order permanently enjoining Southern Star from registering the Lot E Ground Lease against title to Lot E.

[35] Southern Star objects to the RVO as vesting off any interest it may have in the unregistered Lot E Ground Lease, arguing:

a) This Court has no jurisdiction to do so under the *CCAA*. Southern Star argues that this is simply a disguised disclaimer of the Ground Lease that the *CCAA* expressly prohibits. Disclaimers are allowed pursuant to s. 32 of the *CCAA*, however, limits are imposed by s. 32(9)(d) which provides that disclaimers can not be made:

> . . . in respect of real property or of an immovable if the company is the lessor.

b) If such jurisdiction exists under the *CCAA*, the relief sought is not fair and equitable in the circumstances.

[36] I will begin by discussing the nature of any interest held by Southern Star in relation to the Lot E Ground Lease.

[37] In my view, no "lease" *per se* is yet in existence and valid and enforceable between Quest and Southern Star. Although the parties executed the Form C Charges relating to the Lot E Ground Lease, Southern Star's principal, Michael Hutchison, acknowledges that they were not to be registered until construction had commenced. I conclude that the parties did not intend that the Ground Lease would be valid and effective between them until that time, in conjunction with the registration of the Sublease and the execution and registration of Southern Star's mortgage that would allow construction to begin.

[38] Southern Star does not argue that it has acquired any legal or beneficial interest in Lot E. At its highest, I conclude that Southern Star's rights to Lot E are purely contractual; Quest agreed that it would grant the Lot E Ground Lease in the future and it would become effective upon certain conditions being satisfied – in

essence, an agreement to agree. Those conditions included that Quest would decide to build a residence building on Lot E and that Southern Star would arrange financing to construct the building. In these circumstances, I readily conclude that this condition has not been satisfied and will never be satisfied by Quest given Quest's insolvency.

[39] Further, even assuming that this is a "disguised" disclaimer, I conclude that Quest is not a "lessor" as that term is used in s. 32(9)(d) of the *CCAA*. Quest agreed that, if certain conditions were satisfied, it would become a "lessor" under the Ground Lease; however, that has not come to pass.

[40] I conclude that I have the jurisdiction under s. 11 of the *CCAA* to grant the order sought by Quest to ensure that Southern Star does not assert any rights under the Lot E Ground Lease at a future date. In addition, I rely on s. 36(6) of the *CCAA* that allows the Court to exercise its jurisdiction to vest off "other restrictions".

[41] The exercise of the Court's jurisdiction under s. 11 and 36 of the *CCAA* requires that the relief sought be "appropriate". This is in the sense that it accords with the statutory objectives of the *CCAA*, not only in terms of what the order will achieve, but the means by which it employs to that end: *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.

[42] In this respect, the parties have advanced arguments as to equitable considerations in terms of whether such relief is appropriate in the circumstances, while taking into account the respective positions of the parties. While in the receivership context, Quest has referred to various authorities that discuss the balancing of interests in similar situations where leases (in these cases effective and enforceable) were vested off title: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.) at paras. 19-23, citing *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154; *Romspen Investments Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648 at para. 66; rev'd other grounds *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817 at para. 25.

[43] Southern Star argues that the equities favour it, not Quest, in these circumstances.

[44] Southern Star contends that neither Quest nor Primacorp have made any attempt to negotiate with it concerning its interest in Lot E. I would not accede to this argument. While the negotiations between Quest, Primacorp and Southern Star were not fruitful, it remains the case that Quest has made good faith efforts to address Southern Star's interests, although its ability in that respect were hampered by Primacorp's willingness to accommodate those interests.

[45] Southern Star also argues that it will be prejudiced if its contractual right is vested off in that Quest and Primacorp are not offering compensation for the loss of that interest. Southern Star focusses on what it says is the "status *quo*", arguing that it has the "right" to build a residence on Lot E. However, any such "right" is illusory at best, since Quest has no present ability to occupy the Residences, let alone the financial capability to participate in the construction of a fifth one on Lot E. Nor is there any realistic prospect that Quest will be in a position to do so in the future.

[46] Southern Star's argument in relation to Lot E is an attempt to gain leverage more than anything else. If Southern Star's argument succeeds and the relief sought is refused, Southern Star would be in the same position—facing a sale of Lot E and a likely order vesting off any rights or interests it may have. It is a condition of the Primacorp transaction that Lot E be transferred to it without any further involvement with Southern Star. Without an order rejecting Southern Star's claim in respect of the escrowed Ground Lease on Lot E, the likely result would be the end of these proceedings and the commencement of realization proceedings by the Interim Lender and other secured creditors.

[47] The Ground Lease is not effective and enforceable; the Ground Lease is not registered on title to Lot E. Given the circumstances, Quest has no ability to build a residence on Lot E and there is no reasonable prospect of that happening, given its insolvency and the need to dispose of its assets, including Lot E.

[48] While I acknowledge the negative impact on Southern Star arising from this relief, that impact must be balanced in the context of Quest's restructuring efforts in this proceeding. Those efforts are intended to address not only Southern Star's interests, but also the myriad interests held by other stakeholders. The sale of Lot E to Primacorp will allow Quest to realize on its interest in Lot E to the benefit of the stakeholders as a whole.

[49] I conclude that the relief sought by Quest in the RVO in relation to Lot E is appropriate and it is granted.

**CapU ROFR**

[50] Lot 1 and Lots A-E are subject to various charges in favour of CapU.

[51] In March 2019, Quest granted mortgage security in favour of CapU in connection with a loan made to Quest. As part of these agreements, in April 2019, Quest also granted the ROFR in favour of CapU. CapU registered the ROFR against these lands. Under the Primacorp transaction, Quest is required to obtain title to Lot 1 and Lots A-E without reference to the ROFR.

[52] Pursuant to s. 9 of the *Property Law Act*, R.S.B.C. 1996, c. 377, a right of first refusal to land is an equitable interest in land.

[53] CapU has referred to two non-*CCAA* cases that discuss ROFRs generally.

[54] In *Adesa Auctions of Canada Corp. v. Southern Railway of B.C.*, 2001 BCSC 1421 at paras. 26-30, the Court found that the contractual terms were to be strictly enforced and that the rights under the ROFR could not be defeated or circumvented by an offer that included other lands not covered by the ROFR. To similar effect, *Alim Holdings Ltd. v. Tom Howe Holdings Ltd.*, 2016 BCCA 84 at para. 41 states, following *Adesa*, that a ROFR will be triggered by a package sale that includes the subject property, subject to contrary language in the ROFR.

[55] It is common ground, however, that different considerations may also apply in the *CCAA* context. Having said that, there is little case authority on the ability of a court in *CCAA* proceedings to vest off a ROFR, whether triggered or not.

[56] In “Rights of First Refusal and Options to Purchase in Insolvency Proceedings” (2019) 8 J.I.I.C. 103 (the “ROFR Article”), the authors Virginie Gauthier, David Sieradzki and Hugo Margoc extensively review the issue, including in relation to Options to Purchase (OTPs). At 106, the authors state:

> . . . Section 11 of the *CCAA* grants courts the right to "make any order that it considers appropriate in the circumstances" except as limited by the CCAA. As such, the *CCAA* court is well equipped to approve the sale of an OTP- or ROFR-encumbered asset to a party other than the rights-holder and without having first complied with the restrictive covenants if the transaction is in the best interests of the creditors at large, provided that the interest of the OTP or ROFR-holders is taken into account. The court will consider, *inter alia,* the monitor's views on these issues before making any such approvals.

[57] At 118-119, the authors conclude that:

> While jurisprudence on this matter is not conclusive, it appears that a *CCAA* court would likely only vest out a valid and unexpired OTP that runs with the land in exceptional circumstances such as in the context of a going-concern restructuring where obtaining the highest possible price for the encumbered asset is paramount to support the restructuring efforts of the debtor company, and where the OTP rights-holders are also creditors in the proceeding and could seek compensation for any loss incurred due to the removal of the OTP right.
>
> . . .
>
> In summary, common law *CCAA* courts may vest out valid or unexpired ROFRs and OPTs in a case where the equities favour such an order or on consent.

[58] Quest has referred to *Bear Hills Pork Producers Ltd. (Re),* 2004 SKQB 213*,* additional reasons 2004 SKQB 216. In that *CCAA* proceeding, the debtors sought approval of a sale of bundled assets relating to a hog farm, in the face of a ROFR that applied to the land only. Justice Kyle referred to the overall security affecting the assets; the court also commented that a withdrawal of the lands from the sale would not allow the proposed sale to complete, leading possibly to a liquidation (at paras. 4-5).

[59] However, in *Bear Hills*, Kyle J. relied on authorities that have since been questioned in *Alim Holdings* (see paras. 38-41). Justice Kyle's conclusion at para. 10 that the ROFR was not triggered runs contrary to the court's conclusion in *Alim Holdings* at para. 41.

[60] I have no doubt that courts across Canada have vested off ROFRs in the context of assets sales approved in *CCAA* proceedings. For example, Quest refers to *Artic Glacier Income Fund (Re)*, [2012] M.J. No. 451 (Q.B.) where a ROFR was vested off title, although the circumstances under which that *CCAA* relief was granted is not clear.

[61] Similarly, in *Great Slave Helicopters Ltd. v. Gwichin Development Corp*. (November 23, 2018), CV-18-604434-00CL (Ont. S.C.J.), Justice Hainey's endorsement directed that a purchaser of aggregated assets in a *CCAA* proceeding provide certain information to the holder of the ROFR with respect to the purchase price allocation. The ROFR Article, which discusses the circumstances before the court in *Great Slave Helicopters* at 108-109, indicates that the issue of the exercise of the ROFR was ultimately resolved consensually.

[62] Fortunately, in this case, there is no dispute concerning the Court's jurisdiction to address CapU's rights arising under the ROFR. Both Quest and CapU agree that the Court has jurisdiction under the *CCAA* to vest off the ROFR, subject to a consideration of the equities as between the parties.

[63] For the following reasons, I conclude that a balancing of the equities favours vesting off CapU's ROFR to allow the Primacorp transaction to proceed:

a) Since January 2020, Quest has been pursuing a going concern restructuring that will permit it to remain as a university and employer in the Squamish area. CapU has been involved in this proceeding from the outset and was well aware of the opportunity to participate in that pursuit;

b) There is a significant issue as to whether the ROFR has even been triggered by delivery of the Primacorp PSA. The definition provided in the ROFR of "Bona Fide Offer to Purchase" means, in part, an offer that is:

> (iii) only for the entirety of the Property [the lands] and all chattels thereto and <u>no other property, rights or assets</u>
>
> [Emphasis added.]

The definition of "Purchased Assets" in the Primacorp PSA is broad and refers not only to lands and chattels, but a variety of other assets (for example, contracts, plans, permits, vehicles and intellectual property). This express language is what the court in *Alim Holdings*, at para. 41, described could indicate an intention that any such aggregated offer would *not* trigger the ROFR;

c) The term of the ROFR expires in March 2024. The ROFR appears to contemplate that, even if CapU does not exercise the ROFR, the purchaser of the lands must still agree to grant CapU a ROFR on the same terms. Similarly, "change of control" provisions are potentially effective that would allow CapU to later acquire control of Quest in place of anyone else. This would frustrate Primacorp's expectation under the Primacorp PSA that it would have the right to nominate the board of governors for Quest after closing;

Primacorp does not agree to assume these restrictions. In addition, every other offer for Quest's assets required that the ROFR be vested off title to the lands. It is difficult to see that any purchaser would agree to take title to purchased assets with such significant restrictions. If the ROFR is effective, this would give rise to a severe "chilling effect" on the market, with potentially disastrous results for Quest's restructuring efforts;

d) The 60-day period within which CapU is entitled to consider any "Bona Fide Offer to Purchase" is simply unworkable in these circumstances. This is not a matter of expediency, without regard to any rights held by CapU. Quest will have no funds to continue its operations past December 2020 and, if realizations by the secured creditors ensue, CapU's ROFR rights will be illusory at best;

e) CapU complains that it received the redacted Primacorp PSA only recently, on October 29, 2020. CapU then requested an unredacted copy, which Quest agreed to do upon CapU executing an NDA. CapU refused to sign the NDA, stating that it would hamper its ability to participate in its own offer. Again, CapU has had months to formulate its own offer;

f) Quest asserts that CapU has no intention to or ability to make its own offer for all of Quest's assets in competition to the Primacorp transaction. CapU has not put forward any evidence at this hearing to confirm such intention or ability. Similarly, there is no evidence that CapU truly wishes to or is able to exercise any rights under the ROFR to purchase Quest's lands and chattels;

g) I consider that the evidence conclusively supports that CapU advances its arguments under the ROFR simply as a tactic to oppose the Primacorp transaction and delay the matter so that it and Landrex can seek to advance their own joint competing offer;

h) As I will discuss below, the terms of the joint Landrex/CapU proposal is only semi-formed at this point and Quest has indicated that some major terms are not acceptable. As such, it is highly questionable that this joint offer is, as CapU asserts, a "better, higher offer";

i) I conclude that Quest has given proper regard to and has not ignored CapU's rights under the ROFR in the context of these proceedings.

CapU has had sufficient information even from the redacted Primacorp PSA to discern the substance of the Primacorp transaction in terms of advancing any competing offer or exercising the ROFR;

j) Given the above circumstances, including CapU's involvement in Quest's lengthy efforts to restructure, I cannot conclude that CapU will suffer significant prejudice if the ROFR is vested off. Quest has indicated that CapU will have the opportunity to file a proof of claim in respect of any loss alleged to arise because of the vesting off of the ROFR. Of course, the value of any such claim would be questionable unless CapU can establish that its rights were triggered by the Primacorp transaction and that it had the ability to complete under the ROFR; and

k) The Monitor supports the Primacorp sale, as maximizing the value of Quest's assets for the stakeholders and allowing a successful restructuring of Quest's business.

[64] If CapU has rights under the ROFR, allowing CapU to assert those rights would delay the Primacorp sale and potentially negate it, all with potentially devastating effect on the broader stakeholder group. The Primacorp sale is the only sale that is before the Court that would result in a restructuring of Quest for the benefit of the stakeholders. Clearly, within that context, the rights of all affected stakeholders must be balanced in respect of any rights held by CapU.

[65] In *Bear Hills,* similar considerations were before the court. The Saskatchewan Court of Queen's Bench approved a bundled sale of assets, without first requiring compliance with a ROFR. In part, the prospective purchaser would only consider purchasing the complete bundle of properties for an aggregate purchase price and did not allocate value on a property-by-property basis.

[66] As I have sought to do here, the court in *Bear Hills* (at para. 9) was attuned to the overarching and remedial statutory purpose and objective of the *CCAA* to avoid

the "social and economic losses resulting from liquidation of an insolvent company": *Century Services* at para. 70 and *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 40-41. This objective is not to be achieved simply in the most expedient manner and without due regard to interests of stakeholders that are affected in that process. As the Court further stated in *Century Services* at para. 70, any restructuring is best achieved when "all stakeholders are treated as advantageously and fairly as the circumstances permit".

[67] I am satisfied that it is appropriate, in the context of the Primacorp transaction, to vest off the ROFR held by CapU. In that regard, I have also considered the factors set out in s. 36(3) of the *CCAA* in terms of assessing any rights of CapU under the ROFR in that context.

**Landrex / CapU Offer**

[68] Landrex, supported by CapU, opposes approval of the Primacorp transaction. Landrex argues that they should be given further time to present an offer for Quest's assets in competition with the Primacorp transaction.

[69] As with CapU, Landrex has been fully engaged in discussions with Quest for some time now, having been alerted to the possibility of a transaction as long ago as fall 2019. Landrex's interest in Quest has always been in conjunction with securing an academic partner, namely, CapU.

[70] In June 2020, Landrex and Quest entered into an agreement for a sale; however, the conditions lapsed.

[71] On October 8, 2020, Landrex and Quest executed a further purchase and sale agreement (the "Landrex PSA") providing for a purchase price of $51 million for most of Quest's assets (Lot 1 only and excluding Lots A-E: obviating any need for disclaimers of the Southern Star Subleases or vesting off any of Southern Star's rights under the Lot E Ground Lease). The closing date under the Landrex PSA is December 23, 2020.

[72] By the start of this hearing, significant conditions precedent in respect of the Landrex PSA were still outstanding. Those included the financing condition in favour of Landrex and the mutual condition by which “another party” (CapU) was to have secured a sublease with Quest after Landrex had granted CapU a lease in the first instance.

[73] Landrex suggests that Quest is contractually bound to honour the Landrex PSA by allowing it further time to remove the conditions precedent, citing the good faith organizing principle discussed in *Bhasin v. Hrynew*, 2014 SCC 71. Further, Landrex argues that Quest has a duty to take all reasonable steps to satisfy the conditions precedent: *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072.

[74] Further discussions and negotiations continued between Landrex and Quest beyond October 8, 2020; however, matters under the Landrex PSA were not advanced.

[75] By late October 2020, Quest was under significant pressure, if not a legal requirement from the Interim Lender, to conclude a transaction. At that time, only two potentially viable proposals were on the table, one being from Primacorp. As above, where the Monitor noted in its Confidential Report that other proposals were “not currently at a stage such that they are capable of being accepted by Quest”, those “other proposals” included the Landrex PSA.

[76] By the time the Landrex PSA was executed on October 8, 2020, Landrex was not aware that Quest had already signed the Primacorp PSA. However, I agree with Quest’s counsel that Landrex had not secured any rights of exclusivity in terms of advancing its offer. The Landrex PSA provided:

> 20.2 Notwithstanding anything else contained herein, Landrex acknowledges and agrees that, following from date of the acceptance of this Offer by the Vendor until the date that the Vendor waives or declares satisfied the Vendor’s Condition, the Vendor will be authorized to negotiate with or offer the Property for sale to any third party (including the entering into of any agreement by the Vendor with any third party). . . .

[77] Under the Landrex PSA, Quest's Vendor's Condition was approval from its Board of Governors. Quest never obtained that approval because Quest's Board of Governors did not agree to certain deal terms under the Landrex PSA.

[78] By October 29, 2020, Landrex would have been fully aware that its offer was not going to be advanced by Quest any further since, by then, Quest had chosen Primacorp.

[79] On November 2, 2020, Landrex made a further offer for $53.5 million. The only other significant change to their offer was to describe the requirement for a lease/sublease arrangement between Landrex, "another party" (intended to be CapU) and Quest as Landrex's condition precedent, not a mutual condition precedent. Quest did not accept this offer.

[80] In any event, by that time, Landrex's financing condition was far from being satisfied. On November 9, 2020, TD Asset Management ("TD"), Landrex's lender, provided a letter simply stating that it was continuing to work with Landrex and CapU to provide that financing.

[81] I acknowledge that, since the initial hearing date of November 3, 2020, Landrex has moved to finalize its offer but it has only done so to some extent.

[82] On November 13, 2020, Landrex secured a letter from TD that referred to a term sheet being in place after a final financing structure was negotiated (no documents were disclosed). However, TD's commitment is clearly conditional upon CapU's board approving the lease between Landrex and CapU at a meeting that is not scheduled to take place until November 24, 2020. There is no evidence as to what those lease terms are and whether there is a reasonable likelihood that CapU's board will approve it. Further, this whole arrangement continues to hinge on a negotiated sublease between CapU and Quest, which is not in place.

[83] On November 16, 2020, Landrex's counsel advised of yet further developments: (i) removal of its financing condition; (ii) an LOI with Southern Star by

which it would take over the Residences but not require disclaimer of the Subleases; and, (iii) agreement with CapU to remove the ROFR.

[84] Despite these developments, Quest advised that it was still not agreeable to the terms of the Landrex transaction. In addition, the Monitor continues to support approval of the Primacorp transaction, noting the uncertainty and potential delay of CapU obtaining ministerial approval to allow its participation in the Landrex transaction.

[85] The s. 36(3) factors continue to provide a useful structure for consideration of the Landrex transaction, and these late breaking developments.

[86] I am satisfied that Landrex was given a reasonable opportunity to participate in the SISP and that it has been aware of this opportunity for many months, even before it officially began. The fact that the cash consideration under the Landrex transaction exceeds that of Primacorp is deserving of consideration. However, other considerations arise, including that the Primacorp transaction involves significant other benefits to Quest in terms of its future operations, including the working capital facility of $20 million.

[87] Both Quest and the Monitor continue to be of the view that the Primacorp transaction is more beneficial to the creditors. I agree with this, particularly considering the continuing uncertainty and risk associated with the Landrex/CapU transaction that is yet to be resolved, leaving aside that Quest has unequivocally stated that it has no intention to pursue it. Even if the further negotiations required under the Landrex sale were advanced in an expeditious manner, it seems unlikely to be finalized by the end of the year. To the contrary, the Primacorp transaction has been finalized after weeks of complex negotiations and Quest and Primacorp are ready to close without further delay. I agree that time is of the essence at this stage of the proceedings, for the reasons already noted above.

[88] In the overall circumstances here, I see no reason to delay, if not risk, the "bird in hand" transaction that arose through a reasonable sales process, in the hope that a more uncertain transaction may be finalized, such as with Landrex.

**Southern Star Disclaimers**

[89] On October 23, 2020, and with the approval of the Monitor, Quest issued notices of disclaimer (the "Disclaimers") to Southern Star relating to the Subleases on Lots A-D by which Southern Star leases those lands and the Residences to Quest.

[90] A condition precedent of the Primacorp transaction is that either Quest will disclaim the Subleases or Primacorp will have entered into an agreement with Southern Star to its satisfaction. The evidence discloses that negotiations did take place between the parties but they did not reach a mutually acceptable agreement.

[91] Quest's rent payments to Southern Star under the Subleases for the Residences on Lots A-D total approximately $236,218 per month.

[92] Very recently, on November 15, 2020, before the conclusion of this hearing, Quest voluntarily withdrew the Disclaimers with respect to Lots A-B. Accordingly, failing an agreement between Primacorp and Southern Star, it remains a condition of the Primacorp transaction that Quest's Disclaimers of the Subleases in relation to Lots C-D be upheld.

[93] The Ground Leases are registered against Lots A-D. BMO's security is registered against Southern Star's interest under the Ground Leases; in addition, Fivestone Capital Corp. ("Fivestone"), a company controlled by Mr. Hutchison, has registered security against the Grounds Leases. Quest does not seek any relief in respect of the Ground Leases; unlike Lot E, those documents are fully effective and enforceable and have been the basis upon which the parties have developed those properties.

[94] What remains to be addressed is Southern Star's application pursuant to s. 32(2) of the *CCAA*, supported by BMO, for an order disallowing any disclaimer by Quest of the Subleases of the Residences on Lots C-D. Section 32(4) of the *CCAA* lists various non-exhaustive factors that the court is to consider in relation to disputes over disclaimers:

> In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[95] In *League Assets Corp. (Re)*, 2016 BCSC 2262, I discussed the significance of disclaimers in *CCAA* proceedings, both from the point of view of the counterparty and that of the entire stakeholder group:

> [49] These *CCAA* provisions are not inconsequential in the face of this type of proceedings. At this point, the matter is no longer between the debtor company and a counterparty. There are other stakeholders involved and the statutory provisions, and the provisions of court orders such as the Initial Order, are meant to protect the stakeholder group as a whole, while also allowing a certain amount of flexibility for the debtor company. A disclaimer of a contract has consequences not only to the debtor company, but the estate generally. Such an action can substantially increase the debt being faced by the estate or divest the debtor of a substantial benefit that might be realized for the benefit of the creditors. It is in that context that the *CCAA* requires that certain procedures be followed by the debtor company, with the necessary oversight by the Court's officer, the Monitor, as to whether any disclaimer will be approved or not.

[96] The factor under s. 32(4)(b) of the *CCAA* as to enhancing the prospects of a viable restructuring applies equally in respect of disclaimers in the context of a sales process by which the business is to continue as a going concern: *Timminco Ltd. (Re)*, 2012 ONSC 4471 at paras. 51-52 and *Aveos Fleet Performance Inc. (Re)*, 2012 QCCS 6796 at paras. 48-50. In addition, the disclaimer need not be proven as "essential", only "advantageous and beneficial": *Timminco* at para. 54.

[97] Quest asserts that the Disclaimers are necessary to pursue and complete the Primacorp transaction, which it considers the best possible outcome for Quest and its stakeholders, including students, faculty, staff, secured and unsecured creditors, suppliers and vendors. In its letter dated October 28, 2020 to Southern Star, Quest also refers to its liquidity crisis and that amounts owing to its secured creditors became due some time ago.

[98] In its Fourth Report dated November 2, 2020, the Monitor confirmed its approval of the Disclaimers, based on:

> 2.8.1 The residences are not currently being used by Quest (other than two units being used by staff members and some limited use by a film crew recently) given on-line learning format being employed as a result of COVID 19;
>
> 2.8.2 It is a term of the Primacorp Agreement that the subleases be disclaimed; and,
>
> 2.8.3 The Monitor noted that the two most promising alternative parties in discussions with Quest also required the Southern Star subleases to be disclaimed.

[99] Southern Star advances a number of arguments in relation to the Disclaimers.

[100] Firstly, it argues that the Disclaimers will not result in a viable compromise or arrangement. Southern Star argues that there is no indication that Quest and Primacorp do not wish to continue to have the Residences as part of the student experience for those attending Quest.

[101] I agree that, in the Rent Deferral Reasons, many of my comments (at paras. 23-26, 90) were confirmatory of the importance of the Residences to Quest in respect of its future operations. However, that was then and this is now. The pandemic continues in full force and Quest is necessarily required to make decisions in the face of current circumstances. I agree that it is likely that Quest will seek to continue the student residence experience once the pandemic has receded, however, when that might happen is anyone’s guess.

[102] In the meantime, Quest, under the Primacorp transaction, must make decisions as to its financial capabilities going forward. Maintaining two empty

Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances. It was Primacorp, an arms length purchaser, who has imposed this condition.



[103] Further, the Monitor agrees with Quest that the Disclaimers are necessary to enhance the prospects of Quest making a viable compromise or arrangement in these proceedings. There is no reason to question the Monitor's view as it is apparent that the Monitor has considered all relevant matters.

[104] I agree that the Disclaimers will enhance the prospects of Quest making a viable compromise or arrangement. The Monitor overwhelmingly agrees after a consideration of all the circumstances including those particularly faced by Southern Star as a result.

[105] Secondly, Southern Star argues that Quest delivered the Disclaimers simply to secure a bargaining advantage for Quest and Primacorp toward a re-visitation of the rent deferral issue or to attempt to reduce the rent. I agree that there is some indication that Quest and Primacorp had that in mind; however, that is often the reality that arises after a debtor concludes that it is no longer viable to abide by those contractual commitments and that a disclaimer is appropriate. If it were possible to come to an amicable resolution with Southern Star in the context of the Primacorp transaction, I expect Quest would have done so.

[106] Southern Star refers to the statements in *Allarco Entertainment Inc. (Re)*, 2009 ABQB 503 at para. 59, where Justice Veit considered whether certain contracts should be terminated. She was attuned to whether the termination was fair, appropriate and reasonable and whether it arose after good faith negotiations. In this case, there is no evidence to suggest that the parties did not approach the negotiations in good faith. Clearly, it is not my role on this application to assess the reasonableness of the respective positions of Quest, Primacorp and Southern Star in those negotiations. It does appear, however, that Quest and Primacorp have moved toward a middle ground by the withdrawal of the Disclaimers in relation to Lots A-B.

[107] Thirdly, Southern Star places great emphasis on what it says will be the significant hardship it will suffer if the Disclaimers are upheld. Southern Star says that it has spent approximately $41.7 million to construct the Residences.

[108] The monthly mortgage payments to BMO and Fivestone are approximately $220,000. The outstanding balance of the BMO loan facility is $34.4 million. Mr. Hutchison indicates that, without payment of rent by Quest, Southern Star will not be able to make its mortgage payments to BMO. In that event, BMO will be in a position to foreclose on the Ground Leases. Mr. Hutchison has guaranteed the BMO debt, as has another of Mr. Hutchison’s companies.

[109] As noted by Quest, any financial consequences to Southern Star will largely depend on what mitigating measures are undertaken. Those could include a re-letting of the Residences or a sale of its interests under the Ground Leases. At present, with no clear indication as to how those matters might evolve, I am unable to conclude with certainty that any hardship suffered by Southern Star would be “significant”.

[110] Regardless of any hardship faced by Southern Star, the reality is that Quest has only one viable means by which to advance the restructuring at this time – the Primacorp transaction. Within the confines of that transaction, Primacorp sees no merit in maintaining the Subleases on these two Residences. Apparently, no other interested party expressed an interest in maintaining the Subleases besides Landrex. In light of Landrex’s submissions at the conclusion of this hearing on November 16, 2020, I have considered that the Landrex/CapU transaction may have presented a more palatable resolution of the Subleases given the recent LOI between Landrex and Southern Star. However, I conclude that delaying the Primacorp sale, on the prospect that the Landrex/CapU transaction will come about, is not a viable option for the reasons discussed above.

[111] I agree that this decision will visit hardship, even arguably significant hardship, upon Southern Star. However, it is difficult to see that preventing delivery of the Disclaimers would avoid that result in any event. If the Primacorp transaction

does not proceed, there is no transaction and Quest has no financial means to continue past December 2020. The Interim Lender has indicated that it will not advance funds to Quest beyond that date, and specifically, that it has no interest in funding continued rent payments to Southern Star.

[112] In that event, Southern Star will be in the same position post December 2020, with Quest unable to pay the rent for the Residences at that time: see *Target Canada Co. (Re)*, 2015 ONSC 1028 at paras. 27-28.

[113] As the court noted in *Target Canada* at paras. 24-25, the court must give due consideration to the stakeholder group as a whole in assessing whether the Disclaimers are fair and reasonable: *Doman Industries Ltd. (Re)*, 2004 BCSC 733 at para. 33. The price of setting aside the Disclaimers is that the Primacorp transaction will not proceed and a receivership at the behest of the Interim Lender will likely follow. In my view, this is not in the best interests of that larger stakeholder group which, in my view, has primacy here even in the face of the hardship and prejudice caused to Southern Star.

[114] I dismiss Southern Star's application for order that the Subleases of the Residences on Lots C-D not be disclaimed by Quest.

**RVO**

[115] At the November 3, 2020 hearing, when Quest originally sought the TAVO, Quest was seeking to uphold the Disclaimers of the Subleases. At that time, Southern Star's evidence and submissions were to the effect that, if the Court upheld the Disclaimers, it would have a substantial unsecured claim against the estate. As indicated above, the amount of any claim that Southern Star might advance in the estate is far from clear, given possible mitigation, although there is potential for a significant claim.

[116] This position did not come as a surprise to Quest; however, it appears that Quest did not appreciate the potential magnitude of Southern Star's claim. More importantly, Quest has not fully appreciated that a very unhappy claimant – Southern

Star under the Disclaimers – was not likely to vote in favour of the Plan and that the value of its claim could swamp the class votes to prevent any approval by the creditors. Again, creditor approval of the Plan is a requirement of the Primacorp Transaction.



[117] In early November 2020, known unsecured creditor's claims were estimated at approximately $2.3 million. "Restructuring Claims" (which will include any claim of Southern Star under the Disclaimers) were yet unknown.

[118] Initially, Primacorp agreed to fund Quest's Plan in the amount of the lesser of 50% of the claims or $1.35 million. The Monitor now states that there is a "high probability" that Southern Star's claim will be large enough such that Southern Star will control the value of the votes at the creditors meeting. Other major unsecured creditor claims have also since emerged, being that of Dana (estimated $1 million) and the Association for the Advancement of Scholarship (estimated $5 million).

[119] As the Monitor notes, any of these claims could effectively veto the Plan.

[120] Quest and Primacorp were then facing a dilemma. They determined that, while they might succeed on the Disclaimer issue, they could not likely obtain approval of the Plan, a further requirement of the Primacorp PSA, if Southern Star carried through with its suggested negative vote. While Quest could raise arguments in relation to the value of any claim advanced by Southern Star, uncertain and lengthy litigation would likely result; even if Quest was successful, it would be too late to factor into this restructuring.

[121] Quest, with Primacorp's approval, solved this dilemma by revising the TAVO to an RVO. In addition, the Primacorp PSA was amended to delete the conditions precedent requiring creditor and court approval of the Plan. Accordingly, the only condition precedent that remains before closing of the Primacorp transaction is the granting of the RVO.

