

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

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

AND

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1057863 B.C.
LTD., NORTHERN RESOURCES NOVA SCOTIA CORPORATION, NORTHERN PULP NOVA
SCOTIA CORPORATION, NORTHERN TIMBER NOVA SCOTIA CORPORATION, 3253527
NOVA SCOTIA LIMITED, 3243722 NOVA SCOTIA LIMITED and NORTHERN PULP NS GP
ULC

PETITIONERS

APPLICATION RESPONSE

Application response of: The Province of Nova Scotia (the “**Application Respondent**” and the “**Province**”)

THIS IS A RESPONSE TO the Notice of Application of 1057863 B.C. Ltd., Northern Resources Nova Scotia Corporation, Northern Pulp Nova Scotia Corporation, Northern Timber Nova Scotia Corporation, 3253527 Nova Scotia Limited, 3243722 Nova Scotia Limited and Northern Pulp NS GP ULC (the “**Applicants**”) dated February 7, 2022.

Part 1: ORDERS CONSENTED TO

The Application Respondent consents to the granting of the orders set out in Notice of Application, Schedule “B”: None.

Part 2: ORDERS OPPOSED

The Application Respondent opposes the granting of the orders set out in Notice of Application, Schedule “B”.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent takes no position on the granting of the orders set out in Notice of Application, Schedule “B”: None.

Part 4: FACTUAL BASIS

Position of the Province

1. Section 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “**CCAA**”) grants broad powers to a court to make any order considered “appropriate in the circumstances.” The Province submits that the Applicants' request for the appointment of a mediator and a tolling and suspension of all deadlines in the litigation commenced by the Applicants and Northern Pulp NS LP, Northern Timber Nova Scotia LP, Paper Excellence Canada Holdings Corporation and Hervey Investment BV (Netherlands) (collectively, the “**Plaintiffs**”) against the Province in the Nova Scotia Supreme Court, Hfx No. 511473 (the “**Nova Scotia Litigation**”) is not appropriate, for the following reasons:

- (a) The Province's position is that it has no liability to the Plaintiffs as a result of the *Boat Harbour Act*¹, which provides a full defence to the Plaintiffs' claims through section 4:

4(1) No action lies against Her Majesty in Right of the Province or a member of the Executive Counsel in respect of the cessation of use of the Facility for the reception and treatment of effluent from the Mill as a result of this Act.

(2) The enactment of this Act is deemed not to be a repudiation or anticipatory repudiation by Her Majesty in Right of the Province of the Lease Agreement dated December 31, 1995 between Her Majesty in Right of the Province and Scott Maritimes Limited, as extended by a Lease Extension Agreement dated October 22, 2022 between Her Majesty in Right of the Province and Kimberly-Clarke Inc.

- (b) The Province's willingness to negotiate assistance for Northern Pulp is predicated upon it being in the public interest of Nova Scotians and upon the preservation of the integrity of the environmental assessment and approval processes and the discharge of its duties to consult with First Nations;²
- (c) The Province does not deem it to be in the public interest to engage in such negotiation at this time;

¹ SNS 2015, c. 4 (**Tab 9**)

² Affidavit of Duff Montgomerie sworn on July 22, 2020 (the “**Montgomerie Affidavit**”) at para 63.

- (d) The request for mediation is shortly after the Nova Scotia Litigation was begun, with the Statement of Claim filed on December 16, 2021 and, in particular;
 - (i) pleadings have not closed; and
 - (ii) there has been no document disclosure;
- (e) The request for a suspension of all deadlines in the Nova Scotia Litigation, including precluding the filing of a defence by the Province, undermines the Province’s right to make a full defence in reliance upon the procedural protection of the Nova Scotia *Civil Procedure Rules*. It interferes with a full exploration of the evidence and the merits of the positions of the parties. Instead, it suggests a monetary settlement is guaranteed and promotes an expectation that the Province should be offering such a settlement, contrary to the Province’s position;
- (f) The environmental assessment process (“**EA Process**”) will not conclude until mid-2024. Only once the EA Process is successfully completed can a replacement effluent treatment plant be built as part of a new mill (the “**Project**”);
- (g) The Applicants are seeking significant powers for the Court-appointed mediator that fall outside of what would otherwise be available, including the power of “dealing with any Court, regulatory body or other government ministry, department or agency” (para 4 of the proposed Order). It is unclear what this power is intended to be used for, but the language on its face is inappropriate. It is overly broad and would permit the mediator to interpose himself into the EA Process and approval process in a manner which would undermine the integrity of the regulatory regime. The EA Process for the Project will entail a hearing before an independent review panel and a final decision by the Minister of the Environment and Climate Change. There is no room in this process for *ex parte* dealings on the part of the mediator. The EA Process is independent from interference through the Nova Scotia Litigation or these CCAA proceedings, and such independence cannot be subject to interference for the Applicants’ financial convenience; and
- (h) The mediation will be a duplication of mandatory steps in the Nova Scotia Litigation, at considerable expense to the Province and other stakeholders.

2. The Plaintiffs also seek to shift the oversight of the Nova Scotia Litigation into this Court. There is no correlation between the request for mediation at this time and the Applicants' stated goal of re-starting operations. There is only the presumption of settlement from the Province to the Plaintiffs and such a presumption is unfounded, particularly at these early stages of the Nova Scotia Litigation.
3. Section 11 of the CCAA does not provide limitless powers. There is no urgency to a mediation being ordered at this time. From the outset of this proceeding, the Applicants and the DIP Lenders have imposed deadlines through the milestones in the term sheets for the conclusion of the litigation (or a settlement) that the Province has repeatedly identified as unrealistic. At the same time, the Plaintiffs only commenced the litigation in December 2021 shortly before the expiry of the limitation date for their claim. We submit that the Province is entitled to respond fully to the Nova Scotia Litigation in the appropriate forum of the Nova Scotia Supreme Court, and an Order requiring it to participate in mediation against its will is not likely to be productive. Further, such an Order would be an extension of the powers provided to a CCAA Court beyond what is appropriate in the circumstances.

Factual Background

4. The Province refers to the factual background set out in its Application Response filed on July 22, 2020 (the "**Initial Application Response**"), with the history of operations, the environmental issues caused by the effluent discharge from the Northern Pulp facility (the "**Mill**") into the local harbour, Boat Harbour, and its impact on the Pictou Landing First Nation ("**PLFN**"). The Initial Application Response sets out the timeline that was imposed on the Applicants from the passage of the *Boat Harbour Act*, which set a January 31, 2020 deadline for Northern Pulp to identify and obtain approval for an alternative effluent treatment facility (the "**Replacement ETF**").
5. Mediation is not on the immediate critical path forward for re-starting the Mill, being the completion of the environmental assessment for the Project. Potential benefits of mediation are low in view of the Province's position with respect to its liability to the Plaintiffs. Mediation will entail cost, time, and efforts. The cost, time and efforts to advance the Nova Scotia Litigation can assist the parties in formulating their positions in the event that the parties later wish to mediate. The same cannot be said for mediation efforts advancing the Nova Scotia Litigation.

6. The Applicants' request for mediation of the Nova Scotia Litigation at this early stage is unrelated to the re-opening of the Mill operations, which is currently dependent on the EA Process. Such a request does, however, provide a path for the Applicants to continue funding the Nova Scotia Litigation through the protections granted to it through the CCAA process.
7. The milestones presented by the Applicants provide a finish date of August 20, 2024 for the EA Report and decision.³ Such a timeline provides significant opportunity for the Nova Scotia Litigation to be advanced, without the additional costs associated with a mandatory mediation.

Part 5: LEGAL BASIS

Issue 1 – Mandatory Mediation Order

8. The CCAA does not expressly provide for mandatory mediation as a form of relief during insolvency proceedings. Accordingly, the Applicants must rely on the statutory discretion in Section 11 of the CCAA or, alternatively, this Honourable Court's inherent jurisdiction as the basis for the requested order. Section 11 of the CCAA (**Tab 10**) states:

General power of court

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

9. In *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 [*Century Services*] (**Tab 8**), the Supreme Court of Canada held that, in most instances, the issuance of an order not directly prescribed in the CCAA should be considered an exercise of statutory discretion:

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

³ Affidavit no. 10 of Bruce Chapman sworn on October 18, 2021 (the "**Chapman Affidavit No. 10**") at para 4, Exhibit "B".

authority during CCAA proceedings? (2) what are the limits of this authority?

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

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

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

10. Accordingly, it is submitted that this Honourable Court's authority to grant the requested mediation order is grounded in the statutory discretion provided by Section 11 of the CCAA. Section 11 of the CCAA requires that the order be "appropriate in the circumstances".
11. The Court, in *Century Services*, noted the following concerning the limits of statutory discretion:

70 *The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind*

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

[Emphasis added]

12. In 9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10 [Callidus] (Tab 1), the Supreme Court of Canada made the following comments concerning the exercise of judicial discretion in CCAA proceedings:

47 One of the principal means through which the CCAA achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each CCAA proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

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

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

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:*

[...]

51 *The third consideration of due diligence requires some elaboration. Consistent with the CCAA regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage (Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the CCAA rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party’s failure to participate in CCAA proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the CCAA regime (see, e.g., North American Tungsten Corp. v. Global Tungsten and Powders Corp., 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; BA Energy Inc., Re, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); HSBC Bank Canada v. Bear Mountain Master Partnership, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; Caterpillar Financial Services Ltd. v. 360networks Corp., 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party’s failure to act diligently).*

[Emphasis added]

13. It is submitted that an order made pursuant to Section 11 of the CCAA requires:
 - (a) that the order is appropriate in the circumstances (with a particular view to the policy and remedial objectives of the CCAA);
 - (b) that the applicant has been acting in good faith; and
 - (c) that the applicant has been acting with due diligence.
14. It is respectfully submitted that the requested mediation order is not appropriate in the circumstances, and therefore should not be granted, for the following reasons:

- (a) the Order will not further the restructuring or the remedial objectives of the CCAA – at least, not at this time;
- (b) the circumstances are unlike other CCAA proceedings where mediation has been ordered; and
- (c) the potential benefits of mediation at this time do not outweigh the costs of mediation, in particular the prejudice to the Province of Nova Scotia.

The Order will not further the restructuring or the remedial objectives of the CCAA

15. It is settled law that the facilitation of a restructuring of an insolvent business so that it may emerge from CCAA protection as a going concern is a principal purpose of the CCAA (see *Callidus*, at para 41). As has been stated previously in these proceedings, the Province fails to see how the litigation against the Province for the passage of the *Boat Harbour Act*, and now the requested mediation, will assist with the identification and approval of a Project necessary to re-start operations at the Mill. As the necessary approvals for the proposed Project are an absolute precondition for the re-starting of the Mill operations, it is the Province's view that the EA Process for the Project must be the primary focus of these CCAA proceedings if the Applicants are to emerge from CCAA protection.
16. In their materials, the Applicants suggest that a successful resolution to these CCAA proceedings requires not only the completion of the Project, but also a resolution of the Applicants' claims against the Province.⁴ The Applicants further suggest in their materials that the requirement of a resolution of the claims against the Province has consistently been put forth as a precondition to a resolution of these CCAA proceedings.⁵ In the Province's view, such a suggestion is at odds with the Applicants' other statements that the primary objective of the CCAA proceedings is obtaining the necessary environmental approvals for the re-starting of the Mill, as set out in Mr. Chapman's Affidavit No. 11 at paragraph 2:⁶

As described in greater detail in my affidavit sworn June 16, 2020 (the "First Chapman Affidavit") and filed in these proceedings (the "CCAA Proceedings"), the Petitioners commenced the CCAA

⁴ Notice of Application dated February 7, 2022 (the "**Notice of Application**") at p. 14.

⁵ Notice of Application at p. 14.

⁶ Affidavit No. 11 of Bruce Chapman sworn February 3, 2022, at para 2.

Proceedings to, among other things (i) preserve their material assets by completing a safe and orderly decommission and hibernation of their formerly operated pulp mill (the “Mill”); and (ii) pursue alternatives to the Replacement ETF project described in the First Chapman Affidavit for re-starting the Mill (the “Project”), which remains the preferred outcome for the petitioners in these CCAA Proceedings.

17. The Province denies any liability to the Applicants or other Plaintiffs in the Nova Scotia Litigation as a result of the passage of the *Boat Harbour Act* and has made this clear from the outset of this CCAA proceeding. The Province does not consider it to be in the public interest at this time to contribute anything to the Plaintiffs to settle this litigation.
18. Further, and as has been previously stated in these proceedings, the Province again asserts that the environmental process is separate and administered independently from (i) the direction of the Province (as a whole) in these proceedings, and (ii) the Nova Scotia Litigation or any associated mediation. As set out in the Montgomerie Affidavit sworn on July 22, 2020:⁷

5. Public interest considerations also include the need to ensure that the Mill and any modifications to it obtain any required environmental approvals and permits and operate in accordance with these approvals and permits. The integrity of the environmental assessment and approval processes is important to the Province and people of Nova Scotia and these processes are administered independently under the direction of the Minister of Environment. The Province itself is subject to these same processes and approvals when it is the proponent of a new or modified undertaking, such as a new highway or highway twinning project.

19. Accordingly, it is the position of the Province that the mediation will not further the EA Process, which is the primary determinant of whether the Mill may re-start operations.
20. Notwithstanding the foregoing, the Province recognizes that the CCAA also provides for remedial purposes that do not result in the debtor emerging from CCAA protection, such as the objective of maximizing creditor recovery (see *Callidus*, at para 42). In *Callidus*, the Supreme Court of Canada noted:

46 Ultimately, the relative weight that the different objectives of the CCAA take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a

⁷ Montgomerie Affidavit at para 5.

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

21. The Province recognizes this Court's earlier comments that the litigation claim is a potential asset of the Applicants, and that, *prima facie*, the protection of a debtor's assets could be consistent with the purposes of the CCAA. However, the Province submits that in the current proceedings, a mediation as sought by the Applicants would not assist the ultimate goal of re-starting Mill operations, and therefore arguments in favour of mediation as a means of protecting or enhancing the assets of Applicants must be fettered by this fact. Simply put, the Mill cannot re-start without the proper environmental approvals, and such approvals are years away.

The circumstances are unlike other CCAA proceedings where mediation has been ordered

22. The issue of court-ordered mediation in a CCAA proceeding concerning a claim of debtor against a creditor does not appear to have been addressed in any reported decision. The Applicants rely on the mediation orders granted in the following proceedings as justification to granted the proposed mediation order (see Notice of Application, at para 12): (i) *Canadian Red Cross Society*; (ii) *Nortel Networks Corporation (Re)*; (iii) *Laurentian University of Sudbury*; (iv) *CannTrust Holdings Inc. et al*; (v) *Rothmans, Benson & Hedges Inc.*; (vi) *Imperial Tobacco Canada Limited et al.*; and, (vii) *JTI-Macdonald Corp.*
23. The circumstances of each matter are summarized below.
 - i) Canadian Red Cross Society
24. The CCAA proceedings of Canadian Red Cross Society were commenced in the wake of mass tort claims for the distribution of tainted blood. The CCAA allowed for the transfer of

the Canadian blood supply system in order establish a fund to compensate the transfusion claimants, and also allowed for the Red Cross Society to then deal with all of its creditors in a single proceeding.⁸

25. The mediation in the CCAA was required prior to the sanction of a plan of compromise and arrangement, and was related to certain pension issues.⁹

ii) Nortel Networks Corporation (Re)

26. In the Nortel CCAA proceedings, mediation was ordered in an attempt to settle disagreements as to the allocation of the proceeds of sale of the assets of the debtor companies. In ordering mandatory mediation, the supervising CCAA court noted that the parties had been unable to resolve the issue on a consensual basis, and therefore the significant proceeds of sale remained in escrow pending a resolution of the allocation issue.¹⁰

27. In its reasons, the court paid particular attention to the circumstances of Nortel's employees and former employees, who held unsecured claims for, among other things, pension and medical benefits. The court noted that delay in distribution of the sale proceeds was significant for these individuals, and that "[a] *protracted delay in the progress of the cases [would] only exacerbate an already unfortunate situation for the many individual creditors*".¹¹ Accordingly, the court ordered mandatory mediation, with any settlement reached to be binding on the parties.¹²

iii) Laurentian University of Sudbury

28. Laurentian University sought CCAA protection as it suffered from a liquidity crisis following years of occurring operational deficits.¹³ As part of its restructuring, Laurentian University intended to implement long-term financial stability initiatives including:¹⁴

⁸ *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re*, 19 CBR (4th) 158, 2000 CarswellOnt 3269 at paras 6-7 [*Canadian Red Cross Society*] (**Tab 2**)

⁹ *Canadian Red Cross Society* at para 9.

¹⁰ *Nortel Networks Corp., Re*, 2011 ONSC 4012 at paras 7-8 [*Nortel*]. (**Tab 7**)

¹¹ *Nortel* at para 17.

¹² *Nortel* at para 22.

¹³ *Laurentian University of Sudbury*, 2021 ONSC 659 at para 3 [*Laurentian University*]. (**Tab 5**)

¹⁴ *Laurentian University* at para 24.

- (a) a review of the breadth of academic programs offered and their enrollment levels;
 - (b) a re-evaluation of the Federated Universities model;
 - (c) negotiations with the university's unions regarding what the university must look like in the future and ensuring that the restructured university can be aligned with collective agreements that will facilitate its future sustainability;
 - (d) identification of opportunities for future revenue generation;
 - (e) refinement of the student experience at the university; and
 - (f) consideration of options for addressing current and long-term indebtedness.
29. The stated goal of the CCAA proceedings was for Laurentian University to financially and operationally restructure in order to emerge as a financially sustainable university for the benefit of all its stakeholders.¹⁵
30. Early in the proceedings, Laurentian University sought the appointment of a mediator to assist with: (i) negotiations related to the review and restructuring of the university's academic programs; and (ii) the collective agreement between the university and its faculty association. The university viewed the appointment of a mediator by the court as urgent and a high priority item.¹⁶ All parties supported the appointment of a mediator.¹⁷
- iv) CannTrust Holdings Inc. et al
31. CannTrust Holdings Inc. and its affiliates entered into CCAA proceedings following the suspension of CannTrust Holdings' Health Canada licences for the production and sale of cannabis. CannTrust Holdings and its affiliates were also facing various securities class actions and other claims alleging misrepresentations in their disclosure to investors.¹⁸

¹⁵ *Laurentian University* at para 4.

¹⁶ *Laurentian University* at paras 73-74.

¹⁷ *Laurentian University of Sudbury*, 2021 ONSC 951 at para 3. (Tab 6)

¹⁸ *In the Matter of A Plan of Compromise or Arrangement of CannTrust Holdings Inc. et al*, ONSC (Comm. List) File No. CV-20-00638930-00CL, Report of the Proposed Monitor dated March 31, 2020 at para 29 (online: <<https://documentcentre.ey.com/api/Document/download?docId=27748&language=EN>>) [*CannTrust*]. (Tab 12)

32. The proceedings, at the time of the issuance of the mediation order, contemplated a sale and investment solicitation process (SISP) which allowed for sale of, or investment in, all or part of the applicants' assets and business operations. It was open as to whether this process would result in a restructuring, recapitalization or other form of reorganization of the business of the applicants as a going concern, or a sale of all or one or more components of the applicants' assets and business operations (either as a going concern or otherwise).¹⁹
33. CannTrust Holdings sought the appointment of a mediator in order to mediate a global resolution of the securities class actions. Due to the complexity and overlapping nature of these claims, CannTrust Holdings was of the view that it would be preferable to work towards a global resolution of these claims through a mediation.²⁰
- v) Rothmans, Benson & Hedges Inc., Imperial Tobacco Canada Limited et al., & JTI-Macdonald Corp.
34. In these separate but related CCAA proceedings, the applicants sought CCAA protection with the intention of effecting a global resolution of multiple significant claims brought against the applicants and related companies. The actions included claims by various governments to recover healthcare costs incurred in connection with smoking related diseases, and class actions seeking damages on behalf of individuals.²¹ CCAA protection (and the associated mediation) was required in order to provide the applicants with an opportunity to deal with the litigation claims in an orderly manner, while still enabling them to continue to operate their business in the ordinary course and generate positive cash flow for the benefit of stakeholders.²²

¹⁹ *CannTrust*, Second Report of the Monitor dated May 4, 2020 at para 26 (online: <<https://documentcentre.ey.com/api/Document/download?docId=27751&language=EN>>). (Tab 13)

²⁰ *CannTrust*, Notice of Motion returnable May 8, 2020 at para 22 (online: <<https://documentcentre.ey.com/api/Document/download?docId=27766&language=EN>>). (Tab 14)

²¹ *In the Matter of A Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.*, ONSC (Comm. List) File No. CV-19-616779-00CL, Second Amended and Restated Initial Order granted on April 25, 2019 at para 39 (online: <<https://documentcentre.ey.com/api/Document/download?docId=28286&language=EN>>) [*Rothmans, Benson & Hedges*]. (Tab 15)

Imperial Tobacco Canada Limited, et al, Re, 2019 ONSC 1684 at paras 2, 5. (Tab 3)

JTI-Macdonald Corp., Re, 2019 ONSC 1625 at paras 3-6. (Tab 4)

²² *Rothmans, Benson & Hedges*, Notice of Application dated March 22, 2019 at para 2(l) (online: <<https://documentcentre.ey.com/api/Document/download?docId=28328&language=EN>>). (Tab 16)

The Current Proceedings

35. The circumstances in the current proceedings can be distinguished from the above-noted CCAA proceedings in that:
- (a) There are no urgent circumstances which require mediation in place of another means of dispute resolution;
 - (b) The proposed mediation cannot properly or appropriately involve the EA Process and, thus, is not directly relevant to the success of the CCAA proceedings; and
 - (c) There is objection by the Province to being forced in mandatory mediation at this time (unlike the cited proceedings, where there was consent amongst the affected parties for mediation, or the mediation was sought to resolve multiple claims against the applicant in an orderly manner).
36. The Province states that there is no urgency in the present circumstances that would warrant intervention by this Court in the Nova Scotia Litigation, as:
- (a) The Mill is currently not an operating business, and has not operated for over two-years;²³
 - (b) The Applicants do not expect to obtain necessary environmental approvals until at least mid-2024;²⁴

In the Matter of A Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited et al., ONSC (Comm. List) File No. CV-19-616077-00CL, Notice of Application dated March 12, 2019 at para 16 (online: <<http://cfcanada.fticonsulting.com/imperialtobacco/docs/Volume%201%20-%20Application%20Record%20of%20ITCAN%20and%20ITCO.pdf>>). (**Tab 17**)

In the Matter of A Plan of Compromise or Arrangement of JTI-Macdonald Corp., ONSC (Comm. List) File No. CV-19-615862-00CL, See Notice of Application dated March 8, 2019 at p. 5 (online: <https://www.insolvencies.deloitte.ca/en-ca/Documents/ca_en_insolv_JTIM_ApplicationRecordoftheApplicant_Volume1of4_Final_030819.pdf>). (**Tab 18**)

²³ Affidavit No. 1 of Bruce Chapman sworn June 15, 2020 (the “**Chapman Affidavit No. 1**”) at para 35.

²⁴ Chapman Affidavit No. 10 at paras 6, 29.

- (c) Following receipt of the necessary environmental approvals it will take some time to complete the construction and commissioning work to bring the Mill into operation;²⁵ and
 - (d) There is a suggestion that the Applicants did not expect to negotiate a (potential) settlement with the Province until late 2024.²⁶
37. While re-starting operations at the Mill is the ultimate stated goal of the Applicants in these CCAA proceedings, there is little risk that allowing the Nova Scotia Litigation to continue without court-ordered mediation will jeopardize the Applicants' restructuring proceedings, or the interests of their stakeholders, at this time. It is submitted that in the Nortel and Laurentian University CCAA proceedings, mediation was ordered in order to resolve issues which otherwise would have stymied the CCAA proceedings, to the detriment of stakeholders. This is not the case in these proceedings.
38. Similarly, the Province submits that the issues subject to the proposed mediation are not central to the success of the CCAA proceedings. In the Nortel proceedings, the mediation was ordered to address the allocation of the proceeds of sale of the applicants' assets. In the Laurentian University proceedings, the mediation was to address the university's academic programs and collective agreement with its faculty association, two facets of its operations that required restructuring in order to ensure the university's long-term financial stability.
39. In the CannTrust Holdings, Rothmans, Benson & Hedges, Imperial Tobacco, and JTI-MacDonald CCAA proceedings, mediation was ordered in an attempt to resolve the multiple claims against the applicants in an orderly manner, such claims being the impetus for seeking CCAA protection. As has been previously stated in these submissions, the Province submits that, in the current proceedings, the proposed mediation does not assist the ultimate goal of securing the environmental assessment and other approvals necessary for re-starting Mill operations.
40. Finally, the CCAA cases cited by the Applicants do not expressly deal with the circumstance where a party central the mediation objected to the mediation on the basis

²⁵ For the Replacement ETF it was estimated this would take two years from the receipt of the necessary approvals (see Chapman Affidavit No. 1 at para 35).

²⁶ Chapman Affidavit No. 10 at para 29.

of prejudice. In the Laurentian University proceedings, all parties consented to the mediation. The mediation in the CannTrust Holdings, Rothmans, Benson & Hedges, Imperial Tobacco, and JTI-Macdonald CCAA proceedings concerned multiple class actions and other claims against the applicants, a circumstance wholly-different than the within proceedings.

41. In summary, it is submitted that while CCAA cases cited by the Applicants are examples of court-ordered mediation in CCAA proceedings, such cases are distinguishable from the current proceedings.

The potential benefits of mediation at this time do not outweigh the costs of mediation, in particular the prejudice to the Province of Nova Scotia

42. One of the purposes of the CCAA is to permit a broad balancing of stakeholder interests in the debtor corporation (see *Rescue! The Companies' Creditors Arrangement Act* (2d ed (Toronto: Thompson Reuters Canada, 2013) at pages 15-16 (**Tab 11**)). A determination of whether an order is appropriate in the circumstances therefore requires a balancing of the interests of the various stakeholders in the proceeding. In particular, the prejudice to creditors must be balanced against the prospect that the mediation will be successful (and the impact a successful mediation will have on the overall restructuring proceedings). It is submitted that, at this time, the potential benefits of the proposed mediation do not outweigh the costs of such mediation and, in particular, the prejudice to the Province. It is possible that this position may change as the Nova Scotia Litigation is allowed to unfold and if the Applicants succeed in obtaining the EA approvals for the Project.
43. The Province submits that mediation at the current stage of the Nova Scotia Litigation is inappropriate. In particular:
 - (a) the positions of the parties have not been fully defined by the pleadings, which have not been closed, nor are the facts involved in the dispute fully understood without document disclosure. The Province submits that it would be more efficient to define the issues through pleadings before possibly moving to mediation;
 - (b) at this stage, the mediation is not likely to lead to a settlement;
 - (c) there is no harm in delaying any potential mediation for the reasons set out above (and in particular, as the Mill is closed and cannot be re-opened without the

necessary environmental approvals in place first and the Replacement ETF built); and

- (d) whether or not the Mill will obtain approval to reopen through the EA Process and industrial approval processes will presumably have a significant effect upon the claimed quantum of damages. A decision on the environmental approval is therefore critical before mediation can meaningfully proceed.
- 44. The proposed mediation will be a significant cost, sought to be funded through the use of the current DIP facility. Given the Province's opposition to the mediation process at this time, this use of DIP financing will be a futile waste of resources, to the detriment of the stakeholders (other than the Applicants and their shareholders) and in particular, to the Province through the continued erosion of its security.
- 45. Ordering a mediation process is not useful when one of the parties to the process is opposed to mediation, particularly when such party is denying any liability. As noted, the Province denies any liability to the Applicants as a result of section 4 of the *Boat Harbour Act*.
- 46. For the reasons set out in these submissions, the Province opposes mediation at this time.

Part 6: MATERIAL TO BE RELIED ON

- 1. Affidavit of Duff Montgomerie sworn July 22, 2020 (already on file with the Court)

The Application Respondent estimates that the application will not take more than the allotted time.