[122] The Monitor supports this change as necessary in the circumstances in order to allow Quest to complete the Primacorp transaction. The Monitor supports the granting of the RVO.

[123] In its Fifth Report dated November 10, 2020, the Monitor describes the characteristics of the new structure and steps under the RVO, which involves Quest's subsidiary, Guardian Properties Ltd. ("Guardian"):

> RVO Structure & Impact
>
> 2.6 The RVO provides for the following to occur in sequential order on the closing of the Primacorp Transaction:
>
> 2.6.1 A wholly owned subsidiary of Quest, Quest Guardian Properties Ltd. ("Guardian") shall be added as a Petitioner in these CCAA proceedings. Guardian was incorporated on January 25, 2018 and has never carried on any business and has never held any assets or liabilities;
>
> 2.6.2 All of Quest's right, title and interest in and to the Excluded Assets (as defined in the Primacorp PSA and the RVO) shall be transferred to and vested in Guardian;
>
> 2.6.3 All Contracts (other than Approved Contracts), Claims and Liabilities of Quest shall be transferred to Guardian and Quest shall be released from and in respect of all obligations in respect of such Contracts, Claims and Liabilities;
>
> 2.6.4 Primacorp will pay the Purchase Price to the Monitor to the extent of the Secured Charges and all the Secured Claims and the Secured Charges shall be extinguished and cancelled. The Purchase Price will stand in the place of the Purchased Assets;
>
> 2.6.5 All of Quests right, title and interest in the Purchased Assets shall vest in Primacorp free and clear of any security interests, Claims and Liabilities; and,
>
> 2.6.6 Quest will cease to be a Petitioner in these CCAA proceedings leaving Guardian as the sole Petitioner.
>
> 2.7 The RVO contains release provisions similar to those contained in the Plan. Quest, its employees, legal advisors and other representatives, Quest's Governors and Officers, and the Monitor and its legal counsel shall be released from any and all demands and claims relating to, arising out of, or in connection with these CCAA Proceedings. The releases do not apply in the case of wilful misconduct or fraud.
>
> 2.8 As a result of the amendments to the Primacorp Transaction and the RVO, if the RVO is granted:
>
> 2.8.1 There will be no uncertainty as to whether the Primacorp Transaction can close and the condition precedent for the

approval of the Plan is no longer applicable. As a result, there will be certainty for the go-forward operations of Quest, thereby creating security for the Quest students, faculty and staff leading into the critical enrolment period for the winter term;

2.8.2 Guardian will become responsible for the obligations under the Southern Star subleases should they not be disclaimed. As Guardian will not have the financial resources to meet those obligations, it is expected that Guardian would default on the Southern Star subleases in January 2021; and

2.8.3 The Plan, which will now compromise the debts of Guardian, will be funded through the Primacorp Transaction and therefore this aspect of the Primacorp Transaction and the Plan has not changed.



[124] As I will discuss below, the effect and substance of the RVO is to achieve what Quest has originally sought by way of a restructuring in these proceedings; namely, a sale of certain assets to Primacorp and, importantly, Quest continuing as a going concern as an academic institution, in partnership with Primacorp. The only aspect now missing is that, under the RVO, Quest will avoid having to obtain creditor or Court approval of the Plan.

[125] The intention is that the amounts that Primacorp was to fund under the Plan will now be transferred to Guardian to be distributed under Guardian's plan in relation to the Quest's liabilities that are to be transferred to Guardian. Effectively, Guardian will be funded just as it was originally intended that Quest's Plan was to have been funded to resolve those claims.

[126] Southern Star and Dana, as unsecured creditors of Quest, object to the granting of an RVO, contending that it effectively and unfairly negates their right to vote on Quest's Plan under s. 6 of the *CCAA*. They object to the transfer of their claims to Guardian. They say that, although they will have the ability to vote on Guardian's plan, it will effectively mean that they cannot vote to block Quest's restructuring to enable it to continue as a going concern within the context of the Primacorp transaction.

### *RVO Jurisdiction and Authorities*

[127] There is no dispute between the parties that this Court has authority to grant the RVO under its general statutory jurisdiction found in s. 11 of the *CCAA*.

[128] Quest has referred me to a number of decisions across Canada where courts have exercised that jurisdiction to grant an RVO in the context of sale approvals considered under s. 36 of the *CCAA*. I will review those decisions in some detail below to highlight the relevant circumstances.

[129] In *Re T. Eaton Co.* 2000 CarswellOnt 4502, 26 C.C.P.B. 295, the Ontario court granted such an order under its *CCAA* proceedings. There are no written reasons discussing the circumstances in that case. The only brief reference to that structure is found in Claims Officer Houlden's decision in *Eaton's* that addressed an unrelated issue. The agreed statement of facts before the Claims Officer provided:

> 5. The *CCAA* Plan contemplated that all of the assets of Eaton's which were not being retained by Eaton's under the Sears Agreement would be transferred to a new corporation, Distributionco Inc. ("Distributionco"). These assets would then be liquidated by Richter & Partners Inc. ("Richter") in its capacity as court-appointed liquidator of the estate and effects of Distributionco. Richter would then distribute the assets of Distributionco to unsecured creditors and others in accordance with priorities set out in the *CCAA* Plan.
>
> 6. Under the *CCAA* Plan, unsecured creditor claims against Eaton's are converted into a right to participate in distributions in the liquidation of Distributionco based on the amount of the creditor's claim against Eaton's. Accordingly, a critical initial step in the liquidation of Distributionco is the determination of the validity and amount of claims asserted against Eaton's. For this purpose the *CCAA* Plan establishes a Claims Procedure for the resolution of such claims, of which the parties to this matter are aware.

[130] It is unclear as to the basis upon which the court approved this structure in *Eaton's* although, as Southern Star notes, it was a transaction approved within the context of a *CCAA* Plan.

[131] More recently, this structure was approved in *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont. S.C.J. [Comm. List]). In those *CCAA* proceedings,

an agreement was approved that “effectively” transferred current tax losses and intellectual property to a purchaser. Justice Wilton-Siegel’s endorsement stated:

> The Global Settlement contemplates implementation of a corporate reorganization by which the shares of Plasco will be transferred to an acquisition corporation owned by NSPG and CWP and the remaining assets of the applicants will be held by a new corporation, referred to as “New Plasco”, which will assume all of the liabilities and obligations of Plasco. I am satisfied that the Court has authority under section 11 of the *CCAA* to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the *CCAA* insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise. For this purpose, I consider that the Global Settlement is analogous to such a plan in the context of these particular proceedings. …



[132] Justice Gouin granted an RVO in the *CCAA* proceedings of *Stornoway Diamond Corporation* (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]). There are no written reasons from the court; however, the motion materials disclose that, under the transaction, the purchasers acquired substantially all the debtor’s assets by purchasing 100% of the shares of one debtor company (SDCI, which held the acquired assets). In consideration, the purchaser released certain liabilities owed by the debtors and agreed to assume others.

[133] In *Stornoway Diamond*, to ensure the purchaser acquired the assets free and clear of all encumbrances, the debtors incorporated a new subsidiary (Newco), added Newco as an applicant in the *CCAA* proceedings, and transferred all liabilities, obligations, and unacquired assets of SDCI to Newco. The debtor’s motion referred to this transaction as the only viable alternative to preserve the going concern value of the debtor. The debtor noted that the equity and “non-operational related unsecured claims” had no value. As in the RVO sought here, the court’s order included familiar aspects found in sanction orders, including releases.

[134] An RVO was also approved in the *CCAA* proceedings of *Wayland Group Corp.* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]). Approval was sought in the context of preserving valuable cannabis licenses. Justice Hainey’s brief endorsement indicates that the relief was unopposed. The court

approved a sale of substantially all of the debtor's assets to the successful bidder under a share purchase agreement after a sales and investment solicitation process.

[135] Other information before me regarding the *Wayland Group* transaction is found in the applicant's factum. The factum refers to both *Plasco Energy* and *Stornoway Diamond*, while also referring to ss. 11 and 36(3) of the *CCAA* as the jurisdictional basis for the relief. The applicants argued that transferring certain assets and liabilities of the debtors into a "newco" would ensure that the purchaser acquired the underlying assets of the target company free and clear of all claims and encumbrances and allow the business to continue as a going-concern. They asserted that this was the "only way" to complete the sale to realize the value in the assets; it was also argued that this transaction was in the best interests of stakeholders and did not prejudice major creditors. In *Wayland Group*, the transaction value was only sufficient to repay the interim lender and perhaps some amount for the first secured creditor.

[136] The Ontario court again approved a similar RVO transaction in the *CCAA* proceedings of *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]). Justice Hainey granted the RVO while again indicating in a brief endorsement that the relief was unopposed. The share sale preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business. The purchaser was a related party who was making a credit bid for the assets.

[137] In *Comark Holdings*, the purchaser acquired all the issued and outstanding shares of the primary *CCAA* debtor and agreed to pay out all the secured debt and priority claims. The excluded assets, agreements, liabilities and encumbrances were transferred to another entity that became a debtor in the *CCAA* proceedings, with the result that the *CCAA* debtor held its assets free and clear of all claims and encumbrances and was then removed from the *CCAA* proceedings. The purchaser and the primary *CCAA* debtor then amalgamated. The new *CCAA* debtor (Newco) was authorized to make an assignment into bankruptcy. The monitor, along with the

principal secured creditors, including the interim lender, supported the transactions. As in *Plasco Energy*, *Stornoway Diamond* and *Wayland Group*, the debtors in *Comark Holdings* argued that this was the "only option" to preserve the business, that the value in that business would be lost in a liquidation and that the transaction was in the best interests of the stakeholders generally.



[138] Justice Conway granted an RVO in the *CCAA* proceedings of *Beleave Inc.* (September 18, 2020), Toronto, CV-20-00642097-00CL (Ont. S.C.J. [Comm. List]). As in *Wayland Group*, the preservation of valuable cannabis licenses were at stake. The motion was supported by the monitor and unopposed. Justice Conway stated in her brief endorsement:

> The Applicants seek approval of the transaction whereby . . . (the Purchaser) will acquire the operating business of the Applicants. The structure of the transaction is partly by share sale and partly by asset sale. The reason for the structure is to accommodate the licensing requirements of Health Canada. The order is structured as a reverse vesting order, in which excluded liabilities and assets will be transferred to "Residualco", which will then become one of the Applicants in the *CCAA* proceedings. Reverse vesting orders have been approved by the courts in other cases: see *Re Stornoway Diamond Corporation* . . . and *Re Wayland Group Corp*. . . .
>
> The transaction is the culmination of a stalking horse sales process approved by the court. The motion is unopposed. The Monitor recommends and supports the transaction in its Fourth Report. In particular, the Monitor states that the proposed transaction is economically superior to the estimated liquidation value of the Beleave Group's assets and operations, will allow the Purchaser to maintain operations and use of the Cannabis licenses and will provide for continued employment for a majority of the existing employees. In my view, the transaction satisfies s. 36(3) of the *CCAA* and the *Soundair* test and should be approved.

[139] In *Beleave*, the RVO included releases of claims similar to that granted in other RVO decisions. These provisions were also consistent generally with sanction orders and are similar to the relief sought by Quest here.

[140] Even more recently, the Alberta court approved an RVO structure in the *CCAA* proceedings of *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.Q.B.). Justice Eidsvik approved the RVO structure as part of a sale approval. No written reasons of the court are available, however, the monitor's bench brief discloses the relevant facts.

[141] As in the above cases, the transaction addressed in *JMB Crushing* arose from a sale and investment solicitation process that yielded only one offer, with the RVO described as a critical component. The underlying intention was to preserve the value of the paid up capital and regulatory permits in the *CCAA* debtor.

[142] In *JMB Crushing*, the monitor relied on the orders granted in *Plasco Energy*, *Stornoway Diamond*, *Wayland Group* and *Beleave*, arguing that the RVO structure was justified in those circumstances:

> 24. In recent *CCAA* proceedings, where it was not practical to compromise amounts owed to creditors through a traditional plan of compromise and arrangement, but it was critical to the viability of a transaction to "cleanse" the debtor company, such that a prospective purchaser may: (i) utilize non-transferrable regulatory licenses (by way of amalgamation or the purchase of the shares of the debtor company); or, (ii) make use of tax attributes of the debtor company, such as [paid up capital], Courts have recently approved and utilized reverse vesting orders to achieve such objectives.
>
> 25. The purpose of a reverse vesting order is to transfer and vest all of the assets and liabilities of a debtor company, which are not subject to a sale, to another company within the same *CCAA* proceedings. The cleansed debtor company is then able to: (i) be utilized by a purchaser as a go-forward vehicle, without any concern regarding creditors and obligations that may otherwise be "laying in the weeds"; and, (ii) allow the purchaser to make use of the debtor company's tax attributes and non-transferrable regulatory licenses. This approach is necessary in situations where the parties would otherwise be unable to preserve the value of significant assets that are subject to restraints on alienation and to provide a corresponding realizable benefit for creditors and stakeholders.

[143] In *JMB Crushing*, the monitor further justified the RVO structure in asserting that the debtor's secured creditors would suffer a shortfall even with such measures. The monitor stated that the unsecured creditors had no economic interest in the transaction and there was no reasonable prospect of any recovery to them. The debtor did not intend to undertake a claims process or present a plan to its unsecured creditors.

[144] By pure coincidence, another and perhaps more compelling authority came to the attention of the parties during this hearing.

[145] On November 11, 2020, the Québec Court of Appeal dismissed an application for leave to appeal the granting of an RVO by Gouin J. of the Québec Superior Court on October 15, 2020: *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218; leave to appeal denied *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488. The Court of Appeal's decision is in English; Gouin J.'s decision is in French and no English translation was available. As such, all references to *Nemaska Lithium* will be to the QCCA.

[146] All counsel agree that Gouin J.'s decision in *Nemaska Lithium* is the first time a Canadian court has granted an RVO in contested *CCAA* proceedings.

[147] In *Nemaska Lithium* (at para. 5), the court stated that the RVO allowed the purchaser to carry on the operations of the Nemaska Lithium entitles (mining in James Bay) by maintaining existing permits, licenses and authorizations. This goal was accomplished via a credit bid for the shares in Nemaska Lithium in return for assumption of the secured debt. At para. 22, the court refers to the intention of the "residual companies" to later present a plan of arrangement to the "remaining creditors", but the details are not disclosed.

[148] In denying leave to appeal in *Nemaska Lithium*, the court stated that an appeal would hinder the progress of the proceedings. More relevant to this application were the court's comments on the legitimacy of the position of the only objecting creditor, Cantore, and the court's rejection that it was appropriate to allow Cantore to exercise a veto in the restructuring:

> [38] As it turns out, the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at $8,160 million out of a total value of provable claims of $200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors'' claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?
>
> [39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool", while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in the first instance.

[149] Similar to Cantore's position in the *Nemaska Lithium* restructuring, Southern Star and Dana's objections to the RVO are grounded in the assertion it will negate their effective veto on the Plan (and hence the Primacorp transaction) by which they seek to leverage further concessions. For obvious reasons, those concessions can only come about at a cost to other stakeholders, whose interests remain to be addressed.

***Discussion***

[150] Quest, with the support of the Monitor, submits that the Primacorp transaction satisfies s. 36 of the *CCAA* and that the Court should grant the RVO pursuant to ss. 11 and 36 of the *CCAA*.

[151] As with the structures approved in the above *CCAA* proceedings, the RVO has certain aspects that Southern Star says are objectionable. Those include primarily: (i) the addition of Guardian as a petitioner in the *CCAA* proceeding; (ii) the vesting of the Excluded Liabilities and Excluded Contracts in Guardian; (iii) Quest's exit from this *CCAA* proceeding; and (iv) the release of Quest in respect of the Excluded Liabilities and Excluded Contracts.

[152] Essentially, unsecured claims against Quest and minor assets are transferred to Guardian and Quest continues as a going concern after having transferred the bulk of its assets to Primacorp free and clear of any encumbrances (save for certain Retained Liabilities). Quest no longer requires approval of the Plan by the creditors and the Court to complete the Primacorp transaction.

[153] At para. 19, the QCCA in *Nemaska Lithium* referred to Gouin J.'s comment that s. 36 of the *CCAA* allows the court a broad discretion to consider and, if appropriate, grant relief that represents an innovative solution to any challenges in a proceeding. Justice Gouin considered that approving an RVO structure was such an innovative solution. Indeed, this is the history of *CCAA* jurisprudence under the court's broad statutory discretion and court approval of innovative solutions continues to this time.

[154] That said, the ability of a *CCAA* court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the *CCAA*: *Century Services*.

[155] I find further support for Quest's position in the recent comments of the Court in *Callidus.* The Court was there addressing a different issue – whether a *CCAA* judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is "acting for an improper purpose" – but the Court's comments on the exercise of jurisdiction under the *CCAA* ring true in relation to the RVO structure:

> [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).
>
> [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.)
>
> . . .
>
> [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, <u>*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</u>

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

. . .

[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). . . .

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).

. . .

[70] . . . 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.

. . .

[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.*

> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))
>
> 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.
>
> [Underline emphasis added; italic emphasis in original.]



[156] Quest is not seeking to bar Southern Star or Dana from voting on the Plan. It is seeking approval of a structure that would result in Guardian submitting its own plan to the unsecured creditors, which would include Southern Star and Dana, at which time they are generally free to vote their "self-interest" subject to any relevant constraint (for example, if the court finds that they are voting for an improper purpose): *Callidus* at para. 24 and 56.

[157] There is no provision in the *CCAA* that prohibits an RVO structure. As is usually the case in *CCAA* matters, the court must ensure that any relief is "appropriate" in the circumstances and that all stakeholders are treated as fairly and reasonably "as the circumstances permit": *Century Services* at para. 70.

[158] As with the sales considered in most of the above RVO cases, including *Nemaska Lithium*, this is the *only* transaction that has emerged to resolve the financial affairs of Quest. No other options are before the stakeholders and the Court that would suggest another path forward. As was noted by Gouin J. in *Nemaska Lithium* (at para. 12), it is not up to the Court to dictate the terms and conditions that are included in an offer. Primacorp has presumably made the best offer that it is prepared to make in the circumstances – that is the offer the Court must consider.

[159] I agree with the Monitor that, without the RVO structure, the Primacorp transaction is in jeopardy. The only other likely path forward for Quest is

receivership, liquidation and bankruptcy, a future that looms in early 2021 if the transaction is not approved.

[160] Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable “assets” that could be not transferred.

[161] Akin to the tax losses, permits and licences that could not be transferred in those RVO cases, is Quest’s ability to confer degrees under its statutory authority under s. 4(2) of the *Sea to Sky Act*, S.B.C. 2002, c. 54 (the "*Sea to Sky Act*"). Quest cannot sell its ability to grant degrees under s. 4(2) of the *Sea to Sky Act*. Nor can any purchaser acquire the right to grant degrees indirectly through a purchase of the shares in Quest. Pursuant to s. 2 of the *Sea to Sky Act*, Quest is a corporation “composed of the members of the board” and no shareholders exist. Pursuant to s. 1 of the *Sea to Sky Act*, the “board” means the board of governors of the university.

[162] It is a critical requirement under the Primacorp transaction that Quest remain a viable entity to continue its operations and, in particular, continue to grant degrees. That is a significant component of the Primacorp transaction and the value that Primacorp is prepared to pay under the transaction reflects that component. In other words, the stakeholders are receiving a benefit from this transaction by which Primacorp ensures that Quest continues after exiting these *CCAA* proceedings.

[163] At para. 38, the court in *Nemaska Lithium* asked:

> . . . whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

[164] I acknowledge the negative consequences that arise particularly for Southern Star if the Primacorp transaction is approved, although there is significant uncertainty about the extent of any loss that may be suffered. Dana’s unsecured claim has little, if any value, outside of the benefits of the Primacorp transaction.

[165] In that light, I would ask Southern Star and Dana a similar question to that of the QCCA—to what end is your veto if Quest's Plan is put presented for creditor approval?

[166] Both creditors potentially hold the sword of Damocles over the head of the significant broad stakeholder group who stand to benefit from the Primacorp transaction. Recently, Southern Star has secured further benefits by the withdrawal of two of the Disclaimers. Both objecting creditors have nothing to lose at this point in this dangerous game of chicken with Primacorp, with only the oversight of this Court to oversee this strategy. By any stretch, no one is blinking at this point, while significant other interests hang in the balance.



[167] The Monitor's comments in its Fifth Report as to the jeopardy to those other interests are apt:

> 2.15 The Monitor has considered the competing interests of Southern Star and the interests of Quest's other stakeholders. In the Monitor's view, the Primacorp Transaction should not be jeopardized by the lack of agreement between Southern Star and Primacorp. Southern Star can mitigate its financial hardship by entering into an agreement with Primacorp for use of some or all of the residences. By contrast, Quest's other stakeholders have no ability to mitigate their potential losses in the event that the Primacorp Transaction does not close. They are reliant on the completion of the Primacorp Transaction or face significant losses themselves should it not complete.

[168] In my view, in the vein of the Court's discussion in *Callidus*, these are unique and exceptional circumstances where the Court may grant the relief by allowing Quest to employ the RVO structure within the context of this sale transaction.

[169] Southern Star and Dana seek to effectively block the only reasonable outcome here by insisting that they must approve of Quest's Plan in conjunction with the sale. However, creditor approval of a sale is not required under s. 36 of the *CCAA*.

[170] The granting of the RVO in these circumstances is in accordance with the remedial purposes of the *CCAA*. To use the words of Dr. Sarra, quoted above in

*Callidus*, I conclude that Southern Star and Dana are working actively against the goals of the *CCAA* by their opposition to the RVO.

[171] I do not consider that an RVO structure would be generally employed or approved in a *CCAA* restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the *CCAA*.

[172] Here, in these complex and unique circumstances, I conclude that it is appropriate to exercise my discretion to allow the RVO structure. Quest seeks this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. I have considered the balance between the competing interests at play. This transaction is unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group, a group that includes Southern Star and Dana.

[173] The structure also allows Quest to continue its operations in partnership with Primacorp, a result that will avoid the devastating social and economic consequences that will be visited upon the stakeholders if this transaction is not approved. Ironically, the continuation of Quest's operations will also benefit Southern Star in the future through the continued payment of rent for two of the Residences. Other potential benefits may also arise if Southern Star and Quest are later able to come to terms once the pandemic has receded and students return to campus.

**<u>THE PRIMACORP TRANSACTION</u>**

[174] Quest applies for the granting of the RVO in favour of Primacorp pursuant to s. 36(1) of the *CCAA*.

[175] Section 36(1) of the CCAA allows the court to authorize the sale of a debtor company's assets out of the ordinary course of business. Section 36(3) of the *CCAA* lists the relevant non-exhaustive factors to be considered:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[176] The well-known considerations identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (C.A.) are consistent with and overlap many of the s. 36(3) factors: see *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at para. 25, referring to various authorities such as *Canwest Publishing Inc. (Re)*, 2010 ONSC 2870 at para. 13. Those considerations include: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and, (iv) whether there has been any unfairness in the sales process.

[177] More generally, in analyzing whether a transaction should be approved, taking into consideration the s. 36(3) and *Soundair* factors, a court is to consider the transaction as a whole and decide whether or not the sale is appropriate, fair and reasonable: *Veris Gold* at para. 23.

[178] I conclude that the s. 36(3) and *Soundair* factors all favour approving the Primacorp transaction and granting the RVO. Specifically:

a) The process leading to the Primacorp transaction has been lengthy and exhaustive. The Monitor has overseen that entire process;

b) Quest ‘s Restructuring committee and its Board of Governors have sought and obtained professional advice throughout the *CCAA* process toward finding a suitable academic partner and/or a purchaser/developer for Quest’s lands;

c) No stakeholder objects to the proposition that the sales process was conducted in an appropriate, fair and reasonable manner;

d) The Primacorp transaction will see the repayment of Quest’s secured creditors, now totalling approximately $42.2 million in what has been an increasingly pressurized environment to do so after long standing defaults;

e) Since August 7, 2020, the Interim Lender and VF, Quest’s major secured creditors, have been kept apprised of developments. They both support the Primacorp transaction. In addition, other secured creditors have been involved throughout these proceedings and support the transaction;

f) There has been significant community and stakeholder involvement throughout the sales process;

g) The Primacorp transaction will ensure that Quest continues as a going concern, by continuing operations as a post-secondary institution in Squamish. This will result in continuing benefits to the broad stakeholder group. This includes faculty, staff, students, secured and unsecured creditors, suppliers, landlords and the community generally;

h) The broader stakeholder interests must be balanced against those who will be negatively affected by the transaction, such as Southern Star under the Disclaimers, although no viable offer has emerged that does not include the Disclaimers;

i) Quest's Board of Governors have exercised their business judgment and determined that the Primacorp transaction is the best option to fulfil the goals of Quest's restructuring;

j) The Primacorp transaction will fund a Plan for unsecured creditors;

k) The Primacorp transaction provides Quest with significant benefits in terms of its future operations. These include the $20 million working capital facility and Primacorp support for Quest's marketing, recruiting and operations to allow it to continue as a post-secondary institution into the future;

l) No other or better offer or proposal has emerged that can be considered superior to the Primacorp transaction;

m) The Monitor is satisfied that the consideration to be received from Primacorp is reasonable and fair, taking into account the market value of the assets and the other unique factors of these proceedings;

n) The Monitor is of the view that this transaction will yield a greater benefit to the stakeholders than might be achieved in a liquidation or bankruptcy;

o) Any delay of approval is likely to lead to ruinous consequences after December 2020, when Quest will be out of funds and the Interim Lender will be in a position to commence a receivership and liquidation of Quest's assets; and

p) Simply, Quest has run out of time to find a restructuring solution and the Primacorp transaction presently stands as the *only* viable option to avoid the devastating social and economic consequences to its stakeholders if a liquidation results.

## CONCLUSIONS

[179] I grant the RVO as sought by Quest, and as supported by the Monitor.

[180] The Primacorp transaction is the best option available that maximizes recovery for Quest's creditors and preserves Quest's university operations. Allowing Quest to continue as a university will benefit all stakeholders, including Quest's current and former employees, current and future students of Quest and the community generally. The RVO structure is an appropriate means to accomplish this result in these unique and exceptional circumstances.

"Fitzpatrick J."

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Rain Coast Water Corp. v. British Columbia,* 2019 BCCA 201

Date: 20190606
Docket: CA43698



Between:

**Rain Coast Water Corp.**

Respondent
(Plaintiff)

And

**Her Majesty the Queen in Right of the Province of British Columbia, Bill Vander Zalm, and Richard Roberts (a.k.a. Dick Roberts)**

Appellants
(Defendants)

Before: The Honourable Madam Justice Dickson
The Honourable Mr. Justice Fitch
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated May 12, 2016 (*Rain Coast Water Corp. v. Her Majesty The Queen in Right of the Province of British Columbia*, 2016 BCSC 845, Vancouver Docket A963919).

| | |
|---|---|
| Counsel for the Appellants: | G.J. Underwood<br>N.E. Brown, Q.C.<br>A.F. Davies |
| Counsel for the Respondent: | H.S. Fairley<br>G. Douvelos<br>D. Dolejsi<br>N.J. Kasozi |
| Place and Date of Hearing: | Vancouver, British Columbia<br>February 7–8, 2018 |
| Written Submissions received: | June 13, 20 and 22, 2018,<br>February 22, 2019,<br>March 8, 20 and 22, 2019 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>June 6, 2019 |

**Written Reasons by:**
The Honourable Madam Justice Dickson

**Concurred in by:**
The Honourable Mr. Justice Fitch
The Honourable Madam Justice Fisher

***Summary:***

*Appeal concerning the conduct of public officers in regulating the export of water for commercial purposes in British Columbia. Through its principal, the respondent, Rain Coast, sought to establish a commercial enterprise exporting and selling bulk and bottled water from British Columbia and obtained a foreshore licence of occupation over Crown land and licences to acquire provincial water. Rain Coast failed to pay, or was late in paying, the rentals due for these licences and did not make use of them. In response, the government terminated Rain Coast's licences. The judge found the appellants liable for the unlawful means tort and misfeasance in public office. Held: Appeal allowed, action dismissed. The judge made material factual errors, erred in concluding that the causes of action in relation to certain acts were not time-barred, misapplied the tests for liability for misfeasance in public office and the unlawful means tort and erred by permitting Rain Coast to re-open its case and provide further evidence on damages. As the pleadings, law and record reveal no evidence capable of supporting Rain Coast's allegations, the action must be dismissed in its entirety.*



**Reasons for Judgment of the Honourable Madam Justice Dickson:**

***<u>Overview</u>***

[1] This appeal concerns the conduct of public officers in regulating the export of water for commercial purposes in British Columbia in the 1980s and 1990s. The respondent, Rain Coast Water Corp., through its principal, Colin Beach, was deeply dissatisfied with that conduct, which he considered unfair, unreasonable and harmful to his fledgling water export enterprise. After complaining for many years without satisfaction, Rain Coast sued the appellants, Her Majesty the Queen in Right of the Province of British Columbia, Bill Vander Zalm and Richard Roberts, and others in 1996 for various causes of action. The causes of action alleged included the unlawful means tort and the tort of misfeasance in public office.

[2] The action languished for most of the two decades thereafter. However, following a 26-day trial the judge found the appellants liable for the unlawful means tort and misfeasance in public office in 2016. He also found the evidence and submissions on damages presented at trial "unhelpful" and invited the parties to present further evidence and submissions. The appellants appealed and damages have yet to be determined. The judge retired the year after the judgment was handed down.

[3] The appeal raises issues of procedural fairness, limitations and the requirements of proof of serious allegations of wrongdoing against public officers in the discharge of their duties. Primarily fact-driven, it serves to remind all concerned that claims for damages for the misuse of public power by dissatisfied citizens must be advanced, scrutinized and resolved with caution and restraint. As Justice Newbury explained in *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619, the tort of misfeasance in public office provides redress for egregious intentional misconduct, not for what may be, at worst, maladministration, official incompetence or bad judgment in the execution of public duties. For this reason, when addressing claims of misfeasance in public office, the courts strike a careful balance between curbing unlawful behaviour by governmental officials, on the one hand, and, on the other, protecting those charged with making decisions for the public good from unmeritorious claims by those adversely affected by their decisions.

[4] For these reasons and those that follow, I would allow the appeal and dismiss the action. To explain my conclusions, I will provide an overview of the statutory context and framework within which bulk water export was regulated during the relevant period and then discuss the factual and procedural background of the case, the reasons for judgment and the issues for determination on appeal.

## ***Statutory Context and Framework***

### *The 1979 Water Act and Regulations*

[5] The *Water Act*, R.S.B.C. 1979, c. 429 [*1979 Water Act*] governed rights to the use of water in British Columbia throughout the relevant period. Broadly speaking, its purpose was to control and regulate the use of all water in the province and to prevent its waste and misuse: *Steadman v. Erickson Gold Mining Corp*. (1987), 43 D.L.R. (4th) 712 at 728 (B.C.S.C.), aff’d (1989), 56 D.L.R. (4th) 577 (B.C.C.A). Pursuant to s. 2 of the *1979 Water Act*, property in and the right to use of all water in provincial streams was vested in the Crown except to the extent water licences issued or approvals given established private rights. On application, a statutory

decision-maker, the Comptroller of Water Rights, was empowered to issue water licences entitling the holder to divert and use beneficially the specified quantity of water for the specified purpose during the stipulated time and to engage in authorized activities as provided in the licence and in accordance with the statutory scheme (ss. 4–6, 10).

[6] The Comptroller could issue a water licence to, among others, an "owner of land or a mine" or the "Crown as represented by a minister" for a purpose defined in s. 1 of the *1979 Water Act* (s. 6). An "owner" was defined as the person entitled to possession of or a substantial interest in any land, mine or undertaking and a "comptroller" as the Comptroller, a deputy comptroller, an assistant comptroller or an acting comptroller. Section 1 also defined several specified purposes for water use, including a catch-all "industrial purpose", meaning the use of water for a purpose other than "the purposes elsewhere defined in this section". The export of water was not a defined purpose under s. 1.