- [X] The Application Respondent has not filed in this proceeding a document that contains an address for service. The Application Respondent's ADDRESS FOR SERVICE is:

Stewart McKelvey
600-1741 Lower Water Street
P.O. Box 997
Halifax, NS B3J 2X2
Tel: (902) 420-3200
Fax: (902) 420-1417
Email: rgrant@stewartmckelvey.com
Email: mchiasson@stewartmckelvey.com

DATED: March 18, 2022

A handwritten signature in black ink, appearing to read 'Robert G. Grant', with a long, sweeping horizontal stroke extending to the right.

Robert G. Grant, Q.C.
Maurice P. Chiasson, Q.C

Counsel for the Province

Appendix A – List of Authorities

<u>Tab</u>	<u>Authority</u>
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| 1. | <i>9354-9186 Québec inc. v. Callidus Capital Corp.</i> , 2020 SCC 10 |
| 2. | <i>Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re</i> , 2000 CarswellOnt 3269 |
| 3. | <i>Imperial Tobacco Canada Limited, et al, Re</i> , 2019 ONSC 1684 |
| 4. | <i>JTI-Macdonald Corp., Re</i> , 2019 ONSC 1625 |
| 5. | <i>Laurentian University of Sudbury</i> , 2021 ONSC 659 |
| 6. | <i>Laurentian University of Sudbury</i> , 2021 ONSC 951 |
| 7. | <i>Nortel Networks Corp., Re</i> , 2011 ONSC 4012 |
| 8. | <i>Ted Leroy Trucking [Century Services] Ltd., Re</i> , 2010 SCC 60 |

Legislation

- | | |
|-----|---|
| 9. | <i>Boat Harbour Act</i> , SNS 2015, c. 4 |
| 10. | <i>Companies' Creditors Arrangement Act</i> , R.S.C. 1985, c. C-36, s. 11 |

Secondary Sources

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| 11. | <i>Rescue! The Companies' Creditors Arrangement Act</i> (2d ed (Toronto: Thompson Reuters Canada, 2013)) |
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Pleadings

- | | |
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| 12. | <i>In the Matter of A Plan of Compromise or Arrangement of CannTrust Holdings Inc. et al</i> , Report of the Proposed Monitor dated March 31, 2020, ONSC (Comm. List) File No. CV-20-00638930-00CL |
| 13. | <i>In the Matter of A Plan of Compromise or Arrangement of CannTrust Holdings Inc. et al</i> , Second Report of the Monitor dated May 4, 2020, ONSC (Comm. List) File No. CV-20-00638930-00CL |
| 14. | <i>In the Matter of A Plan of Compromise or Arrangement of CannTrust Holdings Inc. et al</i> , Notice of Motion returnable May 8, 2020, ONSC (Comm. List) File No. CV-20-00638930-00CL |
| 15. | <i>In the Matter of A Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.</i> , Second Amended and Restated Initial Order dated April 25, 2019, ONSC (Comm. List) File No. CV-19-616779-00CL |
| 16. | <i>In the Matter of A Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.</i> , Notice of Application dated March 22, 2019, ONSC (Comm. List) File No. CV-19-616779-00CL |
| 17. | <i>In the Matter of A Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited et al.</i> , Notice of Application dated March 12, 2019, ONSC (Comm. List) File No. CV-19-616077-00CL |

<u>Tab</u>	<u>Authority</u>
18.	<i>In the Matter of A Plan of Compromise or Arrangement of JTI-Macdonald Corp.</i> , Notice of Application dated March 8, 2019, ONSC (Comm. List) File No. CV-19- 615862-00CL

TAB 1



SUPREME COURT OF CANADA

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

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

BETWEEN:

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

and

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

- and -

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

AND BETWEEN:

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

and

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

Respondents

- and -

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

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

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

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

9354-9186 QUÉ. v. CALLIDUS

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

Appellants

v.

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

Respondents

and

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

- and -

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

v.

Callidus Capital Corporation,

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

Respondents

and

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

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

2020 SCC 10

File No.: 38594.

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

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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By Wagner C.J. and Moldaver J.

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Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage and Hannah Toledano, for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.

Neil A. Peden, for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited).

Geneviève Cloutier and Clifton P. Prophet, for the respondent Callidus Capital Corporation.

Jocelyn Perreault, Noah Zucker and François Alexandre Toupin, for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier.

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

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

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

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

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

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

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

II. Facts

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

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

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

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

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

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

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

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

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

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

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

B. *The Initial Competing Plans of Arrangement*

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

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

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

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

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

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

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

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

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

D. Bluberi’s Interim Financing Application and Callidus’s New Plan

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

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

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

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

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

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

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

III. Decisions Below

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

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

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

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

its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.

As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Issues

[37] These appeals raise two issues:

- (1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?
- (2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the CCAA?

V. Analysis

A. *Preliminary Considerations*

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

(1) The Evolving Nature of CCAA Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Related creditors

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

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

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

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

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

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

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

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

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

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

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

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

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

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

General power of court

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

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

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

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

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

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

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

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

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

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

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

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

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

(“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.

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

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

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus’s vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it to do so⁴. The supervising judge was also aware that Callidus’s First Plan had failed to receive the other creditors’ approval at the creditors’ meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of \$250,000 — none of the factual circumstances relating to Bluberi’s financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a “second kick at the can” and manipulate the vote on the New

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

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

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

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

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

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

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

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

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

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

(1) Interim Financing and Section 11.2 of the CCAA

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

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

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

Interim financing

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

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

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

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

Priority — secured creditors

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

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

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

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

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

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Assur. Co., [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at N§33)

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

A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between *Crystallex* and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

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

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

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

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

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

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

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

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

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);
- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));
- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));
- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that “[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch” (at para. 91 (emphasis added); s. 11.2(4)(f)); and
- the supervising judge was also well aware of the Monitor’s reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

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

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

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

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

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

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

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

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

The facts of this case are unusual: there is a single “pot of gold” asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge’s exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

. . .

. . . While the approval of the Tenor DIP Loan affected the Noteholders’ leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

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

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

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

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

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

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

VI. Conclusion

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

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

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

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

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

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

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

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

TAB 2

Most Negative Treatment: Distinguished

Most Recent Distinguished: *Oblats de Marie Immaculee du Manitoba, Re* | 2004 MBQB 71, 2004 CarswellMan 104, 129 A.C.W.S. (3d) 1064, [2004] M.J. No. 112, [2004] 10 W.W.R. 164, 182 Man. R. (2d) 201, 1 C.B.R. (5th) 279 | (Man. Q.B., Mar 17, 2004)

2000 CarswellOnt 3269
Ontario Superior Court of Justice

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re

2000 CarswellOnt 3269, [2000] O.J. No. 3421, 19 C.B.R. (4th) 158, 99 A.C.W.S. (3d) 732

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

In the Matter of a Plan of Compromise or Arrangement of the Canadian
Red Cross Society/La Société Canadienne de la Croix Rouge, Applicant

Blair J.

Heard: September 12, 2000
Judgment: September 14, 2000
Docket: 98-CL-002970

Counsel: *Benjamin Zarnett, Brian Empey and Jessica Kimmel*, for Canadian Red Cross.

James H. Grout and Scott Bomhof, for Monitor, Ernest & Young.

David Harvey and Aubrey Kauffman, Representative Counsel for pre-1986/post 1990 Hepatitis C Claimants (non-B.C. and non-Quebec).

David Klein and Gary Smith, Representative Counsel for B.C. pre-1986/post 1990 Hepatitis C Claimants.

Dawna Ring, Representative Counsel for Secondarily Infected Spouses and Children.

Kenneth Arenson, for various HIV Directly Infected Claimants.

Michel Bélanger, for Quebec Class Action Claimants.

Paul Vickery, for Government of Canada.

William V. Sasso, for Provincial and Territorial Governments except Ontario.

Richard Horak, for Government of Ontario.

S. John Page, for Canadian Blood Services.

Michael Kainer, for Service Employees Union.

Neil Saxe, for Dominion of Canada General Insurance Company.

Michael Babcock, for Defendant, Hospitals.

Mary M. Thomson, for Certain Physicians.

Alex MacFarlane, for Connaught Laboratories Limited.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Thousands of persons contracted disease from transfusions of contaminated blood supplied by Red Cross — Society's potential liabilities to claimants far exceeded its assets — Society transferred control of Canadian blood supply to new agencies — Fund of about \$79 million established to compensate claimants — Interested parties conducted intense and lengthy negotiations to reach plan of compromise — Society applied for approval of plan — Application granted — Plan equitably balanced various competing interests — Plan overwhelmingly approved by all classes of creditors, including claimants — Parties all

represented by legal and professional advisors — Creditors would not receive better distribution on liquidation of Society's assets — Approval strongly recommended by court-appointed monitor — Important that Society be allowed to continue its other humanitarian activities.

Table of Authorities

Cases considered by *Blair J.*:

Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) — considered

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) — considered

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — referred to

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re*) 12 O.R. (3d) 500 (Ont. Gen. Div.) — considered

Wandlyn Inns Ltd., Re (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.) — considered

Statutes considered:

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

s. 6 — pursuant to

APPLICATION by Canadian Red Cross Society for approval of plan of compromise and arrangement pursuant to *Companies' Creditors Arrangement Act*.

Blair J.:

1 After two years of intense and complex negotiations, the Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge applies for approval and sanction of its Plan of Compromise and Arrangement, as amended ("the Plan"). The application is made pursuant to [section 6 of the *Companies' Creditors Arrangement Act*](#) (the "CCAA"). The Plan was approved by an overwhelming majority of all classes of creditors on August 30, 2000.

Background

2 All insolvency re-organizations involve unfortunate situations, both from personal and monetary perspectives. Many which make their way through the courts have implications beyond simply the resolution of the debt structure between corporate debtor and creditors. They touch the lives of employees. They have an impact on the continued success of others who do business with the debtor company. Occasionally, they affect the fabric of a community itself. None, however, has been characterized by the deep human and, indeed, institutional tragedy which has given rise to the restructuring of the Canadian Red Cross (the "Red Cross" or the "Society").

3 The Canadian Red Cross has been an institutional icon in the lives of Canadians for many years. As the Court noted in its endorsement at the time of the original Order granting the Society the protection of the [CCAA](#):

Until recent years it would have been difficult to imagine a not-for-profit charitable organisation with a more highly regarded profile than the Canadian Red Cross Society. Who among us has not benefited in some way, does not know someone who has benefited in some way, or is at least unaware of the wide-ranging humanitarian services it provides, nationally and internationally? It aids victims of conflicts or disasters — providing assistance to refugees from the conflict in Rwanda, or programs for relief and health care and emergency training in places like Angola, Haiti, and Russia, and working with communities in Quebec and Manitoba in recent years as a result of flood disasters and ice storms, as but some examples. It furnishes water safety programs and first aid services, homemaker services and other community initiatives across Canada. And it has been responsible for the national blood program in Canada for the past 50 years, recruiting donors and collecting, testing, processing, storing and distributing blood products for the collective Canadian need.

4 Regrettably, however, that honourable tradition and the reputation which has accompanied it, have been badly sullied in recent years. Thousands of innocent Canadians have found themselves inflicted with devastating disease — Hepatitis C, HIV, and Creutzfeld Jakob disease, principally — arising from the transfusion of contaminated blood or blood products, for the

supply of which the Red Cross was responsible. I shall refer to these affected people, globally, as "the Transfusion Claimants. Many have died. Others are dying. The rest live in the shadow of death. As Ms. Dawna Ring, Representative Counsel for one group of Transfusion Claimants put it in argument, the well-known Red Cross symbol, for many unfortunately, has become "a symbol of death". Nothing that the Court can do will take away these diseases or bring back to life those who have died.

5 The tragedy of these events has been well chronicled in the Report of the Krever Commission Inquiry into problems with the Canadian Blood Supply, and in the numerous law suits which have proceeded through the courts. Measured from the perspective of that stark background, the legal regime which governs the disposition of these proceedings must seem quite inadequate to many. However, it has provided at least a mechanism whereby some order, some closure, and some measure of compensatory relief are offered to the Transfusion Claimants and to others in respect of the blood supply problems, while at the same time offering to the Red Cross the possibility of continuing to provide its other humanitarian services to the community.

6 Recognizing that its potential liabilities far outstripped its assets and abilities to meet those liabilities, and hoping as well to save the important non-blood related aspects of its operations, the Red Cross applied to this Court for protection under the CCAA in July, 1998. The Federal, Provincial and Territorial Governments (the "FPT Governments") — which also faced, and continue to face, liability in connection with these claims — had decided that it was imperative for the control and management of the Canadian Blood Supply to be transferred into new hands, Canadian Blood Services and Héma Québec. It was a condition of the Acquisition Agreement respecting that transfer that the Red Cross seek and obtain CCAA protection. The concept put forward by the Red Cross at the time was that the sale proceeds would be used to establish a fund to compensate the Transfusion Claimants (after payment of secured and other creditors) and the Society would be permitted to continue to carry on its other non-blood related humanitarian activities.

The CCAA Process

7 CCAA protection was granted, and a stay of proceedings against the Red Cross imposed, on July 20, 1998. The stay of proceedings has been extended by subsequent Orders of this Court — most recently to October 31st of this year — as the participants in the process have negotiated toward a mutually acceptable resolution of the particularly complex issues involved.

8 The negotiations have been intense and lengthy. They have of necessity encompassed other outstanding proceedings involving the Red Cross and the FPT Governments, including a number of class actions in Ontario, Quebec and British Columbia, and the negotiation of a broader settlement between the Governments and Transfusion Claimants infected between 1986 and 1990. As a result of this latter settlement, the funds made available by the transfer of the Canadian Blood Supply to Canadian Blood Services and Héma Québec are primarily directed by the Red Cross Plan to meet the claims of the pre-1986/post 1990 Transfusion Claimants, who were not entitled to participate in the Government Settlement.

9 The CCAA process itself involved numerous attendances before the Court in the exercise of the Court's supervisory role in cases of this nature. Orders were made — amongst others — appointing a Monitor, appointing Representative Counsel to advise each of the Transfusion Claimant groups and to assist the Court, dealing with funding for such counsel, establishing a Claims process (including notice, a disallowance/approval mechanism and the appointment of a Claims Officer), granting or refusing the lifting of the stay in certain individual cases, approving a mediation/arbitration process respecting certain pension issues, determining issues respecting appropriate classes of creditors for voting purposes, and providing for the holding of creditors' meetings to vote on approval of the Plan and for the mailing of notice of those meetings and the materials relating to the Plan to be considered. Over 7,000 copies of the Plan and related materials were mailed.

A Summary of the Plan

10 I draw upon the Applicant's factum for a summary of the basics of the Plan. Under the Plan,

- a) Ordinary Creditors with proven claims not exceeding \$10,000 will receive 100% of their proven claim;
- b) Ordinary Creditors with proven claims of more than \$10,000 will receive 67% of their proven claim;

c) A Trust is established for Transfusion Claimants, on specific terms described in the Plan, funded with \$79 million plus interest already accrued under the Plan, as follows:

(i) \$600,000 for CJD claimants;

(ii) \$1 million for claimants in a class action alleging infection with Hepatitis C from blood obtained from prisons in the United States;

(iii) \$500,000 for claimants with other transfusion claims that are otherwise not provided for;

(iv) approximately \$63 million for claimants in class actions alleging Hepatitis C infection before 1986 and after June 1990; and,

(v) approximately \$13.7 million for settlement of HIV claims.

11 The source of these funds are those which the Red Cross has been holding from the sale of the Blood Assets, and negotiated contributions from co-defendants in various actions, and insurers. The Plan establishes procedures whereby claimants may apply to a Referee (the Honourable R.E. Holland, in the case of the HIV Claimants, and the Honourable Peter Cory, in the case of the other Transfusion Claimants) for determination of the amount of their damages.

12 Several other aspects of the Plan bear mention as well. They relate to implementation and to the effect of the Plan upon implementation. Included, of course, is the fact that once the compromises and arrangements to be effected by the Plan are approved, they will bind all creditors affected by the Plan. As well, provided the Red Cross carries out its part of the Plan, all obligations and agreements to which the Society is a party as at the Plan Implementation Date are to remain in force and are not subject to acceleration or termination by any other parties as a result of anything which occurred prior to that Date, including the fact that the society has sought [CCAA](#) protection and made the compromises and arrangements in question. In addition, the Courts of each Province are to be asked to give recognition and assistance to the sanction order and to the implementation of the Plan. And the Red Cross is to be authorized to make payment in accordance with a specific settlement entered into with Service Employees' International Union with respect to a collective agreement and other issues involving the Society's homemaker employees. Finally, there are provisions respecting the discharge of the Monitor and the Claims Officers upon implementation.

13 The Red Cross has now put forward its Plan, as most recently amended in the negotiation process. On August 30, 2000, all classes of creditors — including the classes of Transfusion claimants — voted overwhelmingly in favour of accepting the Plan. The society now applies for the Court's sanction and approval of it.

The Test

14 Where a majority in number representing two-thirds in value of the creditors present and voting in person or by proxy approve a plan of arrangement, the plan may be sanctioned by the Court and, if sanctioned, will bind all the creditors (or classes of creditors, where there is more than one class) and the company: [CCAA](#), s. 6.

15 The principles to be applied in the exercise of the Court's discretion upon such an application are well established:

(1) There must be strict compliance with all statutory requirements;

(2) All materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the [CCAA](#); and,

(3) The Plan must be fair and reasonable.

See: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 506.

16 Applying those principles to the circumstances of this case, I have no hesitation in concluding — as I do — that the Plan should be sanctioned and approved.

Compliance with Orders and Statutory Requirements

17 The Court has already ruled that the Red Cross is a debtor corporation entitled to the protection of the [CCAA](#), and I am satisfied that all of the statutory requirements of the Act have been complied with.

18 I am also satisfied that the Applicant has complied with the substance of all Orders made in the course of these proceedings. To the extent that there has been a variance from the terms of the Orders, they have been the result of understandable logistical hurdles for the most part, and there has been no prejudice to anyone as a result. I am content to make the necessary corrective orders requested in that regard. Nothing has been done or purported to be done which is not authorized by the provisions of the [CCAA](#).

19 There was apparently some confusion at the time of voting which resulted in 8 members of the group of Secondly Infected Spouses and Children with HIV not voting. The claims of 6 of those people have been disallowed for voting purposes. Ms. Ring, who is Representative Counsel for this group, advises, however, that even if all 8 claimants had voted, and opposed approval — which she believes is quite unlikely — her clients' group would still have strongly favoured sanctioning and approval of the Plan. I observe for the record, that what was at issue here related only to the right to vote at the Special Meeting held. It does not affect the rights of anyone to claim compensation from the Plan.

The Plan is Fair and Reasonable

20 I conclude as well that the Plan is fair to all affected by it, and reasonable in the circumstances. It balances the various competing interests in an equitable fashion.

21 The recitation of the background and process above confirms the complexity and difficult nature of these proceedings, and the scope of the negotiations involved. It is not necessary to repeat those facts here.

22 To be "fair and reasonable" a proposed Plan does not have to be perfect. No Plan can be. They are by nature and definition "plans of compromise and arrangement". The Plan should be approved if it is inherently fair, inherently reasonable and inherently equitable: see, [Re Wandlyn Inns Ltd. \(1992\)](#), 15 C.B.R. (3d) 316 (N.B. Q.B.) at p. 321; [Re Central Guaranty Trustco Ltd. \(1993\)](#), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) at p. 142. The Red Cross Plan meets those criteria, in my view.

23 In the first place, the Plan has been overwhelmingly approved by each of the four classes of creditors — who turned out in significant numbers to vote at the Special Meetings held. I note that 99.3% of the votes cast by Ordinary Creditors, representing 99.9% of the value of those claims, approved. The FPT Governments — which cast their own votes as well as the assigned votes of the 1986-1990 Transfusion Claimants who have the benefit of the Government Settlement — voted 100% in favour. Of the remaining Transfusion Claimants, 91.0% of the votes cast by the pre-1986/post 1990 Hepatitis C class, representing 91.0% of the value of those claims support approval; the figures are 91.2% for the other Transfusion Claimants.

24 Counsel filed with the Court letters from three individuals (of thousands) who dispute the sanctioning of the Plan. I read these letters carefully. They are poignant in the extreme and raise many points pertaining to the claims made and the process followed. There is no doubt something to be said for all of them. I am advised, however, that most of the issues raised were raised as well at the Special Meetings on August 30th and debated fully at that time. Ranked in opposition to those issues are all of the factors which militate in favour of acceptance of the Red Cross Plan. The huge majority of Transfusion Claimants opted to support the Plan, concluding that it represents the best possible outcome for them in the circumstances.

25 Although the Transfusion Claimants are not the type of "business" creditors normally affected by a [CCAA](#) arrangement, they are the ones most touched by the events leading up to these proceedings and by the elements of the Plan. I see no reason why their voting support of the Plan should not receive the same — or more — deference as that normally granted to creditors by

the Court in these cases. The fact that the Plan has received such a high level of support weighs very heavily in my consideration of approval. The Plan is the result of negotiations amongst all interested parties — leading to changes and amendments which were made and approved as late as the August 30th meetings. The various groups were all represented by legal and professional advisors, including the Transfusion Claimants who were advised and represented by Representative Counsel.

26 I accept the submission that the Plan equitably balances the various competing interests and the available resources of the Red Cross. In regard to the latter, the evidence is that creditors — including the Transfusion Claimants — would not receive a better distribution in the event of a liquidation of all of the assets of the Society.

27 Moreover, with the exception of the three letters I have referred to, no one opposes the sanctioning of the Plan. Indeed, most strenuously support its approval. In addition, the Monitor has advised that it strongly recommends the Plan and its approval.

28 Finally, it is significant, in my view, that the Plan if implemented will permit the Canadian Red Cross to continue to carry on its non-blood related humanitarian activities. There is a deep-seated anger and bitterness towards the Society amongst many of the victims of these terrible blood diseases. To them, it is not right that thousands of people have been poisoned by tainted blood yet the Society is able to continue on with the other facets of its business. These feelings are understandable. However, the Red Cross currently continues to employ approximately 7,000 Canadians in the other aspects of its work, and it makes valuable contributions to society through these humanitarian efforts. That it will be able to continue those works, if the Plan is implemented, is important.

Disposition

29 For all of the foregoing reasons the Plan is sanctioned and approved. Two Orders are requested, one relating to the sanction and approval of the Plan, and the second making the logistical and minor corrections I referred to earlier in these Reasons. Orders will issue in terms of the draft Orders filed, on which I have placed my fiat.

30 Before concluding, I would like to acknowledge the excellent work done by all counsel in this matter, and to thank them for their assistance to the Court and to their clients throughout. They have conducted themselves in the best tradition of the Bar in a difficult and sensitive case, and I commend them for their efforts.

Application granted.

TAB 3

CITATION: Imperial Tobacco Canada Limited, et al, Re, 2019 ONSC 1684
COURT FILE NO.: CV-19-616077CL
DATE: 20190315

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36 AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED, AND IMPERIAL TOBACCO COMPANY LIMITED, Applicants

BEFORE: McEwen J.

COUNSEL: *Deborah Glendinning, Marc Wasserman, John A. MacDonald, and Michael De Lellis*, for the Applicants

David Byers and Maria Konyukhova, for the British American Tobacco p.l.c, B.A.T. Industries p.l.c., and British American Tobacco (Investments) Limited

Jay Swartz, Robin Schwill, and Natasha MacParland, for the Proposed Monitor, FTI Consulting Canada Inc.

Jonathan Lisus and Matthew Gottlieb, for the Proposed Tobacco Claimant Representative

HEARD: March 12, 2019

ENDORSEMENT

[1] On March 12, 2019 I granted the Initial Order, as amended, with reasons to follow. I am now providing those reasons.

Background

[2] Imperial Tobacco Canada Limited (“ITCAN”) and its subsidiary Imperial Tobacco Company Limited (“ITCO”) (together, the “Applicants”) seek an Initial Order for a stay of all existing and prospective proceedings pursuant to s. 11.02(1) of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “CCAA”), primarily so that they can effect a global resolution of multiple claims that have been brought or may be brought against ITCAN and related companies in Canada. They also seek the same relief on behalf of their related companies.

[3] The timing of this Application stems from the recent judgment of the Quebec Court of Appeal in *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 (the “Quebec Appeal Judgment”), in which the Applicants and co-defendants were

found liable for damages totalling approximately \$13.5 billion. Based on the filed record, enforcement of the Quebec Appeal Judgment would likely spell the end of the Applicants' business because ITCAN does not have sufficient funds to satisfy the judgment. ITCAN's share of the judgment exceeds \$9 billion.

[4] Amongst other submissions, the Applicants stress that enforcement of the Quebec Appeal Judgment places in serious jeopardy the continued employment of the Applicants' 466 full-time and 98 contract employees across Canada who receive wages and salaries of approximately \$70 million per year. The Applicants also point to the fact that they generate taxes payable to various levels of government across Canada totalling approximately \$4 billion per year. They further stress that, based on industry publications, if the Applicants and other legal producers of tobacco products in Canada cease to operate then the illegal tobacco trade could expand to fill the void.

[5] In addition to the Quebec Appeal Judgment, ITCAN (and in some cases related companies) face more than 20 large proceedings across Canada. In Ontario alone there are four actions claiming damages in excess of \$330 billion. The actions across the country include government actions to recover healthcare costs incurred in connection with smoking related diseases; smoking and health class actions seeking damages on behalf of individuals; and a class action brought by Ontario tobacco growers in relation to certain pricing practices of ITCAN. Most of these cases are in the preliminary stages.

[6] The Applicants submit that in the above circumstances the proposed Initial Order is necessary and reasonable as it seeks an overall solution with respect to the Quebec Appeal Judgment and other outstanding and potential proceedings.

Analysis

[7] ITCAN and ITCO are incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. ITCO is a privately held subsidiary of ITCAN. Their registered head offices are located in Brampton, Ontario. Their liabilities clearly exceed \$5 million as a result of the Quebec Appeal Judgment. According to the affidavit filed by Mr. Eric Thauvette, the vice-president and chief financial officer of ITCAN, the Applicants do not have sufficient funds to pay the Quebec Appeal Judgment that is currently payable.

[8] Based on the above, the Applicants are insolvent companies to which the CCAA applies. I am also of the view that it is appropriate to grant the stay of proceedings requested by the Applicants. This court, pursuant to the provisions of s. 11.02 of the CCAA, may grant a stay of proceedings if it is satisfied that circumstances exist that make such an order appropriate.

[9] It is settled law that the principal purpose of the CCAA is to maintain the *status quo* while a debtor company has the opportunity to consult with its creditors and stakeholders with a view to continue the company's operations. In the circumstances of this case, ITCAN cannot pay the amount of the Quebec Appeal Judgment and the Judgment is currently enforceable. Enforcement would cause the Applicants serious harm. As I have outlined above, it would also jeopardize tax revenue and legal trade in tobacco. It is therefore appropriate to grant the stay of proceedings requested by the Applicants as all stakeholders would likely be detrimentally

affected if the Quebec Appeal Judgment was enforced. These stakeholders include employees, retirees, customers, landlords, suppliers, the provincial and federal governments, and contingent litigation creditors. Specifically, a stay creates a level playing field amongst the litigation claimants.

[10] Insofar as the proposed monitor is concerned I am satisfied that FTI Consulting Canada Inc. (“FTI”) is a suitable monitor and should be appointed in these proceedings pursuant to s. 11.7 of the CCAA. FTI is an experienced monitor who frequently acts in this capacity in CCAA proceedings. FTI is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

[11] I also agree with the Applicants that the CCAA extension should be extended to the non-Applicants British American Tobacco p.l.c. (“BAT”) and B.A.T. International Finance p.l.c., B.A.T. Industries P.L.C., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, and entities related to or affiliated with them (the “BAT Affiliates”), Liggett & Myers Tobacco Company of Canada Limited (“Liggett & Myers”), and other non-Applicant subsidiaries noted in the Application Record.

[12] I have jurisdiction to extend the stay: *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 and *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429. In my view, it is reasonable to do so in circumstances where most of the outstanding proceedings against ITCAN also name BAT and the BAT Affiliates as co-defendants. Further, Liggett & Myers and the other non-Applicant subsidiaries are highly integrated with the Applicants and indispensable to the Applicants’ business and restructuring. As submitted, certain of them hold trademarks or other assets of ITCAN, provide services to ITCAN, share the cash management system with ITCAN, and /or have guaranteed ITCAN debts from time to time. It is reasonable to extend the stay to these entities. Failure to do so would undermine the intent of the stay. Further, given the stay of proceedings that I have granted with respect to the Applicants, I see no prejudice to claimants in existing and potential proceedings if the stay is extended.

[13] I am further satisfied that the charges requested below by the Applicants are reasonable and should be granted.

[14] The Administration Charge in the amount of \$5 million is fair and reasonable. The restructuring will be an extremely extensive and expensive undertaking. It will involve a great deal of effort by the professional advisors who are subject to this charge. I do not see any duplication of the roles. Furthermore, the Administration Charge is supported by the Applicants’ parent and other related companies, which are secured creditors. The amount is reasonable given the size of this matter.

[15] I am further satisfied that the Tobacco Claimant Coordinator Charge is reasonable. I pause here to note that the Applicants had proposed that a Tobacco Claimant Coordinator be described as the “Tobacco Claimant Representative”. To avoid any confusion that might suggest that the Honourable Warren K. Winkler, Q.C., whom I have appointed, may be seen to displace existing counsel, or to take some sort of role that may be considered binding in nature with

respect to any of the litigants affected by this order, the title was amended to Tobacco Claimant Coordinator.

[16] Given the immense size and complexity of this matter, I am of the view that a charge is reasonable with respect to the Honourable Warren K. Winkler, Q.C. as per the terms of the Interim Order so that he, along with others, can begin a claims process. It is also reasonable to allow him to retain the independent counsel requested and provide for a charge of \$1 million.

[17] It is reasonable that the Administration and Tobacco Claimant Coordinator Charges rank as first charges *pari passu* given their importance.

[18] The Directors' and Officers' Charge sought should also be approved to ensure that the Applicants enjoy ongoing stability during these CCAA proceedings.

[19] The directors and officers reasonably insist that a charge be put in place. I agree with their concerns. They also have significant knowledge and experience. The Applicants and related companies require that the directors and officers can continue on with the management of the businesses.

[20] The proposed charge of \$16 million, which stands second in priority to the aforementioned Administration and Tobacco Claim Coordinator Charges, is also reasonable.

[21] Last, insofar as the charges are concerned, I am also satisfied that the charge concerning Sales and Excise Taxes in the maximum amount of \$580 million is also reasonable as a third charge. It is important that this charge be granted so that the directors and officers do not face personal liability for the taxes. I reviewed the Applicants' record and I am satisfied that the amount is fair and reasonable.

[22] All of the charges are supported by FTI.

[23] In addition to the above specific comments, I am further satisfied that the remaining terms of the proposed Interim Order ought to be granted. The Applicants will be carrying on business during the CCAA proceedings. The filed materials demonstrate that the Applicants and their affiliated companies expect that the Applicants will continue to carry on their business in a profitable fashion and be able to meet both their pre-filing and post-filing obligations. It is in the best interests of all stakeholders to allow for the payment of these obligations.

[24] BAT, the BAT Affiliates, and FTI all support the Applicants' position, including their intention and ability to meet their current payables in the ordinary course of conducting business.

[25] For all of the reasons above, the Application was granted and the Interim Order was signed, as amended.

Date: March 15, 2019

TAB 4

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERCIAL LIST

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF JTI-MACDONALD CORP.**

Applicant

BEFORE: Hainey J.

COUNSEL: *Robert I. Thornton, Leanne M. Williams, Rachel Bengino and Mitch Grossell*, for
the Applicant

Scott A. Bomhof and Adam M. Slavens, for Respondents JT Canada LLC, and
PWC, in its capacity as Receiver of JTI-MacDonald TM

Pamela L.J.Huff, Linc A. Rogers and Christopher Burr, for the Proposed Monitor,
Deloitte Restructuring Inc.

HEARD: March 8, 2019

ENDORSEMENT

Background

[1] On March 8, 2019 JTI-Macdonald Corp. (“JTIM” or “Applicant”) sought an Initial Order pursuant to *The Companies Creditors Arrangement Act* (“CCAA”). I granted the Initial Order and endorsed the record as follows:

I am satisfied that this application should be granted today on the terms of the attached Initial Order. There shall be a sealing order on the terms of para. 59 of the Initial Order. I will provide written reasons for my decision to grant this order in due course. The comeback motion referred to in para. 50 shall be on April 4, 2019 at 10 a.m. in this Court.

[2] These are my Reasons.

Facts

[3] As a result of a judgment of the Quebec Court of Appeal released on March 1, 2019 in a class proceeding (“Quebec Class Action”), JTIM and two other defendants are liable for damages totaling \$13.5 billion (“Quebec Judgment”). If this judgment is not stayed, its enforcement could destroy the company because JTIM does not have sufficient funds to satisfy the judgment.

[4] According to JTIM, enforcement of the Quebec Judgment would destroy the company’s value for its 500 employees and 1,300 suppliers. It would also impact approximately 28,000 retailers that sell JTIM’s products and 790,000 consumers of its products. Enforcement of the Quebec Judgment would also jeopardize federal and provincial taxes and duties in excess of \$1.3 billion paid annually in connection with JTIM’s operations (of which \$500 million per year is paid directly by JTIM and another \$800 million per year is paid by third parties and consumers).

[5] JTIM is also a defendant in a number of significant health care costs recovery actions (“HCCR Actions”). The total claims in the HCCR Actions exceed \$500 billion.

[6] JTIM wishes to seek a “collective solution” to the Quebec Judgment and the HCCR Actions for the benefit of all of its stakeholders. It is for this reason that it seeks a stay of all proceedings in its application for an Initial Order pursuant to the CCAA.

[7] In its application JTIM seeks protection from its creditors and the following additional relief under the CCAA:

- (a) declaring that it is a company to which the CCAA applies;
- (b) granting a stay of proceedings against it, and the Other Defendants in the Pending Litigation, as defined and described in the Notice of Application;
- (c) appointing Deloitte Restructuring Inc. (“Proposed Monitor”) as Monitor in these CCAA proceedings;
- (d) granting an Administrative Charge, Directors’ Charge and Tax Charge;
- (e) authorizing the Applicant to pay its pre-filing and post-filing obligations in respect of suppliers, trade creditors, taxes, duties, employees (including outstanding and future pension plan contributions, other post-employment benefits and severance packages) and royalty payments and to pay post-filing interest of certain of its secured obligations in the ordinary course of business in order to minimize any disruption of the Applicant’s business;
- (f) approving the engagement letter dated April 23, 2018 (the “CRO Engagement Letter”) appointing Blue Tree Advisors Inc. as the Applicant’s Chief Restructuring Officer (“CRO”);
- (g) authorizing it to apply for leave and, if successful, to appeal the Quebec Judgment to the Supreme Court of Canada; and

- (h) sealing Confidential Exhibit “1” of Robert Master’s affidavit.

Issues

[8] I must decide the following issues:

- (a) Should the Court grant protection to JTIM under the CCAA?
- (b) Is it appropriate to grant the requested stay of proceedings?
- (c) Should the Proposed Monitor be appointed as Monitor in these proceedings?
- (d) Should the Court grant the requested charges?
- (e) Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?
- (f) Should Blue Tree Advisors be appointed as CRO?
- (g) Should JTIM be authorized to continue its application for leave to appeal of the Quebec Judgment to the Supreme Court of Canada?

Analysis

Should the Court grant protection to JTIM under the CCAA?

[9] The CCAA applies to an insolvent company whose liabilities exceed \$5 million.

[10] JTIM is a company incorporated pursuant to the *Canada Business Corporations Act*.

[11] JTIM’s liabilities clearly exceed \$5 million. It faces a judgment for \$13.5 billion. According to Robert McMaster, JTIM’s Director, Taxation and Treasury, the company does not have sufficient funds to satisfy the Quebec Judgment which is currently payable. Accordingly, JTIM is an insolvent company to which the CCAA applies.

Is it appropriate to grant the requested stay of proceedings?

[12] The Court may grant a stay of proceedings pursuant to s. 11.02 of the CCAA in respect of a debtor company if it is satisfied that circumstances exist that make the order appropriate. In order to determine whether a stay order is appropriate the Court should consider the purpose behind the CCAA. The primary purpose of the CCAA is to maintain the *status quo* for a period while the debtor company consults with its creditors and stakeholders with a view to continuing the company’s operations for the benefit of the company and its creditors.

[13] JTIM cannot pay the amount of the Quebec Judgment. Any steps to enforce the judgment could cause serious harm to JTIM's business to the detriment of all of its stakeholders. In my view, it is appropriate for this reason to grant the requested stay of proceedings in favour of JTIM.

[14] JTIM also requests a stay of proceedings in favour of the other defendants in other litigation relating to tobacco claims in which JTIM is a defendant, including the Quebec Class Action and the HCCR Actions. The Court has discretion under s. 11 of the CCAA to impose a stay of proceedings with respect to non-applicant third parties. In *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461, Newbould J stated as follows at para. 21:

Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, where it is just and reasonable to do so.

[15] I came to the same conclusion in *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429, where at para. 26 I set out the following list of factors that courts have considered in deciding whether to extend a stay of proceedings to non-applicant third parties:

- (a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;
- (b) extending the stay to the third party would help maintain stability and value during the CCAA process;
- (c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;
- (d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;
- (e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;
- (f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and
- (g) the balance of convenience favours extending the stay to the third party.

[16] Having considered these factors, I am satisfied that granting the requested stay of proceedings to the other defendants will allow JTIM to attempt to arrive at a collective solution with respect to the Quebec Class Action and the HCCR actions. If these actions continue to

proceed against the other defendants but not JTIM there could be significant economic harm for all of JTIM's stakeholders.

[17] Accordingly, I have concluded that the balance of convenience favours exercising my discretion under the CCAA to grant a stay of proceedings to the other defendants.

Should the Proposed Monitor be appointed as the Monitor?

[18] I am satisfied that Deloitte Restructuring Inc. ("Deloitte") should be appointed the Monitor in these proceedings pursuant to s. 11.7 of the CCAA. Deloitte regularly acts as the Monitor in CCAA proceedings and it is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

Should the requested charges be granted?

Administrative Charge

[19] JTIM requests that I grant an administrative charge in favour of JTIM's counsel, the CRO, the Monitor and its legal counsel in the amount of \$3 million.

[20] The Court has jurisdiction to grant an administrative charge pursuant to s. 11.52 of the CCAA. In *Canwest Global Publishing Inc.*, 2012 ONSC 633, Pepall J. set out the following list of factors the Court should consider when granting an administrative charge:

- (a) the size and the complexity of the business 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.

[21] Having considered these factors, I am satisfied that the requested administration charge should be granted for the following reasons:

- (a) JTIM's restructuring will require extensive involvement by the professional advisors who are subject to the administrative charge;
- (b) the professionals subject to the administration charge have contributed, and will continue to contribute, to the restructuring of JTIM;
- (c) there is no unwarranted duplication of roles so that the professional fees associated with these proceedings will be minimized;

- (d) the administrative charge will rank in priority to the directors' charge and the tax charge. The only secured creditors that will be affected by the administrative charge are JTIM's parent companies and certain other secured related party suppliers, each of which support the granting of the administrative charge; and
- (e) the Proposed Monitor believes that the amount of the administration charge is reasonable

Directors' Charge

[22] I am satisfied that the directors' charge should be approved to ensure the ongoing stability of JTIM's business during the CCAA proceedings. The directors and officers have a great deal of institutional knowledge and experience and JTIM requires their continued management of its business. To ensure that the officers and directors remain with JTIM during the CCAA proceedings they require the protection of the directors' charge. The proposed charge of \$4.1 million will only be available to the extent that the directors' and officers' insurance is not available if a claim is made against them. The Proposed Monitor is of the view that the directors' charge is reasonable and appropriate.

Tax Charge

[23] JTIM is also seeking a third-ranking super-priority charge in the amount of \$127 million in favour of the Canadian federal, provincial and territorial authorities that are entitled to receive payments and collect money from JTIM with respect to sales taxes and excise taxes and duties. I am satisfied that this tax charge should be granted so that JTIM's directors and officers do not become personally liable for these taxes. Further, the Proposed Monitor is of the view that the tax charge is reasonable and appropriate.

Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

[24] In *Cinram International Inc., Re*, 2012 ONSC 3767 Morawetz J. (as he then was) concluded at Para. 68 that the court should consider the following factors in deciding whether to authorize the payment of pre-filing obligations:

- (a) whether the goods and services were integral to the business of the applicants;
- (b) the debtors' need for the uninterrupted supply of the goods or services;
- (c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and
- (d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

[25] JTIM's business is expected to remain cash-flow positive during these CCAA proceedings so that it will have sufficient cash to meet its pre-filing and post-filing

obligations. JTIM's operations depend on timely and continuous supply from its suppliers. Maintaining its operations as a going concern is in the best interests of all of JTIM's stakeholders. The Proposed Monitor supports JTIM's intentions to pay its employees, trade creditors, royalty payments, interest, payments, previous obligations and other disbursements in the ordinary course of its business. I agree and adopt the Proposed Monitor's reasons for supporting these pre-filing and post-filing payments as set out at paras. 65-72 of the Report of the Proposed Monitor dated March 8, 2019.

Should Blue Tree Advisors be appointed as CRO?

[26] According to JTIM, it requires the proposed Chief Restructuring Officer, William Aziz, to successfully complete its contemplated restructuring plan. Mr. Aziz has the experience and necessary skills to oversee and assist JTIM with its complex negotiations during the CCAA proceedings. With the assistance of the CRO, JTIM's management can focus on the company's operations which should maximize value for its stakeholders.

[27] I am satisfied that Mr. Aziz should be appointed as CRO pursuant to the terms of the CRO Engagement Letter which the Monitor supports.

[28] JTIM requests an order sealing the unredacted copy of the CRO Engagement Letter. Section 137(2) of the *Courts of Justice Act* gives the Court jurisdiction to order that a document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

[29] The CRO Engagement Letter sets out the commercial terms of the CRO's engagement. This is commercially sensitive information. In my view JTIM's request for a sealing order meets the test set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 because it will protect a commercial interest and the salutary effects of sealing the CRO's Engagement Letter outweighs any deleterious effects since this is the type of information that a private company outside of a CCAA proceeding would treat as confidential.

Should JTIM be authorized to continue its appeal to the Supreme Court of Canada?

[30] At para. 75 of its Factum, JTIM submits as follows:

75. In this case, the Applicant is cash flow positive and has successful business operations. Its insolvency is primarily due to the QCA Judgment. The Applicant wishes to exercise its right to appeal the QCA Judgment, while staying enforcement thereof and while considering its options for a viable solution for the benefit of all of its stakeholders.

[31] In my view, based on this submission it is reasonable to permit JTIM to continue its leave to appeal application to the Supreme Court of Canada.

Conclusion

[32] For the reasons set out above the Application is granted.

HAINES J.

Date Released: March 12, 2019

TAB 5

CITATION: Laurentian University of Sudbury, 2021 ONSC 659
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-02-01

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF LAURENTIAN UNIVERSITY OF
SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell, Andrew Hanrahan and Derek Harland*, for the
Applicant

Ashley John Taylor and Elizabeth Pillon, for the Monitor

Peter J. Osborne, for the Board of Governors

Natasha MacParland, Lender Counsel to the Applicant

Pamela L.J. Huff and Aryo Shalviri, for Royal Bank of Canada

Stuart Brotman and Dylan Chochla, for Toronto Dominion Bank

Martin R. Kaplan and Vern W. DaRe, for Firm Capital Mortgage Fund Inc., DIP
Lender

Michael Kennedy, Labour Counsel for the Applicant

George Benchetrit, for Bank of Montreal

HEARD: February 1, 2021

ENDORSEMENT

Introduction

[1] Laurentian University of Sudbury (“LU” or the “Applicant”) seeks certain relief pursuant to an order (the “Initial Order”) under the *Companies’ Creditors Arrangement Act* (the “CCAA”).¹

[2] LU is a publicly funded, bilingual and tricultural postsecondary institution in Sudbury, Ontario. Since inception, LU has provided higher education to the community of Sudbury and Northern Ontario at large and is an integral part of the economic fabric of the Northern Ontario community.

[3] As a result of many years of recurring operational deficits in the millions of dollars, and notwithstanding LU’s recent efforts to improve its financial stability, LU is experiencing a liquidity crisis and is insolvent.

[4] LU submits that it requires the protection of the Court and the relief available under the CCAA so that it can financially and operationally restructure itself in order to emerge as a financially sustainable university for the benefit of all its stakeholders.

[5] The facts with respect to this application are briefly summarized below and more fully set out in the Affidavit of Dr. Robert Haché sworn January 30, 2021, filed in support of this application (the “Haché Affidavit”).²

[6] For the following reasons, the Interim Order is granted.

Overview of the Applicant

[7] LU is a non-share capital corporation that was incorporated pursuant to *An Act to Incorporate Laurentian University of Sudbury*, S.O. 1960, c. 151, as amended by S.O. 1961-62, c. 154 (the “LU Act”) and is a registered charity pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[8] The governance structure of LU is bicameral. The Board of Governors (the “Board”), the President, and the Vice-Chancellor generally have powers over the operational and financial management of LU, whereas the Senate of LU (the “Senate”) is responsible for the academic policy of LU.

[9] LU primarily focuses on undergraduate programming, with approximately 8,200 total domestic and international undergraduate students (approximately 6,250 full-time equivalents) enrolled in the 2020-21 academic year. LU has five undergraduate faculties, each of which offer

¹ *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

² Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Haché Affidavit. All references to currency in this factum are to Canadian dollars, unless otherwise noted.

programs in both English and French, and students can choose from 132 undergraduate programs to enroll in.

[10] LU also has a graduate program, with approximately 1,098 total domestic and international graduate students enrolled during the 2020-21 academic year. LU offers 43 Masters and PhD programs in a variety of disciplines.

[11] LU has a federated school structure whereby it has formal affiliations with several independent universities under the overall LU umbrella: the University of Sudbury, the University of Thorneloe, and Huntington University. The Federated Universities are integrated into LU, however, each of the Federated Universities are separate legal entities and are governed by Boards that are independent of LU.

[12] LU is one of the largest employers in the Greater Sudbury area. As at December 30, 2020, LU employed approximately 1,751 people, of which approximately 758 are full-time employees. Total salaries and benefits represent the single largest expense item for LU on an annual basis (approximately \$134 million of \$201 million in total expenses during fiscal year 2019-20).

[13] Approximately 612 LU employees are represented by the Laurentian University Faculty Association (“LUFA”). Approximately 268 non-faculty staff are represented by the Laurentian University Staff Union (“LUSU”).

[14] LUFA and the Board of LU are parties to a Collective Agreement (the “LUFA CA”), with a three-year term that expired on June 30, 2020.

[15] Since April 2020, LU and LUFA have been engaged in bargaining with respect to a new collective bargaining agreement.

[16] On July 1, 2018, LUSU and LU entered into a Collective Agreement that was set to expire on June 30, 2021 (the “LUSU CA”).

Assets and Liabilities

[17] LU does not prepare interim financial statements. The most recent audited statements for the year ended April 30, 2020, are attached to the Haché Affidavit.

[18] As at April 30, 2020, LU had assets with a book value totaling approximately \$358 million, of which approximately \$33 million is comprised of current assets such as cash and short-term investments, accounts receivable, and other current assets. The remaining assets of LU consist primarily of investments in LU’s segregated endowment fund (\$53 million) and capital assets (\$272 million), comprising LU’s land and buildings.

[19] As at April 30, 2020, LU had liabilities with a book value totaling approximately \$322 million, comprised of: (i) approximately \$43 million of current liabilities; (ii) approximately \$168 million of deferred contributions; and (iii) approximately \$110 million in long-term liabilities.

LU's Liquidity Crisis and Insolvency

[20] LU has experienced recurring operational deficits in the millions of dollars each year for a significant period of time. These operational deficits have led to the accumulated deficit in the operational fund of LU of approximately \$20 million at the end of 2019-20 fiscal year. In the current 2020-21 fiscal year, LU projects a further operational deficit of \$5.6 million.

[21] LU takes the position that it is insolvent and absent the relief sought in the Initial Order, will run out of cash to meet payroll in February.

[22] LU advises that it has a number of structural issues that are causing financial challenges and that need to be resolved to ensure long-term stability, including:

- (a) The terms of the LUFA CA are above market in several respects, and that issue is exacerbated by the tenuous labour relationship between LU and LUFA;
- (b) Operationally, the structure of the academic programming offered by LU and the distribution of enrollment among the programs offered is flawed and must be addressed; and
- (c) With its current cost structure, it costs more for LU and the Federated Universities to educate each student than the average for all Ontario universities by approximately \$2,000 per student, per year.

[23] LU submits that the financial challenges that LU faces are significant and, absent fundamental change, LU's short-term and long-term financial and operational sustainability are at risk.

Objective of CCAA Filing

[24] As part of its restructuring strategy, LU intends to implement long-term financial stability initiatives including, among other things:

- (a) A review of the breadth of academic programs offered at LU and their enrollment levels;
- (b) A re-evaluation of the Federated Universities model;
- (c) Negotiations with LU's unions regarding what LU must look like in the future and ensuring that a restructured LU can be aligned with collective agreements that will facilitate its future sustainability;
- (d) Identification of opportunities for future revenue generation;
- (e) Refinement of the student experience at LU to continue providing a top-notch education; and
- (f) Consideration of options for addressing current and long-term indebtedness.

Law and Analysis

[25] The CCAA applies to a “debtor company” whose liabilities exceed \$5 million. A “debtor company” is defined, *inter alia*, as a “company” that is “insolvent” or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.³

[26] The CCAA defines “company” to include, among other things, a company incorporated by or under an Act of the legislature of a province.⁴

[27] The Applicant is incorporated under an act of the legislature of the Province of Ontario, the LU Act, and therefore is a “company” for the purposes of the CCAA.⁵ Further, as a not-for-profit, non-share capital corporation, the Applicant falls under the *Corporations Act* (Ontario).⁶

[28] There have been several CCAA proceedings commenced in respect of not-for-profit corporations, such as *Canadian Red Cross Society*⁷ and *The Land Conservancy of British Columbia*.⁸

[29] I am satisfied that the Applicant’s status as a not-for-profit, non-share capital corporation does not impact the applicability of the CCAA to the Applicant.

Insolvency

[30] The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define “insolvent”, the definition of “insolvent person” under the BIA is commonly referenced by the Court in assessing whether an applicant is a debtor company in the context of the CCAA.⁹ The BIA defines “insolvent person” as follows:¹⁰

“insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (i) who is for any reason unable to meet his obligations as they generally become due,

³ R.S.C. 1985, c. B-3 (“BIA”).

⁴ CCAA, s. 2(1).

⁵ S.O. 1960, c. 151, as amended by S.O. 1961-62, c. 154.

⁶ R.S.O. 1990, c. C.38.

⁷ *Canadian Red Cross Society*, 2000 CarswellOnt 3269 (S.C.).

⁸ *TLC, The Land Conservancy of British Columbia, Re*, 2014 BCSC 97 at paras. 14-18.

⁹ *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (S.C.) at paras. 21-22 [*Stelco*].

¹⁰ BIA, s. 2.

- (ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[31] The tests for “insolvent person” under the BIA are disjunctive. A company satisfying either (i), (ii) or (iii) of the test is considered insolvent for the purposes of the CCAA.¹¹

[32] In addition to the foregoing tests, in *Stelco*, Farley J. held that a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.¹²

[33] Based on the evidence set out in the Haché Affidavit and as summarized in the Report of Ernst & Young Inc., the Proposed Monitor, I find that the Applicant is plainly insolvent and faces a severe liquidity crisis.

[34] I also find that the Applicant is a “debtor company” to which the CCAA applies.

Stay of Proceedings

[35] Pursuant to section 11.02(1) of the CCAA, a Court may grant an order staying all proceedings in respect of a debtor company for a period of not more than ten days, provided that the Court is satisfied that circumstances exist to make the order appropriate.

[36] The Applicant submits that it is just and appropriate to grant a stay of proceedings. The Applicant submits that it requires a stay of proceedings in order to provide it with the breathing room necessary to financially and operationally restructure itself in order to emerge as a sustainable and long-term financially viable university to continue providing quality post-secondary education in Northern Ontario.

[37] The Proposed Initial Order provides for a stay of proceedings in favour of the Applicant’s current and future directors and officers who may subsequently be appointed. The Applicant submits that the stay in favour of the current and future directors and officers is critical to retain the involvement of the Board and key officers who have knowledge that will assist the Applicant in negotiating with stakeholders and implementing a restructuring plan. I accept this submission.

[38] The Applicant also seeks a limited stay in respect of the Laurentian University Students General Association (the “Non-Applicant Stay Party” or “the SGA”). The stay in respect of the

¹¹ *Stelco*, *supra* note 9 at para. 28.

¹² *Stelco*, *supra* note 9 at para. 26.

Non-Applicant Stay Party is limited to preventing any person from: (i) commencing proceedings against the Non-Applicant Stay Party, (ii) terminating, repudiating, making any demand or otherwise altering any contractual relationships with the Non-Applicant Stay Party or enforcing any rights or remedies, or (iii) discontinuing or ceasing to perform any obligations under any contractual agreements with the Non-Applicant Stay Party, resulting from the commencement of this CCAA proceeding by the Applicant, the stay of proceedings granted to the Applicant and any default or cross-default arising due to the foregoing.

[39] CCAA courts have, on numerous occasions, extended the initial stay of proceedings to non-applicants.¹³ The Court's authority to grant such an order is derived from its broad jurisdiction under ss. 11 and 11.02(1) of the CCAA to make an initial order on "any terms that [the Court] may impose." It is well-established that it is appropriate for the Court to extend the protection of the stay of proceedings to third party entities where such parties are integrally and closely interrelated to the debtor companies' business or where doing so furthers the primary purpose of the CCAA, being the successful restructuring of an insolvent company.¹⁴

[40] In particular, where the business operations of a group of entities are inextricably intertwined, such as where there are agreements among the entities, guarantees provided by certain entities in the group in respect of the obligations of other entities in the group or shared cash management systems, courts have found it necessary and appropriate to extend a stay in respect of non-applicant parties.¹⁵

[41] In the present circumstances, the Applicant has provided a written guarantee in respect of a credit facility obtained by the Non-Applicant Stay Party. If counterparties were to exercise remedies due to the Applicant's insolvency, it would disrupt the Non-Applicant Stay Party and have financial implications for the Applicant.

[42] In my view, it is desirable to avoid disruption to the Non-Applicant Stay Party which is particularly critical given the Applicant's status as an operating university and its overarching aim in this CCAA proceeding to avoid or minimize any disruption to students resulting from the commencement of this proceeding. In furtherance of this objective, the Non-Applicant Stay Party will be essential to ensuring students are given all of the information and resources they need to stay informed. The Non-Applicant Stay Party will play a crucial role in maintaining an open dialogue between the Applicant and the interests/concerns of all students.

¹³ For example, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063; *Canwest Global Communications Corp, Re*, 2009 CarswellOnt 6184 (S.C.) [*Canwest*]; *Cinram International Inc (Re)*, 2012 ONSC 3767 [*Cinram*].

¹⁴ *Cinram*, *ibid* at paras. 61-65.

¹⁵ *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at paras. 20-21; *Cinram*, *ibid* at paras. 61-65.

[43] I am satisfied that extending a limited stay of proceedings to the Non-Applicant Stay Party will allow it to continue fulfilling its intended role and providing the myriad of other key services it provides to the Applicant's students.

Pre-Filing and Post-Filing Payments

[44] The Proposed Initial Order allows the Applicant to continue to make certain pre-filing and post-filing payments, including express authorization to:

- (a) pay all outstanding amounts owing in respect of the current 2020-21 academic year and future amounts owing in respect of rebates, refunds or other amounts that are owing or may be owed to students (directly, or to the student associations of the Applicant on behalf of students), in each case, subject to the policies and procedures of the Applicant; and
- (b) pay all outstanding amounts owing in respect of the current 2020-21 academic year and future amounts payable to students in respect of student scholarship, bursary or grants.

[45] The Applicant intends on operating in the ordinary course during this CCAA proceeding and minimizing the disruption to students as much as possible. To facilitate this, the Applicant must be able to process certain rebates owing to students and continue to provide students with scholarship and bursary money that is critical to their ongoing studies. Some students must pay tuition prior to the receipt of funding from the Ontario Student Assistance Program (OSAP). Upon receipt of OSAP funding, the Applicant reimburses the students who receive such funding. In many instances, scholarship, bursary and grant money has been committed and is critical to students in need of financial aid to fund their education.