[7] The *1979 Water Act* set out the procedure for acquiring a water licence, including requirements that an applicant post notice of the application, pay prescribed fees and rentals and furnish plans, specifications and other information to the Comptroller (s. 8). Pursuant to s. 9, a licensee, riparian owner or applicant who considered his or her rights would be prejudiced if an application was granted could file an objection and, if necessary, the Comptroller could hold a hearing to determine it. The Comptroller could also suspend or cancel the rights of a licensee for various reasons on notice to the licensee and the owner of land to which the licence was appurtenant (ss. 20(2), (3) and (4)). Possible reasons for cancellation included the licensee's failure for three successive years to make beneficial use of the water for the specified purpose, failure for three successive years to pay the rentals due or cancellation of the licensee's title to the land on which the water was to be used if it resulted from the exercise of a statutory authority.

[8] Pursuant to s. 21(1) of the *1979 Water Act*, an owner of land to which a licence was appurtenant and enumerated others could abandon all or part of the

rights held under the licence. Sections 38, 39 and 40 provided for appeal rights from the decisions of the Comptroller. Section 41 created offences such as operating works to carry water for others without holding a licence or other authority, diverting water from a stream without authority and using water without lawful entitlement, in part for the purpose of protecting licensees: *Steadman (BCCA)* at 580. Under s. 44 of the *1979 Water Act*, the Lieutenant Governor in Council was empowered to reserve all or part of the “unrecorded” (unlicensed) water in the province by order in council if it appeared advisable for specified reasons.

[9] The Lieutenant Governor in Council was empowered to establish a tariff of fees, rentals and charges payable for applications and water licences and every applicant and licensee was required to pay them (s. 45). Throughout the relevant period, B.C. Reg. 240/60 was in force, as amended, in respect of tariff fees, rentals and charges. Within 60 days of posting an application, every applicant for a water licence was required to pay the prescribed fees and the first year’s rental as initially assessed by the Comptroller, who would later settle them when the application was considered and, if the initial sum was too much or too little, collect the insufficiency or refund the excess (ss. 2.08, 5.03). Thereafter, annual rentals were payable under the tariff currently in force (ss. 5.07, 5.16). However, no fees, rentals or other charges were payable in respect of a water licence when the Minister of Lands and Forests was the applicant or licence-holder (s. 5.21).

[10] Schedule A to B.C. Reg. 240/60 set out the tariff of fees, rentals and charges for specified purposes. Fees and rentals for miscellaneous uses came under the heading “Industrial Purpose (Miscellaneous Uses)”, which included a catch-all provision: “[f]or all other proposed uses under Industrial Purpose the application fee and the annual rental shall be those fixed by the Comptroller”. In December 1981, the Lieutenant Governor in Council amended Schedule A by B.C. Reg. 501/81, which, like its predecessor, listed specified purposes, fees and rentals and did not list export of water as a specified purpose. It also included the “Industrial Purpose (Miscellaneous Uses)” category and added a $5,000 cap when the Comptroller set the fees.

[11] In the early 1980s, the government began to study its policies regarding the export of water for commercial purposes. The province historically opposed bulk export of water, but opportunities to export water from coastal streams by sea transport presented themselves and the possibility that export might be in the best interest of the province if the water was surplus to provincial requirements was discussed. The development of policies for this purpose was recommended to Cabinet if government wished to pursue the export of water and encourage the private sector to participate. In September 1984, a proposed fee schedule for the export of water based on the volume of water applied for, allowed and used was appended to a Cabinet submission in this regard.



[12] Jack E. Farrell was the Deputy Comptroller of Water Rights during this period. On December 7, 1984, he signed a tariff headed “Industrial Purpose” that applied to “… all other proposed uses of water not otherwise defined as a specific purpose under the Water Act or described within Schedule A …” (the “1984 Tariff”). For the first time, the words “export of water” appeared across from a corresponding entry: “(Presently same as “Mineral Trading (a) Purpose. Is subject to review and may be segregated into a separate category.)”. At the bottom of 1984 Tariff these words also appeared: “For any use listed in this Schedule the application fee and annual rental shall not exceed $5,000.00 each.”

[13] On March 28, 1985, OIC 630/85 was approved and the next day it was deposited. Under the heading “Industrial Purpose (Miscellaneous Uses)”, fees and annual rentals for “commercial bulk export of water by marine transport vessels” were set by the Lieutenant Governor in Council. As recommended, fees and rentals were calculated based on the volume of water applied for, allowed and used by the licensee. The new tariff item was amended in 1987 and 1988 by subsequent OICs.

[14] However, the export of water remained a complex, politically sensitive and controversial topic. As a result, an inter-ministry task force was established to study the issue and make recommendations. In February 1991, the Minister of International Business and Immigration proposed that a comprehensive review of

water policy be conducted. On March 12, 1991, the Ministry of Environment recommended placing a moratorium on the issuance of new export licences and initiating public discussion on water export policy.

[15] On March 18, 1991, Cabinet prohibited the issuance of further licences for the purpose of bulk export of water by enacting OIC 331/91, which reserved all unrecorded water in British Columbia from export until June 30, 1991 (the "1991 Moratorium"). On June 21, 1991, the *Water Protection Act*, R.S.B.C. 1996, c. 484, was passed limiting the bulk export of water. Thereafter, the 1991 Moratorium was extended by subsequent OICs.

### *The Land Act*

[16] As noted, the Comptroller could issue a water licence to an "owner of land", meaning the person entitled to possession of or a substantial interest in any land, mine or undertaking. To acquire an interest in Crown land, an applicant was required to apply for a disposition under the *Land Act*, R.S.B.C. 1979, c. 214 [*1979 Land Act*]. Pursuant to s. 7(3) of the *1979 Land Act*, the minister had a broad discretion to disallow an application if the proposed disposition was not considered to be in the public interest.

[17] The *1979 Land Act* set out four possible methods by which the minister could dispose of Crown land in the public interest: pursuant to an application, by public auction, by public notice of tender or by public drawing of lots (s. 8(1)). Terms and conditions could be imposed in a disposition (s. 8(3)) and, at the application stage, the minister could require an applicant to provide a wide range of information (s. 31(1)). Like the *1979 Water Act*, the *1979 Land Act* provided for cancellation of a disposition for default in payment of money or performance of a covenant, stipulation or term of the disposition. Pursuant to ss. 40(1) and (2) of the *1979 Land Act*, in such circumstances the minister would send a notice by registered mail to the disposition-holder requiring payment or compliance with the term in question within 60 days. If the default continued thereafter, the disposition could be cancelled.

***<u>Background Facts</u>***

***Freil Lake Project***

*(i) Freil Lake Water and Foreshore Licence Applications*

[18] Mr. Beach was an entrepreneur with an interest in the nascent bulk water export industry in British Columbia in the early 1980s. An industry pioneer, he identified Freil Lake, Hotham Sound, near Jervis Inlet on the south coast of the province as a desirable source of fresh water for transport by marine vessel, export and sale. In September 1982, in accordance with *1979 Water Act* requirements, he posted an application for a licence for water from Freil Lake for this purpose. In December 1982, he posted an application for a foreshore lease of Crown land to acquire the necessary appurtenant interest in land.

[19] In January 1983, Mr. Beach met and corresponded with the Water Management Branch of the Ministry of Environment regarding his water licence application. An official advised him that the current tariff of fees and rentals did not contain a specific category for bulk water export, which was a relatively new concept. As a result, he said, the matter was under study and recommendations would be made to the Lieutenant Governor in Council under whose authority tariffs were established. However, the official advised, he was unable to provide an indication of a probable assessment at that time.

[20] In February 1983, Lobel Timber Ltd. filed an objection to Mr. Beach's water licence application, contending that raising the level of Freil Lake as he proposed would subject its logging roads to flooding. Opposition to the application was also expressed by others, including various individuals, the B.C. Wildlife Federation and the Elphinstone Electors' Association of Gibsons, B.C.

*(ii) Rain Coast Assumes the Licence Applications*

[21] In March 1983, Mr. Beach incorporated Rain Coast to pursue his fledgling water export enterprise and develop the Freil Lake project. Rain Coast assumed his licence applications and submitted detailed plans to both the Ministry of Lands,

Parks and Housing and the Water Management Branch of the Ministry of Environment. However, in May 1983 a Lands official informed Rain Coast that its foreshore lease application was disallowed pending finalization of provincial policy on bulk water export.

[22] In October 1983, government formulated a policy that permitted bulk export of fresh water from British Columbia, although a tariff of applicable fees and rates was not yet established. In November 1983, Anthony Brummet, the Minister of Lands and Minister of Environment, advised Rain Coast that its export applications would be processed and considered on their merits. Shortly thereafter, a Lands official informed Mr. Beach of the demanding two-stage approval process involved in obtaining a foreshore lease: first, the submission of a conceptual proposal and, second, a detailed formal proposal.

[23] In January 1984, Rain Coast provided Lands with a conceptual proposal for the Freil Lake project. Among other things, it included an explanation of why Rain Coast selected Freil Lake as the source of water for its export enterprise and rejected other possible locations, including Ocean Falls. As discussed below, Ocean Falls was the site of a failed pulp and paper mill acquired by B.C. Cellulose Company, a Crown corporation. In February 1984, Mr. Beach wrote to Mr. Farrell and confirmed that Rain Coast had chosen not to pursue Ocean Falls as a possible source of water for export.

[24] As Rain Coast's applications progressed, Mr. Beach met and corresponded with numerous government officials regarding the Freil Lake project. In doing so he raised several concerns, including the possible length of the licensing term sought (he wanted 20 years), the likely amount of fees and annual rentals to be charged (he wanted to know) and the regulatory risks that could compromise Rain Coast's ability to attract investment in the enterprise (he wanted them removed). Although a schedule of fees for the export of water remained under government review, in its conceptual proposal Rain Coast included an allowance of $50,000US for "licences, water, foreshore, and upland" under the heading "Annual Fixed Costs".

[25] In March 1984, Tom Smith of the Water Management Branch met with Mr. Beach and, shortly thereafter, wrote a memorandum to Mr. Farrell stating that the need to know the fee structure for water export was “becoming critical, particularly in connection with the water application from [Rain Coast]”. He went on to say that it was important to be “up front” with Mr. Beach and advise him of the fee schedule regarding water export as he needed it for Rain Coast’s formal proposal. He also asked Mr. Farrell for guidance on what could be said regarding fees.

[26] On April 3, 1984, Lands granted approval-in-principle to Rain Coast’s Freil Lake project and allowed it two years to produce a detailed formal proposal prior to the issuance of any land tenure. The same day, Mr. Smith advised Rain Coast that he was recommending the Comptroller process its water licence applications with an initial ten year term, subject to completion of the required formal proposal and issuance of a foreshore licence. He also recommended that Rain Coast reach a formal agreement with Lobel Timber Ltd. because its objection to the Freil Lake proposal bore directly on the processing of Rain Coast’s water licence application.

[27] At a meeting in September 1984, Cabinet considered water export policy but did not make a clear decision on fees for annual rentals. As noted, on December 7, 1984 Mr. Farrell signed the 1984 Tariff, which included the words “export of water” together with a corresponding entry, “(Presently same as “Mineral Trading (a) Purpose. Is subject to review and may be segregated into a separate category.)”, together with a statement that “For any use listed in this Schedule the application fee and annual rental shall not exceed $5,000.00 each.”

[28] In the months that followed, Mr. Beach continued to meet and correspond with Lands and Water Management Branch officials. At one such meeting in February 1985, he stated that he urgently required confirmation of water charges applicable to the Freil Lake project and was told that a tariff was before Cabinet with a result expected in two weeks to two months. Although he also corresponded with several prospective investors, Rain Coast did not conclude any financing deals.

[29] On March 28, 1985, OIC 630/85 established a new tariff of fees and annual rentals for the industrial purpose of "commercial bulk export of water by marine transport vessels" based on the volume of water applied for, allowed and used: $1.50 per acre-foot for the application fee, $7.50 per acre-foot per year as annual rent for the right to use water, plus $7.50 per acre-foot per year based on the volume actually used.

[30] Following the enactment of OIC 630/85, Mr. Beach reduced the volume of water requested in Rain Coast's licence application. He also sought an extension of time to pay the fees and a second licence for water for bottling purposes. He and Jack Davis, an M.L.A., complained that the fees charged were exorbitant and that government was making it unduly difficult for Rain Coast to get its business started by requiring payment of a year's rental in advance of issuing a water licence without any assurance that a licence would be issued. However, Minister Brummet rejected Rain Coast's proposal to pay only the application fee and defer the annual rental payment until water was actually being used because it did not conform to the regulatory scheme in the *1979 Water Act* and would set a precedent he was unwilling to entertain.

[31] In April 1985, Rain Coast resolved the Lobel Timber Ltd. objection by negotiated agreement. In May 1985, Lands issued the foreshore licence of occupation. In January 1986, Rain Coast paid the required fees for the water licences. In February 1986, the Comptroller issued two licences to Rain Coast, one for bulk water export and one for bottling water. Both the foreshore and water licences included terms and conditions relating to their intended purpose and the payment of annual fees.

*(iii) Noncompliance and Cancellation of the Licences*

[32] After the water and foreshore licences were issued, Mr. Beach continued to complain about the requirements of the regulatory scheme and the licence that he considered unreasonable. He sought and obtained extensions of time for Rain Coast to pay the annual fees, extensions of time to make beneficial use of the licenced

water and offers to convert its foreshore licence of occupation to a lease of Crown lands. Nevertheless, Rain Coast was often late in making payments or, in the case of the water licences, failed to do so entirely. Despite considerable efforts, it was also unable to raise capital to construct the necessary works to load water for marine transport or to secure any export contracts.

[33] On August 3, 1990, a Lands official sent Rain Coast a letter warning that it was required to pay the annual fee by October 2, 1990 or its foreshore licence would be cancelled. The letter was sent by ordinary rather than registered mail, as required by s. 40 of the *1979 Land Act*.

[34] On November 28, 1990, a senior Lands official, Richard Roberts, cancelled Rain Coast's foreshore licence. In his cancellation letter, Mr. Roberts stated that Rain Coast had failed to make diligent use of the foreshore, that rent and interest remained unpaid and that, based on these factors, Lands had no alternative but to cancel the tenure for noncompliance with terms and conditions of the licence. At a meeting held shortly thereafter, Mr. Beach argued that the cancellation notice was defective, but Mr. Roberts maintained that standard Ministry procedure was followed.

[35] In February 1991, Minister Parker offered to reinstate Rain Coast's foreshore licence subject to payment of the outstanding arrears due and owing on both its water and foreshore licences. Rain Coast eventually paid the outstanding arrears on the foreshore licence, but it did not pay the outstanding arrears on the water licences.

[36] In September 1990, Mr. Beach advised the Water Management Branch that Rain Coast was not in a position to pay the three years of arrears due and owing on its bulk water export licence. In October 1990 he gave written notice of Rain Coast's intention to abandon its bulk water export licence and another licence for which it had recently applied. Nevertheless, the licences remained in force, although, in January 1991, Mr. Farrell notified Rain Coast that he proposed to cancel them unless it addressed the outstanding issues. In response, Mr. Beach repeated his

long-standing assertion that Rain Coast should not be required to pay annual rentals until such time as water exports commenced. As noted, Rain Coast did not pay the outstanding arrears.

[37] On September 23, 1991, Mr. Farrell cancelled Rain Coast's water licences. In the cancellation letter, he wrote:

> As the rental accounts for your licences are still outstanding; you have had your tenure to the land to which each licence is appurtenant terminated; you have failed to construct the works authorized under Conditional Water Licence 64113 within the time specified; and have not made a beneficial use of water under Conditional Water Licence 64113, it is my decision to proceed with the cancellation of both licences.
>
> Copies of the Orders of Cancellation are enclosed.
>
> Your right of appeal to this decision, as set out in Section 39 of the Water Act, lies to the Supreme Court of British Columbia.

[38] On October 23, 1991, Minister Parker denied Rain Coast's application to restore its foreshore licence due to the cancellation of its water licences on September 23, 1991.

[39] In a 1992 letter to the Ombudsman, Mr. Beach stated that proceedings had been commenced in the Supreme Court of British Columbia to recover Rain Coast's water licences. It appears the status of that proceeding was not canvassed at trial and I am unaware of how it was resolved.

***Ocean Falls and WCW***

[40] Ocean Falls, British Columbia was a company town with a pulp and paper mill owned by Crown Zellerbach. When the mill failed in the 1970s, the provincial government stepped in and acquired Crown Zellerbach's assets through B.C. Cellulose. In the 1980s, the government decided to close the mill and dispose of the assets through a second Crown corporation, the Ocean Falls Corporation ("OFC"). The assets in question included the dam at Ocean Falls behind which lies Link Lake, as well as the licences to extract all water from Link Lake for purposes of generating hydraulic energy.

*(i) Contact with Ray Williston*

[41] Ray Williston was the Chairman and President of B.C. Cellulose and OFC. Following an approach by a potential client expressing interest in more water than Rain Coast could supply from Freil Lake, Mr. Beach contacted Mr. Williston in July 1984 to inquire about Ocean Falls as a possible source of water for export. He advised Mr. Williston that, as a result of the approach, “we would be interested to be kept appraised of all relevant information concerning availability of water for export from Ocean Falls” and requested details on matters such as available volume, water quality and existing facilities.

[42] Mr. Williston responded immediately to Mr. Beach’s inquiry. He advised that there had been no productive activity in relation to water export from Ocean Falls in the last two years but that recently some firms had expressed interest and it appeared there could be a demand in the relatively near future. He went on to say that OFC had not taken the initiative to develop trade in water although it responded to enquiries, no engineering had been undertaken and interested firms planned to start operations on an experimental basis. After commenting on the quality and quantity of the water, he enclosed a copy of a sample agreement between OFC and an interested party to permit experimental development of a water export project at Ocean Falls.

*(ii) The OFC Normalization Program*

[43] In May 1985, Cabinet decided to wind-down OFC’s affairs and, among other things, dispose of its assets. Trillium Projects Ltd. was retained as the project management consultant and, according to contemporaneous government documents, Cabinet directed that it negotiate “the best possible deal on water export rights”. In response to this direction, Trillium sought and received proposals from five parties interested in buying water from Ocean Falls for purposes of export. Rain Coast was not one of them. The successful competitor selected was Western Canada Water (“WCW”). WCW’s principals were Margaret Annett and her son, William Annett.

[44] Because the water from Ocean Falls was to be used for export, OFC either had to obtain an amendment to its existing water licence for this purpose and sell the water or dispose of its interest in the Ocean Falls lands to enable the purchaser to obtain the necessary water licence. It chose the former and the Comptroller issued an export water licence for 552.6 acre-feet per year to OFC in February 1986, shortly before it finalized an agreement with WCW in March 1986 (the "WCW Agreement"). When OFC was wound up shortly thereafter, the Minister of Forests and Lands acquired OFC's export water licence and its contractual rights and obligations with respect to WCW.

[45] Mr. Beach and Mr. Annett met in December 1985, shortly before the WCW Agreement was concluded. Unfortunately, as discussed below, the content of their discussion was not determined by the judge. Nevertheless, it is clear from the contemporaneous documents that, in January 1986, Mr. Beach contacted the coordinator of the OFC normalization program, Mr. Wakabayashi, seeking information about water for export from Ocean Falls and, in particular, details of whether any commitments had been made and any rate structure then under negotiation. Mr. Wakabayashi responded that OFC was in the final stages of concluding an agreement with WCW, that the details of the negotiations were confidential and, when agreements were finalized, he would be pleased to discuss any remaining opportunities with Mr. Beach.

*(iii) The WCW Agreements*

[46] Pursuant to the terms of the WCW Agreement, WCW agreed to pay OFC \$2,025 as a fee for *1979 Water Act* charges, \$150,000 as a minimum fee at the rate of \$10,000 per month, fees equivalent to *1979 Water Act* charges annually in arrears and a separate royalty. It also provided for a three-year "exclusivity period" during which OFC agreed not to directly engage in the export of water or sell any water for export purposes to anyone other than one named party, Pacific Rim Water Resources (another party that made a proposal).

[47] In 1987, the WCW Agreement was amended "to reflect the assumption of OFC's obligations by the Province and to clarify the nature and extent of the exclusivity provisions…" The exclusivity period was until March 26, 1990. In 1988 and 1989, the WCW Agreement was amended and renewed to provide an increased volume of water to WCW and extend the term (collectively, the "WCW Agreements").



[48] From 1987 onward, Mr. Beach sought copies of the WCW Agreements from various government officials. Although he was advised of their general structure and terms, he was not provided with copies. He also complained repeatedly that Rain Coast was being denied the opportunity to compete with WCW "on a level playing field". When addressing overdue payment issues on its Freil Lake licences, Mr. Beach inquired about obtaining a similarly structured agreement for Rain Coast, but was told the Ocean Falls situation was unique.

*(iv) California Export Opportunities*

[49] In 1990, the City of Santa Barbara, California, sought proposals for water imports. Rain Coast and others, including WCW, submitted them, but none were successful because the cost of shipping water by tanker was too high. During this period, Minister Reynolds wrote letters of support for WCW to Santa Barbara officials, urging them to give serious consideration to its proposal. The letters were drafted by Ms. Annett of WCW.

[50] On March 4, 1991, the Goleta Water District put out a request for proposals to supply the district with bulk fresh water. The Goleta Water District is located in California, near Santa Barbara. WCW, Rain Coast, and two others, Snowcap and Sun Belt, responded to its request for proposals. The same day, Rain Coast applied for an additional export licence for water from Freil Lake in connection with its bid for the Goleta contract.

[51] On March 8, 1991, Premier Vander Zalm wrote to the President of the Board of Directors of the Goleta Water District, Katherine Crawford. In his letter, he confirmed the details of the WCW Agreements. On March 14, the Goleta Water

District chose to negotiate first with Sun Belt, an American company. However, it later decided not to proceed with a contract.

[52] On March 15, 1991, Ms. Annett wrote to Premier Vander Zalm advising that Snowcap and Rain Coast were “fronts” for Sun Belt and expressing the hope that this information would be “useful” in dealing with their requests for additional water licences. She sent copies of her letter to Minister Veitch and Minister Serwa. The same day Ms. Annett wrote the letter, Cabinet met and decided to impose the 1991 Moratorium.



***Pleadings***

[53] On November 26, 1996, Rain Coast filed a Writ of Summons and Statement of Claim, and amended the latter in 2007 and 2009. Among other things, in the original Statement of Claim it claimed that the Crown defendants unlawfully discriminated against it in fixing export water rates, abused their authority by interfering with its applications and abused their power in a manner that caused it loss. It also alleged that the lawful fee for its water licence applications was $5,000.

[54] The trial proceeded based on the Second Amended Statement of Claim and related pleadings. As noted, the claims advanced included the unlawful means tort and misfeasance in public office. The defendants were the Crown, Premier Vander Zalm, Minister Veitch’s estate, Minister Parker, Minister Serwa, Deputy Minister Dalon and Mr. Roberts, as well as Ms. Annett and WCW. Mr. Farrell was not a Crown defendant and Rain Coast did not allege that he committed any act of misfeasance in public office. In addition to its claims for damages, Rain Coast sought declarations that numerous OICs, including OICs 630/85 and 331/91, and the *Water Protection Act* were unconstitutional and, as part of its misfeasance in public office claim, alleged that government officials knew the impugned provisions were unconstitutional.

[55] The Crown defendants filed an Amended Statement of Defence in which they raised, among other things, a limitations defence. On the last day of the trial, Rain Coast filed an Amended Reply in which it pleaded that the running of time was

postponed pursuant to the provisions of the *Limitation Act*, R.S.B.C. 1996, c. 266. It also produced a document entitled "particulars" that listed three documents Rain Coast claimed were wilfully concealed, one of which was the 1984 Tariff.

***Rule 19(24) Application: 2008 BCSC 1182 (2008 Ruling)***

[56] In 2008, the Crown defendants applied to strike out the Amended Statement of Claim pursuant to Rule 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90. Among other things, they argued that the claims in respect of OIC 630/85 and the *Water Protection Act* were statute barred. In reasons indexed as 2008 BCSC 1182, the judge rejected this argument, citing *Fuoco Estate v. Kamloops (City)*, 2001 BCCA 325, for the proposition that because statutory limitations is a defence pleading it typically cannot be dealt with under Rule 19(24). He also stated that it was possible the running of time was postponed, rejected certain arguments on other issues, accepted others, granted part of the application and dismissed the balance of the motion.

***Summary Trial: 2010 BCSC 114 (Summary Trial Decision)***

[57] Following a summary trial in 2010, the judge decided that Rain Coast's foreshore licence of occupation was cancelled unlawfully. In reasons indexed as 2010 BCSC 114, he held that the Crown failed to provide Rain Coast with proper notice of the proposed cancellation because it sent the August 3, 1990 warning letter regarding outstanding rent by ordinary, rather than registered, mail and it did not identify Rain Coast's alleged failure to make diligent use of the land as a ground for the cancellation.

***At Trial***

[58] The trial proceeded over 26 days between October 22, 2012 and March 6, 2013. Much of the evidence was in documentary form, although several witnesses testified on both liability and on damages, including expert witnesses.

[59] The main witness was Mr. Beach, who testified over the course of 12 trial days. Among many other things, he stated that he first obtained the 1984 Tariff in

1998 via a request made under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FOIPPA*]. Ms. Crawford of the Goleta Water District also testified, as did Mr. Annett of WCW. Mr. Farrell did not testify, nor did Premier Vander Zalm. The presentation of evidence was completed by November 30, 2012.



[60] At the outset of closing submissions, the judge proposed that counsel confine their oral arguments to factual matters and theories of liability due to the limited court time available. Given the breadth of possible outcomes, he said, he proposed to write a judgment on facts and liability alone and, if necessary, hear further oral argument on the quantum of damages taking into account his findings of fact. Neither counsel responded directly to the judge's proposal. However, neither objected to proceeding in this way.

[61] In his closing submissions, counsel for Rain Coast invited the judge to draw adverse inferences imputing bad faith based on the Crown defendants' failure to call Crown witnesses to testify to "their version of the facts". Counsel for the Crown defendants urged him not to do so, arguing that he must not speculate and that Rain Coast bore the burden of proof. In the lengthy exchange that followed, counsel emphasized the passage of time and, for example, Mr. Farrell's advanced age, submitting the judge could reasonably conclude that such an elderly man would have no recollection or useful evidence, particularly in light of the available documentary evidence. The judge asked if counsel was offering an explanation for not having called the potential witnesses, which, he said, would make "a huge difference". Counsel replied in the affirmative, stating again that the potential witnesses would likely have no firsthand memory and, given the documentary evidence, would have nothing to add.

[62] On March 6, 2013, closing submissions concluded. A few weeks later, the parties made extensive written submissions on the limitations defence. In 2015, they made further written submissions on *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 and *Bhasin v. Hrynew*, 2014 SCC 71.

[63] On May 12, 2016, the judge issued his reasons for judgment.

***Factual Findings***

[64] Throughout his reasons for judgment, the judge made factual findings on a wide range of issues. According to the appellants, in doing so he repeatedly misunderstood and ignored material evidence, drew inferences in the absence of supporting evidence and drew unjustified adverse inferences against the Crown defendants. As a result, they say, there was no proper basis upon which the foundational factual findings and factual inferences for the causes of action alleged were established, "commensurate with the seriousness of the wrongs": see *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at para. 338. According to Rain Coast, the record amply supports all of the judge's factual findings, including all of his findings based on inferences.

[65] I cannot agree with Rain Coast. In my view, the judge made many material factual errors, several of which bear on the grounds of appeal. Given their nature, number and significance, I will identify and discuss these errors as I review the reasons for judgment in detail. I will analyse their implications for the limitations defence and the individual causes of action when I address the grounds of appeal.

[66] Unfortunately, this discussion is complicated by the absence of clear findings on several key factual matters. For example, the judge made no express findings on the state of knowledge or intention of government officials whom he found committed acts of public office misfeasance. Nor, with one exception, did he make express findings on Rain Coast's state of knowledge of material facts or the Crown defendants' intentions regarding allegedly concealed documents. However, the basis for a judge's reasoning can sometimes be found in the record: *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 13. Bearing this in mind, I will attempt to identify any implicit factual findings the judge presumably must have made and the evidence, if any, upon which the implicit findings were presumably based (see *Cromwell Restoration Ltd. v. Shui*, 2004 BCCA 460 at para. 6).

[67] In undertaking this discussion, I also bear in mind the standard of review that applies to the judge's factual findings. The finding of facts is the province of the trial judge and an appellate court must not interfere merely because it takes a different view of the evidence. Rather, an appellate court must show deference to a trial judge's conclusions on factual matters unless there is palpable (obvious) and overriding (material) error. Intervention on factual conclusions, including inferences of fact, is justified only if the judge made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence or drew erroneous conclusions from the evidence. Findings that are unreasonable or unsupported by the evidence are palpable and overriding errors: *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at paras. 13–18; *J.P.* at para. 317.

[68] In addition, I note that the fact a judge does not discuss all of the evidence on a given point does not mean that he or she ignored it. Judges are not obliged to detail every aspect of their deliberations in reasons for judgment. Rather, reasons need only show that the judge grappled with the substance of the live issues for determination, including the factual issues. In addition, as Rain Coast emphasizes, when reasons for judgment are considered on appeal they must be understood in the context of the entire record below: *Coast Mountain Aviation Inc. v. M. Brooks Enterprises Ltd.*, 2014 BCCA 133 at para. 74; *Zhang v. Cute-Go Novelty Inc.*, 2016 BCCA 451 at paras. 3–4.

[69] As to inferences, I note that a judge must rely on logic, common sense and experience, taking into account the totality of the evidence, when deciding whether to draw an inference: *R. v. Calnen*, 2019 SCC 6 at para. 112. I also note the difference between an inference grounded in the evidence and speculation. An inference can be reasonably and logically drawn from an established fact or group of facts, whereas speculation is mere conjecture based on guesswork. For this reason, if there is an evidentiary gap between the established facts and a proposed inference the inference is unavailable and it is an error for a judge to draw it. On the other hand, if an inference can be reasonably and logically drawn from the established facts it is available and a judge may choose among any number of

available reasonable inferences. However, if the factual foundation upon which an inference is drawn rests upon a misapprehension of the evidence it is a palpable error for a judge to draw the inference: *Calnen* at para. 112; *R. v. Widdifield*, 2018 BCCA 62 at para. 35; *J.P.* at paras. 339–341.

[70] Further, I note that an adverse inference may be drawn in a civil case where, without sufficient explanation, a party fails to call a witness over whom the party has exclusive control, who would presumably be willing to assist and who would be able to provide important supporting evidence. In such circumstances, failure to call the witness is akin to an admission that his or her evidence would harm the party's case or, at least, would not provide reasonably expected support. This principle is derived from ordinary logic and experience. Its application engages the discretion of the judge: *Rohl v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316 at paras. 1–3; *Singh v. Reddy*, 2019 BCCA 79 at para. 8; *R. v. Jolivet*, 2000 SCC 29 at paras. 24–28.

[71] Nevertheless, an adverse inference should not be drawn unless it is warranted in the circumstances. For this reason, a case-specific inquiry into the circumstances surrounding the failure to call a potential witness is required before an adverse inference is appropriately drawn. A judge should not draw an adverse inference where counsel has provided a reasonable explanation for failing to call a witness, such as a belief that the witness would not be reliable or that the testimony would be inferior to other available evidence. As with all inferences, if a judge decides to draw an adverse inference he or she must be precise about the nature of the inference that is drawn: *Parris v. Laidley*, 2012 ONCA 755 at para. 2; *Rohl* at paras. 1–3; *Calnen* at para. 113.

[72] As Justice Newbury explained in *Singh*, although a judge's decision on whether to draw an adverse inference is discretionary in the sense that there is no mandatory rule applicable whenever a party fails to call a material witness, the standard of appellate review is the palpable and overriding error standard. The drawing of adverse inferences is a component of the fact-finding process and,

despite comments to the contrary in *Rimmer (Guardian ad litem of) v. Langley (Township)*, 2007 BCCA 350, recent developments in the law confirm that, because their nature and availability are the same as in other fact-finding situations, the same strict standard of review applies on appeal: *Singh* at paras. 21–22; *Benhaim v. St. Germain*, 2016 SCC 48 at paras. 42, 52.

[73] With all of these considerations in mind, I turn to reviewing the reasons for judgment in detail and discussing the material errors of fact made by the judge.