[46] If the Applicant is unable to continue to process such payments, vulnerable students may be irreparably harmed. Many of these students are younger than 19 years of age, and therefore particularly vulnerable. In addition, a change to the manner in which these financial aspects are addressed by the Applicant with their students could create immediate emergencies and disruption to their ability to continue their studies.

[47] The proposed Monitor supports the inclusion of this provision and I am satisfied that it is reasonable in the circumstances.

The Administration Charge

[48] The Applicant requests that this Court grant a super-priority Administration Charge on the Property (as defined in the proposed form of the Initial Order) in favour of the Proposed Monitor, counsel to the Proposed Monitor, the Applicant's counsel and advisors, and independent counsel to the Board. At the initial hearing the Administration Charge was requested in the amount of \$400,000, and the Applicant will seek to increase it to \$1.25 million pursuant to a proposed Amended and Restated Initial Order on the Comeback Hearing. Section 11.52 of the CCAA provides the Court with statutory jurisdiction to grant the Administration Charge.

[49] In *Canwest Publishing*, Pepall, J. (as she then was) considered section 11.52 of the CCAA and identified the following non-exhaustive list of factors the Court may consider when granting an administration charge:

- (a) the size and complexity of the business 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.¹⁶

[50] The Applicant submits that the Administration Charge is warranted, necessary, and appropriate in the circumstances, given that:

- (a) the proposed restructuring will require the extensive involvement of the professional advisors subject to the Administration Charge;
- (b) the professionals subject to the Administration Charge have contributed, and will continue to contribute, to the restructuring of the Applicant;
- (c) there is no unwarranted duplication of roles so the professional fees associated with these proceedings will be minimized;
- (d) the Administration Charge will rank in priority to the DIP Charge and the Directors' Charge; and
- (e) the Proposed Monitor believes that the proposed quantum of the Administration Charge is reasonable.

[51] Further, the Applicant has limited the quantum of the Administration Charge that it seeks approval of to what is reasonably necessary for the first ten days of the CCAA proceedings.

[52] The proposed Monitor supports the requested relief.

[53] I am satisfied that the Administrative Charge is reasonable in the circumstances.

The Directors' Charge

[54] The Applicant requests that this Court also grant a priority charge in favour of the Applicant's current and future directors and officers in the amount of \$2 million (the "Directors' Charge"). The Applicant will seek to increase the Directors' Charge at the comeback hearing to

¹⁶ *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037 at para. 58.

\$5 million, \$3 million of which will rank subordinate to the DIP Charge. The Directors' Charge protects the current and future directors and officers against obligations and liabilities they may incur as directors and officers of the Applicant after the commencement of the CCAA proceedings, except to the extent that any such claims or the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct.

[55] The Applicant has certain insurance policies in place (as defined in the Haché Affidavit); however, the Applicant is concerned that the directors and officers may be unwilling to continue in their roles with the Applicant absent the Court granting the Directors' Charge. The Directors' Charge will only be available to the extent that any claim or liability is not covered by any applicable D&O insurance and in the event that the Applicant's D&O insurance does not respond to claims against the directors and officers.

[56] Section 11.51 of the CCAA provides the Court with the express statutory jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.¹⁷

[57] In approving a similar charge in *Canwest*, Pepall J. applied section 11.51 of the CCAA and noted the Court must be satisfied with the amount of the charge and that it is limited to obligations the directors and officers may incur after the commencement of the proceedings, so long as adequate insurance cannot be obtained at a reasonable cost.¹⁸

[58] The proposed Monitor supports the relief requested.

[59] I am satisfied that the Directors' Charge is reasonable in the circumstances because: (i) the Applicant will benefit from the active and committed involvement of the directors and officers, who have considerable institutional knowledge and valuable experience and whose continued participation will help facilitate an effective restructuring, (ii) the Applicant cannot be certain whether the existing insurance will be applicable or respond to any claims made, and the Applicant does not have sufficient funds available to satisfy any given indemnity should its directors and officers need to call upon such indemnities, (iii) the Directors' Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct, and (iv) the Proposed Monitor is of the view that the Directors' Charge is reasonable and appropriate in the circumstances.

¹⁷ CCAA, section 11.51.

¹⁸ *Canwest*, *supra* note 17 at paras. 46 and 48.

Sealing Provision

[60] Pursuant to the *Courts of Justice Act* (Ontario), this Court has the discretion to order that any document filed in a civil proceeding be treated as “confidential”, sealed and not form part of the public record.”¹⁹

[61] In *Sierra Club of Canada v. Canada (Minister of Finance)*, Iacobucci J. set out that a sealing order should only be granted when:

- (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternatives measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.²⁰

[62] The Applicant requests that, in the Initial Order, this Court seal Confidential Exhibits “FFF” and “GGG” to the Haché Affidavit. These documents relate to correspondence between the Applicant and the Ministry of Colleges and Universities (the “Ministry”). The documents contain information with respect to the Applicant and certain stakeholders of the Applicant, including various rights or positions that stakeholders of the Applicant may take either inside or outside of a CCAA proceeding, which could jeopardize the Applicant’s efforts to restructure.

[63] If the Confidential Exhibits are not sealed, the Applicant submits that stakeholders may react in such a way that jeopardizes the viability of the Applicant’s restructuring. As such, the salutary effects of the sealing order, which provides the Applicant with the best possible chance to effect a restructuring, far outweigh the deleterious effects of not disclosing the correspondence between the Applicant and the Ministry.

[64] I have reviewed the Confidential Exhibits and I accept the submissions of the Applicant and grant the sealing request.

¹⁹ *Courts of Justice Act*, R.S.O. 1990, c C.43, s. 137(2). See also *Target Canada Corp (Re)*, 2015 ONSC 1487 at paras. 28 – 30.

²⁰ *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 at para. 53.

The Requested Relief Sought is Reasonably Necessary

[65] Pursuant to s. 11.001, the relief sought on an initial application is to be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period.²¹

[66] The stated purpose of s. 11.001 is to “limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players.”²²

[67] For the purposes of relief sought on this initial hearing, I accept the facts as stated in the Haché affidavit.

[68] The financial information required pursuant to s. 10(2) of the CCAA has been provided.

[69] I am satisfied the Ernst & Young Inc. is qualified to act as Monitor.

Disposition

[70] The requested relief complies with s. 11.001 of the CCAA in that it is limited to relief that is reasonably necessary for the continued operation of the applicant in the ordinary course of business. The Initial Order is granted in the form presented and it has been signed by me.

[71] The comeback hearing is to be held by Zoom on Wednesday, February 10, 2021 at 9:00 a.m.

Court-Appointed Mediator

[72] Finally, LU is also seeking an Order for the appointment of a mediator by the Court (the “Court-Appointed Mediator”) to oversee negotiations with respect to the various restructuring initiatives necessary for the Applicant to achieve a successful restructuring.

[73] If appointed, the Applicant expects the Court-Appointed Mediator to assist with (i) negotiations related to the review and restructuring of the academic programs and (ii) the collective agreement between the Applicant and LUFA.

[74] The Applicant is of the view that the need for the appointment of a mediator by the court is urgent and a high priority item.

²¹ CCAA, s. 11.001, 11.02(1) and (3).

²² *Lydian International Limited (Re)*, 2019 ONSC 7473 at paras. 22-26.

[75] The proposed Monitor is of the view that the appointment of a Court-Appointed Mediator is critical to ensure that LU, LUFA and the other negotiating parties have the best possible opportunity to succeed.

[76] It is the Proposed Monitor's view that it is necessary that the Court-Appointed Mediator be someone who is independent and objective, has experience in both insolvency matters as well as collective agreements and labour negotiations, someone who will appreciate the urgency with which the mediation must be conducted and have the time available to dedicate to it. Finally, in the Proposed Monitor's view, a sitting or recently retired judge meeting these characteristics would be preferable. The Proposed Monitor asks that the appointment be made by the court on an urgent basis.

[77] I appreciate and acknowledge the points put forth by counsel to both the Applicant and the Proposed Monitor. However, prior to determining this issue, in my view it is necessary to provide LUFA with an opportunity to make submissions.

[78] In recognition of the compressed timeline in these proceedings, it is desirable to determine this issue at the earliest opportunity and, in any event, not later than the comeback hearing on February 10, 2021.

[79] If LU, LUFA and the Proposed Monitor wish to address this matter prior to February 10, 2021, a case conference can be scheduled with me through the Commercial List Office.

CHIEF JUSTICE G.B. MORAWETZ

Date: February 1, 2021

TAB 6

CITATION: Laurentian University of Sudbury, 2021 ONSC 951
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-02-05

SUPERIOR COURT OF JUSTICE - ONTARIO

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF LAURENTIAN UNIVERSITY OF
SUDBURY**

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller*, for the Applicant

Michael Kennedy, Labour Counsel for the Applicant

Charles Sinclair, Susan Philpott and David Wright, for Laurentian University
Faculty Association ("LUFA")

Ashley Taylor and Ben Muller, for the Monitor

Sharon Hamilton, Ernst & Young Inc., the Court-appointed Monitor

HEARD: February 5, 2021

ENDORSEMENT

[1] In my Endorsement of February 1, 2021, at paragraphs 72 to 79, I addressed the possible appointment of a Court-Appointed Mediator to oversee negotiations with respect to the various restructuring initiatives necessary for the Applicant to achieve a successful restructuring.

[2] In recognition of the compressed timeline in these proceedings, I indicated that if the Applicant, LUFA and the Monitor wished to address this matter prior to the Comeback Hearing on February 10, 2021, a case conference could be scheduled through the Commercial List Office. A case conference was held this morning to consider this issue.

[3] The parties in attendance all support the immediate appointment of a mediator and are agreeable to the appointment of the Honourable Justice Sean F. Dunphy as Court-Appointed Mediator.

[4] The parties are also in agreement with the draft form of order presented by the Applicant (the "Mediator Appointment Order"), which I have signed.

[5] The Mediator Appointment Order sets out the Mediation Objectives and the Mediation Process.

[6] Justice Dunphy can consult with such parties as he considers appropriate, including the Senate of Laurentian University.

[7] I express my appreciation to the parties in arriving at a consensual resolution of the issues addressed today.



CHIEF JUSTICE G.B. MORAWETZ

Date: February 5, 2021

TAB 7

CITATION: Nortel Networks Corporation (Re), 2011 ONSC 4012
COURT FILE NO.: 09-CL-7950
DATE: 20110629

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL
NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION,
NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL
NETWORKS TECHNOLOGY CORPORATION, Applicants

BEFORE: MORAWETZ J.

COUNSEL: Alan Mark, Derrick Tay, Alan Merskey and Jennifer Stam, for Nortel Networks
Corporation et al

F. Myers, J. Pasquariello and C. Armstrong, for the Monitor, Ernst & Young Inc.

Mark Zigler, Andrea McKinnon, for the Former & Disabled Employees

G. Finlayson, R. Orzy and R. Swan, for the Noteholder Group

Lily Harmer and Max Starnino, for the Superintendent

S. Seigel, for the Bank of New York Mellon

Alex MacFarlane and Abid Quereshi, for the Official Committee of Unsecured
Creditors

R. Paul Steep and Elder C. Marques, for Morneau Shepell

Barry Wadsworth, for CAW-Canada

M. P. Gottlieb, R. Schwill and S. Campbell, for the Joint Administrators

Bill Burden, for the U.K. Pension Trustee

Lyndon Barnes, for the Board of Directors of Nortel

Andrew Gray and Scott Bomhof, for the U.S. Debtors

Arthur O. Jacques, for Nortel NCCE

ENDORSEMENT

[1] This Endorsement relates to my Endorsement of June 17, 2011. The following directions take precedence over the directions provided on June 17, 2011.

[2] On June 7, 2011, Nortel Networks Corporation (“NNC”), Nortel Networks Limited (“NNL”), Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation (collectively, the “Canadian Debtors”) brought a motion requesting approval of a proposed protocol for the allocation of the proceeds of the sale of their assets, the assets of the U.S. Debtors (defined below) and those of Nortel Networks U.K. Limited (NNUK”) and certain of its affiliates located in Europe, the Middle East and Africa (collectively, the “EMEA Debtors”) (the “Allocation Protocol”).

[3] A similar motion was also brought at that time by Nortel Networks Inc. (“NNI”) and certain of its U.S. affiliates (the “U.S. Debtors”) in the Chapter 11 Proceedings before the United States Bankruptcy Court for the District of Delaware (the “U.S. Court”) (the “Chapter 11 Proceedings”).

[4] The hearing was conducted by video conference with the companion motion being heard in the U.S. Court before His Honor Judge Gross. The joint hearing was conducted in accordance with the provisions of the Cross-Border Protocol which was previously approved by both the U.S. Court and by this Court.

[5] Both motions had the support of all parties appearing, save for the joint administrators of NNUK.

[6] Allocation issues have arisen out of the Interim Funding and Settlement Agreement (“IFSA”), which was entered into in June 2009, between the Canadian Debtors, certain of the U.S. Debtors and certain of the EMEA Debtors. The IFSA provides amongst other things, for the parties cooperation in the global sales of Nortel’s business units as well as for the parties to attempt to negotiate the terms of an Interim Sales Protocol (“Protocol”).

[7] To date, the parties have been unable to resolve these allocation issues on a consensual basis. This has resulted in a most unfortunate situation.

[8] Nortel’s insolvency is somewhat unique. The sale of its business units has created a sizeable asset pool. With the exception of the IP Transaction, the auction for which commenced on June 27, 2011, the Canadian Debtors, the U.S. Debtors, the EMEA Debtors and their affiliates have now divested substantially all of Nortel’s material worldwide assets. The proceeds of these divestitures – some \$3 billion currently with a minimum of a further \$900 million expected to be added upon consummation of the patent portfolio and related asset transactions – now sit in escrow awaiting the resolution of allocation.

[9] This allocation issue, together with the resolution of the EMEA claims and the U.K. pension claims, lies at the heart not only of these CCAA proceedings, but also the Chapter 11 Proceedings and proceedings in the United Kingdom. As the Monitor noted in its 67th Report: “Simply put, they are matters that must be resolved before any creditor of an applicant (and likely any other Nortel debtor) can expect to receive a meaningful distribution on account of amounts that have now been outstanding in most cases since January 2009.

[10] The Canadian Debtors have no significant secured creditors. The Canadian Debtors do, however, have significant unsecured creditors, most of whom are individuals who are employed or were formerly employed by Nortel. Many of these former employees are pensioners and this group have unsecured claims for both pension and medical benefits.

[11] There are also significant employee and former employee claims against the U.S. Debtors and the EMEA Debtors.

[12] For many of these individuals, the delay in receiving a meaningful distribution can be significant. It is not just a question of calculating the time value of money. For this group of creditors, time is not on their side.

[13] This issue is international in scope. It is also a public-interest issue. A protracted delay in resolving the impasse surrounding allocation is highly prejudicial to this group.

[14] In making these comments, I do not mean to suggest that the claims of other creditor groups are not of equal significance. The reality is, however, that the timing of a receipt of a distribution may be less critical for a financial player as opposed to an individual.

[15] The difficulty in resolving the allocation issue that is before both the U.S. Court and this Court is, of course, complicated by the fact that it is a multi-jurisdictional issue. There is no simple solution to the legal predicament that faces all parties.

[16] Decisions in respect of both motions are currently under reserve. The nature and length of the arguments presented at the motion will necessitate careful drafting and separate rulings by the U.S. Court and this Court. Both Courts are concerned that this delay will also delay allocation proceedings and therefore distributions to creditors. Moreover, the risk of inconsistent decisions and the uncertainty of the appellate process (with further risk of inconsistent decisions) may further delay the progress of the cases.

[17] A protracted delay in the progress of the cases will only exacerbate an already unfortunate situation for the many individual creditors. With extended delay comes uncertainty. For many, uncertainty brings considerable stress and a bad situation becomes even worse. Clearly, the consequences of extended litigation are not desirable.

[18] Both Courts concluded that the parties could benefit from the appointment of a mediator so that they can continue to make progress towards the ultimate resolution of Nortel matters. Consequently, both the U.S. Court and this Court directed that the parties, who participated in the hearing on June 7, 2011, engage in mediation pending the release of decisions in both

motions. The mediator will have the authority to include such other parties as he deems appropriate, in his discretion.

[19] The mediator has the authority, in consultation with the parties, to determine the scope of the mediation, as he deems appropriate, including, without limitation, the allocation issue in its entirety and global issues relating to allocation and claims.

[20] The mediator is authorized to select advisors of his choosing. The reasonable fees and expenses of the advisors shall be reimbursed by the Canadian Debtors, the U.S. Debtors and the EMEA Debtors.

[21] The particulars of the mediation are as follows:

Mediator: The Honourable Warren K. Winkler
Chief Justice of Ontario
Court of Appeal for Ontario
Osgoode Hall
130 Queen Street West
Toronto, ON
M5H 2N5

Timing: To be arranged by the mediator

[22] Participation in this mediation is mandatory. Any agreements reached as a result of mediation will be binding on the parties.

[23] A settlement of the dispute being mediated shall also be subject to the approval of the U.S. Court and this Court, on notice to parties in interest.

[24] The parties shall recognize that mediation proceedings are settlement negotiations, and that all offers, promises, conduct and statements, whether written or oral, made in the course of the proceedings, are inadmissible in any arbitration or court proceeding, to the extent allowed by law. The parties shall not subpoena or otherwise require the mediator or any advisor to the mediator, to testify or produce records, notes or work product in any future proceedings, and no recording will be made of the mediation session. Evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation session. In the event that the parties do reach a settlement agreement, the terms of that settlement will be admissible in any court or arbitration proceedings required to enforce it, unless the parties agree otherwise. Information disclosed to the mediator at a private caucus shall remain confidential unless the party authorizes disclosure.

[25] The mediator has the right, prior to the commencement of the mediation only, to communicate with Judge Gross and me, for the purposes of obtaining background information.

[26] The mediation process shall be terminated under any of the following circumstances:

- (a) by a declaration by the mediator that a settlement has been reached;
- (b) a declaration by the mediator that further efforts at mediation are no longer considered to be worthwhile; or
- (c) for any other reason as determined by the mediator.

[27] The Monitor is directed to circulate a copy of this endorsement to all parties who attended on the return of the motion on June 7, 2011.

MORAWETZ J.

Date: June 29, 2011

TAB 8

Century Services Inc. Appellant

v.

**Attorney General of Canada on behalf
of Her Majesty The Queen in Right of
Canada Respondent**

**INDEXED AS: CENTURY SERVICES INC. v. CANADA
(ATTORNEY GENERAL)**

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. Appelante

c.

**Procureur général du Canada au
nom de Sa Majesté la Reine du chef du
Canada Intimé**

**RÉPERTORIÉ : CENTURY SERVICES INC. c. CANADA
(PROCUREUR GÉNÉRAL)**

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie,
LeBel, Deschamps, Fish, Abella, Charron, Rothstein et
Cromwell.

**EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE**

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("ETA") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("BIA"). However, s. 18.3(1) of the CCAA provided that any statutory deemed trusts in favour of the Crown did not operate under the CCAA, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the CCAA chambers judge, a payment not exceeding \$5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the BIA. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the ETA to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the CCAA to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the ETA and s. 18.3(1) of the CCAA can be resolved through an interpretation that properly recognizes the history of the CCAA, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« LTA ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« LFI »). Toutefois, le par. 18.3(1) de la LACC prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la LACC a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la LFI. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la LTA, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la LACC ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la LTA et le par. 18.3(1) de la LACC en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la LACC, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the CCAA established above, because the Crown's deemed trust priority over GST claims would be lost under the CCAA and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a CCAA or BIA provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the CCAA and in s. 67(3) of the BIA in clear and unmistakable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the BIA or the CCAA, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la LACC dégagee précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la LACC et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la LTA, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la LACC ou de la LFI confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la LTA, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la LACC et au par. 67(3) de la LFI en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la LTA. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la LFI ou la LACC, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44f) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith J.J.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, Owen J. James and Matthew J. G. Curtis, for the appellant.

Gordon Bourgard, David Jacyk and Michael J. Lema, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell J.J. was delivered by

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

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, Owen J. James et Matthew J. G. Curtis, pour l'appelante.

Gordon Bourgard, David Jacyk et Michael J. Lema, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« LACC »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la LACC et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« LTA »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la LACC, et non la LTA, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la LACC et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

Act, R.S.C. 1985, c. B-3 (“*BIA*”). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d’avis d’accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L’entreprise a vendu certains éléments d’actif excédentaires, comme l’y autorisait l’ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s’applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s’applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s’appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l’époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l’emportait sur la *LACC*, la Couronne jouissant ainsi d’un droit prioritaire à l’égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu’elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l’objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu’il sera utile de le faire.

[4] On April 29, 2008, Brenner C.J.S.C., in the context of the CCAA proceedings, approved a payment not exceeding \$5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of \$305,202.30 be held by the Monitor in its trust account.

[5] On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the BIA. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the BIA (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[7] First, the court's authority under s. 11 of the CCAA was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la LACC, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 \$ soit détenue par le contrôleur dans son compte en fiducie.

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la LFI. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la LFI (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la LACC n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the CCAA and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the CCAA.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

[9] This appeal raises three broad issues which are addressed in turn:

- (1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the CCAA and give priority to the Crown's *ETA* deemed trust during CCAA proceedings as held in *Ottawa Senators*?
- (2) Did the court exceed its CCAA authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
- (3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la LACC, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la LTA, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la LTA à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la LACC.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Questions en litige

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

- (1) Le paragraphe 222(3) de la LTA l'emporte-t-il sur le par. 18.3(1) de la LACC et donne-t-il priorité à la fiducie réputée qui est établie par la LTA en faveur de la Couronne pendant des procédures régies par la LACC, comme il a été décidé dans l'arrêt *Ottawa Senators*?
- (2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la LACC en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?
- (3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor “[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)” (s. 222(3)), while the *CCAA* stated at the relevant time that “notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded” (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.’s conclusion that an express trust in favour of the Crown was created by the court’s order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors’ enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l’insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l’égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l’insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l’époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d’imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c’est souvent le cas, le conflit apparent peut être résolu au moyen des principes d’interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l’historique de la *LACC*, la fonction de cette loi parmi l’ensemble des textes adoptés par le législateur fédéral en matière d’insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d’insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l’objectif de cette loi et l’interprétation qu’en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l’espèce, j’aborderai la conclusion du juge Tysoe selon laquelle l’ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l’insolvabilité*

[12] L’insolvabilité est la situation de fait qui se présente quand un débiteur n’est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d’insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing \$1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of \$5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvable — personnes physiques ou personnes morales — qui doivent 1 000 \$ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the CCAA that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the CCAA's remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The CCAA fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la LACC, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la LACC. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La LACC est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives. The manner in which courts have used CCAA jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the CCAA, the House of Commons committee studying the BIA's predecessor bill, C-22, seemed to accept expert testimony that the BIA's new reorganization scheme would shortly supplant the CCAA, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the CCAA enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la LACC. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la LACC.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvable ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la LACC dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la LFI a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la LFI supplanterait rapidement la LACC, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule n° 15, 3^e sess., 34^e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la LACC dans la pratique contemporaine,

flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The “flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions” (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, “the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world” (R. B. Jones, “The Evolution of Canadian Restructuring: Challenges for the Rule of Law”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors’ remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor’s assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

ni des avantages qu’offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la *LACC* [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l’insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d’un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d’insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] Si les instances en matière d’insolvabilité peuvent être régies par des régimes législatifs différents, elles n’en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l’objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

[TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d’éviter l’anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l’absence d’un processus collectif, chaque créancier sait que faute d’agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

Le modèle de la procédure unique vise à faire échec à l’inefficacité et au chaos qui résulteraient de l’insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d’un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

3.2 *GST Deemed Trust Under the CCAA*

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, “Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy” (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance (“EI”) and Canada Pension Plan (“CPP”) premiums, but ranks as an ordinary unsecured creditor for most other claims.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d’une priorité en cas d’insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l’insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l’objet d’aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu’elle l’était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l’État en cas d’insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l’État ne bénéficie d’aucune priorité, alors qu’aux États-Unis et en France il jouit au contraire d’une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d’une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l’impôt sur le revenu et des cotisations à l’assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s’applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n’a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as “source deductions”.

[33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 (“*PPSA*”). As then worded, an *ITA* deemed trust over the debtor’s property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the “*Sparrow Electric* amendment”).

également les biens détenus par un créancier garanti qui, si ce n’était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l’égard des retenues à la source relatives à l’impôt sur le revenu et aux cotisations à l’AE et au RPC (voir par. 227(4) de la *Loi de l’impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l’assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J’emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l’impôt sur le revenu et aux cotisations à l’AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d’un litige portant sur la priorité de rang entre, d’une part, une fiducie réputée établie en vertu de la *LIR* à l’égard des retenues à la source, et, d’autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l’Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D’après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l’égard des biens du débiteur pour une valeur égale à la somme due au titre de l’impôt sur le revenu — commençait à s’appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l’emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n’existait pas de biens susceptibles d’être visés par la fiducie réputée de la *LIR* lorsqu’elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu’elle est réputée s’appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l’arrêt *Sparrow Electric* »).

[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. . . .

. . . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

[35] The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

[36] The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 . . .

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi*

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 . . .

. . . .

(3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

18.4 . . .

. . . .

(3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

conflicts, apparent or real, and resolve them when possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be “identical” (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 (“*C.C.Q.*”), was held to have repealed a more specific provision of the earlier *Quebec Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy,

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l’égard de la TPS dans le cadre de la *LACC*. Dans l’arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d’appel de l’Ontario a invoqué la doctrine de l’abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d’appel de l’Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu’en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

[TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d’exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d’appel de l’Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s’estimait donc tenue de suivre l’arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu’une disposition d’une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d’abroger une disposition plus spécifique

the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrerait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édicton visait justement à prévenir.

[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at “ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer” (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament’s express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l’effet de l’arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l’on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L’anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d’un projet de loi d’exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n’indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l’égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l’assurance-emploi et au Régime de pensions du Canada qu’un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l’employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l’égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l’égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

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

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

[54] I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l’historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d’être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l’historique législatif. On ne peut donc pas dire que l’arrêt *Doré* commande l’application automatique d’une règle d’abrogation implicite.

[53] Un bon indice de l’intention générale du législateur peut être tiré du fait qu’il n’a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D’ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l’art. 18.3 a, comme nous l’avons vu plus tôt, été reprise sous une formulation différente à l’art. 37. Par conséquent, dans la mesure où l’interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d’abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l’engagement de procédures fondées sur la *LACC*, c’est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c’est dans la *LACC* qu’est exprimée l’intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d’accord avec ma collègue la juge Abella pour dire que l’al. 44f) de la *Loi d’interprétation*, L.R.C. 1985, ch. I-21, permet d’interpréter les modifications de 2005 comme n’ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l’objet d’un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l’approche de la *LFI* et celle de la *LACC* à l’égard de l’insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by CCAA s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in CCAA proceedings.

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

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

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

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

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

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

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a LACC est par nature schématisque » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]’histoire du droit relatif à la LACC correspond à l’évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la LACC découlent souvent de l’exercice discrétionnaire de certains pouvoirs. C’est principalement au fil de l’exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la LACC a évolué de façon graduelle et s’est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L’exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la LACC. Le caractère réparateur dont j’ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l’un des premiers exemples :

[TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu’elle fournit un moyen d’éviter les effets dévastateurs, — tant sur le plan social qu’économique — de la faillite ou de l’arrêt des activités d’une entreprise, à l’initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la LACC comporte plusieurs aspects. Le tribunal doit d’abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

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

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

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la LACC ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la LACC. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la LACC, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

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

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

[64] The first question concerns the boundary between a court's statutory authority under the CCAA and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during CCAA proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[62] L'utilisation la plus créative des pouvoirs conférés par la LACC est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La LACC a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la LACC, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la LACC n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la LACC? (2) Quelles sont les limites de ces pouvoirs?