***<u>Reasons for Judgment</u>***

***Background***

[74] The judge began his reasons by describing the claims and main issues for determination. Then he outlined the history of Rain Coast's licence applications and Mr. Beach's dealings with Crown employees in connection with its water export enterprise. He also outlined the history of Ocean Falls, OFC and Rain Coast's consideration of Ocean Falls as a possible source of water for that enterprise. In doing so, he referred to Rain Coast's January 1984 conceptual proposal, Mr. Beach's February 1984 letter to Mr. Farrell and Mr. Beach's July 1984 letter to Mr. Williston asking to be "kept appraised of all relevant information concerning availability of water for export from Ocean Falls". In discussing this evidence, the judge characterized Freil Lake as Rain Coast's "preferred alternative" as a source of water for export (at para. 51).

[75] In my view, the judge misapprehended the evidence when he implicitly found that Rain Coast considered Freil Lake and Ocean Falls as alternative sources of water for its bulk water export enterprise. As noted above, in its January 1984 conceptual proposal Rain Coast stated that a decision was made <u>against</u> applying for water from Ocean Falls and in February 1984 Mr. Beach advised Mr. Farrell that Rain Coast had chosen <u>not</u> to pursue Ocean Falls as an alternative source of water. Similar statements were made in subsequent Rain Coast documents. As also noted, Mr. Beach's July 1984 letter to Mr. Williston was written after Rain Coast received an inquiry from a potential client for more water than Freil Lake could supply, but that

inquiry never went any further. Most importantly, the uncontroverted evidence was that Rain Coast never sought to acquire water from Ocean Falls for its bulk water export enterprise.

[76] Nor was there evidence that Mr. Williston withheld “terms of reference” for development of a proposal for an export operation at Ocean Falls, as Mr. Beach seemingly suggested in his testimony and the judge may have implicitly accepted. On the contrary, in his responsive letter to Mr. Beach, Mr. Williston answered his questions, provided a sample agreement for such a proposal and informed Mr. Beach that OFC was not taking the initiative to develop export trade in water from Ocean Falls. There was no reason to question the accuracy of this statement. As discussed, the OFC normalization program was not initiated until May 1985, almost a year after Mr. Williston responded to Mr. Beach’s inquiry.

[77] Given all of the foregoing, it is apparent that the judge misapprehended the evidence when he found that Rain Coast considered Freil Lake and Ocean Falls as alternative sources of water for its bulk water export enterprise. As discussed below, he later drew inferences and conclusions based in part on that misapprehension.

[78] Next, the judge stated that there was a dispute as to how WCW learned about the Ocean Falls opportunity. He described Mr. Annett’s testimony that he saw an advertisement in the Vancouver Sun in mid-1985, but rejected it. Instead, based on Mr. Beach’s testimony that he did not see an advertisement, the absence of documentary proof of an advertisement and the failure of the Crown defendants to call witnesses on the point, he concluded that the Ocean Falls opportunity was not widely publicized and that there was no proper public process (at paras. 60, 99, 189, 196).

[79] The judge went on to state that documentary evidence showed Mr. Annett, Ms. Annett and their lawyer met with Minister McClelland in August 1985 to discuss the Ocean Falls opportunity “as their first contact” (at para. 99). This, too, was a misapprehension of the evidence. In fact, the evidence was that the Annetts met with Minister McClelland in August 1985, but Mr. Annett testified their first contact

regarding the Ocean Falls opportunity was with Mr. Wakabayashi, not Minister McClelland, and, contrary to the judge's statement, there was nothing in the documentary evidence that suggested otherwise.



[80] The judge also stated that Mr. Beach and Mr. Annett gave inconsistent evidence about discussions they had in December 1985 regarding the Ocean Falls opportunity. This was a further misapprehension of the evidence. In fact, only Mr. Annett testified about the December 1985 discussions, stating that Mr. Beach proposed they develop the Ocean Falls project together and asked for a 50% interest in WCW, but he (Mr. Annett) was not interested and rejected Mr. Beach's suggestion. However, the judge concluded that he could not decide what transpired in the course of the December 1985 discussion due to the inconsistency between the (non-existent) testimony of Mr. Beach on the matter and the testimony of Mr. Annett (at para. 61).

[81] Later in his reasons, the judge concluded that the initial selection of WCW was "a clear example of giving favorable treatment to one competitor at the expense of others, including [Rain Coast], and against the public interest" (at para. 215) and that, despite Mr. Beach's previous communications with Mr. Williston, Rain Coast was given "no opportunity to compete with WCW" to bid for the right to acquire water from Ocean Falls (at para. 197). In my view, both conclusions were rooted in the foregoing misapprehensions of the evidence. They were also reached without considering relevant contemporaneous documents and the complete absence of evidence of any ulterior motive for anyone involved in the selection process to favour WCW and harm its competitors.

[82] According to the judge, he generally accepted the contemporaneous documents "at face value" (at para. 96). However, several contemporaneous documents included statements that OFC selected WCW as the successful competitor because it was the only interested party prepared to agree to performance clauses and conditions. They also included statements that, during the selection process, OFC "received proposals and dealt with a number of parties", that

both WCW and another proponent negotiated rights to buy Ocean Falls water and that OFC did not consider Rain Coast an interested party because Mr. Beach made no further inquiries about Ocean Falls from July 1984 to January 1986, when he contacted Mr. Wakabayashi seeking information. However, by that point the WCW negotiations had reached their final stages and Mr. Wakabayashi advised Mr. Beach that, when they were finalized, he would be pleased to meet and discuss any remaining opportunities.

[83] The judge failed to grapple with any of this relevant evidence. Instead, he found that WCW received favourable treatment in the selection process and that Rain Coast was given no opportunity to compete, apparently based on Mr. Beach's July 1984 request that Mr. Williston keep him "appraised of all relevant information", his finding that there was no advertising or proper public process regarding the Ocean Falls opportunity (at paras. 99, 189, 196) and perhaps his findings that the Annetts met with Minister McClelland as their "first contact" (at para. 99). Although he did not mention it, he might also have based his finding on Mr. Beach's January 1986 exchange of correspondence with Mr. Wakabayashi.

[84] In my view, none of the evidence supported the judge's conclusion that WCW received favourable treatment at the expense of its competitors in the initial selection of a contractor to conduct the Ocean Falls operation or that Rain Coast had no opportunity to compete with WCW in the selection process. As noted above, the uncontroverted evidence was that Rain Coast was not interested in the opportunity at the relevant time. Mr. Beach's core complaint throughout was not that Rain Coast wanted, sought and was denied an opportunity to compete with WCW in the selection process context. Rather, it was that Rain Coast was required to pay fees he considered exorbitant for its Freil Lake licences, that the WCW Agreements were kept secret, that their terms as to rates, exclusivity and other matters were preferable to those granted to regular licensees such as Rain Coast and that, as a result, they gave WCW an unfair advantage over its industry competitors, including Rain Coast.

[85] After describing the lead up to the first WCW Agreement, the judge described the water licence granted by the Comptroller to OFC shortly before it was concluded. In doing so, he stated:

> [66] To be clear the Comptroller granted that water licence to OFC alone on the basis that OFC alone intended to and would carry on the bulk water export operation itself. There was no mention of WCW being permitted to divert or to use any of the licenced water.
>
> [Emphasis in original.]

[86] It appears from the foregoing that the judge may have inferred the Comptroller granted the water licence to OFC based on an understanding that OFC alone would carry on the intended export operation. To the extent this was a factual finding, it was unsupported by the evidence. There was no evidence of any fact capable of supporting the inference that the Comptroller granted the OFC licence on the basis described by the judge and the licence contained no such limitation. However, there was a large body of evidence that all concerned, including the Comptroller, expected one or more of the proponents then negotiating with OFC to conduct the operation under the terms of a contract.

[87] When water licences were later issued to the Minister of Forests and Lands, WCW was already conducting the Ocean Falls export operation pursuant to the terms of the WCW Agreements. Nevertheless, the judge drew the same unsupported inferences regarding the Comptroller's intentions when he granted those licences to the Minister (at paras. 75–77).

***Fact-Finding, Credibility and Adverse Inferences***

[88] After summarizing the terms of the WCW Agreements, the California tenders and the 1991 Moratorium, the judge turned to "Fact Finding and Credibility" and "Failure to call Defence Witnesses". He concluded that Mr. Beach and Ms. Crawford were credible witnesses but that Mr. Annett was not credible (at paras. 96–102). He also stated that Rain Coast's counsel urged him to draw an adverse inference against "all the defendants for their failure to testify" (at para. 103), outlined the applicable principles regarding adverse inferences and then drew adverse inferences against the Crown and Premier Vander Zalm:

> [104] I agree with [Rain Coast's counsel's] submission and have drawn an adverse inference against the Province of British Columbia for not calling Mr. William Farrell to explain his lack of action in response to Tom Smith's memorandum of March 13, 1984 and his failure to disclose the $5,000 limit affecting the export of water in the December 7, 1984 Schedule of Fees.
>
> [105] I have also drawn an adverse inference against the Province of British Columbia and Premier Vander Zalm for the failure of the ex-premier to testify or call other witnesses to testify with respect to the timing of the initial O.I.C. establishing a moratorium on water licences for the bulk export of water.



[89] Later in his reasons, the judge repeatedly made factual findings based on the absence of evidence from Crown defendants denying an allegation advanced by Rain Coast (at paras. 131, 168, 189, 214). In other words, as Rain Coast urged, the judge drew unspecified adverse inferences against the Crown defendants due to their failure to call Mr. Farrell, Premier Vander Zalm and "other witnesses" to testify to "their version of the facts". In my view, this was a serious error that infused and informed most of the judge's key factual findings, including many of his findings on the acts and intentions of the Crown defendants and Crown employees.

[90] In every instance in which he drew an adverse inference, the judge failed to conduct an inquiry into the surrounding circumstances or identify the precise nature of the proposed inference. In no instance in which he drew an adverse inference were the conditions precedent to warrant doing so met: *Parris* at paras. 2–3. On the contrary, in his closing submissions counsel for the Crown defendants provided a reasonable explanation for not calling the Crown witnesses in question, namely, that, given the passage of time and their advanced age, none of them were likely to have any firsthand memory of these events, the evidence was in the documents and the witnesses were in no position to add anything of value. However, despite his statement to counsel that such an explanation would make "a huge difference", the judge failed to consider it when he repeatedly drew adverse inferences against the Crown defendants.

***Limitations Issue***

[91] In this section of his reasons, the judge noted that the applicable limitation period was six years. However, he rejected the Crown defendants' limitations

defence based on delayed disclosure of "important relevant documents". With one exception, he did not identify these documents or explain why their delayed disclosure justified a postponement. Nor did he analyse the parties' positions, expressly find that the alleged concealment of documents was willful or make any findings on the material facts concerning which Rain Coast did and did not have knowledge.



[92] This was the judge's entire analysis under the heading "Limitation Act":

> [106] The Crown defendants plead, and rely upon, the *Limitation Act*, R.S.B.C. 1996, c. 266. They concede that the applicable limitation period is six years.
>
> [107] [Rain Coast's] position is that the limitation period should be postponed on the basis that the evidence at trial showed that the defendants had concealed documents necessary for [Rain Coast] to ascertain that it had a reasonable prospect of success. [Rain Coast] also alleges that the concealment was willful. Examples cited by [Rain Coast] include the $5,000 Water rate schedule of December 1984 and other key Government documents not disclosed to [Rain Coast] until 2005 or 2006.
>
> [108] This is not the first time that the Court has had to deal with a limitation argument in this case. In *Rain Coast Water Corp. v. British Columbia*, 2008 BCSC 1182, the Court dealt with a Rule 19(24) application by the Crown defendants. On the limitations issue the defendants were unsuccessful, in part for the procedural reason that statutory limitation is a defence pleading that does not arise on a 19(24) application. A second issue discussed in that ruling was the possibility that the time limitation was postponed by virtue of s. 6(4) of the *Limitation Act*. At that time the Court was obliged to rely upon [Rain Coast's] pleading that certain relevant documents had not been disclosed until 2005 or 2006. <u>After hearing the evidence and submissions at trial I am satisfied that document disclosure of important relevant documents was delayed to an extent that the defendant's reliance upon the *Limitation Act* must fail</u>.
>
> [109] Another branch of the defendant's limitation argument in 2008 was that certain amendments to [Rain Coast's] pleadings amounted to new cause of action. On that issue, I said at para. 36:
>
> > "[Rain Coast's] current civil claims are based on the same facts as were pleaded in the original statement of claim" and at para. 38:
> >
> > > "… I find that the original statement of claim was sufficient to put the government on notice of the essence of [Rain Coast's] civil claims"
>
> These rulings were not appealed and are binding on the defendants.
>
> [Emphasis added.]

[93] Later in his reasons, the judge found that Mr. Beach first learned of the 1984 Tariff in 1998 when he made a request under the "*Privacy Act*". He stated, incorrectly, that counsel for the Crown defendants made no submissions on this issue (in fact, he made extensive written submissions). He also drew an adverse inference based on the absence of an explanation from Mr. Farrell for failing to inform Mr. Beach about the $5,000 1984 Tariff cap. Although there was no pleading to this effect, he went on to conclude that Mr. Farrell committed misfeasance in public office based on his failure to disclose the $5,000 1984 Tariff cap to Rain Coast (at paras. 166–168, 221).

[94] I agree with Rain Coast that the judge implicitly found Mr. Farrell wilfully concealed the $5,000 1984 Tariff cap from Rain Coast in the sense articulated in *Cimolai v. Hall*, 2005 BCSC 31. In other words, he implicitly found that Mr. Farrell knowingly kept the existence of the $5,000 cap secret from Rain Coast and that the $5,000 cap applied to Rain Coast's licence applications. This inferential finding was based on Mr. Smith's March 1984 memorandum stating that Mr. Beach should be advised of the fee schedule for purposes of his formal proposal, the terms of the 1984 Tariff and the fact that Mr. Farrell did not disclose it to Rain Coast, combined with an adverse inference (at paras. 29–30, 36, 104, 162–168). In my view, it was unreasonable and unavailable on the evidence.

[95] There was no basis upon which it could reasonably be inferred that Mr. Farrell wilfully concealed the $5,000 1984 Tariff cap from Rain Coast. There was no evidence, direct or circumstantial, that Mr. Farrell was obliged to disclose the 1984 Tariff to Rain Coast, believed he should disclose it or had any motive to conceal it. The $5,000 cap had been in place since 1981 under B.C. Reg. 501/81, the 1984 Tariff stated that fees for the export of water were "under review" and Rain Coast was not eligible for a water licence until after OIC 630/85 was enacted because of the unresolved Lobel Timber Ltd. objection and the fact that it did not yet have a foreshore licence. In other words, there was a substantial gap between the evidence and the inference, which was, therefore, unavailable. The judge erred in drawing it.

[96] I am unable to identify any of the other "important relevant documents" to which the judge referred in para. 108 of his reasons.

***Causes of Action***

[97] After rejecting the limitations defence, the judge dealt with the individual causes of action. He dismissed the claim for negligent misrepresentation, dismissed the argument that *Bhasin* applied and decided it was unnecessary to resolve the constitutional questions. However, he found that Premier Vander Zalm and the Crown committed the unlawful means tort and that Mr. Farrell, Mr. Roberts, Premier Vander Zalm and the Crown committed misfeasance in public office.

***Analysis of Unlawful Means Tort***

[98] The judge began his analysis by quoting from *A.I. Enterprises Ltd*. He set out the parties' positions, summarized the Crown defendants' arguments on the essential elements of the unlawful means tort and then disposed of their arguments in a single paragraph each.

[99] First, the judge considered the Crown defendants' argument that there was no unlawful conduct directed at Sun Belt or Snowcap. He rejected it, although he did not say what conduct was unlawful, who committed the conduct or why it was unlawful. After drawing an adverse inference based on the Crown defendants' failure to deny "improper conduct", he found there was "unlawful conduct directed at Sun Belt and Snowcap" (at para. 131). Taking into account his conclusion on liability, I agree with Rain Coast that he implicitly found Premier Vander Zalm and Cabinet intended to cause economic harm to Sun Belt and Snowcap by imposing the 1991 Moratorium.

[100] Second, the judge rejected the position that Sun Belt and Snowcap had no right of action against the Crown defendants. On the contrary, he found, had they suffered loss due to the Crown defendants' conduct, Sun Belt and Snowcap could have brought actions for misfeasance in public office. He did not explain how the conduct in question amounted to the tort of misfeasance in public office or why Sun

Belt or Snowcap would have had a right of action against the Crown defendants (at para. 132).

[101] Third, the judge found that Rain Coast suffered economic loss due to the Crown defendants' unlawful activities directed at Sun Belt. In reaching this conclusion, he relied on his finding that Rain Coast had an agreement with Sun Belt to supply water if Sun Belt got the Goleta Water District contract (at para. 133). This was a manifestly erroneous finding. There was no evidence whatsoever that any such contract existed. On the contrary, all the salient evidence was that Sun Belt and Rain Coast did <u>not</u> have a contract when the negotiations with the Goleta Water District took place, or ever. Nor did the judge grapple with the uncontroverted evidence that <u>no</u> competitor was awarded the Goleta Water District contract. In my view, his finding that Rain Coast suffered economic loss due to the Crown defendants' misconduct directed at Sun Belt was based on a misapprehension of the evidence.

[102] Fourth, the judge found that Premier Vander Zalm and members of Cabinet intended to cause Rain Coast economic harm because doing so was a necessary means of assisting WCW in its dealings with the Goleta Water District. He went on to conclude that Premier Vander Zalm and the Crown committed the unlawful means tort based on the imposition of the 1991 Moratorium which, he found, was timed to achieve the ulterior motive of benefiting WCW and hindering its competitors (at paras. 134–135). Later, in his misfeasance analysis, he expanded upon the basis for this extraordinary finding, which, he said, included "the absence of defence evidence to provide an innocent explanation" for the timing of the 1991 Moratorium:

> [214] More importantly, when the Board of the Goleta Water District decided to reject its committee's recommendation to deal with WCW and instead chose to deal with Sun Belt, Mrs. Annett wrote to Premier Vander Zalm and two other members of the Provincial Cabinet pointing out that Sun Belt, an American company, was relying on [Rain Coast] and another B.C. company, Snowcap, for its source of tankered B.C. water. She sought the help of these Provincial Ministers to assist WCW and hinder the plans of Sun Belt, [Rain Coast] and Snowcap. The same day her communications were received the Cabinet decided to impose a moratorium on further export licences for B.C. water. The moratorium was announced on March 18, 1991 effective March 20, 1991. In the absence of defence evidence to provide an innocent

> explanation of this timing, I infer that Cabinet, urged by the Premier and supported by Ministers Veitch and Serwa timed the initial imposition of the moratorium to assist WCW and hinder the efforts of Sun Belt, [Rain Coast], and Snowcap to deal with the Goleta Water District. Based on the evidence of Ms. Katherine Crawford, which I accept, this scheme was successful in defeating the plans of Sun Belt, [Rain Coast] and Snowcap but unsuccessful in assisting WCW.



[103] In my view, the judge's finding that Cabinet, urged by Premier Vander Zalm and supported by Minister Veitch and Minister Serwa, timed the imposition of the 1991 Moratorium to assist WCW and harm its competitors was no more than conjecture based on guesswork. There was a substantial gap between the established facts and the inferences that the judge drew concerning the acts and intentions of Premier Vander Zalm and Cabinet. In addition, there was a large body of highly relevant evidence that the judge failed to consider. Further, the judge's finding was based in part on an unwarranted adverse inference.

[104] The judge seemingly based his finding on the acts and intentions of Premier Vander Zalm and Cabinet on the following evidence: i) on May 17, 1990 Minister Reynolds wrote supportive letters for WCW drafted by Ms. Annett to the Santa Barbara water district; ii) on March 4, 1991 the Goleta Water District received proposals from Rain Coast, WCW, Snowcap and Sun Belt; iii) the same day (March 4), Rain Coast applied for an additional export licence in connection with its proposal to the Goleta Water District; iv) Snowcap also had a pending water licence application, which it insisted must be granted by March 14, 1991; v) on March 8, 1991, Premier Vander Zalm wrote to the Goleta Water District confirming the terms of the WCW Agreement; vi) the Goleta Water District selection committee recommended the Board negotiate with WCW but, on March 14, 1991, it decided to negotiate first with Sun Belt; vii) the next day (March 15), Ms. Annett wrote to Premier Vander Zalm, with copies to Ministers Veitch and Serwa, expressing concern that Snowcap and Rain Coast were "fronts" for Sun Belt and hope this information would be "useful" for decisions on their requests for additional water licences; viii) the same day that Ms. Annett wrote to Premier Vander Zalm (March 15), Cabinet decided to impose the 1991 Moratorium pending a comprehensive

water export policy review; and ix) on March 18, 1991 OIC 331/91 prohibited the issuance of further licences for bulk water export.

[105] There was no direct evidence that Premier Vander Zalm, Minister Veitch or Minister Serwa saw Ms. Annett's March 15 letter before the Cabinet meeting in question. However, in my view, fax transmission evidence together with the matching dates of the letter and the Cabinet meeting formed a body of circumstantial evidence from which it was open to the judge to infer that the letter was seen by its intended recipients. Nevertheless, there was no direct or circumstantial evidence from which it could reasonably be inferred that Premier Vander Zalm or anyone else advanced a position on the 1991 Moratorium at the Cabinet meeting motivated by Ms. Annett's letter. There was also no direct or circumstantial evidence from which it could reasonably be inferred that Premier Vander Zalm, Cabinet or any other Crown defendant had any ulterior motive to assist WCW and harm its competitors in their dealings with the Goleta Water District.

[106] In contrast, there was a large body of evidence from which it could reasonably be inferred that Premier Vander Zalm and Cabinet approved the imposition of the 1991 Moratorium on March 15 for legally unobjectionable reasons. For example, there was evidence of Cabinet agendas, meeting notes, and correspondence in the days and months leading up to the meeting in which the need for a comprehensive review of water export policy was discussed and identified as a priority. There was also the evidence that an inter-ministry task force was working on the politically controversial issue and the March 12, 1991 briefing note in which the Ministry of Environment recommended placing a moratorium on the issuance of new export licences and initiating public discussion on water export policy.

[107] Further, there was evidence that was starkly inconsistent with the inference that Premier Vander Zalm and Cabinet intended to assist WCW and harm its competitors. For example, a February 1991 draft Cabinet Submission included a recommendation that the WCW Agreements be reviewed to "permit all firms to compete on a level playing field". In addition, on March 15, 1991, Minister Parker

wrote to Ms. Annett to advise that Cabinet had decided not to extend WCW's exclusivity and would require WCW to obtain a water licence from the Crown like everyone else. That letter followed a May 22, 1990 letter in which he stated that continued exclusivity should not be granted to WCW. The judge quoted from that May 22, 1990 letter earlier in his reasons, although he incorrectly attributed it to Premier Vander Zalm (at para. 204), but he ignored it when he inferred that Premier Vander Zalm and Cabinet had a "scheme" to assist WCW and harm its competitors and that they timed the imposition of the 1991 Moratorium intending to advance their "scheme".

[108] A judge must scrutinize the relevant evidence with care when making factual determinations, particularly where, as here, the allegations are serious: *F.H. v. McDougall*, 2008 SCC 53 at paras. 40, 49. An allegation that a public official abused his or her office for an ulterior motive is an extremely serious claim and proof commensurate with the seriousness of the alleged wrong is required: *J.P.* at paras. 329, 338. In concluding that Premier Vander Zalm and Cabinet intended to assist WCW and harm its competitors by imposing the 1991 Moratorium when they did the judge failed to consider, much less scrutinize, most of the relevant evidence. Taking into account that evidence, the gap between the established facts and the inferences that he drew, in my view the judge committed a palpable and overriding error when he found that Cabinet, urged by Premier Vander Zalm and supported by Minister Veitch and Minister Serwa, timed the imposition of the 1991 Moratorium to assist WCW and harm its competitors.

### *Analysis of Misfeasance in Public Office*

[109] The judge's analysis of the tort of misfeasance in public office was more extensive than his analysis of the unlawful means tort. He reviewed several authorities, citing, among others, *Odhavji Estate v. Woodhouse*, 2003 SCC 69 on the two alternative branches of the tort. The first branch, he stated, is "Category A", which involves conduct specifically intended to injure a person or class of persons. The second branch, he stated, is "Category B", which involves a public officer who

acts knowing that he or she lacks power to do the act in question and that the act is likely to injure the plaintiff.

### *(i) Was the Province of B.C. the Tortfeasor*

[110] The first issue the judge considered was whether the Province of British Columbia, as a collective body, could be a responsible tortfeasor. He expressed initial doubt that the requisite mental elements of either Category A or Category B misfeasance could be established for the provincial government as a whole, quoting from *Powder Mountain* in which Justice Newbury emphasized the need to consider the actions and motivations of each individual government actor separately and the context in which a decision-maker operates. Then, without further comment or explanation, he stated:

> [161] However, upon further reflection I have come to the conclusion that the Provincial Government as a whole may properly be considered the potential tortfeasor with respect to the contrast between the Government's dealings with [Rain Coast] and with WCW. I will first deal with two matters where individual actors can be clearly identified: (1) the failure to disclose the $5,000 water tariff; and (2) the cancellation of [Rain Coast's] foreshore lease. With respect to those issues, the Government can be found liable on a *respondent superior* basis. Then I will discuss the WCW issues.

### *(ii) Failure to Disclose the $5,000 Cap in the 1984 Tariff*

[111] Next, the judge considered Mr. Farrell's failure to disclose the $5,000 cap in the 1984 Tariff. In doing so, he found that Rain Coast's licence applications were held in abeyance until after OIC 630/85 was promulgated, which meant that instead of having to pay $5,000 each in fees and rentals it had to pay much higher fees and rentals, to its significant detriment. He went on to conclude that Mr. Farrell committed misfeasance in public office by failing to disclose the $5,000 cap in the 1984 Tariff to Rain Coast, although, as noted, Mr. Farrell was not a defendant and the Second Amended Statement of Claim did not include any such pleading. He also concluded that the B.C. Government was liable on the basis of *respondent superior*:

> [167] [Rain Coast's] application for a water licence and the "interest in land" that was required continued to be held in abeyance pending Cabinet decision on water export policy. When that decision was finally made, [Rain Coast] received a foreshore licence and then two water licences. By then O.I.C. 630

> had been promulgated and, instead of having to pay a $5,000 application fee and a $5,000 annual rental, [Rain Coast] had to deal with a $13,839 application fee and a $69,195 annual rental fee. These fees were a significant detriment to the establishment of [Rain Coast's] business.
>
> [168] In the absence of any evidence or explanation from Mr. Farrell or any other defence witness, I am satisfied that [Rain Coast] has established a Category A misfeasance in public office by J.W. Farrell, the Deputy Comptroller of Water Rights. If I have fallen into error in making this finding, I am also satisfied that the facts in this case would also justify a finding that J.W. Farrell committed misfeasance in public office by means of Category B. In either case, I am also prepared to find the B.C. Government liable for this tort on the basis of *respondent superior*.



[112] The foregoing findings were based on a misapprehension of the evidence. Government policy permitting bulk water export was in place by November 1983 and, thereafter, Rain Coast's applications proceeded slowly, but without interruption, through the demanding two-stage approval process until the licences were granted in May 1985 and February 1986. In other words, after November 1983 Rain Coast's applications were not "held in abeyance pending a Cabinet decision on water export policy", although all concerned were awaiting a decision from Cabinet on the applicable fee structure.

[113] Moreover, even if government officials should have proceeded with the approval process without regard to Cabinet's pending decision on fees (a questionable proposition), a water licence could not have been issued to Rain Coast until after OIC 630/85 was enacted. Lobel Timber Ltd.'s objection was not resolved until April 1985. In other words, contrary to the judge's finding, the uncontroverted evidence was that Rain Coast was never in a position to have paid only $5,000 each in fees and rentals rather than $13,839 and $69,195.

*(iii) Cancellation of Rain Coast's Foreshore Licence*

[114] The judge turned next to the cancellation of Rain Coast's foreshore licence. He quoted Mr. Roberts' discovery testimony that he knew Mr. Beach was "talking about" millions of dollars in revenue and cited his Summary Trial Decision that the November 28, 1990 foreshore licence cancellation was unlawful due to noncompliance with notice requirements. He also quoted from Mr. Roberts' December 31, 1990 letter to Rain Coast stating that standard Ministry procedure

was followed when the licence was cancelled, but found that, on the contrary, standard Ministry procedure was not followed. Then he concluded that Mr. Roberts' actions in cancelling the foreshore licence amounted to Category B misfeasance in public office. He made no express finding as to Mr. Roberts' intentions or knowledge when he cancelled the foreshore licence, nor am I able to discern an implied finding:

> [176] As to Mr. Robert's actions in cancelling the Foreshore Licence it would appear that [Rain Coast] has made out a case for Category B misfeasance in office. <u>Whatever his state of knowledge was when he wrote on Nov 28, 1990 purporting to cancel [Rain Coast's] Foreshore Licence,</u> he subsequently met with representatives of [Rain Coast] and [Rain Coast's] counsel, Michael Spearing. Mr. Spearing pointed out to Mr. Roberts's defects in the procedure followed by the Ministry. He subsequently reaffirmed in his December 31st letter the erroneous position that standard Ministry procedure has been followed.
>
> [177] I am satisfied the behavior described above amounted to "reckless indifference or willful blindness to the lack of statutory authority for the *Act*." Mr. Robert's answers on Examination for Discovery would seem to provide satisfactory evidence of either
>
> a. actual knowledge that harm will result
>
> or
>
> b. reckless indifference or willful blindness to the harm that can be foreseen to result.
>
> [178] In either event, that would satisfy the requirement for intent to harm [Rain Coast]. That leaves the question of proving that the tortious conduct was the legal cause of injury to [Rain Coast] and that the injury is compensable in tort.
>
> [Emphasis added.]

[115] As to causation, the judge described the content of Minister Parker's October 23, 1991 letter denying Rain Coast's application to restore its foreshore licence as "Catch 22 type reasoning" and the procedure that was followed as "Kafkaesque" (at paras. 179–181). Although his explanation for this view is hard to follow, it appears he interpreted the evidence as establishing that Rain Coast's water licences were cancelled because its foreshore licence had been (wrongfully) cancelled and, when Rain Coast tendered funds to restore the foreshore licence, that application was denied because it no longer held the water licences, all of which resulted in legal injury.

[116] Based on the foregoing interpretation, the judge concluded that Mr. Roberts and Minister Parker committed Category B misfeasance in public office and that the B.C. Government was liable on the basis of *respondent superior*. He went on to state:

> [185] I believe that any damage flowing from the cancellation of [Rain Coast's] water licences are a result of the unlawful cancellation of the Foreshore Licence. If I have fallen into error in reaching this conclusion, I also find as a fact that the cancellation of the water licences is a Category B misfeasance of office and that Minister Parker's letter of October 23, 1991 constitutes a further Category B misfeasance of office.

[117] The judge's conclusion on causation was also based on a misapprehension of the evidence. Rain Coast's foreshore licence was cancelled in November 1990 for proper reasons (s. 20, *1979 Water Act*) and, while the notice of the proposed cancellation was procedurally defective, Minister Parker offered to reinstate the licence in February 1991 subject to payment of the outstanding arrears on both the water and foreshore licences. Although Rain Coast paid the foreshore licence arrears, it did not pay the water licence arrears.

[118] The evidence was that Rain Coast's water licences were cancelled in September 1991 because of its persistent failure to pay rentals, its failure to construct specified work and its failure to make beneficial use of the water as well as the termination of its foreshore licence. As to the latter, it was also that the foreshore licence could have been restored had Rain Coast paid the outstanding rentals that it was legally obliged to pay, but refused to do so. In my view, it follows that the evidence showed the cause of the water licence cancellation was Rain Coast's persistent failure to pay the rentals, not, as the judge found, the cancellation of its foreshore licence.

[119] Minister Parker was a Crown defendant. Although the judge found that his October 23, 1991 letter amounted to misfeasance in public office (at para. 185), he did not refer to this finding in his summary of conclusions (at para. 221). Nor was the judge's finding that Minister Parker committed misfeasance in public office included in the entered order.

*(iv) The WCW Issues*

[120] Next, the judge dealt with the WCW issues, which he divided into three phases: the commencement of the relationship between WCW and the Province, the WCW Agreements and the conduct of the Province's representatives in discussions with California water districts.

***Commencement of the Relationship***

[121] The judge repeated his finding that the Province did not widely publicize the availability of water for export from Ocean Falls and found there was no "proper public process" for bidding on the right to export water from Ocean Falls. As noted, he also found that Rain Coast was given no opportunity to compete with WCW (at paras. 196–197) based on his misapprehension of the evidence and his failure to consider material evidence. He did not explain the nature of the public process that he considered necessary.