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la LACC et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la LACC, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the CCAA itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la LACC elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

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

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procèdent d'abord à une interprétation des dispositions de la LACC avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la LACC (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la LACC permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

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

[66] L'examen des parties pertinentes de la LACC et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la LACC relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] The initial grant of authority under the CCAA empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

[67] En vertu du pouvoir conféré initialement par la LACC, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section” (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

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

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

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

d’un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l’ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l’espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l’art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu’il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l’interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d’une demande initiale que d’une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu’elle est indiquée et qu’il a agi et continue d’agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n’a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l’opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l’esprit lorsqu’il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l’opportunité de l’ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s’agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l’objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d’une compagnie insolvable. J’ajouterais que le critère de l’opportunité s’applique non seulement à l’objectif de l’ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is “doomed to failure” (see *Chef Ready*, at p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*’s purposes, the ability to make it is within the discretion of a *CCAA* court.

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

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

doivent se rappeler que les chances de succès d’une réorganisation sont meilleures lorsque les participants arrivent à s’entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu’il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l’échec » (voir *Chef Ready*, p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l’ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l’habilite à rendre à cette ordonnance.

[72] L’analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l’encontre de la Couronne, une fois qu’il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d’appel, le juge Tysoe a conclu que la *LACC* n’habilitait pas le tribunal à maintenir la suspension des mesures d’exécution de la Couronne à l’égard de la fiducie réputée visant la TPS après l’arrêt des efforts de réorganisation. Selon l’appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l’objectif fondamental de la *LACC* et n’a pas donné à ce texte l’interprétation téléologique et large qu’il convient de lui donner et qui autorise le prononcé d’une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d’autre choix que d’autoriser les mesures d’exécution à l’endroit de la fiducie réputée visant la TPS lorsqu’il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J’ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l’ordonnance était autorisée par la *LACC*.

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

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

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

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

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

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [...] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [L]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

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

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

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

3.4 *Express Trust*

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

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

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

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Fiducie expresse*

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3^e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

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

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

[87] Thus, uncertainty surrounding the outcome of the CCAA restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [CCAA proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la LACC dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la LACC et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la LFI était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la LACC exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la LACC] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 \$ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the CCAA and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("ETA").

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the CCAA and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a CCAA or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”) provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), where s. 227(4) *creates* a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d’insolvabilité, on conclut à l’existence d’une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l’existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l’art. 222 de la *LTA*.

[98] La première est la *Loi de l’impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l’absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l’effet contraire n’a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l’insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d’un montant qu’une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d’une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the CCAA:

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la LACC :

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3(1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)a), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . .

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Thus, Parliament has first *created* and then *confirmed the continued operation* of the Crown's *ITA* deemed trust under *both* the CCAA and the *BIA* regimes.

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la LACC *que* sous celui de la LFI.

[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (“*CPP*”). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 (“*EIA*”), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament’s intent to enforce the Crown’s deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament’s intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l’on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l’article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu’elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l’assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l’avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d’insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu’il prétende maintenir cette fiducie en vigueur malgré les dispositions à l’effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l’existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j’ai mentionnés fait donc défaut, ce qui témoigne de l’intention du législateur de laisser la fiducie réputée devenir caduque au moment de l’introduction de la procédure d’insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l’absence du droit en garantie, seraient ceux de la personne, jusqu’à ce qu’il soit

security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[108] In short, Parliament has imposed *two* explicit conditions, or “building blocks”, for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it “inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception” (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 \$ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (“*ETA*”), and specifically s. 222(3), gives priority during *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“*CCAA*”), proceedings to the Crown’s deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court’s discretion under s. 11 of the *CCAA* is circumscribed accordingly.

[115] Section 11¹ of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court’s discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

¹ Section 11 was amended, effective September 18, 2009, and now states:

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

au titre de la TPS mais n’a pas encore été versée au receveur général du Canada — ne fasse l’objet d’aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l’art. 222 de la *Loi sur la taxe d’accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d’une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l’égard de la TPS non versée. À l’instar du juge Tysoe de la Cour d’appel, j’estime que tel est le cas. Il s’ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l’art. 11 de la *LACC* est circonscrit en conséquence.

[115] L’article 11¹ de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l’insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu’une demande est faite sous le régime de la présente loi à l’égard d’une compagnie, le tribunal, sur demande d’un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l’ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l’art. 11, il est nécessaire de trancher d’abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l’espèce, prévoit ce qui suit :

¹ L’article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

11. Malgré toute disposition de la *Loi sur la faillite et l’insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l’égard d’une compagnie débitrice, rendre, sur demande d’un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu’il estime indiquée.

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[116] Century Services argued that the CCAA's general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during CCAA proceedings. Section 18.3(1) states:

18.3 (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the CCAA (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) ... [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (para. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”).

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with “any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)”, s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.’s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d’interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c’est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s’applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d’application du par. 222(3) et en déclarant de façon non équivoque qu’il s’applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d’appel MacPherson dans l’arrêt *Ottawa Senators* :

[TRADUCTION] L’intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l’insolvabilité*) », c’est le par. 222(3) qui l’emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l’emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l’insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d’exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L’opinion du juge d’appel MacPherson suivant laquelle le fait que la *LACC* n’ait pas été soustraite à l’application de la *LTA* témoigne d’une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l’édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n’a pas été modifié.

[120] L’absence de modification du par. 18.3(1) vaut d’être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the CCAA.

[123] Nor do I see any “policy” justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the CCAA and ETA described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the BIA as an exception when enacting the current version of s. 222(3) of the ETA without considering the CCAA as a possible second exception. I also make the observation that the 1992 set of amendments to the BIA enabled proposals to be binding on secured creditors and, while there is more flexibility under the CCAA, it is possible for an insolvent company to attempt to restructure under the auspices of the BIA. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is “later in time” prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d’inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l’application du par. 18.3(1) de la LACC.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d’aller à l’encontre, par voie d’interprétation législative, de l’intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l’a fait le juge d’appel Tysoe les raisons pour lesquelles l’argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l’espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

[TRADUCTION] Je ne conteste pas qu’il existe des raisons de politique générale valables qui justifient d’inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n’a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu’il a adopté les modifications susmentionnées à la LACC et à la LTA. Comme le juge MacPherson le fait observer au par. 43 de l’arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu’il a adopté la version actuelle du par. 222(3) de la LTA, ait désigné expressément la LFI comme une exception sans envisager que la LACC puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la LFI ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la LACC, il est possible pour une compagnie insolvable de se restructurer sous le régime de la LFI. [par. 37]

[124] Bien que je sois d’avis que la clarté des termes employés au par. 222(3) tranche la question, j’estime également que cette conclusion est même renforcée par l’application d’autres principes d’interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l’emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

[125] The “later in time” principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that “[a] more recent, general provision will not be construed as affecting an earlier, special provision” (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be “overruled” by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu’il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5^e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3^e éd. 2000), p. 358).

[126] L’exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n’est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu’il a employés, a exprimé l’intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d’interprétation visent principalement à faciliter la détermination de l’intention du législateur, comme l’a confirmé le juge d’appel MacPherson dans l’arrêt *Ottawa Senators*, au par. 42 :

[TRADUCTION] ... en matière d’interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l’intention du législateur lorsqu’il a adopté la loi. Cette règle fondamentale l’emporte sur toutes les maximes, outils ou canons d’interprétation législative, y compris la maxime suivant laquelle le particulier l’emporte sur le général (*generalia specialibus non derogant*). Comme l’a expliqué le juge Hudson dans l’arrêt *Canada c. Williams*, [1944] R.C.S. 226, [...] à la p. 239 ... :

On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n’est pas une règle de droit mais un principe d’interprétation, cède le pas

legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,² s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4^e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005², le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44f) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 The amendments did not come into force until September 18, 2009.

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

“new law” unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the “former enactment”, is repealed and another enactment, in this section called the “new enactment”, is substituted therefor,

. . .

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an “enactment” as “an Act or regulation or any portion of an Act or regulation”.

[130] Section 37(1) of the current CCAA is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[131] The application of s. 44(f) of the *Interpretation Act* simply confirms the government’s clearly expressed intent, found in Industry Canada’s clause-by-clause review of Bill C-55, where s. 37(1) was identified as “a technical amendment to re-order the provisions of this Act”. During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l’al. 44f)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d’abrogation et de remplacement, les règles suivantes s’appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n’est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l’art. 2 de la *Loi d’interprétation* : « Tout ou partie d’une loi ou d’un règlement. »

[130] Le paragraphe 37(1) de la LACC actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d’une telle disposition.

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l’absence de la disposition législative en question, il ne le serait pas.

[131] L’application de l’al. 44f) de la *Loi d’interprétation* vient tout simplement confirmer l’intention clairement exprimée par le législateur, qu’a indiquée Industrie Canada dans l’analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d’ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1^{re} sess., 38^e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the CCAA proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium,

(iv) au moment de tout défaut d’exécution de la transaction ou de l’arrangement,

(v) au moment de l’exécution intégrale de la transaction ou de l’arrangement;

b) la suspension de l’exercice par Sa Majesté du chef d’une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas a)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l’égard d’une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu’il s’agit d’une disposition dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L’ordonnance cesse d’être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l’ordonnance et qui pourrait faire l’objet d’une demande aux termes d’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou

as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person

d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l’exercice des droits que lui confère l’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n’ont pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou

effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”) nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a “provincial pension plan” as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii),

in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

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

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

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a)(i)* à *(v)* qui, le cas échéant, est applicable, des droits que lui confère toute disposition

Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l’égard d’une compagnie qui est un débiteur visé par la loi provinciale, s’il s’agit d’une disposition dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [Cessation d’effet] Les passages de l’ordonnance qui suspendent l’exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b) cessent d’avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l’égard de toute somme qui devient due à Sa Majesté après le prononcé de l’ordonnance et qui pourrait faire l’objet d’une demande aux termes d’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection

perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l’exercice des droits que lui confère l’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L’ordonnance prévue à l’article 11.02, à l’exception des passages de celle-ci qui suspendent l’exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b), n’a pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a “provincial pension plan” as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d’une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s’applique pas à l’égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l’assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l’égard des sommes réputées détenues en fiducie aux termes de toute loi d’une province créant une fiducie présumée dans le seul but d’assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d’une loi de cette province, si, dans ce dernier cas, se réalise l’une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l’impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l’application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l’encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d’accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l’absence du droit en garantie, seraient ceux de la

creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”) nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas a) et b),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)a), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

(b) the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a “provincial pension plan” as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers’ compensation, in this section and in section 87 called a “workers’ compensation body”, rank as unsecured claims.

(3) [Exceptions] Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l’application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l’encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d’une faillite ou d’une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d’une province ou d’un organisme compétent au titre d’une loi sur les accidents du travail prennent rang comme réclamations non garanties.

(3) [Effet] Le paragraphe (1) n’a pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. dissenting.

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Pourvoi accueilli avec dépens, la juge ABELLA est dissidente.

Procureurs de l’appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l’intimé : Procureur général du Canada, Vancouver.

TAB 9

Boat Harbour Act

CHAPTER 4 OF THE ACTS OF 2015



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Halifax

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CHAPTER 4 OF THE ACTS OF 2015

An Act Respecting the Cessation of the Use of the Boat Harbour Effluent Treatment Facility for the Reception and Treatment of Effluent from the Northern Pulp Mill

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(The table of contents is not part of the statute)

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Short title

1 This Act may be cited as the *Boat Harbour Act*. 2015, c. 4, s. 1.

Interpretation

2 In this Act,

(a) “effluent” has the same meaning as in the *Pulp and Paper Effluent Regulations* (Canada), as amended from time to time;

(b) “Facility” means the Boat Harbour Effluent Treatment Facility, comprising

(i) the effluent treatment system located at 340 and 580 Simpson Lane, Pictou Landing, in the County of Pictou, and consisting of two settling basins, an aerated stabilization basin, the former stabilization lagoon and all appurtenances thereof necessary to permit the receipt and disposal of effluent from the Mill, and

(ii) the pipeline for the transmission of effluent from the Mill to the settling basins, which commences at a standpipe located at 260 Granton Abercrombie Branch Road, Abercrombie Point, in the County of Pictou, leads under the East River and discharges into the settling basins;

(c) “Mill” means the Northern Pulp Mill, a bleached kraft pulp mill located at 260 Granton Abercrombie Branch Road, Abercrombie Point. 2015, c. 4, s. 2.

Prohibition

3 On and after the earlier of January 31, 2020, and the date on which the Northern Pulp Nova Scotia Corporation ceases to use the Facility, the use of the

MAY 11, 2015

Facility for the reception and treatment of effluent from the Mill must cease. 2015, c. 4, s. 3.

No action lies

4 (1) No action lies against Her Majesty in right of the Province or a member of the Executive Council in respect of the cessation of the use of the Facility for the reception and treatment of effluent from the Mill as a result of this Act.

(2) The enactment of this Act is deemed not to be a repudiation or anticipatory repudiation by Her Majesty in right of the Province of the lease agreement dated December 31, 1995, between Her Majesty in right of the Province and Scott Maritimes Limited, as extended by a lease extension agreement dated October 22, 2002, between Her Majesty in right of the Province and Kimberly-Clark Inc. 2015, c. 4, s. 4.

TAB 10

Companies' Creditors Arrangement Act

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

An Act to facilitate compromises and arrangements between companies and their creditors

Short Title

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act*, R.S., c. C-25, s. 1.

...

General power of court

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

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

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

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

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* or the by-laws or rules of that Association.

11.07 [Repealed, 2012, c. 31, s. 420]

Restriction — certain powers, duties and functions

11.08 No order may be made under section 11.02 that affects

- (a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*,
- (b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*, or
- (c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

Stay — Her Majesty

11.09 (1) An order made under section 11.02 may provide that

- (a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than
 - (i) the expiry of the order,
 - (ii) the refusal of a proposed compromise by the creditors or the court,
 - (iii) six months following the court sanction of a compromise or an arrangement,
 - (iv) the default by the company on any term of a compromise or an arrangement, or
 - (v) the performance of a compromise or an arrangement in respect of the company; and
- (b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

When order ceases to be in effect

(2) The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection.

Operation of similar legislation

(3) An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Meaning of *regulatory body*

11.1 (1) In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

11.11 [Repealed, 2005, c. 47, s. 128]

Interim financing

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

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (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.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

- (2)** Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under
- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
 - (b) an eligible financial contract; or
 - (c) a collective agreement.

Factors to be considered

- (3)** In deciding whether to make the order, the court is to consider, among other things,
- (a) whether the monitor approved the proposed assignment;
 - (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
 - (c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

11.31 [Repealed, 2005, c. 47, s. 128]

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Removal of directors

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.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

***Bankruptcy and Insolvency Act* matters**

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

No personal liability in respect of matters before appointment

11.8 (1) Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

Status of liability

(2) A liability referred to in subsection (1) shall not rank as costs of administration.

Liability of other successor employers

(2.1) Subsection (1) does not affect the liability of a successor employer other than the monitor.

Liability in respect of environmental matters

(3) Notwithstanding anything in any federal or provincial law, a monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the monitor's appointment; or

(b) after the monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the monitor's gross negligence or wilful misconduct.

Reports, etc., still required

(4) Nothing in subsection (3) exempts a monitor from any duty to report or make disclosure imposed by a law referred to in that subsection.

Non-liability re certain orders

(5) Notwithstanding anything in any federal or provincial law but subject to subsection (3), where an order is made which has the effect of requiring a monitor to remedy any environmental condition or environmental damage affecting property involved in a proceeding under this Act, the monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed or during the period of the stay referred to in paragraph (b), the monitor

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a) or within ten days after the order is made or within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the monitor to contest the order, or

(ii) the court having jurisdiction under this Act for the purposes of assessing the economic viability of complying with the order; or

(c) if the monitor had, before the order was made, abandoned or renounced any interest in any real property affected by the condition or damage.

Stay may be granted

(6) The court may grant a stay of the order referred to in subsection (5) on such notice and for such period as the court deems necessary for the purpose of enabling the monitor to assess the economic viability of complying with the order.

Costs for remedying not costs of administration

(7) Where the monitor has abandoned or renounced any interest in real property affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Priority of claims

(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

TAB 11

Rescue!

The Companies' Creditors Arrangement Act

Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.

University of British Columbia Faculty of Law and
Peter Wall Institute for Advanced Studies

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being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs.⁶⁰ The Supreme Court of Canada held that Parliament understood when adopting the CCAA that liquidation of an insolvent company was harmful for most of those stakeholders it affected, notably creditors and employees; and that a workout that allowed the company to survive was optimal.⁶¹ It held that courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed.⁶² The Supreme Court of Canada has held that reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs.⁶³

While the CCAA does not have an express objective clause, its long title, *An Act to facilitate compromises and arrangements between companies and their creditors* indicates that its objective is to assist insolvent companies in developing and seeking approval of compromises and arrangements with their creditors.⁶⁴ The CCAA has a broad remedial purpose, giving a debtor company an opportunity to find a way out of financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings. It allows the debtor to devise a plan that will enable it to meet the demands of its creditors through refinancing with new lending, equity financing or the sale of the business as a going concern. This alternative may give the creditors of all classes a larger return and protect the jobs of the company's employees.⁶⁵ However, the Court has held that the CCAA should not be the last gasp of a dying company; if a plan is to be implemented, it should be implemented at a stage prior to the "death throes."⁶⁶ The decided cases have identified the following purposes of the legislation:

- to maintain the *status quo* for a period to provide a structured environment in which an insolvent company can continue to carry on business and retain control over its assets while the company attempts to gain the approval of its creditors for a proposed arrangement that will enable the

⁶⁰ *Ibid.* at para. 70.

⁶¹ *Ibid.* at para. 17.

⁶² *Ibid.* at para. 60.

⁶³ *Ibid.* at para. 18.

⁶⁴ *Diemaster Tool Inc. v. Skvortsoff (Trustee of)*, 3 C.B.R. (3d) 133, 1991 CarswellOnt 168 (Ont. Gen. Div.).

⁶⁵ *Ibid.* at para. 40.

⁶⁶ *Re Inducon Development Corp.*, 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) at para. 13.

company to remain in operation for the future benefit of the company and its creditors.⁶⁷

- to permit a broad balancing of stakeholder interests in the insolvent corporation.⁶⁸
- to protect jobs and protect the public interest through facilitating the survival of a debtor company.⁶⁹
- in appropriate circumstances, to effect a sale, winding-up or liquidation of a debtor company and its assets.⁷⁰

One measure of a successful CCAA workout is the financial health of the corporation some years later. However, the nature of restructuring proceedings is shifting, such that the longer term financial health and wealth generating activity of the debtor may no longer be the only measure of a successful CCAA application. Although the public policy objectives of the statute remain the same, there are new actors entering the market and new efforts at controlling the process and outcome of a CCAA proceeding, such that these public policy goals may be at some risk. These shifts are most evident in the discussion of interim financing and exit financing in chapter 4, but are highlighted throughout this text.

Notwithstanding the success of the CCAA in meeting its legislative objective of facilitating plans of compromise and arrangement with creditors, the statute is not without its critics. The nature of the statute means that the supervising judge is required to make numerous procedural and substantive decisions during the CCAA proceedings. There has been some criticism that the statutory language leaves judges with too much discretion and parties with too much uncertainty.⁷¹ US lenders, who often supply capital for a restructuring, are accustomed to a highly rules-based lending environment during insolvency and frequently are concerned about the lack of codification under the CCAA. While amendments in 2009 addressed a number of these issues, some foreign financiers continue to complain about the Canadian legislation as it does not strictly enforce a hierarchy

⁶⁷ *Meridian Development Inc. v. Toronto Dominion Bank*, *supra*; *Quintette Coal Ltd. v. Nippon Steel Corp.*, 80 C.B.R. (N.S.) 98, 1990 CarswellBC 425 (B.C.S.C.); *Re Canadian Airlines Corp.*, 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.); *Milner Greenhouses Ltd. v. Saskatchewan*, 2004 CarswellSask 280, [2004] 9 W.W.R. 310, 50 C.B.R. (4th) 214, 2004 SKQB 160 (Sask. Q.B.); *Re Blue Range Resource Corp.*, 192 D.L.R. (4th) 281, 2000 ABCA 239, 20 C.B.R. (4th) 187, 2000 CarswellAlta 1004 (Alta. C.A.).

⁶⁸ *Nova Metal Products Inc. v. Comiskey (Trustee of)*, 1 C.B.R. (3d) 101, (*sub nom.* *Elan Corp. v. Comiskey*) 41 O.A.C. 282, 1990 CarswellOnt 139, 1 O.R. (3d) 289 (Ont. C.A.); *Re Air Canada [Greater Toronto Airport Authority re gates at new terminal (Toronto)]*, 47 C.B.R. (4th) 189, 2004 CarswellOnt 870 (Ont. S.C.J. [Commercial List]).

⁶⁹ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) at para. 13.

⁷⁰ *Re Anvil Range Mining Corp.*, 34 C.B.R. (4th) 157, 2002 CarswellOnt 2254 (Ont. C.A.), additional reasons 2002 CarswellOnt 3687 (Ont. C.A.), leave to appeal refused 2003 CarswellOnt 730, 2003 CarswellOnt 731 (S.C.C.).

⁷¹ Andrew Kent, "Comment" (2004) 40 Canadian Business L.J. 295.

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TAB 12

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS)
INC. AND ELMCLIFFE INVESTMENTS INC. (each an "Applicant" and, collectively, the
"Applicants" or "CannTrust")**

REPORT OF THE PROPOSED MONITOR

March 31, 2020

INTRODUCTION

1. Ernst & Young Inc. ("**EY**" or the "**Proposed Monitor**") understands that the Applicants have brought an application (the "**CCAA Application**") before this Court returnable on March 31, 2020 seeking an initial order (the "**Proposed First Day Initial Order**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") to, among other things, obtain a stay of proceedings to allow them an opportunity to restructure their business and affairs. The Applicants propose that EY be appointed as Monitor of the Applicants in these CCAA proceedings (in such capacity, the "**Monitor**").
2. This report (the "**Report**") has been prepared by the Proposed Monitor prior to its appointment as Monitor, should this Court grant the Proposed First Day Initial Order, to provide information to this Court for its consideration in respect of the CCAA Application and the relief sought in the Proposed First Day Initial Order.
3. The Proposed Monitor further understands that the CCAA Applicants will be seeking an order (the "**Proposed Amended and Restated Initial Order**") at a subsequent hearing, to be scheduled with the supervising judge prior to the expiry of the initial 10-day stay period, granting certain broader relief. If appointed, the Monitor intends to file a further report in advance of that hearing to provide information on the relief sought in the Proposed Amended and Restated Initial Order.

PURPOSE

4. The purpose of this Report is to provide information to the Court on:
 - (a) EY's qualifications to act as Monitor;

- (b) an overview of the Applicants;
- (c) background on the circumstances leading to the Applicants' decision to commence CCAA proceedings;
- (d) an overview of the Applicants' thirteen-week cash flow forecast on a consolidated basis for all the Applicants (the "**Cash Flow Forecast**") and the Proposed Monitor's comments regarding the reasonableness thereof; and
- (e) certain relevant matters about the relief sought in the Proposed First Day Initial Order.

TERMS OF REFERENCE

5. In preparing this Report and making the comments herein, the Proposed Monitor has been provided with, and has relied upon, unaudited financial information, books and records prepared by the Applicants, discussions with management of the Applicants ("**Management**"), and information from other third-party sources (collectively, the "**Information**"). Except as described in this Report in respect of the Cash Flow Forecast:
 - (a) the Proposed Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Proposed Monitor has not audited or otherwise attempted to verify the accuracy or completeness of such information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards ("**GAAS**") pursuant to the Chartered Professional Accountants Canada Handbook and, accordingly, the Proposed Monitor expresses no opinion or other form of assurance contemplated under GAAS in respect of the Information; and
 - (b) some of the information referred to in this Report consists of forecasts and projections. An examination or review of the financial forecast and projections, as outlined in the Chartered Professional Accountants Canada Handbook, has not been performed.
6. Future-oriented financial information referred to in this Report was prepared based on Management's estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not ascertainable, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be significant.
7. Unless otherwise indicated, the Proposed Monitor's understanding of factual matters expressed in this Report concerning the Applicants and their business is based on the Information, and not independent factual determinations made by the Proposed Monitor.
8. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian dollars.

EY'S QUALIFICATION TO ACT AS MONITOR

9. EY is a licensed insolvency trustee within the meaning of section 2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. EY is not subject to any of the restrictions set out in section 11.7(2) of the CCAA on who may be appointed as Monitor.
10. EY has an understanding of the Applicants' operations and cash flow, and will be able to quickly and seamlessly perform its responsibilities as Monitor, if appointed.
11. EY has previously provided advisory services to CannTrust with respect to internal controls over financial reporting in order to assist the Applicants in complying with their responsibilities under the *Sarbanes-Oxley Act of 2002* and related regulations. At no point has EY been the auditor of the Applicants.
12. The Proposed Monitor has retained Aird & Berlis LLP to act as its counsel.

OVERVIEW OF THE APPLICANTS

13. This Report should be read in conjunction with the affidavit of Greg Guyatt sworn March 31, 2020 (the "**Guyatt Affidavit**") for additional background and financial information with respect to the Applicants.
14. CannTrust was founded in 2013 and, prior to the partial suspension of its licences, detailed further below, was a licensed producer that supplied cannabis to the medical and adult-use recreational cannabis markets.
15. Anyone wishing to cultivate, process and/or sell cannabis in Canada must have a license from Health Canada to do so. In addition to issuing licences, Health Canada is responsible for ensuring compliance with, and enforcement of, the *Cannabis Act*, S.C. 2018, c-16 and the *Cannabis Regulations*, SOR/2018-144 (together, the "**Cannabis Legislation**"). CannTrust Inc., a wholly-owned subsidiary of CannTrust Holdings Inc., is a licensed producer of cannabis in accordance with the Cannabis Legislation, with production and processing facilities in Fenwick, Ontario (the "**Fenwick Facility**") and Vaughan, Ontario (the "**Vaughan Facility**"). The licences issued in respect of the Fenwick Facility and the Vaughan Facility are referred to herein as the "**Cannabis Licences**." CannTrust's Cannabis Licences are currently under suspension. Further discussion is provided herein.
16. Prior to the suspension of its licences, the principal activities of CannTrust were the cultivation, processing, distribution, and sale of dried cannabis flower, cannabis soft gel capsules, and cannabis oil (the products, collectively, the "**Cannabis Products**").
17. CannTrust derived the majority of its revenue from the sale of medical cannabis to registered patients for medical use. By March 31, 2019, CannTrust had approximately 68,000 registered patients in Canada, which was among the top tier of cannabis licence holders by patient count. CannTrust also sold its product in the wholesale market to provincial distributors which was ultimately used to supply the adult-use recreational

market. As at March 31, 2019, wholesale revenue represented 32.5% of CannTrust's total revenue.

18. In addition to its production and processing facilities in Ontario, CannTrust also owns 81 acres of land in British Columbia, through its wholly-owned subsidiary CTI Holdings (Osoyoos) Inc., which was purchased with the intent to commence outdoor cannabis cultivation. CannTrust applied to Health Canada for a licence to plant and cultivate on these lands. CannTrust has not been informed of Health Canada's decision to date.
19. CannTrust is listed on the Toronto Stock Exchange ("TSX") under the ticker TRST and the New York Stock Exchange ("NYSE") under the ticker CTST.

Health Canada Audit Reports and Partial Licence Suspension

20. As further detailed in the Guyatt Affidavit, prior to June 2019, CannTrust's business was experiencing operational growth and expansion.
21. As part of its mandate, Health Canada conducts periodic inspections of licensed producers, including CannTrust. In July 2019, CannTrust announced that as a result of inspections by Health Canada, Health Canada had issued a non-compliance report regarding the Fenwick Facility (the "**Fenwick Audit Report**").
22. In August 2019, CannTrust announced that as a result of further inspections by Health Canada, Health Canada had issued a non-compliance report regarding the Vaughan Facility (the "**Vaughan Audit Report**").
23. In or around September 2019, Health Canada partially suspended CannTrust's Cannabis Licences pursuant to the Cannabis Legislation. The partial suspension affects CannTrust's ability to process, sell, and conduct cannabis research, and CannTrust was barred from propagating new lots or batches of cannabis. CannTrust was allowed to complete cultivation and processing of existing batches.