***The WCW Agreements***

[122] The judge summarized Rain Coast's position that the WCW Agreements were unlawful because they contravened ss. 41(1) and 45 of the *1979 Water Act*, B.C. Reg. 204/88 and OIC 889, as well as its statutory right to notice and to object under ss. 8 and 9 of the *1979 Water Act*. He also noted Rain Coast's argument that the WCW Agreements' exclusivity provisions were unlawful because they were not authorized by the *1979 Water Act*. Then he summarized, but rejected, the Crown defendants' responsive arguments, stating that he was persuaded by those of Rain Coast. He made no findings regarding the Crown defendants' knowledge, if any, of the purported illegality of the WCW Agreements, nor am I able to discern any implicit findings:

> [209] I do not accept the submission that OFC as an "agent of the Province" had the Province's right to the use and flow of all water in any stream in British Columbia. Furthermore, the authority granted to OFC and later the Minister to export water (with no mention whatsoever of WCW) was not sufficient compliance with the *Water Act*. I disagree with the proposition that the Conditional Water Licence <u>implicitly</u> authorized OFC, and later the Province to sell water <u>for export</u> to third parties. The entire scheme was an improper plan to favour WCW and, therefore injure its competitors, including [Rain Coast].

> [210] None of the WCW Agreements complied with the 1979 *Water Act* regime to which [Rain Coast] and other competitors were required to comply. WCW was not required to have an ownership in land; it was not required to apply for a water licence or publish its application so members of the public (including [Rain Coast]) could register objections. It was not required to pay the fees for reserving water in advance. It was initially given a 15-year term that was later extended to 25-years; it was given exclusive rights to the Link Lake water.
>
> ***Discussions with California Water Districts***

[123] As discussed, after considering some of the material evidence the judge found that Cabinet, urged by Premier Vander Zalm and supported by Minister Veitch and Minister Serwa, timed the initial imposition of the 1991 Moratorium to assist WCW and harm Sun Belt, Rain Coast and Snowcap in their dealings with the Goleta Water District (at paras. 211–214). As also discussed, these factual findings were made in error and were unsupported by the evidence.

*(v) Conclusions on Misfeasance in Public Office*

[124] The judge summarized his conclusions on Rain Coast's claim for misfeasance in public office as follows:

> [215] I am satisfied that [Rain Coast] has made out a case of misfeasance in office, Category B, involving reckless indifference or willful blindness as to the lack of statutory authority as well as reckless indifference or willful blindness to the harm that can be foreseen to result on all three issues raised by [Rain Coast] with respect to the Province's dealings with WCW contrasted with the dealings with [Rain Coast]:
>
> 1. The initial selection of WCW was a clear example of giving favorable treatment to one competitor at the expense of others, including [Rain Coast], and against the public interest;
> 2. The WCW agreements, by completely ignoring the *Water Act* requirements, giving WCW exclusivity and not requiring payment of the rental fees required by the *Water Act* in themselves constituted a Category B misfeasance in public office.
> 3. The contact between Mrs. Annett and the Premier with respect to the Goleta Water District and, particularly, the timing of the O.I.C. creating the initial moratorium on water exports again could possible make out a Category A misfeasance but certainly fulfilled the conditions for a Category B misfeasance.
>
> [216] In the unusual circumstances detailed above. I am prepared to find the Provincial Government to be guilty of Category B misfeasance in public office as well as the then Premier, Bill Vander Zalm.

### *Damages*

[125] The judge did not deal with damages. Instead, he stated:

> [218] I did not find either [Rain Coast's] or the defendants' evidence or submissions on damages to be very helpful. In my view this was not the fault of counsel for either party. The facts of this case are complex and the range of possible outcomes very wide.
>
> [219] In my view it should be open to counsel for both parties to put before the court evidence and submissions based on the findings made in these Reasons for Judgment to assist the Court in arriving at a proper quantum of damages.
>
> [220] I ask counsel to arrange a mutually convenient time to hold a Judicial Management Conference to plan this aspect of the case. Of course, if the findings of fact enable the parties to resolve the damages issue without further assistance from the Court, that would be an acceptable result.

[126] Following release of the reasons for judgment, Rain Coast advised the Supreme Court of British Columbia Registry that it intended to adduce further expert and lay evidence on damages.

## ***Issues on Appeal***

[127] In addition to the foregoing factual issues, the following issues emerge for determination:

i) Did the judge fail to consider and apply the provisions of the *Limitation Act* properly?

ii) Did the judge misapply the test for liability for misfeasance in public office and, if so, how?

iii) Did the judge misapply the test for liability for the unlawful means tort and, if so, how?

iv) Did the judge err by permitting Rain Coast to re-open its case and provide further evidence on damages?

v) Should this Court determine the constitutional questions that the judge declined to address and, if so, how should they be answered?

vi) If the appeal is allowed, what order should this Court make?

## Discussion

### Standard of Review

[128] The standard of review on questions of law is correctness. Where a legal test is stated correctly, but misapplied, there is a legal error. As already discussed, the standard of review on questions of fact is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 10, 27.

### Did the judge fail to consider and apply the provisions of the Limitation Act properly?

*Positions of the Parties*

[129] The appellants submit that the judge failed to consider and apply the provisions of the *Limitation Act* properly. In support of this submission, they note that, pursuant to s. 3(5) of the *Limitation Act*, the six-year limitation period commenced on the date upon which all elements of the causes of action had come into existence and it expired six years thereafter unless it was postponed. However, the judge did not conduct a postponement analysis or find any facts that justified a postponement under s. 6(4) of the *Limitation Act*. Nor did the evidence support any such findings. Accordingly, they submit, the cause of action for the unlawful means tort relating to any alleged acts that predated November 26, 1990 was time-barred, as was the cause of action for misfeasance in public office in respect of Mr. Farrell’s failure to disclose the $5,000 cap in the 1984 Tariff, any acts associated with the commencement of the WCW relationship, the WCW Agreements and the Crown defendants’ dealings with the California water districts that predated November 26, 1990.

[130] Rain Coast responds that the judge correctly found the running of time was postponed for limitations purposes based primarily on Mr. Farrell’s wilful concealment of the $5,000 cap in the 1984 Tariff. In support, it emphasizes the 1984 Tariff was not disclosed until 1998 via *FOIPPA* and, while it concedes the original Statement of Claim pleaded that the $5,000 cap applied, it says it did not actually “know” it applied until that document was disclosed. Therefore, Rain Coast argues, it

could not have “known” that it had a reasonable prospect of success any earlier than 1998. It argues further that other important documents were also wilfully concealed and, without them, it could not have known that all the necessary elements of the causes of action had come into existence.



[131] Rain Coast goes on to argue that the Crown defendants did not make timely admissions or document production throughout the litigation, although the relevance of these arguments to the limitations defence is unclear to me. In addition, according to Rain Coast, most of the appellants’ misconduct occurred less than six years before the claim was filed and, by cancelling its water licences, Mr. Farrell became a repeat tortfeasor in 1991, which means that no part of the claim should be reversed for exceeding the limitation period. It cites no authority in support of this unusual proposition. Finally, Rain Coast contends, the judge disposed of the limitations argument in the 2008 Ruling and, therefore, as he implicitly found, the limitations issue was *res judicata*.

*Analysis*

[132] As Justice Newbury explained in *Arishenkoff v. British Columbia*, 2004 BCCA 299, society has an interest in ensuring that injustice does not result from stale claims being advanced long after events of alleged misconduct. As time passes memories may fade, parties and witnesses may disperse and it may become much more difficult for a defendant to mount a meaningful defence. For these reasons and others, most common law jurisdictions enact statutes of limitation: *Arishenkoff* at paras. 1–4.

[133] In British Columbia, the *Limitation Act* was the relevant statute during the relevant period. Subsection 3(5) established a six-year limitation period for claims such as those advanced by Rain Coast. Pursuant to s. 3(5) of the *Limitation Act*, the six-year limitation period commenced when the causes of action accrued, which was when the Crown defendants committed the impugned conduct and caused loss to Rain Coast whether or not Rain Coast was aware of all the facts upon which the causes of action depended. In other words, as explained in *Bera v. Marr* (1986), 27

D.L.R. (4th) 161 (B.C.C.A.), the limitation period began to run on the date upon which each cause of action was complete in the sense that all of its elements had come into existence.

[134] However, under s. 6 of the *Limitation Act* the running of time was subject to possible postponement. As stated in *Arishenkoff* and *Cimolai*, ss. 6(3)(e) and 6(4) codified common law principles of discoverability and equitable principles of fraudulent concealment. Those provisions read, in relevant part:

> 6(3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
>
> > …
> >
> > (e) in which material facts relating to the cause of action have been wilfully concealed;
> >
> > …
>
> (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> > (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
> >
> > (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
>
> …
>
> (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

[135] In *Levitt v. Carr*, [1992] 4 W.W.R. 160 (B.C.C.A), this Court explained that simple ignorance of the existence of a cause of action was insufficient to justify a postponement under s. 6(4) of the *Limitation Act*. Rather, postponement depended upon what was actually known and what ought to have been known. For purposes of s. 6(4), facts falling within a plaintiff’s means of knowledge were, first, those facts known to the plaintiff and, second, those facts which would become known if the

plaintiff took such steps as would have been reasonable in the circumstances. Appropriate advice was such competent advice as was suitable in the circumstances given the facts that were known and reasonably knowable.

[136] In *Iezzi v. British Columbia*, 2012 BCCA 200, this Court overturned a finding that a limitation period did not begin to run until the plaintiff obtained documents in 2008 via a *FOIPPA* request confirming that, in 2001, a child infected with Hepatitis C was placed in her care by the Ministry of Children and Family Development. The plaintiff was not warned of the child's condition, she contracted Hepatitis C after the placement and, in 2006, a trusted social worker told her that Crown records revealed the child's positive diagnosis at the time of placement. Speaking for the Court, Justice Donald held that it would have been reasonable for the plaintiff to seek advice in 2006 based on the information she received from the social worker and, had she done so, competent advice would have been to make a *FOIPPA* request, as she did in 2008, which, in turn, would have allayed her concerns about whether the claim had a reasonable prospect of success. In the result, the appeal was allowed and the action dismissed on the basis that:

> [3] …[n]othing in the record explains why [the plaintiff] did not take steps leading to the substantiation of her claim within two years of being informed that [the Crown] may have breached its duty of care to her.

[137] In this case, the judge held that "document disclosure of important relevant documents was delayed to an extent that [the appellants'] reliance upon the *Limitation Act* must fail", however, he did not conduct a postponement analysis. It is, therefore, necessary to consider this ground of appeal based on the record and the applicable legal principles. I have already concluded that the judge's implicit finding that Mr. Farrell wilfully concealed the $5,000 cap in the 1984 Tariff from Rain Coast was made in error. I also conclude that there is nothing in the record capable of supporting a postponement under s. 6(4) of the *Limitation Act* in respect of any aspect of either cause of action.

[138] As noted, the judge imposed liability for the unlawful means tort based on the timing of the imposition of the 1991 Moratorium and liability for misfeasance in public

office based on Mr. Farrell's failure to disclose the $5,000 cap in the 1984 Tariff, Mr. Roberts' cancellation of Rain Coast's foreshore licence, the Crown defendants' dealings with WCW in selecting it to acquire rights to Ocean Falls water, the WCW Agreements and the timing of the 1991 Moratorium. However, in the Second Amended Statement of Claim, Rain Coast also relied on other acts of alleged misconduct in support of both causes of action, some of which predated November 26, 1990 and were not addressed in the reasons. My conclusion that there is nothing in the record capable of supporting a postponement under s. 6(4) of the *Limitation Act* relates to all aspects of both causes of action as pleaded, regardless of whether the material facts alleged were considered and addressed by the judge.



[139] In my view, Rain Coast has failed to identify any pre-November 26, 1990 material fact that was not within its means of knowledge and would have showed that either cause of action had a reasonable prospect of success but for the effect of the six-year limitation period. Rain Coast plainly knew about the $5,000 cap as evidenced by the original Statement of Claim filed in 1996. In these circumstances, Rain Coast can hardly argue that it did not discover the $5,000 cap applied until it received the 1984 Tariff in 1998 via *FOIPPA*. By then, its claim had been commenced and no further substantiation was required for limitations purposes. In addition, and in any event, given its long-standing concerns regarding the Crown defendants' conduct in connection with its licences, as in *Iezzi*, it would have been reasonable for Rain Coast to seek competent advice and make the *FOIPPA* request many years earlier.

[140] Further, although Rain Coast did not have copies of the WCW Agreements, Mr. Beach was clearly aware of their salient terms from at least 1987 onward when he and others on his behalf communicated with government officials on the matter. For example, the evidence shows Mr. Beach knew that WCW purchased water for export by agreement with the Ministry of Forests, which held the water licence, that the Minister was not required to pay fees and rentals under the *1979 Water Act* and, therefore, that, unlike regular licensees, WCW paid royalties for its water under the terms of the WCW Agreements. He also knew that the WCW Agreements included a

term with respect to exclusivity. Based on his knowledge of these material facts, Mr. Beach repeatedly complained that Rain Coast and other competitors in the bulk water export industry were not operating on a “level playing field” with WCW because government accorded different and better treatment to WCW than it did to regular licensees under the *1979 Water Act*, which preferential treatment, he asserted, was unfair, unreasonable and unjustifiable. He also expressed the view that there was no statutory basis for the royalty arrangement in the WCW Agreements.

[141] In other words, the uncontroverted evidence was that all of the elements of both causes of action relating to alleged acts that predated November 26, 1990 had come into existence more than six years before November 26, 1996 when Rain Coast commenced the action. In addition, there was no material fact that was not within Rain Coast’s means of knowledge and would have showed that either cause of action had a reasonable prospect of success but for the effect of the applicable six-year limitation period.

[142] Finally, there is no foundation in law or logic to Rain Coast’s submission that because the limitations defence does not apply to some of the alleged acts that grounded the causes of action it does not apply to any of them. The same is true of the judge’s implicit finding that the limitations defence was determined in the 2008 Ruling and was, therefore, *res judicata* (at paras. 108–109). On the contrary, as the judge correctly stated in his 2008 Ruling, the limitations defence did not arise on the Crown defendants’ Rule 19(24) application and, therefore, it was <u>not</u> determined. This conclusion applied with equal force to the Crown defendants’ application to strike the pleadings and to the amendments that the judge granted.

[143] It follows that the causes of action for the unlawful means tort and misfeasance in public office relating to any alleged acts that predated November 26, 1990 were time-barred by s. 3(5) of the *Limitation Act*. In my view, the judge erred in concluding otherwise.

[144] Given this conclusion, it is not strictly necessary to address the substance of the claims relating to alleged acts that predated November 26, 1990. However, as this Court affirmed in *Powder Mountain*, *J.P.* and *Wu v. Vancouver (City)*, 2019 BCCA 23, misfeasance in public office is among the most egregious of tortious conduct and it carries the "stench of dishonesty". In addition, I have concluded that Rain Coast's claim should be dismissed in its entirety. For these reasons, I consider it appropriate to deal fully with the substance of all aspects of the unlawful means tort and misfeasance in public office claims, both legal and factual.

### *Did the judge misapply the test for liability for misfeasance in public office and, if so, how?*

#### *Positions of the Parties*

[145] The appellants submit that the appeal should be allowed on all findings of misfeasance in public office by the Province, Premier Vander Zalm, Minister Parker, Cabinet, Mr. Roberts and Mr. Farrell because the judge misapplied the test for liability and made erroneous findings on critical factual and legal issues. In their submission, he either failed to consider whether each Crown defendant deliberately acted unlawfully intending to cause harm to Rain Coast or was recklessly indifferent to the consequences of their unlawful acts or he found the requisite intent existed despite the absence of any supportive evidence. They also submit that he made other key findings that were legally incorrect or manifestly erroneous, including his finding that the WCW Agreements were unlawful and that the impugned conduct caused loss to Rain Coast. Further, he erroneously found that Mr. Farrell committed misfeasance in public office despite the fact that Mr. Farrell was not a named defendant and there was no pleading to this effect contrary to the law articulated in, for example, *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61, *J.P.* and *Wu*.

[146] Rain Coast responds that all of the judge's findings of misfeasance in public office by the Province, Premier Vander Zalm, Minister Parker, Cabinet, Mr. Roberts and Mr. Farrell were correct in law and supported by the evidence.

[147] First, regarding Mr. Farrell's failure to disclose the $5,000 cap in the 1984 Tariff, Rain Coast says that the cap applied but Mr. Farrell charged it much more based on an allocated quantity of water without providing any assurance that the licence would issue for that quantity and he unreasonably declined to issue a letter of commitment to Rain Coast. In its submission, these acts evidenced Mr. Farrell's intention to injure Rain Coast and bolster and support the judge's finding of misfeasance in public office. As to the absence of a pleaded claim against Mr. Farrell personally, Rain Coast submits that no such requirement applied prior to this Court's decisions in *J.P.* and *Wu* and it would be unfair to apply it retroactively. In support of this submission, it sought to adduce fresh evidence on appeal, including written communications in which counsel for the appellants acknowledged that the Crown would be vicariously liable for intentional wrongdoing by its agents, employees and ministers.

[148] Second, regarding Mr. Roberts' cancellation of its foreshore licence, Rain Coast submits the evidence supports the inference that Mr. Roberts knew the foreshore licence could not be cancelled lawfully but he cancelled it anyway. This, it says, proved that he had requisite intent to injure Rain Coast. It also submits that Mr. Farrell must also have known that Mr. Roberts cancelled the foreshore licence unlawfully. Therefore, it says, when Mr. Farrell cancelled its water licences his conduct was "equally malevolent".

[149] Third, regarding the WCW issues, Rain Coast submits that all of the judge's findings were correct in law and supported by the evidence. As to the initial selection of WCW, it emphasizes Mr. Beach's correspondence with Mr. Williston and Mr. Wakabayashi, which, it says, showed that Rain Coast had an ongoing interest in obtaining water from Ocean Falls and that it was denied an opportunity to make a proposal. As to the lawfulness of WCW Agreements, it says the Crown was obliged to follow the regulatory scheme in disposing of rights to Ocean Falls water, but it failed to do so. As to the 1991 Moratorium, it contends that any staff recommendations supporting its imposition were irrational, unexplained and not in the public interest and it characterizes the Comptroller's March 12, 1991 briefing

note as "a ruse". It also emphasizes other evidence that it claims shows the 1991 Moratorium was imposed for the ulterior motive of assisting WCW. Further, it submits, when Cabinet approved OIC 331/91 it demonstrated a reckless disregard for the negative impact on Rain Coast's commercial prospects and the possibility that the 1991 Moratorium was unconstitutional.

*Analysis*

[150] As this Court explained in *Powder Mountain* and *J.P.*, the tort of misfeasance in public office is based on the premise that public officers must exercise their power only for the public good and not deliberately and unlawfully for ulterior or improper purposes. The underlying rationale of the tort is the protection of every citizen's reasonable expectation that those who hold public office will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of their public functions. Its ambit is narrow and proof of the requisite mental element must be commensurate with the seriousness of the wrong alleged, which is among the most egregious of tortious misconduct: *Powder Mountain* at paras. 2, 8–9; *J.P.* at paras. 319–323, 329.

[151] Because misfeasance in public office is an intentional tort, the actions and motivations of each individual actor involved must be considered separately. For this reason, and as a matter of procedural fairness, a claim of misfeasance in public office must be pleaded and advanced against the individual public officer-holder who allegedly committed the wrongdoing in question. As Justice Smith affirmed in *J.P.*, alleged tortfeasors are entitled to notice when serious claims of wrongdoing are levelled against them and to the opportunity to defend themselves against any such claim: *Powder Mountain* at paras. 8–9; *Moses* at para. 44; *J.P.* at paras. 319, 350.

[152] The tort of misfeasance in public office has two distinct branches, commonly referred to as Category A and Category B misfeasance. As Justice Smith explained in *J.P.*, the two branches share common elements: i) deliberate unlawful conduct by a public officer in the exercise of his or her powers; and ii) knowledge that the

unlawful conduct is likely to injure the plaintiff. As to the latter, she said this about the requisite mental elements:

> [326] Category A misfeasance is established when a public officer exercises his or her power for the specific purpose of harming the plaintiff. *Three Rivers* described it as "targeted malice" that includes conduct done for the ulterior or improper purpose of harming the plaintiff. Proof of the specific intent to harm the plaintiff will be sufficient to establish that the public officer had knowledge his or her conduct was likely to harm the plaintiff: *Odhavji* at para. 23.
>
> [327] Category B misfeasance is more complex. It does not require a finding of specific intent to harm the plaintiff, but rather an objective determination that the public officer knowingly engaged in a deliberate unlawful act with an awareness that his or her conduct would likely harm the plaintiff or a class of plaintiffs. Knowledge of harm alone is insufficient to establish that the public officer acted in bad faith or dishonestly. Rather, the officer must know that the deliberate conduct is inconsistent with the obligations of the office, including that it exceeds the powers of the office, or omits a legally required act: *Odhavji* at para. 28 and *Powder Mountain* at para. 67.

[153] Justice Smith went on to describe the high standard of proof required to establish bad faith or dishonesty on the part of a public officer and the line between misfeasance in public office, on the one hand, and, on the other, negligent acts committed without knowledge or subjective recklessness as to their unlawfulness and probable consequences:

> [329] The mental element of Category A or Category B misfeasance establishes the "bad faith" or "dishonesty" of the public officer. Accordingly, it requires "clear proof commensurate with the seriousness of the wrong": *Powder Mountain* at para. 8 and *Odhavji* at para. 28. Awareness or knowledge that the unlawful act is likely to harm the plaintiff requires at least a subjective recklessness or wilful blindness, if not actual knowledge, of the likely consequences of the unlawful act: *Powder Mountain* at paras. 7 and *Odhavji* at paras. 25 and 38. Subjective recklessness or wilful blindness requires a higher standard of proof than objective foreseeability of harm for negligence. The mental element of the tort thus constrains its ambit from including inadvertent or negligent conduct by a public officer in the discharge of his or her official obligations: *Odhavji* at para. 26.

[154] In *Odhavji Estate*, the Supreme Court of Canada considered the underlying rationale for the narrow application of the tort, namely, that public officers must retain the authority to make appropriate decisions that are adverse to the interests of some citizens. Provided they are neither irrational nor taken in bad faith, government

decisions based on public policy considerations, such as economic, social and political factors, are immune from tort liability: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 90; *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, 2013 ONCA 683 at para. 54. As Justice Iacobucci explained in *Odhavji Estate*:

> [28] …In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

[155] Justice Iacobucci went on to explain the requisite nexus between a plaintiff who advances a misfeasance claim and the public officer against whom the allegations of wrongdoing are levelled:

> [29] The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, <u>as an individual</u>. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort.
>
> [Emphasis in original.]

[156] In my view, it is abundantly apparent from the foregoing that none of Rain Coast's submissions on liability for the tort of misfeasance in public office have any merit. Accordingly, I would set aside all findings of liability for that tort.

[157] Regarding Mr. Farrell's failure to disclose the $5,000 cap in the 1984 Tariff, the requirement that intentional torts must be specifically pleaded and advanced against the individual alleged wrongdoer is well-settled law, not, as Rain Coast submits, a new legal development: *Powder Mountain* at paras. 8–9; *Moses* at para. 44. Pleadings define the issues of fact and law for determination in an action

and give opposing parties fair notice of the case to be met: *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para. 43; *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 at para. 5 (S.C.). If a party is unfairly disadvantaged by a failure to raise or properly particularise an issue in pleadings the court should not determine that issue. If it does, on appeal the result will be set aside: *Wu v. Sun*, 2010 BCCA 455 at paras. 19–20.



[158] Rain Coast did not plead that Mr. Farrell committed misfeasance in public office by failing to disclose the $5,000 cap in the 1984 Tariff and, therefore, neither the appellants nor Mr. Farrell had notice that the issue would be determined. Counsel's acknowledgement that the Crown would be vicariously liable for intentional wrongdoing by its agents, employees and ministers was irrelevant to the requirement of a specific pleading where such allegations are made. It follows that I would not admit the fresh evidence because it fails to meet the well-known test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. In addition, as I have already discussed, there was, in any event, no evidence capable of supporting the judge's finding that Mr. Farrell wilfully concealed the $5,000 cap in the 1984 Tariff and, in doing so, intended to harm Rain Coast.

[159] Regarding the cancellation of Rain Coast's foreshore licence, the judge made numerous legal and factual errors when he concluded that Mr. Roberts committed the tort of misfeasance in public office. As noted, he made no finding, express or implied, on Mr. Roberts' state of mind or knowledge when he cancelled the licence, which was the relevant time for analysis. Nor did he find the reason for its cancellation was deliberately unlawful, only that the notice was inadequate, which was, at worst, negligent. He also erroneously conflated Mr. Roberts' awareness that cancelling the foreshore licence could cause financial harm to Rain Coast with a deliberate attempt to cause harm to Rain Coast and erroneously found the cancellation caused Rain Coast to lose its water licence.

[160] Regarding the WCW issues, I am inclined to agree with Rain Coast that the initial process by which WCW was selected to contract with OFC may be open to

legitimate question because the opportunity was not made widely available. Nevertheless, as discussed, the judge erred in finding that WCW was afforded unduly favourable treatment in that process at the expense of other competitors, and Rain Coast suffered no damages a result of the disposition given its lack of interest in the opportunity. Nor did the judge make any findings of individual misfeasance with respect to the initial disposition. Contrary to his conclusion on the point, the requisite mental elements of either Category A or Category B misfeasance could not be established for the provincial government as a whole: *Powder Mountain* at para. 9.

[161] I am also inclined to agree with Rain Coast that the propriety of the WCW Agreements was open to legitimate question. While I do not accept that the regulatory scheme prevented licence-holders from selling their water to third parties for export (see, for example, ss. 13, 20(3), 20(5) and 41(1)(h) of the *1979 Water Act*, which contemplated third party interests in water licences), the Crown was not a regular licensee. In my view, it is unsurprising that the differential treatment accorded by the Crown to WCW and regular licensees led to complaints from industry competitors, including Rain Coast. As Mr. Beach pointed out, they were arguably not playing on “a level playing field”.

[162] However, in my view, there was no evidence, direct or circumstantial, of any deliberate unlawfulness by any Crown defendant associated with the WCW Agreements. On the contrary, the contemporaneous documents show the officials involved were concerned and wanted to avoid any incidental unfairness or noncompliance with the *1979 Water Act* scheme which might exist. To the extent it did exist, in my view, the evidence was not capable of supporting a finding beyond possible “maladministration, official incompetence or bad judgment” in connection with the WCW Agreements.

[163] Finally, in my view, Cabinet’s decision to impose the 1991 Moratorium was plainly a core policy decision. Therefore, unless there was evidence of bad faith, it

was immune from tort liability. Contrary to the judge's finding, there was no such evidence.

### *Did the judge misapply the test for liability for the unlawful means tort and, if so, how?*

*Positions of the Parties*

[164] The appellants go on to submit that the judge erred in applying both branches of the test for liability for the unlawful means tort. First, they say, the fact that Minister Reynolds wrote letters of support for WCW was not unlawful, it did not provide Sunbelt or Snowcap with a civil claim against the appellants and, in any event, it caused no loss because, in the end, no contract was awarded. The same analysis applies, they say, to their dealings with the Goleta Water District and the imposition of the 1991 Moratorium. Second, they say, there was no evidence of any intention on the part of any Crown defendant to cause Rain Coast economic harm because it was a necessary means of achieving the ulterior motive of assisting WCW for any improper purpose or material gain.

[165] Rain Coast responds that the judge made no error in his findings or analysis. In its submission, Minister Reynolds' conduct was actionable at the instance of Sun Belt and Snowcap because it may have influenced the City of Santa Barbara and the Goleta Water District to select WCW and because it was part of an on-going pattern of Crown misconduct, including imposition of the 1991 Moratorium, all of which was motivated by the ulterior purpose of assisting WCW.

*Analysis*

[166] As the judge stated, the Supreme Court of Canada clarified the narrow bounds of the unlawful means tort in *A.I. Enterprises Ltd*. In summary, the tort is available in three-party situations in which the defendant commits an actionable unlawful act against a third party and that act intentionally causes economic harm to the plaintiff (at para. 5). The relevant intention is "targeted malice". As Justice Cromwell explained, incidental economic harm is part of market competition and, therefore, the fact that the plaintiff suffers harm as an incidental consequence of the

defendant's conduct, even where the defendant realizes such harm will likely result, is not sufficient to establish liability (at para. 95).

[167] In my view, the judge erred in applying the test for liability for the unlawful means tort. There was nothing unlawful in any Crown defendants' conduct that provided Sunbelt or Snowcap with a civil claim and, as the appellants point out, even if there was, it caused no one any loss. More importantly, there was no evidence, direct or circumstantial, of any targeted malice directed at Rain Coast. It follows that I would set aside the liability finding for the unlawful means tort.



### *Did the judge err by permitting Rain Coast to re-open its case and provide further evidence on damages?*

#### *Positions of the Parties*

[168] Finally, the appellants submit, the judge erred by permitting Rain Coast to re-open its case and adduce further evidence on damages. In their submission, if he could not assess damages on the evidence adduced at trial, the judge should have dismissed the claims because Rain Coast failed to discharge the burden of proof. In support of this submission, they emphasize that both parties adduced a considerable body of lay and expert evidence and made submissions on the quantum of damages. However, on his own motion and without prior notice to the parties, the judge re-opened the trial, which the appellants contend was a fundamentally flawed and procedurally unfair step that caused them serious prejudice.

[169] Rain Coast responds that the judge had an unfettered discretion to allow further evidence and submissions on damages. He stated his intention to do so during the trial, counsel for the Crown defendants did not object and the trial was not concluded when he decided to re-open. Accordingly, Rain Coast submits, the judge did not err in permitting it to provide further evidence on damages.

#### *Analysis*

[170] I agree with the appellants. The judge erred by re-opening the trial on his own motion and allowing the parties to adduce further evidence on damages. Although

he had a wide discretion, he was required to exercise it judicially based on proper principles: *Hansra v. Hansra*, 2017 BCCA 199 at para. 44. These include the principle that a judge's discretion to re-open should be exercised with restraint and a party should generally not be permitted to lead substantial new evidence, particularly new expert evidence: *Moradkhan v. Mofidi*, 2013 BCCA 132 at para. 31. The fundamental consideration is whether a miscarriage of justice would occur if the trial is not re-opened and the parties are not allowed to adduce further evidence: *Stevens v. Plachta*, 2006 BCCA 479 at paras. 10, 15.

[171] This was not a bifurcated trial in which, by prior order or agreement, evidence and argument on liability were to be heard first, followed, if necessary, by evidence and argument on damages. On the contrary, over the course of 26 trial days both parties presented a substantial body of evidence, including expert evidence, on liability and damages. Nor, as Rain Coast submits, did the judge inform counsel that he might permit them to adduce further evidence and provide an opportunity for objection. Rather, at the outset of closing submissions he informed counsel that he proposed to write a judgment on facts and liability alone and, if necessary, hear further oral argument on the quantum of damages taking into account his findings of fact.

[172] There was no basis for the judge to conclude there would be a miscarriage of justice if the parties were not allowed to adduce further evidence on damages. It is an unfortunate, but not uncommon, reality that evidence adduced at a trial may not be particularly helpful to the court in resolving one or more of the issues for determination. However, it is for the parties to decide how to present their cases, taking into account the burden of proof and the rules of evidence.

[173] The judge permitted Rain Coast to split its case by allowing it to adduce further evidence on damages. This, in turn, distorted the trial process to the detriment of the appellants and compromised the goal of trial finality: *Spoor v. Nicholls*, 2001 BCCA 426. In my view, in doing so the judge erred by failing to exercise his discretion judicially in accordance with applicable legal principles.

### *Should this Court determine the constitutional questions that the judge declined to address and, if so, how should they be answered?*

*Positions of the Parties*

[174] The appellants contend that, like the judge, this Court should refrain from determining the constitutional questions. In their submission, there is no link between Rain Coast's claim for damages and the alleged invalidity of the impugned provisions because legislative validity is not the test for fault. For present purposes, they say, it does not matter if the impugned provisions were unconstitutional because there is no evidence that the Crown defendants wilfully breached the federal-provincial division of powers. In support of their submission, they note that courts generally refrain from making constitutional pronouncements that are not essential to disposing of the case at hand and argue that, in this case, that approach should apply.