CannTrust's Response to the Audit Reports

24. As a result of the Fenwick Audit Report, CannTrust took a number of steps, including placing a hold on the sale and shipment of all Cannabis Products.
25. Also as a result of the Fenwick Audit Report, CannTrust formed a special committee of independent directors (the "**Special Committee**") with the mandate to, among other things, conduct an investigation on the allegations arising from the Fenwick Audit Report, which was ultimately expanded to include the Vaughan Audit Report. The Special Committee was also tasked with making recommendations and considering potential strategic alternatives available to CannTrust. The Special Committee recommended, and the Board agreed, to terminate the employment of the CEO of CannTrust, Peter Aceto, for cause, and demanded the resignation of the Chairman of the Board, Eric Paul, who promptly resigned.

26. As a result of the inability to cultivate new crops or sell cannabis inventory, operations at the Fenwick Facility and Vaughan Facility have been greatly reduced, and the Applicants focused on remediation efforts. To reduce operating costs, CannTrust reduced employee headcount from approximately 800 employees to approximately 280 employees.
27. On October 21, 2019, CannTrust submitted its remediation plan to Health Canada (the “**Remediation Plan**”) detailing actions to be taken to address the identified risks that resulted in the partial suspension of the Cannabis Licences. CannTrust announced that the Remediation Plan included the destruction of approximately \$77 million of inventory and biological assets that were not authorized by CannTrust’s Cannabis Licences.
28. On February 14, 2020, CannTrust reported to Health Canada that it had completed the Remediation Plan for the Fenwick Facility and requested the reinstatement of its Cannabis Licence for the Fenwick Facility. CannTrust is awaiting Health Canada’s decision. CannTrust continues to implement the Remediation Plan for the Vaughan Facility, with the stated goal of completing the Remediation Plan by the end of April 2020, subject to availability of resources during the COVID-19 pandemic, and thereafter will request the reinstatement of the Vaughan Facility licence.

CIRCUMSTANCES LEADING TO THE DECISION TO COMMENCE INSOLVENCY PROCEEDINGS

29. As further detailed in the Guyatt Affidavit, the circumstances leading to the Applicants’ decision to commence the CCAA Application include:
 - (a) the partial suspension of its Cannabis Licences, the result of which being that CannTrust has had no material revenue since July 2019;
 - (b) a general downturn in the Canadian cannabis industry that commenced in 2019;
 - (c) recent global developments which have made it difficult for CannTrust to attract new financing or strategic partners;
 - (d) the significant on-going costs that CannTrust has incurred, and continues to incur, in carrying out the Remediation Plan;
 - (e) the multiple putative securities class actions commenced in Canada and the United States against CannTrust and certain of its current and former officers, directors, employees and other parties, which seek estimated aggregate damages of at least \$500 million; and
 - (f) the potential for monetary penalties to be imposed by regulators and other authorities such as Health Canada, the Ontario Securities Commission (the “OSC”) and the Royal Canadian Mounted Police, among others.
30. These issues are compounded by the COVID-19 pandemic, which may impact Health Canada’s timing for any reinstatement of the Cannabis Licences and operations post-

licensing. Additional delay of the reinstatement of the Cannabis Licences further impacts the Applicants' liquidity.

31. Further, without the benefit of CCAA protection, the Applicants will continue to incur significant on-going costs in investigating, preparing for, and defending the putative class actions.
32. The Applicants' ability to generate revenue is reliant on the reinstatement of the Cannabis Licences. There is uncertainty surrounding the timing and ultimate decision of Health Canada to reinstate CannTrust's Cannabis Licences. If the Cannabis Licences are reinstated, it would still take several months for CannTrust to earn revenue from cannabis plants that would need to be propagated, cultivated, processed and sold.
33. The CCAA proceedings afford time to the Applicants to complete their remediation efforts, obtain the reinstatement of the Cannabis Licences and resume operations at the Fenwick Facility and the Vaughan Facility, which should ultimately lead to the preservation of supply relationships, the preservation of, and increase of, jobs for the Applicants' employees, and the stability needed for the benefit of all the Applicants' stakeholders.

OVERVIEW OF APPLICANTS' THIRTEEN WEEK CASH FLOW PROJECTION

34. The Applicants, with the assistance of the Proposed Monitor, have prepared the Cash Flow Forecast for the 13 week period from March 30, 2020 to the week ending June 28, 2020 (the "**Cash Flow Period**") for the purpose of projecting the Applicants' estimated liquidity needs during the Cash Flow Period. A copy of the Cash Flow Forecast is attached as Appendix "**A**" to this Report.
35. The Cash Flow Forecast is presented on a weekly basis during the Cash Flow Period and represents the estimates of Management of the projected cash flow during the Cash Flow Period. The Cash Flow Forecast has been prepared by the Applicants using probable and hypothetical assumptions (the "**Assumptions**") set out in the notes to the Cash Flow Forecast.
36. The Proposed Monitor has reviewed the Cash Flow Forecast through inquiries, analytical procedures and discussions, and review of documents related to the Information supplied to it by certain key members of Management and employees of the Applicants. Based on the Proposed Monitor's review, nothing has come to its attention that causes it to believe, in all material respects, that:
 - (a) the Assumptions are not consistent with the purpose of the Cash Flow Forecast;
 - (b) as at the date of this Report, the Assumptions are not suitably supported and consistent with the plans of the Applicants or do not provide a reasonable basis for the Cash Flow Forecast, given the probable and hypothetical assumptions; or
 - (c) the Cash Flow Forecast does not reflect the Assumptions.

37. The Applicants maintain 13 bank accounts with Bank of Montreal for their operations. The Applicants have no bank credit or overdraft facilities, aside from credit cards.
38. The Applicants' Cash Flow Forecast shows that during the Cash Flow Period, the Applicants project no receipts and project estimated total combined disbursements of approximately \$22.7 million. The Cash Flow Forecast projects that the Applicants will have sufficient liquidity during the first thirteen weeks of the CCAA proceedings.

SELECT RELEVANT MATTERS ADDRESSED IN THE PROPOSED FIRST DAY INITIAL ORDER

Stay of Proceeding of Affected Parties

39. CannTrust holds significant equity interests in O Cannabis We Stand on Guard For Thee Corporation, Cannatrek Ltd., Elmcliffe Investments [No. 2] Inc. and Cannabis Coffee and Tea Pod Company Ltd. (the "**Affected Parties**").
40. As a result of CannTrust's relationship with the Affected Parties, there are certain agreements that may have been entered between CannTrust, one or more Affected Parties and third parties that may trigger defaults as a result of the Applicants' insolvency proceedings. As such, the Applicants have requested a limited stay of proceedings to be extended to the Affected Parties with respect to the making or filing of these proceedings or any allegation, admission or evidence in these proceedings.
41. The Proposed Monitor is of the view that the limited stay should be extended to the Affected Parties so that there is no risk to disruption to their businesses solely due to the CCAA Application.

Priority of Charges

42. The Proposed First Day Initial Order provides for three priority charges (collectively, the "**Charges**") on the current and future assets, undertakings and properties of the Applicants, wherever located, including all proceeds thereof that rank in the following order:
 - (a) first, the Administration Charge (as that term is defined below);
 - (b) second, the Directors' Charge (as that term is defined below); and
 - (c) third, the Intercompany Charge (as that term is defined below).
43. The Proposed Monitor understands that, if the Proposed First Day Initial Order is granted, the Applicants will provide notice of the Proposed First Day Initial Order and the scheduled comeback motion to any parties who serve a Notice of Appearance in the proceeding or otherwise request service of such material or to be added to the service list, in advance of the comeback motion.

Administration Charge

44. The Proposed First Day Initial Order provides for a charge up to a maximum amount of \$700,000 (the “**Administration Charge**”) in favour of the counsel to the Applicants, the Monitor and its counsel, and FTI Consulting Canada Inc. as Chief Restructuring Officer of the Applicants, as security for the professional fees and disbursements incurred prior to and after the commencement of the CCAA proceedings.
45. The proposed Administration Charge in the Proposed First Day Initial Order is based on the forecast fees of the above-listed professionals to the week ended April 12, 2020. The Proposed Monitor reviewed the calculation of the Administration’ Charge that was prepared by the Applicants and is of the view that the proposed Administration Charge is required and reasonable in the circumstances and believes the quantum of the Administration Charge limited to the amount necessary for the initial 10-day stay period, based upon a review and assessment of the anticipated professional costs to be incurred during this matter.
46. The Proposed Monitor understands that the Applicants will be seeking an increase of the Administration Charge to \$1.5 million on the comeback motion.

Directors’ Charge

47. The Proposed First Day Initial Order provides for a charge in an amount not to exceed \$1.4 million (the “**Directors’ Charge**”) to secure an indemnity in favour of the current directors and officers of the Applicants (the “**Directors and Officers**”) against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of these CCAA proceedings, except to the extent that the obligation or liability is incurred as a result of such director’s or officer’s gross negligence or willful misconduct.
48. The Directors and Officers shall only be entitled to the benefit of the Directors’ Charge to the extent that they do not have coverage under any directors’ and officers’ insurance policy, or to the extent such coverage is insufficient to pay an indemnified amount as described above.
49. The proposed Directors’ Charge in the Proposed First Day Initial Order is based on approximately two weeks of payroll, current accrued vacation pay and current unremitted source deductions. The Proposed Monitor reviewed the calculation of the Directors’ Charge that was prepared by the Applicants and is of the view that the proposed Directors’ Charge is required and reasonable in the circumstances and believes the quantum of the Directors’ Charge is limited to the amount necessary for the initial 10-day stay period, based upon a review and assessment of the anticipated payroll and other employee costs to be incurred during this matter.
50. The Proposed Monitor understands that the Applicants will be seeking an increase of the Directors’ Charge to \$3.75 million to incorporate other employee amounts that are expected to be payable during the course of these CCAA proceedings, including \$1.7

million for the total estimated payments to be made in October 2020 at the end of the first year of the CannTrust Capital Appreciation Plan, a program further described in the Guyatt Affidavit.

Intercompany Charge

51. As detailed in the Guyatt Affidavit, CannTrust Holdings Inc. (the “**Intercompany Lender**”) will be required to fund the operations and expenditures of the other Applicants (each, an “**Intercompany Borrower**”) during the CCAA proceedings, consistent with historical practice.
52. The Proposed First Day Initial Order contemplates that the Intercompany Lender will be authorized to loan, and each Intercompany Borrower will be authorized to borrow, repay and re-borrow amounts to fund their ongoing expenditures and other permitted amounts (the “**Intercompany Advances**”). Intercompany Advances will be limited to \$4.2 million in the Proposed First Day Initial Order, which is the amount that is reasonably necessary for the continued operations of the Intercompany Borrowers in the ordinary course of business during the initial 10-day stay period. Intercompany Advances will be subject to review and approval by the Proposed Monitor if it is appointed as Monitor.
53. The Proposed First Day Initial Order also provides for a charge in favour of the Intercompany Lender (the “**Intercompany Charge**”) on all of the Property (as that term is defined in the Proposed First Day Order) of each of the Intercompany Borrowers as security for the intercompany advances made to such Intercompany Borrower.
54. The Proposed Monitor is of the view that the request for approval of the Intercompany Advances and the Intercompany Charge is required and is reasonable under the circumstances and will ensure that the stakeholders of each entity will not be prejudiced by necessary intercompany advances. The Proposed Monitor reviewed the calculation of the maximum amount of Intercompany Advances (and thus the maximum Intercompany Charge) that was prepared by the Applicants and is of the view that it is limited to the amount necessary for the initial 10-day stay period.
55. The Monitor will work with CannTrust to review, approve and track all such Intercompany Advances and will periodically report thereon to the Court.

Securities Reporting

56. The Monitor understands that each of the TSX, NYSE, and OSC, have indicated that, with respect to the applicable securities, the securities of CannTrust Holdings will likely be delisted and cease-traded as a result of the Applicants commencing these CCAA proceedings. Accordingly, the Applicants have determined that directing further time or resources to securities reporting is not appropriate in the circumstances. The Proposed Monitor supports this decision and recommends that the Court grant the relief sought in the Proposed First Day Initial Order authorizing the Applicants to proceed accordingly, should the Court see fit to do so.

Service and Notice

57. The Applicants are seeking the Court's authorization to deliver the prescribed notices to creditors by e-mail instead of physical mail. In the circumstances of the COVID-19 pandemic, the Monitor believes that such e-mail notices are more likely to come to the prompt attention of creditors, and thus will improve their ability to participate in these proceedings prior to the comeback hearing should they wish. The Proposed Monitor was authorized to deliver e-mail notices to creditors in another recent proceeding and believes that the process worked well. The Proposed Monitor supports this requested relief in the circumstances.

CONCLUSIONS AND RECOMMENDATIONS

58. The Proposed Monitor has reviewed the Applicants' CCAA Application materials and has consented to act as the Monitor of CannTrust should this Court grant the Proposed First Day Initial Order.
59. For the reasons stated herein, the Proposed Monitor believes it is appropriate for CannTrust to be granted protection under the CCAA and respectfully request that the Court grants the Proposed First Day Initial Order, should the Court see fit to do so.

All of which is respectfully submitted this 31st day of March, 2020.

ERNST & YOUNG INC.

Solely in its role as proposed Court-appointed Monitor of CannTrust Holdings Inc., CannTrust Inc., CTI Holdings (Osyoos) Inc. and Elmcliffe Investments Inc., and not in its personal or corporate capacity

per:



**Alex Morrison, CPA, CA
Senior Vice President**

TAB 13

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS)
INC. AND ELMCLIFFE INVESTMENTS INC.

SECOND REPORT OF THE MONITOR

Dated May 4, 2020

INTRODUCTION

1. On March 31, 2020, CannTrust Holdings Inc. ("**CannTrust Holdings**"), CannTrust Inc., CTI Holdings (Osoyoos) Inc. and Elmclyffe Investments Inc. (each an "**Applicant**" and, collectively, the "**Applicants**" or "**CannTrust**") brought an application before this Court seeking an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**") to, among other things, obtain a stay of proceedings to allow them an opportunity to restructure their business and affairs.
2. On March 31, 2020 (the "**Filing Date**"), the Court granted an initial order (the "**Initial Order**") in these proceedings (the "**CCAA Proceedings**") that, among other things, appointed Ernst & Young Inc. as monitor of the Applicants (in such capacity, the "**Monitor**"), approved a stay of proceedings until and including April 9, 2020 (the "**Stay Period**"), granted certain Court-ordered charges, and approved FTI Consulting Canada Inc. continuing to act as Chief Restructuring Officer (the "**CRO**") of the Applicants. In addition, the Initial Order granted a limited stay of proceedings during the Stay Period with

respect to O Cannabis We Stand on Guard For Thee Corporation, Cannatrek Ltd., Elmcliffe Investments [No. 2] Inc. and Cannabis Coffee and Tea Pod Company Ltd. staying any rights arising out of, related to, or triggered by the insolvency of any of the Applicants or the commencement of the CCAA Proceedings.

3. On April 9, 2020, the Court granted an order (the “**Amended and Restated Initial Order**”) that, amongst other things:
 - a) extended the Stay Period to July 5, 2020;
 - b) increased the maximum amount of each of the Administration Charge, the Directors’ Charge and the Intercompany Charge, as defined in the Initial Order;
 - c) approved Greenhill & Co. Canada Ltd. continuing to act as financial advisor (the “**Financial Advisor**”) of the Applicants and approved the Transaction Fee Charge (as defined in the Amended and Restated Initial Order);
 - d) approved a priority charge for the Transaction Fee (the “**Transaction Fee Charge**”);
and
 - e) approved a limited stay of proceedings in respect of various current and former directors, officers and employees of CannTrust, and the auditors, certain underwriters and certain selling shareholders (the “**Other Defendants**”) that are currently named, in addition to the Applicants, as defendants in the Canadian Class Actions, the Zola Action, the US Class Actions and the Construction Action (collectively, the “**Pending Litigation**”), all as defined in the initial affidavit of Greg Guyatt dated March 31, 2020 (the “**March 31 Guyatt Affidavit**”).

PURPOSE

4. The purpose of this second report of the Monitor (the “**Second Report**”) is to provide information to the Court on:
 - a) the Applicants’ activities since the Monitor’s first report dated April 7, 2020 (the “**First Report**”);
 - b) the Applicants’ proposed sales and investment solicitation process (the “**SISP**”);
 - c) the Applicants’ proposed claims procedure (the “**Claims Procedure**”);
 - d) the Applicants’ proposed mediation process (the “**Mediation Process**”); and
 - e) the Applicants’ receipts and disbursements for the period from April 6, 2020 to April 26, 2020 compared to the cash flow forecast appended as Appendix “**B**” to the First Report (the “**Cash Flow Forecast**”).

TERMS OF REFERENCE

5. In preparing this Second Report and making the comments herein, the Monitor has been provided with, and has relied upon, unaudited financial information, books and records prepared by the Applicants, discussions with management of the Applicants (“**Management**”), and information from other third-party sources (collectively, the “**Information**”). Except as described in this Second Report in respect of the Cash Flow Forecast and Variance Analysis:
 - (a) the Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited or otherwise attempted to verify the accuracy or completeness of such

information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards (“GAAS”) pursuant to the Chartered Professional Accountants Canada Handbook and, accordingly, the Monitor expresses no opinion or other form of assurance contemplated under GAAS in respect of the Information; and

- (b) some of the information referred to in this Second Report consists of forecasts and projections. An examination or review of the financial forecast and projections, as outlined in the Chartered Professional Accountants Canada Handbook, has not been performed.
- 6. Future oriented financial information referred to in this Second Report was prepared based on Management’s estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not ascertainable, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be significant.
 - 7. Unless otherwise indicated, the Monitor’s understanding of factual matters expressed in this Second Report concerning the Applicants and their business is based on the Information, and not independent factual determinations made by the Monitor.
 - 8. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian dollars.
 - 9. Unless otherwise specified, capitalized terms not defined herein are as defined the Amended and Restated Initial Order.

BACKGROUND

10. CannTrust was founded in 2013 and, prior to the partial suspension of its Cannabis Licences (as that term is defined below), was a licensed producer that supplied cannabis to the medical and adult-use recreational cannabis markets. The principal activities of CannTrust were the cultivation, processing, distribution, and sale of dried cannabis flower, cannabis soft gel capsules, and cannabis oil.
11. Anyone wishing to cultivate, process and/or sell cannabis in Canada must have a license from Health Canada to do so. In addition to issuing licences, Health Canada is responsible for ensuring compliance with, and enforcement of, the *Cannabis Act*, S.C. 2018, c-16 and the *Cannabis Regulations*, SOR/2018-144 (together, the “**Cannabis Legislation**”). CannTrust Inc., a wholly owned subsidiary of CannTrust Holdings, is a licensed producer of cannabis under the Cannabis Legislation, with production and processing facilities in Fenwick, Ontario (the “**Fenwick Facility**”) and Vaughan, Ontario (the “**Vaughan Facility**”). The licences issued in respect of the Fenwick Facility and the Vaughan Facility are referred to herein as the “**Cannabis Licences**” (each, a “**Cannabis Licence**”). As explained in the March 31 Guyatt Affidavit, CannTrust’s Cannabis Licences are currently under partial suspension.
12. CannTrust derived the majority of its revenue from the sale of medical cannabis to registered patients for medical use. By March 31, 2019, CannTrust had approximately 68,000 registered patients in Canada, which was among the top tier of Cannabis Licence holders by patient count. CannTrust also sold its product in the wholesale market to provincial distributors which ultimately supply the adult-use recreational market. As at March 31, 2019, wholesale revenue represented 32.5% of CannTrust’s total revenue.

13. In addition to its production and processing facilities in Ontario, CannTrust also owns 81 acres of land in British Columbia, through its wholly owned subsidiary CTI Holdings (Osoyoos) Inc., which was purchased with the intent to commence outdoor cannabis cultivation. CannTrust applied to Health Canada for a licence to plant and cultivate on these lands. CannTrust has not been informed of Health Canada's decision to date.
14. Prior to commencing these proceedings, CannTrust was listed on the Toronto Stock Exchange under the ticker TRST and the New York Stock Exchange under the ticker CTST.
15. All court documents and materials related to these CCAA Proceedings have been posted on the Monitor's website at www.ey.com/ca/canntrust (the "**Monitor's Website**").

UPDATE ON THE ACTIVITIES OF THE APPLICANTS

16. On February 14, 2020, CannTrust submitted a comprehensive package to Health Canada evidencing that it had completed the remediation plan for the Fenwick Facility and requested the reinstatement of its Cannabis Licence for the Fenwick Facility. CannTrust has since received and responded to questions from Health Canada regarding the remediation and is awaiting Health Canada's decision regarding reinstatement.
17. On April 17, 2020, CannTrust submitted a comprehensive package to Health Canada evidencing that it had completed the remediation plan for the Vaughan Facility and requested the reinstatement of its Cannabis Licence at that location as well. CannTrust is awaiting Health Canada's decision regarding reinstatement.

18. Since the First Report, the Applicants have focused on continuing activities to reinstate their Cannabis Licenses. As part of this preparation, the Applicants have considered their existing organization structure and future personnel requirements to develop a more effective structure and reviewed existing contractual agreements. The Applicants' operations have been stabilized, and there has been no significant disruption to the business as of the date of this Second Report.
19. The Applicants have been able to negotiate with their vendors and, when applicable, have brought certain vendors forth to the Monitor for consultation and approval of that vendor being paid amounts owing for goods or services supplied prior to the Filing Date on the basis that the supplier is critical to the ongoing operations of the Applicants and such payment was required to ensure continued supply. To date, the Monitor has approved such critical supplier payments totalling approximately \$20,000.
20. On April 8, 2020, the Monitor was made aware that the Ontario Securities Commission (the "**OSC**") intended to issue a cease trade order with respect to the securities of CannTrust Holdings (the "**Cease Trade Order**") and was asked by the OSC if the Monitor had any issues regarding the imposition of the Cease Trade Order. After consulting with the Applicants and their counsel, and considering the provisions of the Initial Order which approved the decision by CannTrust Holdings to incur no further expenses to cure its disclosure defaults under applicable securities legislation, the Monitor indicated to the OSC that it did not have issues with respect to the imposition of the Cease Trade Order.

21. On April 13, 2020, the Cease Trade Order was issued by the OSC, and received by CannTrust Holdings, as a result of CannTrust Holdings' failure to file certain periodic disclosure required by Ontario securities legislation.
22. On April 28, 2020, the Monitor received notice from the United States Financial Industry Regulatory Authority ("**FINRA**") that a trading symbol "CNTTQ" has been assigned to the Applicants' common shares by FINRA's Department of Market Operations effective April 14, 2020 and that the common shares may be quoted and traded in the market for unlisted securities (i.e., the "over-the-counter market") in the United States.

SUMMARY OF THE PROPOSED SALE AND INVESTMENT SOLICITATION PROCESS

23. The Applicants, in consultation with the CRO, the Financial Advisor and the Monitor, have developed the SISP to explore both sale and recapitalization options for all or part of CannTrust's assets and business operations. As the Financial Advisor has familiarity with the business and transaction options available to the Applicants, the SISP contemplates that the Financial Advisor will be primarily responsible for carrying out the SISP, in consultation with the Monitor.
24. A summary of the proposed SISP is set out below. Reference should be made to the complete text contained in an appendix to the order contained at Tab 3 to the Motion Record of the Applicants dated May 1, 2020 (the "**SISP Order**"), which is reproduced herein as Appendix "A" to this Second Report. In this section, capitalized terms not otherwise defined herein are as defined in the proposed SISP Order.

25. The timeline of events relating to the proposed SISP are as follows:

Milestone	Deadline
The Applicants will arrange for notice of the SISP (the “ SISP Notice ”) to be published in the Globe and Mail (National Edition) and any other publication it considers appropriate; and issue a press release containing similar information as the Notice (the “ SISP Press Release ”).	No later than May 15, 2020
The Financial Advisor will send the Teaser Letter (as defined below) and a non-disclosure agreement (the “ NDA ”) to all Known Potential Bidders (as defined below). The Monitor will post the SISP Notice, the SISP Press Release, the Teaser Letter and the NDA on the Monitor’s Website.	No later than May 20, 2020
Phase 1 Bid Deadline	June 22, 2020 (5:00 pm Eastern Time)
The Financial Advisor will send the Bid Process Letter (the “ Phase 2 Bid Process Letter ”) to Phase 2 Qualified Bidders, and it will be posted by the Monitor on the Monitor’s Website	Sent to all Phase 2 Qualified Bidders after June 22, 2020
Phase 2 Bid Deadline	To be specified in Phase 2 Bid Process Letter
Outside Closing Date	To be specified in Phase 2 Bid Process Letter

Overview of the SISP

26. The Applicants have proposed a flexible SISP, designed to maximize the opportunities for sale of, or investment in, all or part of the Applicants' assets and business operations (the "**Opportunity**"). These opportunities may include one or more of a restructuring, recapitalization or other form or reorganization of the business and affairs of the Applicants as a going concern, or a sale of all, substantially all or one or more components of the Applicants' assets (the "**Property**") and business operations (the "**Business**"), as a going concern or otherwise.
27. The Applicants, with the assistance of the Financial Advisor, and in consultation with the Monitor, will develop a list of potential bidders (the "**Known Potential Bidders**"). This list will include local and international strategic and financial parties, parties that have previously shown interest in transacting with the Applicants, and any other parties suggested by a stakeholder as a potential bidder, if reasonable.

Notice

28. To advertise the Opportunity, the Applicants will send out the SISP Press Release, publish the SISP Notice in the Globe and Mail (National Edition) and any other publication that is appropriate; and post the SISP Notice and the SISP Press Release on the Monitor's Website, no later than May 15, 2020.
29. The Financial Advisor and the Applicants, in consultation with the Monitor, will also develop preliminary materials regarding the Opportunity (the "**Teaser Letter**") that will be sent to all Known Potential Bidders no later than May 20, 2020, inviting them to participate in the SISP, as well as a form of NDA.

30. The Monitor will post the SISP Notice, the SISP Press Release, the Teaser Letter and the form of NDA on the Monitor's Website.

Phase 1

31. Potential bidders will be required to submit an NDA (if currently subject to an NDA that has not expired, a new NDA is not required) and any such additional information that will allow the Applicants and the Financial Advisor, in consultation with the Monitor, to determine if such potential bidder is likely to be able to consummate a potential transaction based on the availability of financing, experience and other considerations to allow the potential bidder to continue through the process. If the potential bidder is determined to meet these criteria, such potential bidder will be deemed to be "**Phase 1 Qualified Bidder**".
32. The Financial Advisor, with the assistance of the Applicants, and in consultation with the Monitor, will prepare and send each Phase 1 Qualified Bidder a confidential information package (the "**Confidential Information Package**"), which contains additional information regarding the Applicants that is relevant to the Opportunity.
33. CannTrust, in consultation with the Financial Advisor and the Monitor, reserves the right to limit any Phase 1 Qualified Bidder's access to any confidential information (including any information in the Confidential Information Package or a data room) and to customers and suppliers of CannTrust, where, in CannTrust's opinion after consultation with the Financial Advisor and the Monitor, such access could negatively impact the SISP, the ability to maintain the confidentiality of the confidential information, the Business or the Property.

34. Phase 1 Qualified Bidders that wish to pursue the Opportunity shall deliver a non-binding letter of interest by the Phase 1 Bid Deadline which, to be considered a qualified letter of interest (a “**Qualified LOI**”), must, among other criteria which are detailed in the SISP, indicate whether the offer is to acquire all, substantially all or a portion of the Property, or make an investment in, recapitalization, arrangement or other form of investment in or reorganization of the Business or the Applicants.
35. The Applicants and the Financial Advisor, in consultation with the Monitor, may waive compliance with any of the requirements and deem a non-compliant bid to be a Qualified LOI.

Phase 2

36. Qualified LOIs received by the Phase 1 Bid Deadline will be reviewed by the Financial Advisor and the Applicants, in consultation with the Monitor, to determine if they should be deemed “**Phase 2 Qualified Bidders**”. The Applicants have the right under the SISP to limit the number of Phase 2 Qualified Bidders, taking into account certain factors enumerated in paragraph 16 of the SISP Order. If the Applicants and the Financial Advisor determine that a bidder who submits a Qualified LOI shall not be deemed a Phase 2 Qualified Bidder, the Monitor must approve such decision.
37. The Applicants and the Financial Advisor, in consultation with and with the approval of the Monitor, will determine the manner in which to proceed in Phase 2 of the SISP, and a letter outlining the second phase of the SISP, (the “**Bid Process Letter**”) will be sent to all Phase 2 Qualified Bidders and posted on the Monitor’s Website.