[175] Rain Coast responds that the constitutional questions are fundamental to the central issues raised by its claims and, therefore, this Court should answer them. In its submission, the Crown wilfully breached the federal-provincial division of powers by purporting to regulate export trade in a commodity when it enacted, among other legislation, OIC 630/85, OIC 331/91 and ss. 5(c), 7(1)(a) and (b) of the *Water Protection Act*. It goes on to submit that if the water export rates and the 1991 Moratorium were unconstitutional it would have pursued and successfully developed its water export business. Therefore, it says, answers to the constitutional questions are required for a full analysis of the tort of misfeasance in public office and causation. They are also required, they say, as a basis for punitive damages, which they ask this Court to award on appeal.

*Analysis*

[176] Again, I agree with the appellants. As a general rule, courts avoid answering constitutional questions that do not squarely arise for decision and are not essential for determination of a case. As Justice Sopinka explained in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, this policy of restraint is based on the realization that unnecessary constitutional

pronouncements may prejudice future cases, with unforeseen implications. It also engages the doctrine of mootness and the need to conserve judicial resources in the administration of justice (at paras. 8–12).



[177] In my view, the policy of restraint advocated in *Phillips* applies to the constitutional questions that Rain Coast poses in this case. Regardless of whether they were constitutional, there was no evidence, direct or circumstantial, capable of supporting a finding that the Crown defendants wilfully breached the federal-provincial division of powers in enacting the impugned provisions. As the appellants point out, every other province in Canada has enacted legislation to control the removal of water and Parliament has legislated only in cases involving international boundary waters. While contemporaneous documents show some government officials believed a constitutional question might arise, there is absolutely nothing in the record to suggest that they intended to act in a deliberately unlawful manner. It follows that a decision on the constitutional questions is not essential to determination of the case and I would refrain from answering them.

### *If the appeal is allowed, what order should this Court make?*

#### *Positions of the Parties*

[178] The appellants submit that if the appeal is allowed, the action should be dismissed in its entirety. They also seek an order that Rain Coast pay their costs of the appeal and of the action below.

[179] Rain Coast responds that if the appeal is allowed, a new trial should be ordered.

#### *Analysis*

[180] In my view, Rain Coast's action must be dismissed in its entirety. A thorough review of the pleadings, the law and the record reveals no evidence capable of supporting Rain Coast's allegations of targeted malice or deliberate unlawfulness in the execution of their public duties against the Crown defendants. It would be unjust to vex them any further with Rain Coast's complaints.

## Conclusion

[181] For all of these reasons, I would allow the appeal, set aside the order below and dismiss the action in its entirety. In accordance with the usual rule as articulated in *Murphy v. Murphy*, 2007 BCCA 591, I would order that Rain Coast pay the costs of the trial and the appeal.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice Fisher"

# Court of Queen's Bench of Alberta

**Citation: Re Canada North Group Inc, 2017 ABQB 508**

**Date:** 20170817
**Docket:** 1703 12327
**Registry:** Edmonton



**In the Matter of the**
***Companies' Creditors Arrangement Act*,**
**RSC 1985, c C-36, as amended**

**and in the Matter of a Plan of Arrangement of**
**Canada North Group Inc., Canada North Camps Inc.,**
**Campcorp Structures Ltd., D.J. Catering Ltd.,**
**816956 Alberta Ltd. and 1371047 Alberta Ltd.**

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**Reasons for Decision**
**of the**
**Honourable Mr. Justice S.D. Hillier**

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## I Introduction

[1] Canada North Camps Inc. (CNC), Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd. and 1371047 Alberta Ltd. (collectively, the Group) request extension of a Stay under s. 11.02(2) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*) until November 3, 2017 and ancillary orders.

[2] The Canadian Western Bank (CWB) cross-applies for an order lifting the Stay and appointing either a full or interim Receiver pursuant to s. 243 (or ss. 47 and 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*)), s. 13(2) of the *Judicature Act*, RSA 2000, c J-2, s. 99(a) of the *Business Corporations Act*, RSA 2000, c B-9, and s. 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7.

## II History

[3] The Group operates or provides a number of services including work camps in the natural resource sector, modular construction manufacturing, camp land rentals as well as real estate holdings including a golf course. CWB has been the Group's major secured creditor for a significant period of time.

[4] 1919209 Alberta Ltd. (1919) is an insolvent affiliated debtor holding company of two of the companies in the Group. It was incorporated to lease camp equipment from Weslease Income

Growth Fund LP (Weslease) and provide that camp equipment to Canada North Camps Inc. for its use. 1919's operations are integrated with those of the other applicants.

[5] CNC entered into an agreement to construct a camp on Wandering River. 1371047, and Wandering River Properties Ltd. (owned 2/3 by 1371047) subsequently purchased a parcel for that purpose. CNC joined with the local Heart Lake First Nation and formed Heart Lake CNC LP, Heart Lake Canada North Group GP Ltd., Wandering River Properties Ltd., and Canada North Group LP Holdings Ltd.

[6] An action by Max Fuel Distributors Ltd. as against Shayne McCracken arises from the operation of the camp business. The other creditors of the Group are stayed from enforcing collateral claims against Shayne McCracken.

[7] The Group's operations and profitability have been significantly impacted since 2014 by the downturn in the economy. Earlier attempts by the Group and CWB to deal with the debt and cash flow issues proved to be unsuccessful.

[8] In March 2017, the parties signed a Forbearance Agreement but problems continued. When they were unable to reach a new resolution in a full meeting on June 21, 2017, the Group issued Notices of Intention to make proposals under the *BIA* effective June 26, 2017.

[9] On July 5, 2017, Nielsen J. granted an initial Stay under s. 11.02(1) of the *CCAA*. He imposed numerous terms, including that:

- Ernst & Young be appointed as Monitor;
- R. e. I. Group Inc. be appointed as Chief Restructuring Officer (CRO);
- the Stay continue until August 3, 2017, subject to review;
- Debtor in Possession (DIP) financing from the Business Development Bank of Canada (BDC) be made available, not to exceed $1M;
- Notice of Intention proceedings under the *BIA* be "taken up" and continued under the *CCAA*.

[10] On July 27, 2017, the Group applied under s. 11.02(2) of the *CCAA* for an extension of the Stay to November 3, 2017. It also applied to add 1919 as an applicant in these proceedings.

[11] As well, it applied to expand the Stay to apply to proceedings against the entities involved in the Wandering River contract, and against Shayne McCracken.

[12] Finally, the Group applied for an increase in the DIP financing to a maximum of $2,500,000 and an interim lender's charge up to the same amount due to elevated costs associated with a significant short-term increase in work under a camps contract with the British Columbia provincial government for workers on the wildfires.

[13] The CWB cross-applied for an order lifting the Stay and appointing a full or interim Receiver.

[14] The Monitor sought approval of his First Report and activities, a suspension of limitation periods on claims, and the power to examine the parties regarding questioned transactions on lot sales prior to the *CCAA* Order (preferences) under s. 36.2 of the *CCAA*. Other interested parties also made submissions as affecting their interests.

[15] In an oral decision, this Court extended the Stay to September 29, 2017 with a review to be held on September 26, 2017. The cross-application was dismissed. The Court also issued a series of ancillary directions. The parties were advised that written reasons would be issued dealing with the main issue as to extension of the Stay or appointment of a Receiver. These are the written reasons.



## III Affidavit Evidence

[16] The Group's stated preliminary plan is to return operations to profitability as demand increases, consider sale of some of its assets, and seek new financing or equity investment as required in order to provide a viable Plan of Arrangement.

[17] The Group has presented extensive affidavits from Ms. Shayne McCracken, Director and Secretary of the applicants, in support of the various applications, containing the following key assertions:

- the Group has acted in good faith and with due diligence, working closely with the CRO and cooperating with the Monitor as they gain an understanding of the business and structure;
- the Group has specifically worked with the CRO and Monitor to improve financial reporting and accounting processes;
- together they have taken initial steps to develop a Plan of Arrangement to present to creditors, including a detailed overview of assets and liabilities;
- the Group has been the subject of unsolicited investment and purchase interest, which the Group, Monitor and CRO are pursuing;
- meetings have taken place with interested parties as well as arrangements related to drawdowns on DIP financing;
- work has included contracts with the Province of British Columbia to address efforts in consequence of raging wildfires in that province.

[18] Ms. McCracken's affidavits purport to meet head on the concerns of CWB with the accounting treatment of certain accounts receivable, particularly in relation to the Grand Rapids Pipeline Project and the margining of custom negotiated deferred revenue. In late 2016, cost estimates were prepared for demobilization of the Grand Rapids camp, including removal of the camp for just over \$2M and reclamation work estimated at roughly \$5.36M based on detailed costing. Ms. McCracken asserted that the practice of clients assuming the costs of setting up and removing camps by advance invoicing is used by others in the camp industry.

[19] The margining of custom negotiated deferred revenue allows the Group access to necessary financing to commence work prior to being paid. Ms. McCracken found support for the accounting practice in question in the custom negotiated deferred revenue term of the margining requirement that was part of the credit agreement with CWB.

[20] Two significant receivables were placed on the books between March and May 2017 (it is unclear when they were actually posted and sent to the client) on Grand Rapids. This ostensibly led to a claim against the financing and increased CWB's exposure significantly at a time when the parties were trying to sort things out following the Forbearance Agreement in mid-March.

[21] Ms. McCracken specifically denied CWB's allegation that these invoices were provided in bad faith to artificially inflate the amount available on the operating line. She deposed that the invoicing for this work was reviewed by the Group's corporate counsel. As well, it was part of the financial reporting to CWB and there were regular conversations with account managers at CWB who were aware of the origin and nature of all significant receivables, including the Grand Rapid receivables. Ms. McCracken maintained the view that the receivables were appropriately margined as deferred revenue.

[22] Ms. McCracken noted that Grand Rapids has now raised issues with respect to payment of some of the invoices and a meeting is scheduled with it in Calgary in early August to discuss payment of those invoices.

[23] Ms. Jessica Taha filed extensive material for CWB challenging the Stay, and supporting the appointment of a Receiver. The following assertions are germane, particularly as concerns margining of receivables:

- the Group had been margining receivables for which work had not yet been done (citing Grand Rapids);
- as a result, the operating line was overdrawn by over $3.8M for work not yet done which only came to light at the June 21, 2017 meeting; subsequent information reflects that it is overdrawn by $8M;
- the Group had only performed 10% of required work on one contract and only 40% for another, and none of this was consistent with the margining as represented by the Group, and arranged between the parties dating back to 2012;
- despite representations to the contrary before Nielsen J., CWB was not aware of this prior to the June 21, 2017 meeting.

[24] Ms. Taha attested to her belief that as the level of work dropped dramatically in the economic downturn, the Group changed its approach without advising CWB, and started to render invoices for work which had not yet been done, categorizing those invoices as deferred revenue capable of margining.

[25] In response, Ms. McCracken maintained her position that the Grand Rapids deferred revenue was properly included in the financial statements. She deposed that Ms. Taha's position that deferred revenue was only permitted to be used for margining based on the percentage of the work performed is inconsistent with the supporting material provided by Ms. Taha. The Group kept their branch representatives apprised of the status of the deferred revenue inclusions in the margining calculations and none raised a concern.

[26] In counter response, CWB prepared three affidavits of senior officers at the Edmonton Main Branch deposing that they were unaware of the material amounts that were being margined without the work having been done, and each was unaware of anyone else at CWB having had such knowledge until the meeting on June 21, 2017.

[27] Glenn MacDougall, Manager of ECN Capital Corp. (ECN), also filed an affidavit. ECN is an equipment lessor and creditor of the Group. In short, he opines that the work resulting from the BC wildfires is a temporary salve on the Group's financial circumstances, and it is unlikely that the Group will be able to make a viable Plan of Arrangement. He deposed that ECN would

be materially prejudiced by the continuation of the Stay, as it will erode the value of ECN's security.

[28] With respect to expanding the Stay, Ms. McCracken deposed that direct claims against affiliates have been reviewed. The Group now seeks to expand the stay to specific affiliates where those affiliates are facing claims directly connected to the overall camp operations, in order to preserve the *status quo*, prevent unnecessary expenditures of effort on litigation, maximize recovery for all parties, and allow for an orderly determination of priority and claims.

[29] Regarding inclusion of 1919, Ms. McCracken deposed that 1919 has no revenue other than lease income from Canada North and is completely dependent on such payments to fulfill its obligations under the leases. It is included in the consolidated cash flow projections and financial statements for the Group, as it is treated as a flow through entity. The equipment it leases is essential to the uninterrupted operations of the Group.

[30] Finally, Ms. McCracken explained that the increased work for the B.C. government, although welcome, creates a cash flow issue as the work is invoiced approximately a week after completion and receipt of payment typically takes approximately four weeks from invoicing. Consequently, the Group anticipates a cash flow shortage in August 2017 that will not be met by the present DIP facility. On July 21, 2017, the interim lender approved an increase to the DIP financing to a maximum of $2,500,000.

## IV Monitor's First Report

[31] The Monitor has provided a First Report, advising of various steps taken in conjunction with the CRO, highlights of which include:

*General*

- a new cash management procedure has been initiated to ensure efficient control of cash and cash reporting, with a review of cash flow projections;
- the Group's management and staff have been making significant efforts in all respects and are cooperating fully with the efforts of the CRO;
- based on the Monitor's own work with Group management, the Group appears to have acted in good faith and with due diligence;
- the actual end cash balance for the two weeks ending July 15, 2017 was higher than projected by over $400K and collections higher than projected by nearly $350K;
- while cash disbursements were lower, this was largely due to temporary deferrals;
- the contracts relating to the B.C. wildfires will have a significant positive impact on future cash inflows and receivables.

*Accounts Receivable*

- the Group has used atypical accounting practices as reflected in four areas;

- the steps being adopted in response to CWB's concerns include removing Grand Rapids and Heart Lake related receivables as a conservative strategy while quantum is reviewed;
- some but not all of the room guarantees or reservations have been reversed out.

*Status of Restructuring Efforts and Related Plan*

- the Group's business and operations are very complex;
- the CRO believes, based on preliminary work to date and co-operation of the management team, that there is certainly potential for a going concern plan that could provide significantly greater value to stakeholders as compared to a liquidation;
- the CRO is of the initial view that several profit and gross margin improvements have been realized by the Group due to changes to operations, staffing and other operational matters.

*1919*

- the leasing arrangement with Weslease has been extended for use by the Group valued at approximately $6M and listed as: three Jack+Jill dorms, two power distribution centres and one waste water treatment plant;
- expansion of the Stay to include 1919 is reasonable.

[32] As well, the Monitor and the Group have been in contact with various parties who have expressed interest in participating in a restructuring through refinancing, purchasing assets or investing in the Group.

## V Law

[33] An initial Stay under s. 11.02(1) of the *CCAA* may be imposed for a maximum period of 30 days. The role of this Court on a subsequent application under s. 11.02(2) is not to re-evaluate the initial decision, but rather to consider whether the applicant has established that the current circumstances support an extension as being appropriate and that the applicant has acted, and is acting, in good faith and with due diligence, as required under s. 11.02(3).

[34] The purpose of the *CCAA* is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Appropriateness of an extension under the *CCAA* is assessed by inquiring into whether the order sought advances the policy objectives underlying the *CCAA*. A stay can be lifted if the reorganization is doomed to failure, but where the order sought realistically advances those objectives, a *CCAA* court has the discretion to grant it: ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60 at paras 15, 70, 71, [2010] 3 SCR 62.

[35] In applying for an extension, the applicant must provide evidence of at least "a kernel of a plan" which will advance the *CCAA* objectives: ***North American Tungsten Corp, Re***, 2015 BCSC 1376, 2015 CarswellBC 2232 at para 26, citing ***Azure Dynamics Corp, Re***, 2012 BCSC 781, 91 CBR (5th) 310.

[36] Pursuant to s. 11.02(3), the applicant is required to demonstrate that it has acted, and continues to act, in good faith. Honesty is at the core of "good faith": ***San Francisco Gifts Ltd., Re***, 2005 ABQB 91 at para16, 10 CBR (5th) 275.

[37] Section 11.02(3) refers to consideration of good faith and due diligence in both the past and present tense. Romaine J. in ***Alberta Treasury Branches v Tallgrass Energy Corp***, 2013 ABQB 432 at para 13, 9 CBR (6th) 161 confirmed the language of s. 11.02(3), to the effect that the court needs to be satisfied that the applicant has acted in the past, and is acting, in good faith. See also ***Alexis Paragon Limited Partnership (Re)***, 2014 ABQB 65 at para 16, 9 CBR (6th) 43.

[38] By contrast, in ***Muscletech Research and Development Inc (Re***), [2006] OJ No 462 at para 4, 19 CBR (5th) 57 (Sup Ct Just), Farley J. held that the question of good faith relates to how the parties are conducting themselves in the context of the *CCAA* proceedings. Courts in subsequent cases adopted this view: ***Pacific Shores Resort & Spa Ltd (Re)***, 2011 BCSC 1775 at para 31-32, [2011] BCJ No 2482, and ***4519922 Canada Inc.(Re)***, 2015 ONSC 124 in paras 44-46, 22 CBR (6th) 44.

[39] In ***Guestlogix Inc, Re***, 2016 ONSC 1348, [2016] OJ No 1129, the Court expanded the stay to proceedings against a guarantor, noting that it was insolvent and in default of its obligations, highly integrated with the debtor company, and the debtor company would be able to include all the assets of the guarantor in a potential transaction if the guarantor were added.

[40] The Court has broad equitable jurisdiction to determine appropriate allocation among assets of administration, interim financing and directors' charges: ***Hunters Trailer& Marine, Re***, 2001 ABQB 1094, 30 CBR (4th) 206. The Court in ***Canwest Publishing Inc (Re)***, 2010 ONSC 222 at para 54, 63 CBR (5th) 115 set out factors to be considered in determining priority of charges under s. 11.52 of the *CCAA* which are critical to the successful restructuring of the business:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

[41] Section 11.2(4) of the *CCAA* provides that in deciding whether to make an order allowing DIP financing, the Court must consider:

(a) the period during which the company is expected to be subject to *CCAA* proceedings;

(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.



[42] In ***US Steel Canada Inc (Re)***, 2014 ONSC 6145 at paras 12-18, 20 CBR (6th) 116 the Court discussed the authority under s. 11.2 to grant priority to the DIP lender's charge to secure the DIP loan. In addition to the factors set out in s. 11.2(4), it considered the following in granting priority:

(a) notice had been given to all of the secured parties likely to be affected and broadly to all *PPSA* registrants, and other interested entities;

(b) the maximum amount of the DIP loan was appropriate based on the anticipated cash flow requirements of the applicant as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period;

(c) the cash flows were the subject of a favourable report of the Monitor in its First Report;

(d) the Applicant's business would continue to be managed by the applicant's management with the assistance of the CRO during the restructuring period;

(e) the existing operational relationships between the applicant and its largest creditor would continue; and

(f) the DIP loan would assist in, and enhance, the restructuring process.

## VI Analysis

### Extension of Order

[43] Various factors were profiled by Ms. Wanke before Nielsen J. to support the Group's position that a restructuring under the *CCAA* is possible; if the objective is liquidation, then appointment of a Receiver is appropriate. Nielsen J. recognized the possibility of a successful restructuring in rejecting the application to appoint a Receiver and granting the application to impose a Stay under the *CCAA* with a Monitor and CRO. In recognizing that a lot of work had been done, he found that those supporting the steps to restructure should be given that opportunity in the collective best interest despite the prejudice of deferral and risk as regards repayment of CWB and other creditors.

[44] I now have the responsibility to measure the progress in the period leading up to expiry of the initial Stay. Without second-guessing the initial decision, I must assess the current circumstances, including the good faith and due diligence of the parties in light of steps taken to date.

[45] The legislative objective of a *CCAA* order is to provide the Court considerable scope to maintain the *status quo* for a company to make proposal arrangements to facilitate remaining in operation for a collective benefit. One may have preferred to see some further advancement on the "germ of a Plan" but I am satisfied that the CRO has begun consultations with unsolicited parties who have expressed an interest and that a structure for such a Plan is now an important priority.

[46] I am mindful that the Monitor was obliged to report on just under three weeks of activity in rendering a First Report by July 24, 2017. Various factors have impacted the lack of concrete progress on a Plan at this point, including the value of the Group as a going concern estimated at $97M (equipment, manufacturing and real estate) with diverse activities, assets and work product, the complexity of restructuring, and the need to modernize the sophistication of a family operation that is unable to operate as it has done historically.

[47] Professional advisors are now in place assisting in this required modernization. Potential investors have and continue to express interest in the Group. It appears that DIP funding has been used prudently to cover operational expenses including higher than expected professional expenses. Cash flows are quite healthy and the Group owns a number of assets of marketable value.

[48] CWB notes that Nielsen J. indicated on the initial Stay application that the Group would have to show more than a germ of a plan at the next hearing. It is not entirely surprising that three weeks did not prove long enough to complete the steps necessary to create a Plan of Arrangement. There is no allegation of delay or inertia by the Monitor or the CRO in performance of significant responsibilities undertaken since confirmation of their appointment July 5, 2017. The Monitor reported that the Group has been working with due diligence and in full cooperation. A number of competing interests require the attention of the Monitor. Having considered all of the circumstances before the Court, I am satisfied that the Group has established due diligence.

[49] It bears noting that CWB is not the only party who would be affected by receivership. Employees, other creditors, clients, and the public would also be affected. Changes have already been implemented by the CRO, as observed and reported by the Monitor.

[50] The Group has had the recent opportunity to enter into contracts with the Province of B.C. in relation to the wildfires. It appears that despite the Group's liquidity crisis – impacted by various factors, including market conditions – the business of the Group may well be salvageable. This assessment appears to be supported by: the cash flow projections, recoveries on receivables, and changes begun by the CRO in consultation with the Monitor with particular regard to increased work potential and to increase the sophistication of accounting.

[51] However, CWB takes the position that the Group has been in default of its obligations to CWB for many months. CWB extended time for the Group to find refinancing and continued to make available to the Group the operating line facility in the amount of $12,000,000, margined on accounts receivable of the Group. CWB asserts that the Group took advantage of CWB by falsely including one or more multi-million dollar accounts receivable for which the work had not yet been done.

[52] The parties disagree as to whether the law supports serious consideration of past bad faith if it is relevant to the viability of the *CCAA* proposal or its continuation.

[53] The language of s. 11.02(3) of the *CCAA* does not temporally restrict the consideration of bad faith. The wording of that provision is captured broadly in ***Tallgrass***. It would appear that ***Muscletech*** and the cases which followed it stand for the proposition that courts should look only to conduct in the context of the *CCAA* process. This represents a restrictive reading of s. 11.02(3) and the purpose of such a narrow interpretation is unclear.

[54] It is logical that past due diligence will usually have minimal relevance as a factor. However, past bad faith illuminated after *CCAA* proceedings have been initiated may undermine the confidence of creditors and the Court in the viability of *CCAA* proceedings. In my view, past bad faith may well be a relevant factor in the Court's assessment under s. 11.02(3). This is in keeping with the approach taken in ***Alexis Paragon***, 2014 ABQB 65 at paras 37-38.

[55] I note that the facts in this case are distinguishable from those in ***San Francisco*** where the alleged deception appeared to be aimed at deriving an advantage from customers through knock off products and counterfeit safety labels, rather than deriving an advantage from a financing secured creditor through accounting practices as alleged here by CWB.

[56] Again, the major issue in this regard is, and has been profiled as, the status of accounts receivable in terms of the margining of contracts for work not yet performed or not fully performed.

[57] CWB takes the position that, upon consultation with her client and corporate counsel, Ms. Wanke misrepresented the situation to Nielsen J. in her oral submissions on July 5, 2017. While this Court is not reviewing the basis for Nielsen J.'s order, the issue of margining was raised at that time and the allegation of bad faith remains a live issue. I understand the interpretation placed by CWB on the representations made in front of Nielsen J. both from Affidavits and then information provided to legal counsel. Ms. Wanke summarized her understanding as being that this was part of the camp business on the books of the Group and not a lack of good faith. I accept her expression on this review to the effect that she would have preferred to have been more familiar with the Grand Rapids contract at the time but that this issue only surfaced latterly. She said she would have stated the client's position somewhat differently, but that the net effect remains that the margining was consistent with the Group's understanding of its entitlement.

[58] CWB's concerns regarding the margining are understandable. It takes the position that while margining on deferred revenue was permissible, the Grand Rapids contracts do not qualify for that treatment according to the terms as agreed to between the parties notwithstanding the assertions advanced by the Group. CWB says there was an understanding as relates to the formula to be applied to these receivables that was violated, especially as to the two major Grand Rapids accounts issued between the end of March 2017 and beginning of May 2017. Counsel for CWB took the Court through a number of documents relating to the credit agreement between CWB and the Group to explain what the Group's reasonable understanding should have been in relation to contracts qualifying for special treatment of the accounts receivable for margining purposes.

[59] The Monitor has reviewed and discounted a number of entries as inappropriate; it will likely have to further endorse commitment to revise other receivables. The Court agrees that a commitment to revise other receivables may be appropriate. However, there are a number of priorities competing for the attention of the CRO. It is difficult to measure whether any breaches of the protocol were intentionally deceptive as distinct from aggressive and misguided. That distinction is harder to make based on duelling affidavits as distinct from oral testimony,

questioning or at minimum some objective detailed analysis by the Monitor to assist the Court's interpretation of events.

[60] I have struggled to understand the treatment of invoicing as to the records of accounts receivable, particularly as the idea of charging for work not done is rather foreign to my experience as to the entitlement to collect. So too, the deferral of the time for payment extending from 45 days to 120 days obfuscates the idea of entitlement. The matter is complicated by the risk and relative reliability of these receivables as assets, distinct from a bad or at least tainted debt that needs to be monitored for collection procedures. All of these aspects appear to arise in far greater sums for 2016 than in any previous year which, understandably, is further troubling to principals at CWB.

[61] I endorse the concerns of CWB as legitimate. Even in the absence of a finding of bad faith, the practice employed as reflected in treatment of the Grand Rapids receivables raises legitimate concerns regarding the future viability of the Group. I accept that the practice in question has resulted in margining which has led to overall debt to CWB which is incongruent with the Group's receivables as they would be represented in the normal course, as confirmed in the Monitor's First Report.

[62] I also note CWB's concern that the cash flow projection relied on by the Monitor did not take into account unpaid professional fees relating to the work toward reorganization, and the projected loss to the end of October 2017 is considerably offset only by the fortuitous and uncertain wildfire camp work. CWB's receivables, to the extent they are collectible, are being used up by payment of the professional fees and interim financing.

[63] Nevertheless, I am not prepared to conclude on the basis of the material as presented to me that the Group has failed to act in good faith to the extent of disentitling the extension sought.

[64] Clearly, the parties now disagree on the interpretation of the arrangement between them as regards margining based on deferred revenue. The issue before this Court is not the correct interpretation of the various document referred to by CWB's counsel, but rather whether the Group's reliance on its understanding amounted to bad faith. There has been no trial of the latter issue. While raising questions, the evidence adduced on this application falls short of supporting a finding of bad faith in the sense of knowing reliance on an unsupportable interpretation of the documents, or intentional concealing of the practice or any relevant financial information. This is particularly so in light of the evidence of the Group's understanding that the arrangement between CWB and the Group expressly contemplated that the Group was permitted to margin deferred revenue when no work had been done.

[65] If the CWB was not aware of the effect or extent of this type of margining, it is not clear from the evidence that the Group understood it was acting other than consistently with the intention of the parties in this regard. This view of the matter is generally supported by the Monitor's information that the sophistication of all facets of the accounting system in place has not kept up with the sophistication of its business. The CRO is working to address accounting practices which require improvement.

[66] There is undeniably a considerable difference in the parties' interpretations of the conduct and reporting. Obviously, a debtor may be motivated to maximize access to funding. The past practice here is somewhat unclear, but even if the Group exceeded the terms or protocol as generally agreed, I do not ascribe bad faith to its actions.

[67] Overall, I find that extension of the Stay is in the best interest. However, a further vigorous review must take place within a reasonable period of time.

[68] The November 3, 2017 date targeted by the Group is not reasonable in the circumstances.

[69] As such, the next hearing is set for September 26, 2017. The Court will require a Report from the Monitor at least 7 business days prior to that date.

**Increase in DIP Financing**

[70] Ms. McCracken suggests in her affidavit that they only need a small increase in the DIP loan to cover operations in light of healthy cash flows and significant assets.

[71] While the creditors may rightly take issue with the characterization of the increase as "small", I approve the request to increase the DIP financing from $1M to $2.5M in the form of order proposed by counsel for the Group to address the anticipated cash flow shortage resulting from welcome work during what is typically a slower season for the Group. Counsel for CWB took no issue with the form of order.

[72] At the close of submissions, counsel for CRA alerted the Court, as well as BDC in particular, that it took issue with the increase in DIP financing and that it would be applying for priority with respect to $1.14M owing to the Minister by the Group for unremitted source deductions and GST. It was seeking an order to vary so as to put the administrative charge, director's charge and interim lender charges in second place behind the CRA. In light of that information, BDC counsel indicated that the CRA's position would not impair BDC's ability to advance the DIP financing, noting that the matter would be argued at a later date.

**1919**

[73] The application to add 1919 was not opposed. As was the case in ***Guestlogix***, the operations of 1919 are inextricably linked to those of the Group, as it leases important equipment and provides it Canada North.

[74] I order that 1919 be added as a party included in the Group. Counsel for the Group agreed to include in the order a clause restating the allocation provision in the initial Stay Order to recognize that Welease has made this concern known at this point. Counsel for CWB did not take issue with such a provision in the order.

**Approval of Monitor's First Report**

[75] And at the request of the Monitor, I approve:

- his First Report and activities;
- suspend the limitation periods on claims;
- confer power to examine parties on questioned transactions regarding lot sales prior to *CCAA*.

[76] The further Report of the Monitor is required at least 7 days before the next hearing.

**Expansion of Stay**

[77] The Stay is expanded to apply to proceedings against Heart Lake and associated parties involved in the Grand Rapids contracts, and proceedings by Max Fuel against Ms. McCracken.

Counsel for CWB did not take issue with this. In the result, the applications for appointment of a Receiver, interim or otherwise, are dismissed.

**Sealing of Confidential Information**

[78] I order that the confidential information identified as such on the Court file be sealed.

**Service Protocol to Reduce Costs**

[79] The Monitor is to maintain a service list of parties who provide the Monitor with email addresses. Those parties may be served by email effective the date of the email. All others are to be served by the Monitor posting its and others' materials on its website, effective as at the date of posting.

## VII Conclusion

[80] I have determined that it is in the collective interest to extend the *CCAA* Stay to September 29, 2017. The Order will be subject to review by me on September 26, 2017 in usual consultation with the Court Coordinator.

Heard on the 27th day of July, 2017.
**Dated** at the City of Edmonton, Alberta this 17th day of August, 2017.

**S.D. Hillier**
**J.C.Q.B.A.**

**Appearances:**

S.A. Wanke and S. Norris
DLA Piper (Canada) LLP
for the Applicants/Cross-Respondents

C.P. Russell, Q.C.
McLennan Ross LLP
for the Respondent/Cross-Applicant

D.R. Bieganek, Q.C.
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for the Monitor, Ernst &Young LLP

J. Oliver
Cassels Brock
for Business Development Bank of Canada

T.M. Warner
Miller Thompson
for ECN Capital Corp.

M.J. McCabe, Q.C.
Reynolds Mirth Richards & Farmer LLP
for PricewaterhouseCoopers

R.J. Wasylyshyn
Ogilvie LLP
for Weslease Income Growth Fund LP

H.M.B.Ferris
Lawson Lundell LLP
for First Island Financial Services Ltd.

G.F. Body
Justice Canada
for Canada Revenue Agency

**CITATION:** Re Crystallex International Corporation, 2012 ONSC 2125
**COURT FILE NO.:** CV-11-9532-00CL
**DATE:** 20120416



**SUPERIOR COURT OF JUSTICE - ONTARIO**
**COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION

**BEFORE:** Newbould J.

**COUNSEL:** Markus Koehnen, Andrew J.F. Kent and Jeffrey Levine, for Crystallex International Corporation

Richard B. Swan, S. Richard Orzy and Emrys Davis, for Computershare Trust Company of Canada

David R. Byers and Maria Konyukhova, for Ernst & Young Inc., Monitor

Shayne Kukulowicz, for Tenor Special Situations Fund LP

John T. Porter, for Juan Antonio Reyes

Robert Frank, for Forbes & Manhattan Inc. and Aberdeen International Inc.

**DATE HEARD:** April 5, 2012

## E N D O R S E M E N T

[1] Crystallex moves for four orders, the first being an order approving DIP financing pursuant to a credit agreement between Crystallex and Tenor Special Situation I, LLC ("Tenor"), the second being an order extending the stay referred to in paragraph 16 of the Initial Order dated

December 23, 2011 until July 16, 2012 or such further date as may be ordered, the third being an order approving a Management Incentive Plan ("MIP") and a Retention Advance Agreement in favour of Robert Fung and the fourth being an order to approve the actions of the Monitor referred to in the second and third reports of the Monitor.

[2] The noteholders of Crystallex[1] oppose the Tenor DIP facility. They propose a DIP loan which they would make for a smaller amount and for a shorter term than the Tenor DIP facility. They also oppose the MIP. In order to preserve any appeal rights they may have and may want to assert, they do not consent to an order approving the actions of the Monitor in the second and third reports, but take no position in opposition to the order sought.

[3] A shareholder, Mr. J.A. Reyes appeared on the motion to support the Tenor DIP facility and in principle the MIP, but has some concerns regarding the terms of the MIP.

[4] Forbes & Manhattan Inc. and Aberdeen International Inc., creditors owed approximately $2.5 million by Crystallex, oppose the Tenor DIP facility and the MIP.

**Background to the Financing**

[5] The history of the business of Crystallex and its mining project in Venezuela has been the subject of prior decisions in cases brought by the Noteholders. The evidence on the record before me indicates in summary as follows.

[6] The principal asset of Crystallex was its right to develop the Las Cristinas gold project in Venezuela. Las Cristinas is one of the largest undeveloped gold deposits in the world containing measured and indicated gold resources of approximately 20.76 million ounces.

[7] In September 2002 Crystallex obtained the right to mine the Las Cristinas project through a Mining Operation Contract (the "MOC") with the Corporacion Venezolana de Guayana (the "CVG"), a state-owned Venezuelan corporation. Crystallex complied with all of its obligations

[1] The noteholders in question are hedge funds that represent approximately 77% of the outstanding notes. It is they who have caused Computershare to take action on their behalf in the prior actions against Crystallex and in this CCAA proceeding.

under the MOC. Neither the CVG nor the Government of Venezuela raised any material concerns about lack of compliance. The CVG confirmed on several occasions that the MOC was in good standing and that Crystallex was in compliance with it.



[8] The Ministry of the Environment advised Crystallex in writing in April 2007 that Crystallex had completed all steps necessary to obtain the required environmental permit. Crystallex was shown a draft of the permit and was told that it would obtain the permit as soon as it had paid certain stamp duties and posted an insurance bond. Crystallex paid the duties, negotiated the bond with the Ministry and posted the bond.

[9] On February 3, 2011, despite confirming on several occasions that Crystallex's right to mine the Las Cristinas property continued unchallenged, CVG purported to "unilaterally rescind" the MOC.

[10] CVG rationalized its termination of the contract for reasons of "expediency and convenience" and because Crystallex had allegedly "ceased activities for over a year" on the project. Crystallex did not cease activities. It was maintaining the mining site in a shovel-ready state and was awaiting receipt of an environmental permit. Because of Venezuela's refusal to allow Crystallex to exploit Las Cristinas, Crystallex became unable to pay its debts as they became due effective December 23, 2011.

[11] Crystallex has a number of liabilities, the most of significant of which is a liability of approximately $100 million in senior unsecured notes that were issued pursuant to a Trust Indenture dated December 23, 2004. The notes were due on December 23, 2011. In addition, Crystallex has other liabilities of approximately CAD$1.2 million and approximately US$8 million.

[12] The principal asset of Crystallex is its arbitration claim of US$3.4 billion against Venezuela. In addition, Crystallex has mining equipment with a book value of approximately $10.1 million and cash of approximately $2 million.

[13] Crystallex asserts that the insolvency in which it finds itself is not attributable to poor business judgment by Crystallex but to the illegal conduct of the Venezuelan government in refusing to let Crystallex develop Las Cristina, even though Crystallex had the undisputed contractual right to do so.

**Arbitration proceedings**

[14] On February 16, 2011 Crystallex filed a Request for Arbitration with the International Centre for the Settlement of Investment Disputes ("ICSID") against Venezuela pursuant to a Bilateral Investment Treaty between Canada and Venezuela. ICSID is a mechanism through which private investors can seek legal redress against a foreign government for conduct that might be otherwise immune from suit. In the arbitration, Crystallex seeks compensation of $3.4 billion plus interest as full compensation for the loss of its investment.

[15] The Arbitration Tribunal held its first procedural meeting on December 1, 2011 in Washington, DC. At that hearing, the Tribunal established Washington, DC as the seat of the arbitration proceeding, and established a timetable for the arbitration. Pursuant to the timetable, Crystallex delivered its written case on February 10, 2012. Crystallex's written case comprises fourteen volumes of detailed witness statements, expert's reports, exhibits, law and argument. Its memorial summarizing the evidence, law and argument extends to 226 pages. Venezuela is required to respond to Crystallex's case by August 31, 2012. The hearing of the arbitration is scheduled for two weeks beginning on November 11, 2013.

[16] The valuation evidence Crystallex submitted with its ICSID case claims damages of $3.4 billion plus interest. While the result of the arbitration is unknown, if it is successful, and the award is collected, there will be far more available than necessary to pay the outstanding debts of Crystallex. It is also clear that any meaningful recovery for the creditors and possibly shareholders will require some success in the arbitration, either by a collectible award or a settlement.

**DIP financing selection process**

[17] In accordance with paragraph 12 of the Initial Order, Crystallex, with the assistance of its counsel and its financial advisor, commenced a process to seek DIP financing of $35 million with a term of December 13, 2014.

[18] With the approval of the Monitor, Crystallex hired a financial advisor, Skatoff & Company, LLC based in New York City. Mr. Skatoff is an independent financial advisory firm focused on debt advisory services, financial restructuring advisory services, financing advisory services and M&A services.

[19] Crystallex, in consultation with Mr. Skatoff and on its recommendation, prepared a set of bid procedures to govern the solicitation of bids to provide DIP financing to Crystallex. The bid procedures were approved by the Monitor. The bid procedures are referred to in some detail in my endorsement of January 25, 2012. They included a provision whereby the DIP lender could obtain a “back-end entitlement” of up to 49% of the arbitration proceeds.

[20] The bid procedures provided that Crystallex would only consider bids from qualified bidders. A qualified bidder was one who, among other things, complied with certain participation requirements including the submission of a participation package.

[21] As a result of the DIP financing auction, a small number of qualified bidders ultimately submitted proposals for the DIP financing. Among the bidders were the three hedge funds that hold approximately 77% of Crystallex’s senior unsecured notes.

[22] Ultimately Mr. Skatoff recommended, and the board of Crystallex agreed, to accept the terms of the Tenor DIP financing now before the court for approval.

**Proposed Tenor DIP financing**

[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.

(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 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.



**Proposed Noteholders DIP Loan and Plan**

[26] The noteholders propose a DIP loan of $10 million with a simple interest rate of 1% repayable on October 15, 2012. This was essentially the same as the interim bridge loan of $10 million with simple interest of 1% proposed by the noteholders that would have been repaid on April 16, 2012 that was not accepted by Crystallex. It is quite clear that the interest rate is far below market in the circumstances of Crystallex, and it is referred to in the noteholders factum as "exceptionally favourable".

[27] During the process to find a DIP lender satisfactory to Crystallex and its advisors, the noteholders were asked to increase their proposed loan to $35 million but they refused. However, in his affidavit Mr. Mattoni on behalf of the noteholders stated that the noteholders would in the future be prepared under certain circumstances, if required by the court, to advance a DIP loan on the same terms as the Tenor DIP facility. He stated that the noteholders would do so 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 ability as creditors to continue to oppose the need for such a loan and any stay extensions or attempts to secure such long-term financing outside of a plan of compromise. The $10 million which they provided in interim financing would be repaid from this financing such that the net effect of the financing would be the same as that of the Tenor DIP facility. During argument on this motion, Mr. Swan said 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.

[28] The noteholders have also now proposed a restructuring plan, said to be in response to the Tenor DIP and the MIP. This was first proposed by Mr. Mattoni in his affidavit of March 27, 2012 as a proposal of the noteholders. At that time, he did not have any internal authority from

the QVT fund of which he is the investment manager, or from any of the other noteholders, to make such proposal. This was shored up as indicated in his further affidavit of April 4, 2012 served just before the hearing of this motion. The noteholders do not ask for approval of this plan on this motion, but put it forward as indicating a good faith intention to bargain for a plan. The noteholders plan would:

a) provide $10 million at 1% interest in a single-draw to meet Crystallex's funding needs over the next several months while a plan is negotiated;

b) provide $35 million to the Company in a straight exchange for 22.9% of Crystallex's equity;

c) exchange all outstanding debt for equity;

d) secure approximately 14% of the remaining equity for existing shareholders; and

e) provide incentives to management at a lesser level than the MIP. It would be up to the post-emergence board to ensure that management is properly incentivized, which could involve other compensation as well.

**Management Incentive Plan**

[29] In addition to approval of the DIP, Crystallex seeks approval of a Management Incentive Plan ("MIP") for certain of its key employees. The fundamental terms of the MIP are as follows:

(a) An amount equal to up to 10% of the first $700 million in net proceeds of the arbitration award and an amount equal to up to 2% of the net proceeds in excess of $700 million will be reserved as a retention pool for key management employees.

(b) The amount to be retained in this pool is the amount remaining after payment of the outstanding principal and interest on the DIP loan, outstanding operating and professional expenses, the unpaid claims of noteholders and other stayed unsecured creditors, together with post-filing interest and all taxes payable by the company on the award.

(c) The size of the pool shall not exceed 10% of the net proceeds of the arbitral award or one quarter of the amount that is available to shareholders of Crystallex after satisfaction of any additional compensation owing to Tenor under the loan agreement.

(d) A compensation committee consisting of three persons who are currently independent directors of Crystallex and who are expected to retire from the board in accordance with the governance provisions of the Tenor DIP facility, will determine the retention payment paid to each beneficiary of the MIP. The compensation committee will be entitled to distribute as much or as little of the retention pool as they see fit. Amounts remaining unpaid from the retention pool will be returned to Crystallex.



[30] Crystallex also proposes that there be a MIP charge to secure the payments, the charge to be subordinate to the Administration Charge, the DIP Charge, the Directors' Charge and the Pre-filing Unsecured Creditors Charge.

[31] Also sought for approval is a retention agreement for Mr. Fung which provides that at the end of each calendar quarter during 2012 and 2013 the board of Crystallex will pay a retention advance of $125,000 per quarter to Mr. Fung. The making of each payment will be at the discretion of the board but only to the extent that he remains properly engaged in the arbitration. Those payments are to be treated as if they were pre-payments of any payments that would otherwise be awarded to Mr. Fung from the retention pool under the MIP and therefore reduce any such amount he may receive from the retention pool.

**DIP loan approval analysis**

[32] Section 11.2 of the CCAA provides that a court may provide security in favour of an interim or DIP lender who agrees to lend to the debtor company having regard to its cash-flow statement. Section 11.2 (4) provides:

(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.



[33] Crystallex relies on the business judgment rule to support the decision of its board of directors to accept the Tenor DIP facility. It is clear that the business judgment rule can apply to a debtor in CCAA proceedings. In *Re Stelco*, (2009), 9 C.B.R. (5th) 135 (Ont. C.A.), Blair J.A. stated in that CCAA proceeding:

> 65. …It is well-established that judges supervising restructuring proceedings - and courts in general - will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples*, *supra*, at para. 67:
>
> > Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ...

[34] The noteholders point to *Kerr v. Danier Leather Inc*, [2007] 3 S.C.R. 331 per Binnie J. at para. 54 in which he stated that the business judgment rule could not be used to qualify or undermine the duty of disclosure required by the *Securities Act* and *Bennett v. Bennett Environmental Inc.* 2009 ONCA 198 per Lang. J.A. in which she held that whether a director could be indemnified depended on the application of section 123(4) of the CBCA and not the business judgment rule.

[35] I accept that in considering whether security under a DIP loan should be ordered, a court cannot ignore the factors directed to be considered in section 11.2 (4) of the CCAA and could not

order such security if a consideration of those factors led to an opposite conclusion. But in my view those factors are not the only factors that can be considered, as section 11.2(4) directs a court to consider the listed factors “among other things”. One of the considerations that in my view can be taken into account is the exercise or lack thereof of business judgment by the board of directors of a debtor corporation in considering DIP financing.



**(i) Consideration of the Tenor DIP facility**

[36] In this case, the Crystallex board took legal advice from its solicitors McMillan LLP and financial advice from Mr. Skatoff. I am satisfied that they carefully considered the relevant matters leading to the decision to accept the terms of the Tenor DIP financing, including giving consideration to the noteholders’ proposed DIP financing of $10 million to October, 2012, and that they acted on an informed basis and in good faith with a view to the best interests of Crystallex and its stakeholders. See the affidavits of Mr. Fung at paras. 52 to 67 and the reply affidavit of Mr. van’t Hof at paras. 9 to 12. That being said, I must consider the contentions of the parties and the factors as set out in section 11.2 (4).

[37] The noteholders have made a number of objections to the Tenor DIP financing.

[38] They contend that Crystallex should have sought sufficient financing to pay the noteholders in full, as was attempted prior to the CCAA filing. The evidence indicates, however, that Mr. Skatoff attempted to do so with the market but the message he received back consistently was that the market had no interest in paying out existing noteholders at 100 cents on the dollar in a context where the notes were trading at a significant discount to par. Mr. Mattoni himself said on cross-examination that he did not believe it would be possible to raise sufficient money on the market to pay out the noteholders, as did the noteholder’s financial expert witness Mr. Glenn Sauntry.

[39] Mr. Mattoni in his affidavit states that the Tenor DIP facility was a pre-ordained coronation rather than the result of a competitive bidding process. There is no evidentiary basis for this suggestion. It is clear from the evidence of Mr. Skatoff, Mr. Fung and Mr. van't Hof and from the Monitor's report that there was a robust competitive bidding process and that full consideration right up to the last minute was given to other bidders. The Monitor stated it its report that from its observation of the process, it saw no evidence that Tenor was afforded preferential treatment over other participants in the process. It is also clear that the noteholders' $10 million bid was considered by the board of Crystallex and, based on advice from its advisors, not accepted. Thus any complaint from the noteholders on this score could only be that the Tenor bid was higher than market pricing for the facility. They had no such evidence and on cross-examination their financial expert Mr. Sauntry acknowledged that he could not say that the Tenor bid was not reflective of market pricing.

[40] The noteholders also complain that Mr. Skatoff did not undertake a valuation of Crystallex. The response of Crystallex is that it was not Mr. Skatoff's job to do that. In light of the fact that the main asset of Crystallex is the arbitration claim, Mr. Skatoff in my view would be in a poor position to value Crystallex.

[41] Mr. Sauntry in his report attempted to value the arbitration claim in different ways. He is not a lawyer and has no knowledge of the treaties involved or of the merits of the arbitration claim. He made assumptions in his cash flow analysis that, based on the reply expert report of Mr. Dellepiane, which I have no reason to doubt as he was intimately involved in the preparation of the arbitration claim, indicate Mr. Sauntry's lack of knowledge of the basis of the claim. Regarding Mr. Sauntry's analysis in (i) implying a value to the arbitration claim from an analysis of the Tenor DIP proposal and stating that in substance that proposal is a sale of a percentage of Crystallex's assets to Tenor and (ii) using the market value of Crystallex's securities as a proxy for enterprise value, I accept the reply affidavit of Mr. Skatoff, and in particular paragraphs 34 to 41, as reason to doubt Mr. Sauntry's analysis. As well, Mr. Sauntry's evidence on cross-examination, and in particular that referred to in paragraphs 8 to 12 of the Summary of Key Points From Cross-examinations, indicates little reliability should be placed on Mr. Sauntry's evidence.

[42] In any event, in light of the lack of evidence from the noteholders that the Tenor bid was not above market, the contention that Mr. Skatoff did not undertake a valuation of Crystallex or of the arbitration claim is of little moment.

[43] The noteholders also contend that whereas the bid process spelled out terms that must not be contained in a bid and provided that some terms were to be discouraged, the Tenor bid in the end contained some such terms. In those circumstances, the noteholders contend that Crystallex should have re-canvassed the market. Mr. Skatoff's evidence is that other bidders presented loan terms that would have resulted in similarly extensive changes to the loan document that accompanied the bid packages. The world of restructuring is not a perfect world. A company seeking DIP financing can tell the market what it wants, but cannot dictate its terms if the market tells it otherwise. The alternative is to walk away from the market. Regarding the changes sought by the market, the Monitor in its report states:

> 50. During the negotiations, all bidders requested amendments to the template version of the loan agreement posted on the Monitor's website as part of the CCAA Financing Procedures. The Monitor is of the view that such requests are typical in any bidding or investment raising process. The Monitor observed that all parties were provided with the template loan agreement and, as is common in processes such as the CCAA Financing Procedures, the final forms of the selected commitment letter and senior credit agreement deviate from the template agreement.

[44] The noteholders take a fundamental objection to the Tenor DIP facility on the basis that it is inconsistent with the purposes of the CCAA and case law dealing with DIP loans. The noteholders say that it is not interim financing but a forced restructuring plan prejudicial to them and that it should not proceed without a vote as required by the CCAA for a plan of arrangement or compromise.

[45] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) is authority for the proposition that a stay under the CCAA should not be continued if the debtor company does not intend to propose a compromise or arrangement to its creditors, and 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. In that

case, the debtor wanted to obtain financing to complete the construction of a golf course development without proposing an arrangement or compromise with its creditors.

[46] The noteholders seize upon a statement made by Mr. Fung in his affidavit filed on the initial application leading to the Initial Order in which he said:

> Crystallex strongly desires to pursue the arbitration and have stayed all claims against it until the arbitration has been settled or Crystallex has realized on an arbitration award, at which point Crystallex expects that all creditors would be paid in full to the extent of their proven claims.



[47] While there is no doubt that Mr. Fung made that statement, I think it needs to be considered in light of the reality agreed by the parties that the only way any of the creditors will receive any substantial cash payment is from the proceeds of the arbitration. This would be the case whether a plan of arrangement could be agreed or not. Also Mr. Mattoni agreed on cross-examination that Crystallex's goal of pursuing the arbitration and using the proceeds to pay creditors in full did not prevent Crystallex from giving creditors some additional benefit in a plan of arrangement.

[48] Moreover, often statements are made in CCAA proceedings about the intention of a party that later change. Mr. Koehnen made clear in argument that Crystallex has every intention to attempt to negotiate a plan of arrangement with the noteholders and that this has already been going on now on a without prejudice basis. He said the purpose of the stay to July 16, 2012 is to negotiate a compromise with the noteholders during that time period. I accept that statement. The situation is not the same as in *Cliffs Over Maple Bay*.

[49] Is the Tenor DIP facility a plan of arrangement or compromise requiring a vote? In my view it is not.

[50] 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.



[51] I note that in this case the practical exercise of the rights of the noteholders is very problematical because of issues raised in Mr. Fung's confidential affidavit no. 2.

[52] The noteholders contend that giving Tenor 35% of the arbitration proceedings will take away from Crystallex a substantial amount of equity making a compromise more difficult and less available for the unsecured creditors.

[53] In *Re Calpine Canada Energy Inc*. (2007) 35 C.B.R. (5th) 1 (Alta. Q.B.), leave to appeal denied (2007) 35 C.B.R. (5th) 27, it was contended that a settlement of several claims in a complex cross-border restructuring constituted a plan of arrangement or compromise and thus required a vote under the CCAA by the creditors affected. It was contended that the settlement left less assets available for the Canadian unsecured creditors. In rejecting this contention, Romaine J. stated the following:

> 12. The primary objection is that the GSA [global settlement agreement] amounts to a plan of arrangement and, therefore, requires a vote by the Canadian creditors. The Opposing Creditors support their submissions by isolating particular elements of the GSA and characterizing them as either a compromise of their rights or claims or as examples of imprudent concessions made by the CCAA Debtors in the negotiation of the GSA. These specific objections will be analyzed in the next part of these reasons, but, taken together, they fail to establish that the GSA is a compromise of the rights of the Opposing Creditors for two major reasons:
>
> > (b) the Opposing Creditors blur the distinction between compromises validly reached among the parties to the GSA and the effect of those compromises on creditors who are not parties to the GSA. … If rights to a judicial determination of an outstanding issue have not been terminated by the GSA, which instead provides a mechanism for their efficient and timely resolution, those rights are not compromised.

> 19 … While settlements made in the course of insolvency proceedings may, in practical terms, result in a diminution of the pool of assets remaining for division, this is not equivalent to a compromise of substantive rights.
>
> 51. The GSA is not linked to or subject to a plan of arrangement. I have found that it does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA.
>
> 55. I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed previously.



[54] In refusing leave to appeal from the decision of Romaine J., O'Brien J.A. stated:

> 34. … The GSA does not change its status as a creditor of those companies, nor does it bar the applicant from any existing claims against those companies.
>
> 35. … the fact that the GSA impacts upon the assets of the debtor companies, against which the applicant may ultimately have a claim for any shortfall experienced by it, is a common feature of any settlement agreement and as earlier explained, does not automatically result in a vote by the creditors. The further fact that one of the affected assets of the debtor companies is a cause of action, or perhaps, more correctly, a possible cause of action, does not abrogate the rights of a creditor albeit there may be less monies to be realized at the end of the day.

[55] While this case is not binding on me, it is persuasive and makes sense. It is also consistent with authorities in Ontario that a sale of assets or a settlement in a CCAA before a plan of compromise is put forward may be authorized even if there will be insufficient assets to retire the creditor claims in full. See *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299.

[56] In this case, it cannot be said that there will be insufficient assets coming from the arbitration to repay all of the outstanding notes in full, which at present is approximately $115 million. Even the valuation of Mr. Sauntry, which I do not accept as reliable, indicates far more than that as a possible outcome of the arbitration. While the outcome of the claim cannot be

known at this stage, it is a claim for $3.4 billion dollars in circumstances in which Crystallex spent approximately $500 million on the development of the mine.

[57] The fundamental purpose of the CCAA is well established, and indicates that flexibility is required in dealing with any particular case. In *A.G. Can. v. A.G. Que. (sub. nom. Reference re Companies' Creditors Arrangement Act)*, [1934] S.C.R. 659, 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."
>
> 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.

[58] Since 1934, of course, there has been wide experience in dealing with the CCAA, and it has been an evolving experience. In *Re Canadian Red Cross,* Blair J. (as he then was) approved the sale of the assets of the debtor that would result in the estate having less than sufficient money to pay all of its creditors in full, and before a plan of compromise was put forward. He discussed the flexibility involved in these terms:

> 45. It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. ... The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J. said in *Dylex, supra* (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Re Lehndorff General Partner* (1993), 17 C.B.R. (3d) 24, at p. 31, which I adopt:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[59] In that case, Blair J. considered the factors in *Soundair* in deciding whether to approve of the sale, being whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; to consider the interests of the parties, to consider the efficacy and integrity of the process by which offers are obtained and to consider whether there has been unfairness in the working out of the process. Those factors are consistent with the factors to be taken into account in considering whether security for a DIP loan should be approved, and as the Tenor DIP facility involves a grant of a financial interest in part of the assets of Crystallex, being a percentage of the arbitration award, it seems to me that they can be looked at in this case.

[60] It was contended by the noteholders that the size of a loan of $36 million, an amount calculated to complete and collect the arbitration, was not in accordance with the purposes of a DIP loan as it would take Crystallex beyond what is required before any reorganization. However this complaint regarding the size of the loan was not strenuously pursued in argument, no doubt because of the new position of the noteholders that it would fund that amount on the terms of the Tenor DIP loan if later required and because of the provision in the proposed plan of arrangement put forward by the noteholders that it would provide $36 million in funding in return for an equity stake in Crystallex. There seems no doubt that the parties agree that at least $36 million is required to pursue the arbitration.

[61] The noteholders also contend that the term of the loan by Tenor is far too long and that it indicates an attempt by Crystallex to do an end run around the need to propose a plan of arrangement as the term would extend beyond the date of an anticipated award. I have already dealt with the issue of Crystallex proposing a plan of arrangement. The noteholders contend that the DIP loan, at least initially, should not extend beyond October, 2012 as by then a plan should have been negotiated. However, both sides agree that the only way that any substantial cash will be available to Crystallex or its creditors will be from the arbitration and that it will be necessary to prosecute the arbitration long after October, 2012. The proposed plan of the noteholders recognizes this as it proposes a $36 million injection for the purposes of prosecuting the arbitration. The $36 million figure is based on a projection of expenditures going far beyond 2012. That is, both sides agree that it will be necessary to have financing for the arbitration that will continue after October, 2012. The term of the Tenor DIP loan as to when the loan becomes due in itself is not an impediment to a restructuring.

[62] In my view, the term of the loan is not the substantive issue, so long as Crystallex intends to negotiate if possible an acceptable plan of arrangement or compromise, which it has indicated it intends to do. One of the factors required to be considered under section 11.2(4) is the time during which Crystallex is expected to be subject to the CCAA proceedings. Like many cases, it is not clear when these proceedings may be over. However, as the $36 million financing is going to be required whether Crystallex is out from under the CCAA in a short or longer period, and as the expenditures are to last for a few years, this factor of the time during which Crystallex is expected to be subject to the CCAA proceeding is not a determinative factor.

[63] The noteholders also contend that Tenor has been given control over Crystallex and the restructuring process by reason of the changes in the corporate governance required by the Tenor DIP facility. There is no doubt that Tenor has been given substantial governance rights, including the right to name two of the five directors and the right to agree on who the independent director shall be. An issue is whether the governance provisions are too intrusive for a DIP loan, which according to case law relied on by the noteholders should not be excessive or inappropriate. I note that there is no prohibition in the CCAA against the board of directors changing at the hands

of the debtor. There is a provision allowing the court to remove directors, which I shall later discuss.

[64] Any DIP lender wants to obtain as much control as possible over the affairs of the debtor during the term of the DIP financing, and terms are often imposed to that end. In this case, given the extreme hostility of the noteholders to the board and management of Crystallex over its actions over the few years prior to the arbitration being commenced, it is not surprising that Tenor has demanded what it has. The fact that Tenor at the last minute changed the governance terms that it was prepared to live with, and that the Crystallex board was not happy with the change, does not in itself mean that those terms should not be approved.

[65] To put up the financing and have it subject to change by the noteholders or Crystallex would make no economic sense to Tenor or to any other DIP lender in the circumstances of this case. Like the noteholders and shareholders, Tenor will only be able to have its loan repaid from the proceeds of the arbitration, and it has bargained for what it perceives to be necessary protection for that. I agree with the noteholders that the CCAA is not about protecting new DIP lenders. However, the issue is whether the protections negotiated in order to obtain the DIP loan from Tenor are reasonable or excessive.

[66] Even if there were a prospect of money being raised by Crystallex in some fashion to pay out the noteholders prior to an arbitration award or settlement, which on the evidence I have referred to is not the case, including the issues referred to in Mr. Fung's confidential affidavit no. 2, and the opinion of Freshfields, as a practical matter this is not a case in which the noteholders have any realistic steps to try to cash out now before the arbitration claim is dealt with.[2] A restructuring under the CCAA, or any bankruptcy of Crystallex, is not going to change that. The market cap of Crystallex is far too small to repay the noteholders, even if they were given 100% of the equity of Crystallex.

[67] The terms of the Tenor Dip facility give Tenor no right to conduct the reorganization proceedings in Canada and in the U.S. or interfere with the efforts of Crystallex to reorganize the

[2] The fact that the noteholders have an opinion questioning some of what Freshfields says does not change that.

pre-filing claims of the unsecured creditors. That will be in the hands of the independent/special managing director who will be required to consult with the non-board advisory panel consisting of the three directors of Crystallex who will step down from the board. With respect to matters that may not at law be delegable to the special managing director, he will be required to obtain board approval and if the Tenor nominees use their votes to block that approval, Tenor will forfeit its 35% additional compensation. Tenor is obviously not going to want to put itself in that position.



[68] Tenor recognizes that it cannot conduct the arbitration proceeding. Under the terms of the Tenor DIP facility, 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. Whether it would make such an application is a question mark, and likely would depend on whether Crystallex were put into bankruptcy. There would likely be no other reason for wanting someone other than the Crystallex board to have control over the conduct of the arbitration.

[69] As a practical matter, the conduct of the arbitration will no doubt be in the hands of Freshfields who have the knowledge and expertise. Mr. Mattoni in his affidavit filed on behalf of the noteholders agreed that the arbitration is really in the hands of litigation counsel. As well, the management personnel of Crystallex that have been involved in the claim in presenting evidence and instructing counsel regarding the evidentiary issues are going to have to continue to be involved in order to prosecute the claim. Their failure to do so would compromise the claim.

[70] If any director, whether nominees of Crystallex or of Tenor, is unreasonably impairing the possibility of a viable compromise, the court under s. 11.5(1) of the CCAA has the power to remove such director. That section provides:

> 11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

[71] The noteholders point out that section 8.1(t) of the DIP facility makes it an event of default of the DIP loan if a Tenor nominee director is removed from the board without the consent of Tenor except “by reason of misconduct” of the director, and assert that “misconduct” is a considerably different standard from “unreasonably impairing” in section 11.5(1) of the CCAA, thus restricting a court’s ability to remove a director for unreasonably impairing a compromise or arrangement. Of course, any application under the section would turn on the particular facts, but it would certainly be arguable that if a director were unreasonably impairing a compromise or arrangement, that could constitute misconduct, particularly as the purpose of a CCAA proceeding is to encourage a consensual compromise or arrangement.

[72] One of the factors required to be considered under section 11.2(4) is whether Crystallex’s management has the confidence of its major creditors. There is no doubt from the prior litigation that the noteholders expressed extreme displeasure at the steps taken by its board and management to try to come to some accommodation with Venezuela to maintain the rights to the Las Cristinas mine project. The noteholders maintained that Crystallex should stop spending money and commence the arbitration. That of course is now water under the bridge and the only business of Crystallex is the arbitration that has been commenced. The noteholders did not previously take the position that the management should not be involved in the arbitration, nor do they now raise any such objection. The Monitor notes in its report that the noteholders’ proposed plan contemplates keeping existing management. It is clear that the management who have been involved in the arbitration are going to be needed further, and this is not a situation in which the noteholders could want to insert themselves instead of management in the conduct of the arbitration. As Mr. Mattoni said, that is something in the hands of arbitration counsel.

[73] Another factor to be considered under section 11.4(2) is how the company’s business and financial affairs are to be managed during the proceedings. In my view, the management of the business and affairs of Crystallex under the provisions discussed, being the conduct of the arbitration and paying for it, are a reasonable compromise between Crystallex and Tenor designed to protect the interests of the stakeholders, including the noteholders. The Monitor, of course, will continue to have an important role to play as well in the oversight of matters. If the

noteholders are unhappy with the expenditures for the arbitration claim being incurred in the future, and there is no indication so far that they are, they have the ability in the CCAA process to object to them.



[74] The noteholders also contend that because a term of default of the Tenor loan is a refusal of the court to extend the section 11 stay, that term ties the court’s hands on any stay extension application, thus creating an incentive for Crystallex not to bargain towards a consensual resolution. I do not accept that the court’s hands will be tied in any way. One would expect in any CCAA case that on a refusal to extend the stay, a DIP lender’s loan would become payable. This provision in the Tenor loan is not remarkable.

[75] The noteholders make the same point about it being a term of default of the Tenor loan if the CCAA case is converted to a receivership, a proposal in bankruptcy or bankruptcy proceeding. Again, one would expect a DIP loan to become payable in these events. This is a normal provision in a DIP loan, as conceded by Mr. Swan in argument. If bankruptcy were appropriate, this provision would not prevent it.