38. Phase 2 Qualified Bidders will have the opportunity to conduct further due diligence relating to the Property and Business during this period. Access to further materials and information relating to the Business and Property shall be granted on the reasonable business judgment of the Applicants and the Financial Advisor, in consultation with the Monitor, subject to competitive and other business considerations.
39. Phase 2 Qualified Bidders that wish to make a formal offer to purchase or make an investment in CannTrust or its Property and Business shall submit a binding offer that complies with all of the requirements indicated in the SISP prior to the date set out the Bid Process Letter (the “**Phase 2 Bid Deadline**”).

Formal Binding Offers and Selection of the Successful Bid

40. The Applicants and the Financial Advisor, in consultation with the Monitor, will review and assess all the Phase 2 bids received and will designate the most competitive of those bids to be “**Qualified Bids**”. No Phase 2 bids received shall be deemed not to be Qualified Bids unless the Monitor so approves. All Phase 2 Qualified Bidders which have submitted a formal bid by the Phase 2 Bid Deadline will receive notice in writing as to whether their bid is a Qualified Bid within ten business days of the Phase 2 Bid Deadline.
41. The Applicants and the Financial Advisor, in consultation with the Monitor, have the ability to negotiate with the Phase 2 Qualified Bidders, and will determine the highest or otherwise best bid (the “**Successful Bid(s)**”) and the bidder (such bidder, the “**Successful Bidder**”).

42. A closing date has not been determined at this point but will be determined and outlined in the Bid Process Letter.
43. The Successful Bid and any transaction arising therefrom are subject to approval of the Court. All other Phase 2 Qualified Bids other than the Successful Bid(s), if any, shall be deemed rejected by the Applicants on and as at the date of approval of the Successful Bid(s) by the Court.

Monitor's Involvement in the SISP

44. As noted above, the Monitor was consulted in designing the SISP and will be involved throughout the SISP, including having certain approval rights in respect of steps taken therein.
45. The Monitor will participate in the conduct of the SISP in the manner set out in the SISP and is entitled to receive all information in relation to the SISP.
46. The Applicants will have the right to modify the SISP with the prior written approval of the Monitor if, in their reasonable business judgement, such modification will enhance the process or better achieve the objectives of the SISP; provided that the CCAA service list will be advised of any substantive modification. The Monitor is of the view that this flexibility is appropriate to ensure the best possible outcome from the SISP.
47. The Monitor also notes that the SISP provides that, notwithstanding the process and deadlines set out in the SISP, the Applicants may, in consultation with the Financial Advisor, at any time bring a motion to seek approval of a stalking horse agreement in

respect of some or all of the Property or Business and related bid procedures in respect of such Property or to establish further or other procedures for Phase 2.

Monitor's Comments on the SISP

48. The Monitor is of the view that the proposed SISP is well-structured and will provide for a robust opportunity to canvass sale, restructuring and recapitalization options for the benefit of the Applicants and their creditors and other stakeholders. The Monitor believes it is appropriate for the SISP to be undertaken at this time as the Applicants continue to progress through the Health Canada review process.
49. Some of the key benefits of the proposed SISP can be summarized as follows:
 - a) the proposed SISP allows for ample notice of the Opportunity, as the process allows for the Applicants to canvass known bidders and notice will be published in a major daily newspaper and via a press release to generate interest amongst a broad base of potential bidders and interested parties;
 - b) the SISP provides bidders with the ability to indicate their initial interest in a non-binding manner in Phase 1 and then complete further due diligence to understand the Applicants and its assets and business and determine whether to proceed further with a Phase 2 bid;
 - c) the assessment of the current market at this time will afford the Applicants the ability to pivot their approach in response to changing circumstances surrounding the timing of the reinstatement of the Cannabis Licences and the impact of COVID-19. The proposed SISP provides the flexibility to develop the details of the Phase 2 process and the Bid Process Letter once the level of interest is known after the completion of Phase 1;

- d) the SISP is appropriately managed by the Applicants and the Financial Advisor, subject to consultation with and, in some cases, the approval of the Monitor, and subject to the ultimate oversight and supervision of the Court; and
- e) the factors to be considered in arriving at a Successful Bid(s) are appropriate in the circumstances.

PROPOSED CLAIMS PROCEDURE

- 50. This Second Report summarizes the material terms of the Claims Procedure, the full text of which is contained in the order contained at Tab 4 to the Motion Record of the Applicants dated May 1, 2020 (the “**Claims Procedure Order**”). In this section, capitalized terms not otherwise defined herein are as defined in the proposed Claims Procedure Order.
- 51. The Claims Procedure establishes a procedure for the submission of claims against any of the Applicants and the Directors and Officers of the Applicants, by filing a proof of claim (a “**Proof of Claim**”) except for claims that have been explicitly excluded (such claims, the “**Excluded Claims**”).
- 52. The Applicants will provide the Monitor with a list of known potential Claimants (the “**Known Claimants**”) based on its books and records. The Monitor will then send a Claims Package to:
 - a) each of the Claimants on the list of Known Claimants within five Business Days of the issuance of the Claims Procedure Order, if granted;
 - b) each Claimant with a Restructuring Claim (as that term is defined below), no later than five Business Days following the time the Monitor becomes aware of the existence of the event that might give rise to a Restructuring Claim; and

- c) each Claimant that requests a copy of the Claims Package or related documents.
53. The Claims Package will contain the Proof of Claim form, the Notice to Claimants, the Instruction Letter, and any other documentation the Applicants, in consultation with the Monitor, deems appropriate.
54. The Monitor will publish the Notice to Claimants in the Globe and Mail (National Edition) by no later than May 14, 2020.
55. The Notice to Claimants and the claims package will be posted on the Monitor's Website as soon as possible following of the issuance of the Claims Procedure Order, if granted, and will remain on the Monitor's Website until the Monitor's discharge as Monitor of the Applicants.
56. The Notice to Claimants, Claims Package and other documents relevant to the Claims Procedure are attached as schedules to the Claims Procedure Order and, as such, are not attached to this Second Report.
57. The Claims, whether secured or unsecured, to be called for through the Claims Procedure are, as more specifically outlined in the Claims Procedure Order:
- a) Claims arising prior to the Filing Date, (each a "**Pre-Filing Claim**");
 - b) Claims arising on or after the Filing Date in connection with any indebtedness, liability or obligation of any kind arising out of the repudiation or disclaimer of any contract lease, employment agreement or other agreement by the Applicants, (each a "**Restructuring Claim**"); and
 - c) Pre-filing Claims and Restructuring Claims against one or more of the Directors or Officers for which the Directors or Officers are by statute or otherwise by law liable to

pay in their capacity as Directors or Officers (each a “**D&O Claim**”) but does not include a claim that cannot be compromised due to the provisions of subsection 5.1(2) of the CCAA.

58. The following are Excluded Claims from the Claims Procedure:

- a) any Equity Claims, against or in respect of CannTrust Holdings, or its Directors or Officers, including for greater certainty; (i) any claims against or in respect of CannTrust Holdings or its Directors or Officers in the Pending Litigation; and (ii) any claims of a Director or Officer or any other Person for contribution or indemnity from CannTrust Holdings in respect of the Pending Litigation or an Equity Claim;
- b) any claim secured by any of the CCAA Charges; and
- c) any investigation, action, suit, order or proceeding in respect of the Applicants by or before a regulatory body (as defined in the CCAA), unless such investigation, action, suit order or proceeding constitutes a “claim” within the meaning of the CCAA.

59. Persons holding an Excluded Claim are not required to file a Proof of Claim for such Excluded Claim. The Applicants may apply to Court for a further Order in respect of such Excluded Claims. As detailed below, the Applicants are seeking approval of the Mediation Process in connection with certain of the Excluded Claims.

60. For further clarity, even though the Construction Action is included in the definition of “Pending Litigation”, claims related to the Construction Action are not an Excluded Equity Claim and may be proved as part of the Claims Procedure.

61. Proofs of Claim in respect to Pre-Filing Claims must be received by the Monitor by 5:00 p.m. (Eastern Time) on June 22, 2020 (the “**Pre-Filing Claims Bar Date**”) unless this Court orders that the Proof of Claim be accepted after that date, failing which that creditor

will be forever barred from advancing a claim against the Applicants. Any creditor asserting a Restructuring Claim must file a Proof of Claim by the later of (i) the Pre-Filing Claims Bar Date; and (ii) 5:00 p.m. (Eastern Time) on the day which is thirty (30) days after the Monitor sends a Claims Package with respect to a Restructuring Claim.

62. The Monitor and the Applicants (and in the case of a D&O Claim, in consultation with counsel to the Directors and Officers and the respective Directors or Officers, if applicable) will review all Proofs of Claim filed in accordance with the Claims Procedure and may accept (in whole or in part) or revise or disallow (in whole or in part) the amount and/or secured or unsecured status of any Claim and will notify the Claimant of such decision in writing. In the case of a revision or disallowance, such notice will be in the form of a Notice of Revision or Disallowance.
63. Any Claimant that wishes to dispute a Notice of Revision or Disallowance will be required to deliver a Dispute Notice to the Applicants, with a copy to the Monitor, within 14 days after the Claimant is deemed to have received the Notice of Revision or Disallowance.
64. The Applicants and the Monitor (and in the case of a D&O Claim, with counsel to the Directors and Officers and the respective Directors or Officers, if applicable), may attempt to consensually resolve the amount and/or status of any Claim subject to a Dispute Notice. If a resolution cannot be reached, the Claim will be adjudicated by the Court or by a claims officer to be agreed upon by the parties or appointed by the Court, if considered appropriate.

Monitor's Comments on the Claims Process

65. The Monitor has been consulted during the development of the Claims Procedure and is of the opinion that the proposed process is broadly consistent with claims procedure orders issued in similar CCAA proceedings and will provide creditors with a fair opportunity to assert their claims against the Applicants.
66. The Monitor believes it is appropriate for the Claims Procedure to be undertaken at this time in order to enable the Applicants and the Monitor to identify, quantify and resolve potential Claims so that the Applicants can:
- a) assess the impact of the Claims with respect to a restructuring and plan of compromise and arrangement;
 - b) continue to progress through the restructuring process on a timely basis for the benefit of their stakeholders generally; and
 - c) understand and address potential Claims as they may impact the SISP.

MEDIATION PROCESS AND MEDIATION ORDER

67. This Second Report summarizes the material terms of the Mediation Process, the full text of which is contained in the order contained at Tab 5 to the Motion Record of the Applicants dated May 1, 2020 (the “**Mediation Order**”). In this section, capitalized terms not otherwise defined herein are as defined in the proposed Mediation Order.
68. CannTrust Holdings and certain of the Other Defendants are named as defendants in various actions which allege, among other things, that CannTrust Holdings made misrepresentations in its disclosure to investors. As of March 31, 2020, there are 14 actions, 13 of which are putative class actions, relating to these securities matters (the 14 actions, the “**Securities Actions**”), which are listed in Appendix “**B**” hereto. The Securities

Actions claim damages of at least \$500 million in the aggregate and are Excluded Claims under the proposed Claims Procedure Order.

69. The Applicants have previously noted that the CCAA Proceedings provide an opportunity to, among other things, address and resolve the Securities Actions, among other things, through a single forum. Further to this, the Applicants have developed the Mediation Process to appoint a neutral third party to mediate a global settlement of the Securities Actions and claims related thereto.
70. The Securities Actions are complex: they span multiple jurisdictions, have certain areas of overlap as among them, and name a multitude of defendants in addition to CannTrust Holdings. Further, certain of the Other Defendants may have claims for contribution and indemnity against CannTrust Holdings or against one another. In light of this complexity, the Applicants have determined that the best path forward in resolving any right, claim or dispute arising in or in relation to the Securities Actions, is the Mediation Process (such claims, the “**Mediation Claims**”).

Court-Appointed Mediator

71. The Applicants are seeking the appointment of the Hon. Dennis O’Connor, Q.C. as mediator in the Mediation Process (the “**Court-Appointed Mediator**”). Mr. O’Connor’s extensive experience and qualifications are detailed in the affidavit of Greg Guyatt sworn May 1, 2020 and therefore not repeated herein. The Monitor was consulted in respect of the proposed Court-Appointed Mediator and supports the appointment of Mr. O’Connor.

72. The Mediation Order provides that the Applicants will pay the reasonable fees and disbursements of the Court-Appointed Mediator on a monthly basis.

Mediation Process

73. The Mediation Order contemplates a flexible approach to the Mediation Process, granting the Court-Appointed Mediator the necessary powers to conduct the Mediation Process in the manner that he determines appropriate, including: the power to adopt processes he considers appropriate to facilitate negotiation of a global settlement; the power to consult with the stakeholders with Mediation Claims and other persons as he considers appropriate; and the ability to seek advice and directions from the Court as necessary.
74. The Mediation Order also contemplates a communication and confidentiality protocol between the Court, the Court-Appointed Mediator and the participants in the Mediation Process which will, among other things, protect the confidentiality of the Mediation Process and permit the coordination of the Mediation Process with the CCAA Proceedings.

Monitor's Comments on the Mediation

75. The Monitor is of the view that a global settlement of the Mediation Claims is in the best interests of the Applicants and their stakeholders, and that the terms of the Mediation Order provide for an appropriate process to advance such a settlement.

APPLICANTS' RECEIPTS AND DISBURSEMENTS

76. A summary of the Applicants' actual receipts and disbursements during the period from April 6, 2020 to April 26, 2020 (the "**Reporting Period**") as compared to the Cash Flow Forecast (the "**Variance Analysis**") is attached as Appendix "**C**" to this Second Report.

77. During the Reporting Period, the Applicants' operations generated a net cash outflow of approximately \$1.2 million. The receipt received is interest income and the disbursements relate mainly to payroll and employee related expenses, consulting fees, freight and logistics contract fees and rental expenses. As at April 26, 2020, the Applicants' cash on hand was approximately \$135 million. The Applicants have not needed any Intercompany Advances (as that term is defined in the Amended and Restated Initial Order) during the Reporting Period.
78. The favourable cash position variance for the Reporting Period of approximately \$3.6 million is a result of the delay in ramp up costs and favourable terms with vendors. Details of the differences, both permanent and timing differences are attached to the Variance Analysis.
79. Based on discussion with the Applicants and the CRO, the receipt and disbursements projection and assumptions in the Cash Flow Forecast are still consistent and valid. Therefore, the Applicants and the Monitor do not believe a revised cash flow forecast is required at this time.

CONCLUSIONS AND RECOMMENDATIONS

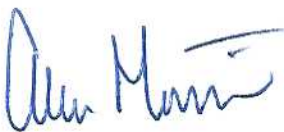
80. The SISP, the Claims Procedure and the Mediation Process will each allow CannTrust to begin the process of identifying the potential restructuring options to most effectively restructure CannTrust and to assess which options may be in the best interests of CannTrust and its stakeholders.

81. For the reasons stated herein, the Monitor recommends that the Court approve the Claims Procedure, Mediation Process and SISP and issue the related orders, should it see fit to do so.

All of which is respectfully submitted this 4th day of May, 2020.

**ERNST & YOUNG INC., in its capacity
as Monitor of the Applicants, and not in
its corporate or personal capacity.**

per:

A handwritten signature in blue ink, appearing to read "Alex Morrison", with a stylized flourish at the end.

**Alex Morrison, CPA, CA
Senior Vice President**

TAB 14

Court File No. CV-20-00638930-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
CANTRUST HOLDINGS INC., CANTRUST INC.,
CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.**

Applicants

**NOTICE OF MOTION
(Re: Sale and Investment Solicitation Process Order,
Claims Procedure Order and Mediation Order)
(Returnable May 8, 2020)**

The Applicants will make a motion before a judge of the Ontario Superior Court of Justice (Commercial List) on May 8, 2020 at 10:00 a.m. or as soon after that time as the motion can be heard by judicial videoconference via Zoom at Toronto, Ontario due to the COVID-19 emergency. Please refer to the conference details attached as Schedule "A" hereto in order to attend the motion and advise if you intend to join the motion by emailing Trevor Courtis at tcourtis@mccarthy.ca.

PROPOSED METHOD OF HEARING: This motion is to be heard orally.

THIS MOTION IS FOR:

- (a) an order (the "**Proposed SISP Order**"), substantially in the form of the draft order included at Tab 3 of the Motion Record of the Applicants (which, for ease of reference, will be referred to herein as "**CannTrust**") approving a sale and investment solicitation process for the purpose of soliciting interest in, and

opportunities for, a sale of or investment in the assets and business operations of CannTrust (the “**SISP**”);

- (b) an order (the “**Proposed Claims Procedure Order**”), substantially in the form of the draft order included at Tab 4 of the Motion Record of CannTrust, approving a claims procedure for the identification, quantification, and resolution of certain claims of creditors of CannTrust (the “**Claims Procedure**”);
- (c) an order (the “**Proposed Mediation Order**”), substantially in the form of the draft order included at Tab 5 of the Motion Record of CannTrust, appointing a neutral third party to mediate a global settlement of certain class action and other claims that have been excluded from the Claims Procedure for the time being (the “**Mediation Process**”); and
- (d) such further and other relief as counsel may request and this Court deems just.

1. All terms not otherwise defined herein have the meanings given to them in the Affidavit of Greg Guyatt, sworn May 1, 2020.

THE GROUNDS FOR THIS MOTION ARE:

Overview

- 2. CannTrust is a licensed producer of cannabis in Canada with production facilities in Fenwick and Vaughan, Ontario.
- 3. CannTrust commenced proceedings under the *Companies Creditors’ Arrangement Act*, (“**CCAA**”) and obtained an initial order on March 31, 2020 (as amended, the “**Initial**

Order”). The Initial Order appointed Ernst & Young Inc. to act as monitor (the “**Monitor**”), approved the agreement engaging FTI Consulting Canada Inc. to act as chief restructuring officer of CannTrust (the “**CRO**”), and approved the agreement engaging Greenhill & Co. Canada Ltd. to act as financial advisor to CannTrust (the “**Financial Advisor**”).

4. CannTrust has determined that it is appropriate at this time to commence court-supervised processes to identify potential sale or investment transactions (as a possible alternative to a standalone restructuring) while identifying, quantifying and resolving claims against CannTrust.

Proposed SISP Order

5. The SISP is intended to solicit interest in, and opportunities for, a sale of or investment in all or part of CannTrust’s assets and business operations.
6. The SISP includes a notification process and two phases to evaluate proposals from qualified interested bidders. The key milestones and deadlines under the SISP are:
 - (a) Implementation of Notification Process: May 20, 2020;
 - (b) Phase 1 Bid Deadline: June 22, 2020; and
 - (c) Phase 2 Bid Deadline: To be specified in the Bid Process Letter to be provided by the Financial Advisor to Phase 2 Qualified Bidders.
7. The notification process includes, among other things:

- (a) CannTrust publishing the SISP Notice in The Globe and Mail (National Edition), and any other publications considered appropriate, and issuing the SISP Press Release, in each case by May 15, 2020;
 - (b) the Financial Advisor sending the Teaser Letter and NDA to all Known Potential Bidders by May 20, 2020; and
 - (c) the Monitor posting the SISP Notice, the SISP Press Release, the Teaser Letter and the NDA on the Monitor's Website.
8. Phase 1 of the SISP includes, among other things:
- (a) potential bidders expressing their interest in potentially pursuing the SISP opportunity by delivering, among other things, an executed NDA;
 - (b) CannTrust and the Financial Advisor identifying which potential bidders will be Phase 1 Qualified Bidders;
 - (c) the Financial Advisor sending a Confidential Information Package regarding the SISP opportunity to each Phase 1 Qualified Bidders; and
 - (d) the delivery of non-binder letters of interest by Phase 1 Qualified Bidders such that they are received by the Financial Advisor by the Phase 1 Bid Deadline which is 5:00 p.m. EST on June 22, 2020; and
 - (e) the letters of interest will be assessed by CannTrust and the Financial Advisor, in consultation with the Monitor, to determine whether they are Qualified LOIs and whether the bidder will be deemed a Phase 2 Qualified Bidder.
9. Phase 2 of the SISP includes, among other things:

- (a) CannTrust and the Financial Advisor, in consultation with and with the approval of the Monitor, will determine the process and timing to be followed for proceeding to Phase 2 of the SISP and will prepare the Bid Process Letter for Phase 2;
 - (b) the Bid Process Letter will be sent by the Financial Advisor to all Phase 2 Qualified Bidders and posted by the Monitor on the Monitor's Website;
 - (c) the delivery of binding offers by Phase 2 Qualified Bidders such that they are received by the Financial Advisor by the Phase 2 Bid Deadline specified in the Bid Process Letter; and
 - (d) following the Phase 2 Bid Deadline, CannTrust and the Financial Advisor, in consultation with the Monitor, will assess the bids and designate the most competitive bids that comply with the requirements in the SISP to be Qualified Bids.
10. The Qualified Bids will be reviewed by CannTrust and the Financial Advisor, in consultation with the Monitor, and a Successful Bid for any particular Property or the Business in whole or part may be identified. CannTrust will subsequently seek the approval of this Court to consummate the transactions with the Successful Bidder contemplated by the Successful Bid.
11. The SISP was developed by CannTrust in consultation with the Financial Advisor, the Monitor and the CRO. The SISP is designed to assist in maximizing value for stakeholders in light of the variety of transactional structures which may be proposed in letters of interest or formal offers from interested parties, and to accommodate external factors such as

regulatory process timelines, market uncertainty and any other concurrent cannabis industry sales processes.

12. It is appropriate to initiate the SISP at this time as it will allow a sufficient opportunity for CannTrust to secure the best possible transaction for the benefit of CannTrust and its stakeholders.

Proposed Claims Procedure Order

13. CannTrust is seeking to commence the Claims Procedure in order to ascertain the universe of claims that may exist against CannTrust and the directors and officers of CannTrust other than certain Excluded Equity Claims which will be subject to the Proposed Mediation Order.
14. The notification process includes, among other things:
 - (a) A Claims Package will be sent to each of the Known Claimants within five Business Days of the date of the Claims Procedure Order;
 - (b) A Claims Package will be sent to each Claimant with a Restructuring Claim no later than five Business Days following the time the Monitor actually becomes aware of the effective date of a restructuring, disclaimer, resiliation or termination of any lease, contract or other agreement or obligation;
 - (c) The Notice to Claimants will be published for at least one Business Day in the Globe and Mail (National Edition) by May 12, 2020;
 - (d) The Monitor will post the Notice to Claimants, Claims Package and Claims Procedure Order on the Monitor's Website.

15. The following are the bar dates established by the Proposed Claims Procedure Order for the various Claims:
 - (a) Pre-Filing Claims: 5:00 p.m. (Eastern Time) on June 22, 2020;
 - (b) D&O Claims: 5:00 p.m. (Eastern Time) on June 22, 2020;
 - (c) Restructuring Claims: 5:00 p.m. (Eastern Time) on the later of: (i) the Pre-Filing Claims Bar Date; and (ii) the day which is 30 days after the Monitor sends a Claims Package with respect to a Restructuring Claim to the Claimant.
16. The Monitor and CannTrust will review the Proofs of Claim filed in accordance with the Proposed Claims Procedure Order and may, among other things, accept, revise or disallow (in whole or in part) the amount and/or Status of any Claim.
17. A Claimant that intends to dispute a Notice of Revision or Disallowance is required to deliver a Notice of Dispute to CannTrust, with a copy to the Monitor, by 5:00 p.m. (Eastern Time) on the day that is 14 days after the Claimant is deemed to have received the Notice of Revision or Disallowance.
18. A Notice of Dispute may be resolved either (i) consensually by CannTrust, the Monitor and the applicant Claimant, (ii) by referring the dispute to a Claims Officer, to be appointed by agreement between the parties or by the Court, or (iii) by the Court.
19. The Claims Procedure contemplated in the Proposed Claims Procedure Order has been developed by CannTrust with input from the Monitor and the CRO.
20. The Claims Procedure will provide sufficient notice to known and unknown potential Claimants and an adequate opportunity to prove their Claims prior to Pre-Filing Claims

Bar Date or the Restructuring Claims Bar Date, as applicable. The adjudication procedure will facilitate the fair and expeditious resolution of any disputes regarding the Status and/or amount of each Claim. and is a fair and reasonable method of determining the potential distribution rights of creditors of CannTrust.

Proposed Mediation Order

21. CannTrust is seeking the appointment of the Hon. Dennis O'Connor, Q.C. (the "**Court-Appointed Mediator**") as an officer of the Court, acting as an independent and neutral third party to mediate a global settlement of certain class action and other claims against CannTrust Holdings Inc. ("**CannTrust Holdings**").
22. CannTrust Holdings and the Other Defendants were named as defendants in the Securities Actions. As a result of the complexity and overlapping nature of the claims related to the Securities Actions, CannTrust has determined that it would be preferable to work towards a global resolution of these claims through the Mediation Process.
23. The Court-Appointed Mediator has significant experience and expertise in resolving significant and complex class action and commercial disputes.
24. The Proposed Mediation Order provides the Court-Appointed Mediator with the necessary powers to conduct the Mediation Process in the manner that he determines will best allow him to carry out his mandate of achieving a global settlement of the Mediation Claims.
25. The Proposed Mediation Order also establishes an appropriate communication and confidentiality protocol between the Court, the Court-Appointed Mediator and participants in the Mediation Process.

26. The prompt resolution of the Mediation Claims is in the best interests of CannTrust, the holders of Mediation Claims and other stakeholders of CannTrust as it will assist CannTrust in proceeding with a plan of compromise or arrangement following the completion of the SISP and the Claims Procedure.
27. CannTrust also relies on:
- (a) the provisions of the CCAA and the inherent and equitable jurisdiction of this Court;
 - (b) Rules 2.03, 3.02, 16, 38 and 57 of the *Rules of Civil Procedure*, RRO 1990, Reg 194;
 - (c) such further and other grounds as counsel for the Applicants may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING
OF THE MOTION:**

- (d) The affidavit of Greg Guyatt, sworn May 1, 2020;
- (e) the Second Report of the Monitor, to be filed; and
- (f) such further and other materials as counsel may advise and this Court may permit.

May 1, 2020

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Lawyers for the Applicants

TO: SERVICE LIST

SCHEDULE “A”**Conference Details to join Motion via Zoom**

Join Zoom Meeting:

<https://zoom.us/j/91942308879?pwd=SmNGZ051anUxWFBENXpwQXFXTG1yUT09>

Meeting ID: 919 4230 8879

Password: 998659

One tap mobile

+16473744685,,91942308879#,,1#,998659# Canada

Dial by your location

+1 587 328 1099 Canada
+1 647 374 4685 Canada
+1 647 558 0588 Canada
+1 778 907 2071 Canada
+1 438 809 7799 Canada
+1 346 248 7799 US (Houston)
+1 669 900 6833 US (San Jose)
+1 929 205 6099 US (New York)
+1 253 215 8782 US (Tacoma)
+1 301 715 8592 US (Germantown)
+1 312 626 6799 US (Chicago)

TAB 15



Court File No. CV-19-616779-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)	THURSDAY, THE 25 th
)	
MR. JUSTICE MCEWEN)	DAY OF APRIL, 2019

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
ROTHMANS, BENSON & HEDGES INC.**

Applicant

ORDER

THIS MOTION, made by Rothmans, Benson & Hedges Inc. (the "**Applicant**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Applicant dated March 28, 2019, the affidavit of Peter Luongo sworn March 22, 2019 (the "**Initial Order Affidavit**"), the affidavit of Peter Luongo sworn March 28, 2019 and the exhibits thereto (the "**Luongo Affidavit**"), the Pre-Filing Report of Ernst & Young Inc. in its capacity as the proposed Monitor of the Applicant (the "**Monitor**"), the First Report of the Monitor, and on hearing the submissions of counsel for the Applicant, the Monitor, and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Sonia Antonellis dated March 29, 2019 and the affidavit of service of Emilia Moon-de Kemp dated April 3, 2019.

1. **THIS COURT ORDERS** that the time for service and filing of this motion is hereby abridged and validated such that the motion is properly returnable today and hereby dispenses with further service thereof.