[76] The noteholders contend that the right of Tenor to 35% of the proceeds of the arbitration, convertible into equity at Tenor’s discretion, should not occur as it will hamper any ability to reach any restructuring resolution. In the bid procedures approved by the Monitor, the market was told that any “back-end entitlement” could not exceed 49% of the equity of Crystallex. 35% is a very large block of the arbitration proceeds and obviously Crystallex would not have been happy to give that up. It eats into any recovery for the shareholders who are entitled to receive any proceeds of the arbitration only after the noteholders have been paid in full. However, 35% on the record does not appear excessive. The process undertaken by Mr. Skatoff indicates that the terms of the Tenor bid were the result of a reasonable market search. Mr. Sauntry, the financial expert for the noteholders, could not say that the Tenor bid did not reflect market pricing. He also said on cross-examination that a return of 10% PIK interest would not be a reasonable return for DIP lender in this case because of the uncertainty of getting anything because of the arbitration risk and risk of collecting on any award, and that a lender would require some additional amount such as the 35% to make it a reasonable deal.

[77] The noteholders propose in their proposed plan that they receive 23% of equity for their infusion of the $36 million needed for the arbitration claim. There is no evidence as to how that 23% figure was arrived at. However, the plan also provides for the noteholders to be given approximately 58% of the equity in return for giving up their notes. Together this amounts to 81% of the equity, and it is artificial to say that the 23% for the $36 million infusion reflects a market indication of the value of the infusion. I realize that the plan of the noteholders is only a proposal, but it does reflect a recognition that someone financing the arbitration would require a considerable amount of any arbitration award in order to take the risk of financing it. If the 35% figure in the Tenor DIP facility is used by the noteholders for the $36 million infusion (which the noteholders say they would be prepared to lend for 35% of the equity if later required), the amount of equity to the noteholders in their plan in return for their notes would be 46% rather than 58%, indicating an interest in receiving that amount of equity for their notes. If the Tenor DIP facility is accepted, it would leave 65% of the equity available, less 10% if the MIP is approved, more than the noteholders propose in their plan.

[78] The noteholders also rely on a statement in Mr. Sauntry's expert report that the Tenor DIP proposal will prevent any plan of arrangement. He states:

> The Tenor DIP Proposal will prevent any plan of arrangement. In fact, it is the logical conclusion of a negotiation between the Company, which has stated that it does not want a CCAA plan prior to an Award or settlement arising from the Arbitration Claim, and Tenor, which may benefit from the Company's near-complete lack of flexibility, if future amendments are required.

[79] Much of Mr. Sauntry's report is little more than legal argument in the guise of an expert's opinion. I view a good deal of his report in much the same light as Farley J. did of an expert report of Mr. Dennis Belcher in *Re Royal Oak Mines Inc*. (1999) 7 C.B.R. (4th) 293, in which he stated "Mr. Belcher has set forth in essence his view of the CCAA situation; he should be regarded as a powerful advocate..." I see Mr. Sauntry being an advocate for the noteholders.

[80] Some things fundamental to Mr. Sauntry's report are wrong. For example, he states that "This is a situation where a material asset could be sold to provide a significant recovery for creditors" and "It is demonstrably possible to sell a significant interest in the Company's

business (i.e. the Arbitration Claim) for material proceeds." On cross-examination he acknowledged his understanding that the claim is not assignable. I have earlier referred to problems I have with Mr. Sauntry's attempts to value the arbitration claim.

[81] I do not see the Tenor DIP facility preventing a plan of arrangement. The noteholders have no right to keep Crystallex's assets and equity static for the purposes of a plan of arrangement, so long as the DIP loan meets the criteria required for approval. The provisions in the Tenor DIP facility complained of are the result of market forces, and unless there is some other preferable DIP available, which for reasons I will deal with is not the case, the question is whether the Tenor DIP facility should be approved.

[82] Reliance is placed by the noteholders on provisions of section 7.19 of the Tenor bid. It provides that Crystallex shall not without the consent of Tenor enter into an agreement with the noteholders that contains certain provisions, including:

(a) Paying any money to pre-filing creditors before Crystallex pays Tenor. The noteholders contend that this eliminated any realistic possibility of Crystallex being refinanced prior to the collection of an arbitral award or settlement. However, this is a normal provision in any DIP financing. Moreover, there is no realistic possibility of Crystallex being refinanced before an arbitration award or settlement, as previously discussed.

(b) Increasing interest payable to the pre-filing creditors above 15%. The reason for this provision was because under the Tenor bid, any post-filing interest to be paid to creditors is to be paid before the additional compensation of 35% is paid to Tenor, and Tenor negotiated to limit this amount. It perhaps is to be noted that on any bankruptcy of Crystallex, interest to the noteholders would be limited to 5%.

(c) Issuing any equity containing anti-dilution provisions, which the noteholders contend means that any new equity proposed to be issued as a compromise exchange for debt could immediately thereafter be completely devalued at the next moment. I am not clear why this was negotiated by Tenor. In reply Mr. Kent contended that the problem could be taken care of by issuing shares to the noteholders with a coupon or agreement that would lock in their right to a percentage of the arbitration award. As the equity in Crystallex is essentially the same as the proceeds of the arbitration, presumably this is something that could be taken care of in a plan. Whether Crystallex would ever attempt to later issue equity to a third party is of course completely unknown and speculative, but it were to be contemplated during the course of the CCAA proceedings, presumably the Monitor would be aware of it and it would become known to the noteholders who would be able to apply to court for any appropriate relief.

[83] I have previously discussed much of what is to be considered under s. 11.4 of the CCAA. Regarding (d), whether the loan would enhance the prospects of a viable compromise or arrangement, in my view it would. 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.

[84] Regarding (f), whether any creditor would be materially prejudiced by the security, the noteholders are unhappy with the Tenor bid and say they are materially prejudiced, for the reasons that I have discussed and largely rejected. I think their complaints have to be looked at in the context of what the market is demanding for a DIP loan. There was a sufficient arm's length and open effort by Crystallex with the assistance of the Monitor to get the best pricing and terms for the loan and the process was carried out with integrity and fairness. The noteholders were asked during the process to increase their proposal but refused to do so. When at the last moment they indicated they would if later required lend on the same terms as the Tenor DIP facility, they made clear they would not agree to do so at this time. That, of course, is their choice. In all of the circumstances, I would not find that they have been materially prejudiced.

**(ii) Consideration of the noteholders' proposed DIP facility**

[85] The noteholders' proposed DIP loan is for $10 million at 1% interest repayable on October 15, 2012. The term is said to give sufficient time to work out a plan of arrangement or

compromise. Mr. Swan said in argument that the noteholders were not being altruistic in this proposal, but merely wanted to maintain the status quo while a plan is being negotiated.



[86] The problem that the board of Crystallex had with this proposal was based on the advice of Mr. Skatoff. He advised the board that if Crystallex needed additional financing in October 2012, it would be difficult to return to the market for financing because there was only so much time and energy that bidders were willing to devote to a transaction. Having devoted the time and failed, bidders would be highly reluctant to spend additional time again. In his affidavit, Mr. Skatoff stated that if Crystallex accepted the $10 million DIP financing it would be highly challenged if not entirely impeded in any subsequent exercise to raise additional financing from parties other than the noteholders.

[87] The noteholders contend that Mr. Skatoff's views on the difficulty of any future financing if the noteholders' proposed DIP loan is approved is "complete puffery" as he said on cross-examination that the parties with whom he negotiated never told him that they would absolutely not participate in a financing in the fall of 2012 if it were necessary. I think this is oversimplification and I do not accept it. Mr. Skatoff also said on cross-examination-

> I know what the facts are in terms of the financing market and how it views Crystallex. …I believe that the company, if it were to accept a $10,000,000 financing, would need to go to the market in the very near term to start to address what happens if that $10,000,000 needed to be refinanced when… we reached October of 2012. And I believe in the construct of my experience with this situation over the last three months that if the company were to accept that $10,000,000, we would need to go back out to the market in the very near term to raise capital to possibly refinance that money in the event that $10,000,000 couldn't be extended, that the company would have a very difficult time in convincing potential financing parties to undertake to spend additional time and resources in evaluating potential financing, as we have been able to convince them to do over the last couple months.

[88] I accept that evidence as reliable. Common sense would indicate that persons who spent time and energy on pursuing a $36 million facility for a three year term only to see a 6 month

facility for $10 million being accepted would be very reluctant to go through the process again in the next few months.

[89] This is particularly the case, in my view, when the proposed interest rate by the noteholders is only 1%, clearly below the market rate.[3] The market would see that rate, as would any reasonable observer, as being used for some purpose to further the ends of the noteholders. Hedge funds are not in the business of lending money at less than market rates. The rate no doubt was proposed to assist an argument that the court should accept the noteholders' proposed loan. Why would the noteholders propose that? The answer, I believe, is that it would assist in removing, or seriously eroding, the chance of Crystallex going to the market in time for a new loan by October and thus further make Crystallex beholden to the noteholders in October, as stated by Mr. van't Hof and Mr. Skatoff. I do not view the noteholders proposed loan as being a *bona fide* loan at market rates but rather a loan to gain tactical advantage.

[90] Thus, I do not see the noteholders proposed $10 million 1% six month facility as maintaining the status quo. I accept the evidence of Mr. Skatoff that it would seriously erode the chances of Crystallex obtaining any third party financing in October.

[91] Had the noteholders been prepared to lend now on the basis of the terms of the Tenor DIP facility, that would have been a preferable outcome, even if it was not made within the terms of the bid process approved by the Monitor, as it would not have involved the insertion of any third party into the process. Unfortunately, it was made clear during argument that the noteholders were not prepared at this time to do so. The uncertainty of a short six month loan when it is clear that financing for a much longer term is required by Crystallex to prosecute the arbitration is something to be avoided.

**(iii) Position of the Monitor**

[92] I have previously referred to portions of the Monitor's report. The Monitor concludes that on the basis that Crystallex, with assistance of Mr. Skatoff, conducted a canvas of the market and determined that the Tenor Bid was the best available bid generated out of the process to meet its

[3] The Monitor calculates the savings in interest over the Tenor loan to October 15, 2012 to be approximately $300,000.

objectives, the Monitor supports approval of the Tenor DIP Loan. This position of the Monitor is subject to this court's determination of the validity of the noteholders' legal arguments, on which the Monitor expresses no view as these are legal issues to be determined by the Court.



[93] It is the case, as the Monitor points out, that the introduction of a third party, Tenor, with consent rights to certain actions will add complexity to the negotiation of a CCAA plan. I entirely agree with the Monitor that a mutually acceptable CCAA plan is preferable to continued expensive and protracted legal disputes between the Noteholders and Crystallex. However, in spite of the encouragement of the Monitor and of the court over the last while to see if a settlement could be reached, that has unfortunately not occurred.

**(iv) Conclusion on DIP loan**

[94] Taking into account all of the forgoing, I approve the Tenor DIP facility.

**(v) Request for stay**

[95] The noteholders ask that in the event that the Tenor DIP facility is approved, the order should be stayed pending an appeal to the Court of Appeal. The parties have already had discussion through the Monitor with the Court of Appeal which has agreed as I understand it to move as expeditiously as possible with any appeal from my decision.

[96] A judge whose decision is to be appealed can stay the order on such terms as are just. On motions for stays, courts apply the *RJR Macdonald* test and will order stays in restructuring and insolvency proceedings to allow sufficient to for consideration of an appeal.

[97] At first blush during the argument, I was inclined to agree with the noteholders that a stay would be appropriate pending an appeal, assuming that it could be dealt with expeditiously. However, argument from Crystallex gave me pause, particularly when the cash flow needs of Crystallex are considered. The cash flow projections as shown in the Monitor's report indicate that as of the end of the week ending April 13, 2012, Crystallex had only $346,000, and that during the following week, it had cash requirements of approximately $6 million, including

repayment of the bridge loan due on April 16. Crystallex does not have the luxury of waiting for the conclusion of a successful appeal.

[98] The answer of the noteholders to this was that the problem would be solved if the court approved its $10 million DIP proposal rather than the Tenor bid. I understand that the noteholders would be prepared to lend the $10 million if an appeal to the Court of Appeal from an order approving the Tenor DIP facility were successful.

[99] Under the Tenor DIP facility, the right of Tenor to the additional compensation of 35% of the proceeds of the arbitration does not arise until the second tranche of the loan of $12 million has been advanced, and this is not due until after any appeal to the Court of Appeal has been completed. As to concerns of the noteholders that Tenor might pre-pay the second tranche in order to fix its right to the additional compensation, I was advised during argument that Tenor has undertaken not to do so and Crystallex has undertaken as well not to draw on the second tranche without two weeks' notice to the noteholders.

[100] Crystallex, and I assume Tenor as well, has agreed that pending the completion of an appeal to the Court of Appeal, the right of Tenor to convert its rights to 35% of the arbitration proceeds and the governance provisions for Crystallex would also be stayed.

[101] In my view, and assuming that the first test of *RJR Macdonald* has been met, there should be no stay of my order approving the Tenor DIP facility, and this can be done in a manner that will protect the interests of the parties on the following basis:

(i) The order approving the Tenor DIP facility shall be subject to the undertakings and agreements of Crystallex and Tenor as referred to.

(ii) The Tenor DIP facility is approved on condition that in the event that the appeal to the Court of Appeal is successful, and the order approving the Tenor DIP facility is set aside in its entirety, the money advanced by Tenor on the first tranche shall be immediately repayable with interest at 1% per annum, in which case the Tenor DIP facility shall be terminated. Tenor shall have no right in that case to any commitment fee which, if already paid, shall be deducted from the repayment of the loan to Tenor.

(iii) The noteholders shall in that event fund the repayment to Tenor by loan to Crystallex with interest at $1% per annum repayable on October 15, 2012 or at some other date as may be agreed or ordered by this court.



**Management Incentive Plan (MIP)**

[102] The terms of the MIP are set out above. 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.

[103] In exercising its discretion to consider whether and in what amount a payment should be made, the compensation committee will take the following factors into account:

(a) The amount of money recovered by Crystallex in the arbitration.

(b) The risks affecting the size of the retention pool including the quantum of the priority payments and the fact that others have influence on discussions relating to the settlement of the claim

(c) How quickly the funds are recovered.

(d) The impact the premature resignation of the individual from Crystallex would or could have had upon the results of the arbitration.

(e) The amount of time and energy spent by the individual on the arbitration.

(f) [Certain matters confidential to the parties.]

(g) The scale and scope of the balance of the compensation package provided by Crystallex to the individual.

(h) The opportunity cost to the individual in staying with Crystallex in terms of professional experience, money and the development of new opportunities.

(i) The amount of any severance payments the employee would receive on termination if such termination is reasonably foreseeable and will be accompanied by a severance payment.

(j) The extent to which the arbitration cost more than anticipated to prosecute and the degree to which it may be appropriate to reduce the bonus pool as a result.

(k) Any other relevant matter.

[104] The noteholders disagree with Crystallex on the quantum and method for providing an incentive to management. They have also expressed concerns as to the timing of the MIP approval motion and inclusion of some MIP participants in the MIP. Under their proposed plan, management would receive 5% through an equity participation in any after tax award.

[105] The Tenor DIP loan is conditional on the approval of a management incentive program acceptable to both Tenor and Crystallex. Tenor has not voiced any objection to the MIP proposal of Crystallex and I take it is in agreement with it. The requirement for a management incentive program acceptable to Tenor is a reflection, obviously, of the need to ensure the participation of the people necessary to pursue the arbitration to a satisfactory conclusion.

[106] The reasons for the MIP are set out in the affidavit of Mr. van’t Hof. See paras. 4 to 10 and 14 to 23 of his affidavit. In the circumstances of this arbitration, these reasons appear legitimate. They were considered so by the independent directors of Crystallex constituting the compensation committee and by Mr. Jay Swartz of Davies Ward Phillips & Vineberg LLP.

[107] Mr. van't Hof states in his affidavit that because in past litigation the noteholders have criticized the independent directors of Crystallex as not being sufficiently independent because of prior business relationships with Robert Fung or companies with which Mr. Fung was associated, Crystallex retained Jay Swartz, a partner of Davies Phillips Vineberg, to determine, from the perspective of an independent director, what an appropriate MIP would be. In coming to that determination, Mr. Swartz was told he could retain such advisors as he saw fit and take such steps as he saw fit. Mr. Swartz' opinion of March 14, 2012 states that he was engaged on June 6, 2011 to negotiate the terms on which directors and members of management will be compensated for their ongoing duties. With the consent of Crystallex, Mr. Swartz retained Hugessen Consulting Inc., an independent national executive compensation consulting firm to provide expert advice with respect to compensation issues and to provide background information regarding compensation standards in circumstances which were analogous to the issues facing Crystallex. Mr. Swartz reviewed extensive documentation and carried out extensive discussions with various persons including the solicitors for Crystallex, counsel for the board and with Freshfields who are arbitration counsel.

[108] Mr. Swartz concluded that the overall compensation proposal for the establishment of the bonus pool for the benefit of management of Crystallex was reasonable in the circumstances, for reasons expressed in his opinion. Included in his reasons was the following:

> The current members of the Compensation Committee are granted substantial discretion to allocate, or not allocate, the bonus Pool and can do so in their discretion having regard to what actually occurs over time and the relative and absolute contributions of each party. In doing so, they are subject to fiduciary duties to Crystallex. In this regard, I note that there may be circumstances when the absolute amount of the bonus Pool may be very substantial in light of all of the factors to be considered by the Compensation Committee. In such circumstances, the Compensation Committee may have to carefully consider the absolute amounts to be paid to each member of a Management Group in order to satisfy its fiduciary duties.

[109] Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the

CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis*, West Law, 2009, it is stated:

> In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress.



[110] In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis -- Butterworths) at p. 231, it is stated:

> KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly.

[111] In *Re Grant Forest Products Inc*. (2009), 57 C.B.R. (5th) 128, I accepted these statements as generally being applicable to motions to approve key employee retention plans. See also *Re Canwest Global Communications Corp*. (2009), 59 C.B.R. (5th) 72, *Re Nortel Networks Corporation*, [2009] O.J. No. 1044, *Re Canwest Publishing Inc*., (2010), 63 C.B.R. (5th) 115 and *Re Timminco Ltd*. [2012] O.J. No. 472.

[112] 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. See my comments in *Grant Forest Products*, in which the payments in question were approved by an independent committee of the board of the debtor, in which I said that the business judgment of the directors should rarely be ignored. See also Morawetz J. in *Re Timminco.*

[113] In this case, the qualifications of the independent board members, Messrs. Brown, Near and van’t Hof, are impressive, and these people are non-conflicted as they will not

participate in the MIP. They acted on advice from Mr. Swartz and had market information from Mr. Skatoff as noted in paras. 10 and 33 of Mr. van't Hof's affidavit. Their judgment was informed and I am in no position to say it was unreasonable.

[114] There is no question that the judgment of Mr. Swartz is independent and informed, and I would not lightly ignore it without good reason.

[115] The noteholders contend that the MIP is something that should await the negotiations of a plan. I can understand the logic of that position, particularly when as here the MIP is to be funded from the proceeds of the arbitration, which is the "asset" that will be the subject of the negotiations of a plan, whether that asset is called the proceeds of the arbitration or equity. However, I am hesitant to have the uncertainty of such a situation hanging over the heads of the people meant to be protected by the MIP. In *Grant Forest Products*, over the objection of a substantial creditor, and in *Canwest Global*, *Canwest Publishing* and *Timminco*, employee retention plans were approved prior to any plan being negotiated, and it appears to be the practice today that these types of plans are generally approved at the time of the initial orders.

[116] The noteholders do not contend that there should not be any MIP. As the Monitor's report notes, under the noteholders' proposed plan, management would receive 5% through an equity participation in any after tax award. While the numbers between the Crystallex MIP (a pool of up to 10% of an award up to $700 million and 2% over that) and the noteholders plan (5%) are different, it is possible that the end result would not be different depending on what the independent compensation committee decided to allocate after the results of the arbitration were known.

[117] The noteholders contend that there are participants in the MIP that should not belong. That is a matter of judgment, and the independent committee has exercised its judgment on the matter. The participants were also known to Mr. Swartz who opined as to the reasonableness of the principles of the MIP. Having reviewed the evidence, including the affidavit of Mr. van't Hof and of Ms. Kwinter, I cannot say that any of the persons included in the MIP should not be there.

[118] Mr. Tony Reyes is a shareholder of Crystallex. He in principle is supportive of the MIP. He raises two concerns regarding the MIP.

[119] The first is the fact that some of the persons who may benefit already have stock options and it is not clear that the proposed MIP will replace and cancel those options. Thus, these persons could end up with more than the MIP proposes. In response to this, Crystallex advises that it will amend the MIP to provide that the value of any existing stock options ultimately realized by participants of the MIP will be deducted from the amount of any bonus awarded under the MIP on a tax neutral basis.

[120] The second relates to the method of calculating the bonus pool. It is described by the Monitor as follows:

> 83. Mr. Reyes also raises a concern that the MIP treats the creation of and payment out of the MIP Pool as a secured debt and not an equity distribution. The MIP Pool is to be protected by a Court-ordered charge and will be created out of the net proceeds of the Arbitration Proceedings but before any payment to shareholders. Value to shareholders is after the repayment of the additional compensation to Tenor and the MIP, while the MIP is calculated based on the gross award before repayment of additional compensation. He notes that the method of calculating the MIP Pool also serves to increase the potential effective "equity participation" of the pool participants well above the rate of 10% relative to the participation rate of existing shareholders, to an effective rate of 18% or more. This is due to the dilutive effect of Tenor's additional compensation on existing shareholders.

[121] The first sentence regarding this concern is not correct. The MIP is triggered by a receipt of funds, and the charge over that pool does not give any priority to the participants in the MIP. Regarding the remainder of the concern, it seems to me that this is something that could be taken into account by the compensation committee in determining what, if any, amount should be allocated to any particular person.

[122] The Monitor has reviewed the MIP and the noteholders proposal. The Monitor does not expressly state that it supports the MIP as proposed by Crystallex being approved, but clearly does not oppose it. Monitor concludes:

> 130. The MIP is ancillary to the Tenor DIP Loan and approval of a management incentive program is a condition of the Tenors DIP Loan. The Noteholders and Mr. Reyes appear to accept the Company's position that a substantial incentive plan is appropriate in these unique circumstances. Mr Swartz, from the perspective of the independent director with advice from Hugessen Consulting Inc., concludes that the Applicant's proposed MIP is "reasonable in the circumstances". The Noteholders and Mr. Reyes' position, however, is that the terms of any incentive plan should be less favourable to the participants than the MIP proposed by Crystallex.
>
> 131. Although the percentage amounts and debt structure provide the potential for compensation to management that could be substantial, both relative to the recoveries of other stakeholders and in absolute dollar terms, it is subject to the discretion of the independent directors who have fiduciary duties that will provide a measure of balance in the implementation of the MIP.

[123] Like the DIP issue, it is unfortunate that Crystallex and the noteholders have not been able to come to some agreement on an MIP. It would have been far more preferable for that to have occurred. However there has been no agreement and it falls for decision by the court.

[124] In all of the circumstances, as discussed, I approve the MIP proposed by Crystallex with the changes regarding the stock options agreed to by Crystallex.

**Approval of Monitor's reports**

[125] Approval is sought of the actions of the Monitor as disclosed in its second and third report. I have no hesitation in approving these actions. A Monitor plays a crucial role in any CCAA restructuring, and this is particularly so in this case. The Monitor is to be commended for the way in which it has participated and in its efforts to bring a consensual resolution of matters as they have arisen. This assistance is invaluable. I approve the actions of the Monitor as set out in its second and third report.

**Continuation of the stay**

[126] Crystallex seeks a continuation of the stay until July 16, 2012 or such further date as may be ordered. No one opposes the stay to that date, and it is supported by the Monitor who

recommends the continuation. Due to holiday considerations, I continue the stay to July 30, 2012.

Newbould J.

**DATE:** April 16, 2012

IN THE MATTER OF A REFERENCE CONCERNING THE CONSTITUTIONAL VALIDITY OF THE COMPANIES' CREDITORS ARRANGEMENT ACT.

1934
*March 27, 28, 29.
*June 6.

*Constitutional law—The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, c. 36 (Dom.)—Constitutional validity—"Bankruptcy and Insolvency" (B.N.A. Act, s. 91 (21) ).*

*The Companies' Creditors Arrangement Act, 1933*, 23-24 Geo. V, c. 36, is *intra vires* of the Parliament of Canada. The matters dealt with come within the domain of "bankruptcy and insolvency" within the intendment of s. 91 (21) of the *B.N.A. Act*.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

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REFERENCE *re* COMPANIES' CREDITORS ARRANGEMENT ACT.

The Act discussed with regard to its aim, its features, its comparison with existing bankruptcy or insolvency legislation, and the history of bankruptcy and insolvency law.

REFERENCE to the Supreme Court of Canada for hearing and consideration pursuant to the authority of s. 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35) of the following question:

> Is *The Companies' Creditors Arrangement Act, 1933,* 23-24 Geo. V, chapter 36, *ultra vires* of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

*L. E. Beaulieu K.C.* and *F. P. Varcoe K.C.* for the Attorney-General for Canada.

*C. Lanctôt K.C.* and *L. St. Laurent K.C.* for the Attorney-General for Quebec.

*I. A. Humphries K.C.* for the Attorney-General for Ontario.

The judgment of Duff C.J. and Rinfret, Crocket and Hughes JJ. was delivered by

DUFF C.J.—The history of the law seems to show clearly enough that legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law.

Under the *Bankruptcy Act,* as it now exists, proposals for compositions and arrangements cannot be dealt with before a receiving order or assignment has been made. This, however, was not always the case. Under the *Bankruptcy Act* of 1919, a proposal for composition or arrangement could be made prior to an assignment or receiving order.

The *Winding-up Act* contains brief provisions, in sections 65 and 66, which, in substance, differ very little indeed from the legislation now before us; although this, no doubt, is subject to the important qualification, that the provisions of the *Winding-up Act* apply only in the case of a company which is in course of being wound up. Similar provisions affecting the subject matter of this legislation are to be found in Canadian legislation before and after Confederation.

The powers conferred upon the court under the *Companies' Creditors Arrangement Act, 1933*, come into operation when a compromise or arrangement is proposed between a "company which is bankrupt or insolvent or which has committed an act of bankruptcy within the meaning of the *Bankruptcy Act* or which is deemed insolvent within the meaning of the *Winding-up Act*," and its "unsecured creditors or any class of them." The important difference, as already observed, between the provisions of the *Companies' Creditors Arrangement Act* and those of the *Bankruptcy Act* itself in relation to compromises and arrangements is that the powers of the first named Act may be exercised notwithstanding the fact that no proceedings have been taken under the *Bankruptcy Act* or the *Winding-up Act*. The Act, however, creates powers, which can be exercised in case, and only in case, of insolvency .

Furthermore, 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. As Lord Cave impliedly states in *Royal Bank of Canada* v. *Larue* (1), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament."

Matters normally constituting part of a bankruptcy scheme, but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

The argument mainly pressed upon us in opposition to the validity of the legislation was that

> It does not endeavour to treat equally all contracts of debts between the debtor and his creditors but allows the interest of some of them to be sacrificed in the interest of the company and of other classes of creditors.

(1) [1928] A.C. 187.

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REFERENCE *re* COMPANIES' CREDITORS ARRANGEMENT ACT.

Duff C.J.

We think an adequate answer to this objection is put forward in the argument on behalf of the Attorney-General for the Dominion. Apart altogether from the judicial control over the proceedings, there is the circumstance that the legislation applies to insolvent companies only; and, consequently, that it is within the power of any creditor to apply for a winding-up order or a receiving order. It seems difficult, therefore, to suppose that the purpose of the legislation is to give sanction to arrangements in the exclusive interests of a single creditor or of a single class of creditors and having no relation to the benefit of the creditors as a whole. The ultimate purpose would appear to be to enable the court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well as to the shareholders. We think it is not unimportant to note the circumstance to which our attention was called by counsel for the Attorney-General for the Dominion that the court may order shareholders to be summoned although they are not authorized to vote.

The judgment of Lamont and Cannon JJ. was delivered by

CANNON J.—This is a reference by the Governor General in Council submitting for hearing and consideration of this Court the following question:

> Is *The Companies' Creditors Arrangement Act, 1933,* 23-24 Geo. V, chapter 36, *ultra vires* of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

This Act is designed to apply to insolvent or bankrupt companies; and it is contended on behalf of the Dominion that Parliament could pass this legislation under section 91, par. 21, which gives it paramount jurisdiction to make laws concerning bankruptcy and insolvency. The provinces represent that in enacting it Parliament disregarded their exclusive jurisdiction under section 92, par. 13, in relation to property and civil rights in the province.

The whole argument before us was finally directed to one point: Are the proceedings contemplated by the Act, in pith and substance, *bankruptcy* or *insolvency* enactments within the fair and ordinary meaning of these words? One of the features which distinguishes this Act from the *Bankruptcy Act* now in force is that, under the latter, a composition or arrangement cannot be proceeded with before a receiving order or assignment has been made. Another difference is that under the *Bankruptcy Act* the secured creditor is dealt with on the footing that he may realize his security or value or surrender the same; it is only in respect of what he claims apart from the security that he is affected by the composition or arrangement. It was pointed out also that similar provisions giving binding effect to this approval by a certain majority of creditors are found in our legislation before and after Confederation.

*The Insolvent Act of 1864,* 27-28 Vict., ch. 17, sec. 9;

*The Insolvent Act of 1869,* Canada, 32-33 Vict., ch. 16, secs. 94 *et seq.;*

*The Insolvent Act of 1875,* Canada, 38 Vict., c. 16, secs. 54 *et seq.*

As far as Lower Canada is concerned, it may be of interest to note that chapter 87 of the Consolidated Statutes of Lower Canada, 1859, allowed the issue of a *capias* if the debtor "had refused to compromise or arrange with his creditors, or to make a *cession de biens,*" and provides that the debtor may be discharged if, when the affidavit for *capias* was made, he had "not refused to compromise or arrange with his creditors."

Moreover, I find that, before and since Confederation, arrangements with the creditors have always been of the very essence of any system of bankruptcy or insolvency legislation. Civil rights and the sanctity of contracts are certainly affected by clause 5 under which a minority of creditors would be bound by the vote of a majority in number representing three-fourths in value of creditors present and voting, either in person or by proxy, if the agreement or compromise to which they agreed be sanctioned by the court. I find that this feature existed long before Confederation and was at that time generally accepted.

Pardessus, Droit Commercial, vol. 3, éd. 1843, p. 92, no. 1232, says:

1232. Les créanciers d'un failli ont presque toujours intérêt à faire avec lui un arrangement quelconque, plutôt que d'éprouver les lenteurs et les embarrass d'une union qui finit souvent par consumer la fortune du débiteur. Mais, comme rarement tous sont d'accord, et qu'il est naturel de présumer qu'un grand nombre prendra les arrangements les plus convenables à l'intérêt commun, on a cru devoir faire céder la volonté de la

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minorité à celle de la majorité; les créanciers présents ont donc été admis à décider pour les absents.

Cette minorité, ces absents, doivent au moins avoir l'assurance que de mûres réflexions ont dirigé ceux dont le voeu doit devenir une loi pour eux. Tel est l'objet des règles prescrites pour la validité du concordat.

Under number 1236, classes or categories having different interests are already recognized by this author, and he adds (No. 1237):

> Le concordat est valablement consenti par la majorité des créanciers présents, pourvu que les sommes dues aux personnes qui forment cette majorité égalent les trois quarts de la totalité des créances vérifiées et affirmées, ou admises par provision, dues à des créanciers ayant droit de prendre part à la délibération du concordat.

Therefore, the very clause objected to in our Act of 1933 seems to be copied from the law of bankruptcy as it existed in France in 1843, when this work was published.

Under our system and the English *Bankruptcy Act* of 1914, bankruptcy legislation deals with the proceedings necessary for the distribution, under judicial authority, of the property of an insolvent person among his creditors. It assumes the commission of an "act of bankruptcy" followed by a petition to the court for a receiving order for the protection of the estate. The property of the debtor then vests in an official receiver. The debtor must submit a statement of affairs to the official receiver who calls a meeting of the creditors. The debtor is examined; and *if no composition or scheme of arrangement is approved,* he is adjudged bankrupt; and his property becomes divisible among his creditors and vests in a trustee.

Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, "bankruptcy" proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as "insolvency proceedings" with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part. Provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation and were incorporated in our *Insolvent Act of 1864;* and such a deed of composition and discharge could be validly made either before, pending or after proceedings upon an assignment, or for the compulsory liquida-