APPROVAL OF SECOND AMENDED AND RESTATED INITIAL ORDER

2. **THIS COURT ORDERS AND DECLARES** that the order of Pattillo J. dated March 22, 2019 (the “**Initial Order**”) as amended and restated on April 5, 2019, is hereby amended and restated in the form attached hereto as Schedule “A”.



ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

APR 26 2019

PER / PAR: *RW*

Schedule "A"

See attached.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)	FRIDAY, THE 22 ND
)	
JUSTICE PATTILLO)	DAY OF MARCH, 2019

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
ROTHMANS, BENSON & HEDGES INC.**

Applicant

SECOND AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by Rothmans, Benson & Hedges Inc. (the "**Applicant**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING (i) the affidavit of Peter Luongo sworn March 22, 2019 and the exhibits thereto (the "**Luongo Affidavit**") and (ii) the pre-filing report dated March 22, 2019 of Ernst & Young Inc. ("**EYI**") in its capacity as the proposed Monitor of the Applicant, and on hearing the submissions of counsel for the Applicant and EYI, and on reading the consent of EYI to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that the Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the “**Plan**”).

DEFINITIONS

4. **THIS COURT ORDERS** that for purposes of this Order:
- (a) “**Deposit Posting Order**” means the order of the Court of Appeal of Quebec granted October 27, 2015 and any other Order requiring the posting of security or the payment of a deposit in respect of the Quebec Class Actions;
 - (b) “**Pending Litigation**” means any and all actions, applications and other lawsuits existing at the time of this Order in which the Applicant is a named defendant or respondent (either individually or with other Persons (as defined below)) relating in any way whatsoever to a Tobacco Claim, including, without limitation, the Quebec Class Actions, the Class Actions, the Health Care Actions, the Tobacco Growers’ Action and the Individual Actions (as each of those terms is defined in the Luongo Affidavit);

- (c) **“PMI Group”** means Philip Morris International Inc. and all entities related to or affiliated with it, other than the Applicant;
- (d) **“Quebec Class Actions”** means the proceedings in the Quebec Superior Court and the Court of Appeal of Quebec in (i) *Cécilia Létourneau et al. v. JTI-Macdonald Corp., Imperial Tobacco Canada Limited and Rothmans, Benson & Hedges Inc.* and (ii) *Conseil Québécois sur le Tabac et la Santé and Jean-Yves Blais v. JTI-Macdonald Corp., Imperial Tobacco Canada Limited and Rothmans, Benson & Hedges Inc.* and all decisions and orders in such proceedings, including, without limitation, the Deposit Posting Order;
- (e) **“Sales & Excise Taxes”** means all goods and services, harmonized sales or other applicable federal, provincial or territorial sales taxes, and all federal excise taxes and customs and import duties and all federal, provincial and territorial tobacco taxes;
- (f) **“Tobacco Claim”** means any right or claim (including, without limitation, a claim for contribution or indemnity) of any Person against or in respect of the Applicant or any member of the PMI Group that has been advanced (including, without limitation, in the Pending Litigation), that could have been advanced or that could be advanced, and whether such right or claim is on such Person’s own account, on behalf of another Person, as a dependent of another Person or on behalf of a certified or proposed class or made or advanced as a government body or agency, insurer, employer or otherwise, under or in connection with:
 - (i) applicable law, to recover damages in respect of the development, manufacture, production, marketing, advertising, distribution, purchase or sale of Tobacco Products, the use of or exposure to Tobacco Products or any representation in respect of Tobacco Products, in Canada or, in the case of the Applicant, anywhere else in the world; or
 - (ii) the HCCR Legislation (as defined in the Luongo Affidavit),

excluding any right or claim of a supplier relating to goods or services supplied to, or the use of leased or licensed property by, the Applicant or any member of the PMI Group; and

- (g) **“Tobacco Products”** means tobacco or any product made or derived from tobacco or containing nicotine that is intended for human consumption, including any component, part, or accessory of or used in connection with a tobacco product, including cigarettes, cigarette tobacco, roll your own tobacco, smokeless tobacco, electronic cigarettes, vaping liquids and devices, heat-not-burn tobacco, and any other tobacco or nicotine delivery systems and shall include materials, products and by-products derived from or resulting from the use of any tobacco products.

POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Applicant shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the **“Property”**). Subject to further Order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the **“Business”**) and Property. The Applicant is authorized and empowered to continue to retain and employ the employees, independent contractors, consultants, agents, experts, accountants, counsel and such other persons (collectively **“Assistants”**) currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business, to preserve the value of the Property or the Business, or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Applicant shall be entitled to continue to utilize the bank accounts currently used by it as described in the Luongo Affidavit and to use or replace them with other accounts from time to time for similar purposes (the **“Bank Accounts”**) and that any present or future bank providing the Bank Accounts and related services (**“Banking Services”**) shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken to, from or with the Bank Accounts, or as to the use or application by the Applicant of funds transferred, paid, collected or

otherwise dealt with in or to the Bank Accounts, shall be entitled to provide Banking Services without any liability in respect thereof to any Person other than the Applicant, pursuant to the terms of the documentation applicable to the Bank Accounts and Banking Services, and shall be, in its capacity as provider of the Bank Accounts and Banking Services, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Bank Accounts and Banking Services.

7. **THIS COURT ORDERS** that the Applicant shall be entitled but not required to pay the following expenses whether incurred prior to, on or after the date of this Order:

- (a) all outstanding and future wages, salaries, commissions, compensation, vacation pay, bonuses, incentive plan payments, employee and retiree pension and other benefits and related contributions and payments (including, without limitation, expenses related to employee and retiree medical, dental, disability, life insurance and similar benefit plans or arrangements, employee assistance programs and contributions to or any payments in respect of the Registered Pension Plans, the Non-Registered Pension Plans and the RRSP (each as defined in the Luongo Affidavit)), reimbursement expenses (including, without limitation, amounts charged to corporate credit cards), termination pay, salary continuance and severance pay, all of which is payable to or in respect of employees, independent contractors and other personnel, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements or with Monitor approval;
- (b) the fees and disbursements of any Assistants retained or employed by the Applicant at their standard rates and charges;
- (c) any payment under or in respect of any Trade Program (as defined in the Luongo Affidavit) operated by the Applicant; and
- (d) any expense that was incurred during or that pertains to the period prior to the date of this Order if, in the opinion of the Applicant and with the consent of the Monitor, the applicable payee or the payment of such expense is necessary or desirable for the

preservation of the Business or the Property or the ongoing operations of the Applicant.

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;
- (b) capital expenditures other than as permitted in clause (a) above to replace or supplement the Property or that are otherwise of benefit to the Business, provided that Monitor approval is obtained for any single such expenditure in excess of \$1,000,000 or an aggregate of such expenditures in a calendar year in excess of \$10,000,000; and
- (c) payment for goods or services supplied or to be supplied to the Applicant on or after the date of this Order (including the payment of any royalties or shared services).

9. **THIS COURT ORDERS** that the Applicant is authorized to complete outstanding transactions and engage in new transactions with the members of the PMI Group and to continue, on and after the date hereof, to buy and sell goods and services and to allocate, collect and pay costs, expenses and other amounts from and to the members of the PMI Group, including without limitation in relation to finished, unfinished and semi-finished materials, personnel, administrative, technical and professional services, and royalties and fees in respect of trademark licences (collectively, all transactions and all inter-company policies and procedures between the Applicant and any member of the PMI Group, the “**Intercompany Transactions**”) in the ordinary course of business or as otherwise approved by the Monitor. All Intercompany Transactions in the ordinary course of business between the Applicant and any member of the PMI Group, including the provision of goods and services from any member of the PMI Group

to the Applicant, shall continue on terms consistent with existing arrangements or past practice or as otherwise approved by the Monitor.

10. **THIS COURT ORDERS** that the Applicant shall remit, in accordance with legal requirements, or pay (whether levied, accrued or collected before, on or after the date of this Order):

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all Sales & Excise Taxes required to be remitted by the Applicant in connection with the Business; and
- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.

11. **THIS COURT ORDERS** that the Applicant is authorized to post and to continue to have posted cash collateral, letters of credit, performance bonds, payment bonds, guarantees and other forms of security from time to time, in an aggregate amount not exceeding \$31,100,000 (the "**Bonding Collateral**"), to satisfy regulatory or administrative requirements to provide security that have been imposed on it in the ordinary course and consistent with past practice in relation to the collection and remittance of federal excise taxes and customs and import duties and federal, provincial and territorial tobacco taxes, whether the Bonding Collateral is provided directly or indirectly by the Applicant as such security and the Applicant is authorized to post

and to continue to have posted cash collateral with Citibank Canada and any other issuers of Bonding Collateral as security therefor.

12. **THIS COURT ORDERS** that the Canadian federal, provincial and territorial authorities entitled to receive payments or collect monies from the Applicant in respect of Sales & Excise Taxes are hereby stayed during the Stay Period from requiring that any additional bonding or other security be posted by or on behalf of the Applicant in connection with Sales & Excise Taxes or any other matters for which such bonding or security may otherwise be required.

13. **THIS COURT ORDERS** that until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicant shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicant and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, at such intervals as such Rent is usually paid in the ordinary course of business. On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

14. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicant is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant or claims to which it is subject to any of its creditors as of this date and to post no security in respect of any such amounts or claims, including pursuant to any order or judgment; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

15. **THIS COURT ORDERS** that the Applicant shall, subject to such requirements as are imposed by the CCAA, have the right to:

- (a) permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding \$5,000,000 in any one transaction or \$10,000,000 in any calendar year in the aggregate;
- (b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate;
- (c) pursue all avenues of refinancing of the Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing; and
- (d) pursue all avenues to resolve any of the Tobacco Claims, in whole or in part,

all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business (the “**Restructuring**”).

16. **THIS COURT ORDERS** that the Applicant shall provide each of the relevant landlords with notice of the Applicant’s intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicant’s entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further Order of this Court upon application by the Applicant on at least two (2) days’ notice to such landlord and any such secured creditors. If the Applicant disclaims or resiliates the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the Applicant’s claim to the fixtures in dispute.

17. **THIS COURT ORDERS** that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

STAY OF PROCEEDINGS

18. **THIS COURT ORDERS** that until and including June 28, 2019, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), including but not limited to an application for leave to appeal to the Supreme Court of Canada in the Quebec Class Actions (a "**QCA Leave Application**"), the Pending Litigation and any other Proceeding in relation to a Tobacco Claim, shall be commenced, continued or take place by, against or in respect of the Applicant, the Monitor or the Court-Appointed Mediator (defined below), or affecting the Business or the Property or the funds deposited pursuant to the Deposit Posting Order, except with leave of this Court, and any and all Proceedings currently under way or directed to take place by, against or in respect of the Applicant or affecting the Business or the Property or the funds deposited pursuant to the Deposit Posting Order are hereby stayed and suspended pending further Order of this Court. All counterclaims, cross-claims and third party claims of the Applicant in the Pending Litigation are likewise subject to this stay of Proceedings during the Stay Period.

by the Applicant

19. **THIS COURT ORDERS** that during the Stay Period, (i) none of the Pending Litigation or any Proceeding in relation thereto shall be commenced, continued or take place against or in respect of any Person named as a defendant or respondent (other than Imperial Tobacco Canada Limited, Imperial Tobacco Company Limited or JTI-Macdonald Corp.) in any of the Pending Litigation (such Persons, the "**Other Defendants**"); and (ii) no Proceeding in Canada that relates

in any way to a Tobacco Claim or to the Applicant, the Business or the Property shall be commenced, continued or take place against or in respect of any member of the PMI Group; except with leave of this Court, and any and all such Proceedings currently underway or directed to take place against or in respect of any of the Other Defendants or any member of the PMI Group, or affecting the Business or the Property or the funds deposited pursuant to the Deposit Posting Order are hereby stayed and suspended pending further Order of this Court.

20. **THIS COURT ORDERS** that, to the extent any prescription, time or limitation period relating to any Proceeding by, against or in respect of the Applicant, any of the Other Defendants or any member of the PMI Group that is stayed pursuant to this Order may expire, including but not limited to any prescription of time whereby the Applicant would be required to commence the QCA Leave Application, the term of such prescription, time or limitation period shall hereby be deemed to be extended by a period equal to the Stay Period.

NO EXERCISE OF RIGHTS OR REMEDIES

21. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “**Persons**” and each being a “**Person**”), against or in respect of the Applicant or the Monitor, or affecting the Business or the Property or to obtain the funds deposited pursuant to the Deposit Posting Order (including, for greater certainty, any enforcement process or steps or other rights and remedies under or relating to the Quebec Class Actions against the Applicant or the Property), are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

22. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

23. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicant or statutory or regulatory mandates for the supply of goods and/or services including, without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility, customs clearing, warehouse or logistical services, or other services to the Business or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

24. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

SALES AND EXCISE TAX CHARGE

25. **THIS COURT ORDERS** that the Canadian federal, provincial and territorial authorities that are entitled to receive payments or collect monies from the Applicant in respect of Sales & Excise Taxes shall be entitled to the benefit of and are hereby granted a charge (the “**Sales and Excise Tax Charge**”) on the Property, which charge shall not exceed an aggregate amount of \$270,000,000, as security for all amounts owing by the Applicant in respect of Sales & Excise Taxes, after taking into consideration any Bonding Collateral posted in respect thereof. The Sales and Excise Tax Charge shall have the priority set out in paragraphs 45 and 47 herein.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

26. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

27. **THIS COURT ORDERS** that the Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

28. **THIS COURT ORDERS** that the directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the “**Directors' Charge**”) on the Property, which charge shall not exceed an aggregate amount of \$7,000,000, as security for the indemnity

provided in paragraph 27 of this Order. The Directors' Charge shall have the priority set out in paragraphs 45 and 47 herein.

29. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 27 of this Order.

APPOINTMENT OF MONITOR

30. **THIS COURT ORDERS** that EYI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

31. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Applicant's receipts and disbursements;
- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) advise the Applicant in its preparation of the Applicant's cash flow statements, which information shall be reviewed with the Monitor;

- (d) advise the Applicant in its development of the Plan and any amendments to the Plan;
- (e) assist the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (f) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicant, to the extent that is necessary to adequately assess the Applicant's business and financial affairs or to perform its duties arising under this Order;
- (g) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;
- (h) assist the Applicant, to the extent required by the Applicant, in its efforts to explore the potential for a resolution of any of the Tobacco Claims;
- (i) consult with the Court-Appointed Mediator in connection with the Court-Appointed Mediator's mandate, including in relation to any negotiations to settle any Tobacco Claims and the development of the Plan; and
- (j) perform such other duties as are required by this Order or by this Court from time to time.

32. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

33. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release

or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, the *Ontario Occupational Health and Safety Act*, the *Quebec Environment Quality Act*, the *Quebec Act Respecting Occupational Health and Safety* and regulations thereunder (the “**Environmental Legislation**”), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor’s duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

34. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicant and the Court-Appointed Mediator with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

35. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

36. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicant shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is

hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a bi-weekly basis and, in addition, the Applicant is hereby authorized to pay the Monitor and counsel to the Monitor, retainers in the amount of \$250,000 and \$50,000 respectively to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

37. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

38. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicant shall be entitled to the benefit of and are hereby granted a charge (the “**Administration Charge**”) on the Property, which charge shall not exceed an aggregate amount of \$3,000,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 45 and 47 hereof.

COURT-APPOINTED MEDIATOR

39. **THIS COURT ORDERS** that the Hon. Warren K. Winkler, Q.C. is hereby appointed, as an officer of the Court and shall act as a neutral third party (the “**Court-Appointed Mediator**”) to mediate a global settlement of the Tobacco Claims.

40. **THIS COURT ORDERS** that in carrying out his mandate, the Court-Appointed Mediator may, among other things:

- (a) Adopt processes which, in his discretion, he considers appropriate to facilitate negotiation of a global settlement;
- (b) Retain independent legal counsel and such other advisors and persons as the Court-Appointed Mediator considers necessary or desirable to assist him in carrying out his mandate;

- (c) Consult with all Persons with Tobacco Claims (“**Tobacco Claimants**”), the Monitor, the Applicant, the Co-Defendants (as defined in the Luongo Affidavit), other creditors and stakeholders of the Applicant and/or the Co-Defendants and any other persons the Court-Appointed Mediator considers appropriate;
- (d) Accept a court appointment of similar nature in any proceedings under the CCAA commenced by a company that is a co-defendant or respondent with the Applicant or the Co-Defendants in any action brought by one or more Tobacco Claimants, including the Pending Litigation; and,
- (e) Apply to this Court for advice and directions as, in his discretion, the Court-Appointed Mediator deems necessary.

41. **THIS COURT ORDERS** that, subject to an agreement between the Applicant and the Court-Appointed Mediator, all reasonable fees and disbursements of the Court-Appointed Mediator and his legal counsel and financial and other advisors as may have been incurred by them prior to the date of this Order or which shall be incurred by them in relation to carrying out his mandate shall be paid by the Applicant and the Co-Defendants on a monthly basis, forthwith upon the rendering of accounts to the Applicant and the Co-Defendants.

42. **THIS COURT ORDERS** that the Court-Appointed Mediator shall be entitled to the benefit of and is hereby granted a charge (the “**Court-Appointed Mediator Charge**”) on the Property, which charge shall not exceed an aggregate amount of \$1 million, as security for his fees and disbursements and for the fees and disbursements of his legal counsel and financial and other advisors, in each case incurred at their standard rates and charges, both before and after the making of this Order in respect of these proceedings. The Court-Appointed Mediator Charge shall have the priority set out in paragraphs 45 and 47 hereof.

43. **THIS COURT ORDERS** that the Court-Appointed Mediator is authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body or other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

44. **THIS COURT ORDERS** that, in addition to the rights and protections afforded as an officer of this Court, the Court-Appointed Mediator shall incur no liability or obligation as a result of his appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on his part. Nothing in this Order shall derogate from the protections afforded a person pursuant to Section 142 of the *Courts of Justice Act* (Ontario).

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

45. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Court-Appointed Mediator Charge, the Directors' Charge and the Sales and Excise Tax Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – Administration Charge (to the maximum amount of \$3,000,000) and the Court-Appointed Mediator Charge (to the maximum amount of \$1,000,000), *pari passu*;

Second – Directors' Charge (to the maximum amount of \$7,000,000); and

Third – Sales and Excise Tax Charge (to the maximum amount of \$270,000,000).

46. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

47. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise (collectively, the "**Encumbrances**") in favour of any Person in respect of such Property, save and except for:

- (a) purchase-money security interests or the equivalent security interests under various provincial legislation and financing leases (that, for greater certainty, shall not include trade payables);

- (b) statutory super-priority deemed trusts and liens for unpaid employee source deductions;
- (c) deemed trusts and liens for any unpaid pension contribution or deficit with respect to the Registered Pension Plans, but only to the extent that any such deemed trusts and liens are statutory super-priority deemed trusts and liens afforded priority by statute over all pre-existing Encumbrances granted or created by contract;
- (d) liens for unpaid municipal property taxes or utilities that are given first priority over other liens by statute; and
- (e) cash collateral deposited with a financial institution as security for letters of credit or bank guarantees issued by the financial institution at the request of the Applicant.

48. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicant also obtains the prior written consent of the Monitor and the beneficiaries of the Charges affected thereby (collectively, the “**Chargees**”), or further Order of this Court.

49. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act* of Canada (the “**BIA**”), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an “**Agreement**”) which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

- (a) the creation of the Charges shall not create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and
- (c) the payments made by the Applicant pursuant to this Order and the granting of the Charges do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

50. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicant's interest in such real property leases.

SERVICE AND NOTICE

51. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in The Globe and Mail (National Edition) and La Presse a notice containing the information prescribed under the CCAA as well as the date of the Comeback Motion (as defined below), (ii) within five days after the date of this Order or as soon as reasonably practicable thereafter, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice (which shall include the date of the Comeback Motion) to every known creditor who has a claim (contingent, disputed or otherwise) against the Applicant of more than \$1,000, except with respect to (I) plaintiffs in the Pending Litigation, in which cases the Monitor shall only send a notice to counsel of record, as applicable, (II) beneficiaries of the Registered Pension Plans (as that term is defined in the Luongo Affidavit), in which case the Monitor shall only send a notice to the trustees of each of the Registered Pension Plans and the Financial Services Commission of Ontario and the Régie Des Rentes Du Québec, as applicable, and (III) current and former employees of the Applicant; and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations

made thereunder. The list referenced at subparagraph (C) above shall not include the names, addresses, or estimated amounts of the claims of those creditors who are individuals or any personal information in respect of an individual.

52. **THIS COURT ORDERS** that the E-Service Guide of the Commercial List (the “**Guide**”) is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/>) shall be valid and effective service. Subject to Rule 17.05, this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established by the Monitor in accordance with the Guide with the following URL: www.ey.com/ca/rbh (the “**Case Website**”).

53. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Guide is not practicable, the Applicant and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings and any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile or other electronic transmission to the Applicant’s creditors or other interested parties at their respective addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery, facsimile or other electronic transmission shall be deemed to be received on the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

54. **THIS COURT ORDERS** that the Applicant is authorized to rely upon the notice provided in paragraph 51 to provide notice of the comeback motion to be heard on a date to be set by this Court upon the granting of this Order (the “**Comeback Motion**”) and shall only be required to serve motion materials relating to the Comeback Motion, in accordance with the Guide, upon those parties who serve a Notice of Appearance in this proceeding prior to the date of the Comeback Motion.

55. **THIS COURT ORDERS** that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the “**Service List**”). The Monitor shall post the Service List, as may be updated from time to time, on the Case Website as part of the public materials to be recorded thereon in relation to this proceeding. Notwithstanding the foregoing, the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

56. **THIS COURT ORDERS** that the Applicant and the Monitor and their counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicant’s creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the Electronic Commerce Protection Regulations, Reg. 8100 2-175 (SOR/DORS).

57. **THIS COURT ORDERS** that, subject to paragraph 58, all motions in this proceeding are to be brought on not less than seven (7) calendar days' notice to all persons on the Service List. Each Notice of Motion shall specify a date (the “**Return Date**”) and time for the hearing.

58. **THIS COURT ORDERS** that motions for relief on an urgent basis need not comply with the notice protocol described herein.

59. **THIS COURT ORDERS** that any interested Person wishing to object to the relief sought in a motion must serve responding motion material or, if they do not intend to file material, a notice in all cases stating the objection to the motion and the grounds for such objection in writing (the “**Responding Material**”) to the moving party, the Applicant and the Monitor, with a copy to all Persons on the Service List, no later than 5 p.m. on the date that is four (4) calendar days prior to the Return Date (the “**Objection Deadline**”).

60. **THIS COURT ORDERS** that, if no Responding Materials are served by the Objection Deadline, the judge having carriage of the motion (the “**Presiding Judge**”) may determine:

- (a) whether a hearing is necessary;
- (b) whether such hearing will be in person, by telephone or by written submissions only;
and
- (c) the parties from whom submissions are required

(collectively, the “**Hearing Details**”). In the absence of any such determination, a hearing will be held in the ordinary course.

61. **THIS COURT ORDERS** that, if no Responding Materials are served by the Objection Deadline, the Monitor shall communicate with the Presiding Judge regarding whether a determination has been made by the Presiding Judge concerning the Hearing Details. The Monitor shall thereafter advise the Service List of the Hearing Details and the Monitor shall report upon its dissemination of the Hearing Details to the Court in a timely manner, which may be contained in the Monitor's next report in the proceeding.

62. **THIS COURT ORDERS** that if any party objects to the motion proceeding on the Return Date or believes that the Objection Deadline does not provide sufficient time to respond to the motion, such objecting party shall, promptly upon receipt of the Notice of Motion and in any event prior to the Objection Deadline, contact the moving party and the Monitor (together with the objecting party and any other party who has served Responding Materials, the “**Interested Parties**”) to advise of such objection and the reasons therefor. If the Interested Parties are unable to resolve the objection to the timing and schedule for the motion following good faith consultations, the Interested Parties may seek a scheduling appointment before the Presiding Judge to be held prior to the Return Date or on such other date as may be mutually agreed by the Interested Parties or as directed by the Presiding Judge to establish a schedule for the motion. At the scheduling appointment, the Presiding Judge may provide directions including a schedule for the delivery of any further materials and the hearing of the contested motion, and may address such other matters, including interim relief, as the Court may see fit. Notwithstanding the foregoing, the Presiding Judge may require the Interested Parties to proceed with the contested motion on the Return Date or on any other date as may be directed by the

Presiding Judge or as may be mutually agreed by the Interested Parties, if otherwise satisfactory to the Presiding Judge.

GENERAL

63. **THIS COURT ORDERS** that the Applicant or the Monitor may from time to time apply to this Court to amend, vary, supplement or replace this Order or for advice and directions concerning the discharge of their respective powers and duties under this Order or the interpretation or application of this Order.

64. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicant, the Business or the Property.

65. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or outside of Canada, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

66. **THIS COURT ORDERS** that each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

67. **THIS COURT ORDERS** that any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

68. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order (the "**Effective Time**") and that from the Effective Time to the time of the granting of this Order any action taken or notice given by any creditor of the Applicant or by any other Person to commence or continue any enforcement, realization, execution or other remedy of any kind whatsoever against the Applicant, the Property, the Business or the funds deposited pursuant to the Deposit Posting Order shall be deemed not to have been taken or given, as the case may be.



TAB 16

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT
OF ROTHMANS, BENSON & HEDGES INC.**

Applicant

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following pages.

THIS APPLICATION will come on for a hearing on March 22, 2019 at 4:00 p.m. or as soon after that time as the matter may be heard at 330 University Avenue, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with the documents in the application, you or an Ontario lawyer acting for you must prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicant's lawyers and file it, with proof of service, in the court office where the application is to be heard, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you and your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyers and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than two (2) days before the hearing.

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IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LEGAL AID OFFICE.

Date: March 22, 2019

Issued by _____

Address of Court Office:
330 University Avenue, 7th Floor
Toronto, Ontario
M5G 1E6

TO: THE SERVICE LIST

APPLICATION

1. Rothmans, Benson & Hedges Inc. (“**RBH**”) makes an application for:
 - (a) an order (the “**Initial Order**”) pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) substantially in the form attached at Tab 3 to the Application Record,¹ among other things:
 - (i) abridging the time for and validating the service and filing of this Notice of Application and the Application Record so that this Application is properly returnable on the return date and dispensing with further service thereof;
 - (ii) declaring that RBH is a company to which the CCAA applies and granting RBH the authority to file a plan of compromise or arrangement;
 - (iii) authorizing RBH to pay certain expenses incurred prior to, on or after the date of the Initial Order and to continue on and after the date of the Initial Order to enter into Intercompany Transactions, including buying and selling goods from members of the PMI Group, in the ordinary course of business on terms consistent with existing arrangements or past practice or as otherwise approved by the Monitor (as defined below);
 - (iv) authorizing RBH to post and to continue to have posted the Bonding Collateral and staying requests by government authorities for additional security;
 - (v) staying the commencement or continuation of any Proceeding, including the Pending Litigation and any other Proceeding in relation to a Tobacco Claim, against or in respect of RBH or the Monitor, or affecting the

¹ Capitalized terms used but not defined herein have the meanings given to them in the affidavit of Peter Luongo, sworn March 22, 2019, attached as Tab 2 to the Application Record of RBH (the “**Luongo Affidavit**”), or the draft Initial Order attached as Tab 3 to the Application Record of RBH.

- 2 -

Business or the Property or the funds deposited pursuant to the Deposit Posting Order, except with the written consent of RBH and the Monitor, or with leave of this Court;

- (vi) staying Proceedings in Canada that relate in any way to a Tobacco Claim or to RBH, the Business or the Property, against or in respect of any member of the PMI Group, except with the written consent of RBH and the Monitor, or with leave of this Court;
- (vii) authorizing RBH to serve and file an application for leave to appeal the Quebec Appellate Decision to the Supreme Court of Canada, but directing that neither RBH nor any other Person shall take any further step or proceeding in respect of such application without further order of the Court;
- (viii) appointing Ernst & Young Inc. (the “**Proposed Monitor**” and, if appointed, the “**Monitor**”) as officer of this Court to monitor the business and affairs of RBH;
- (ix) granting priority Charges as described in the proposed Initial Order; and
- (x) granting such further and other relief as this Court deems just.

2. The grounds for the Application are:

The Business

- (a) RBH and its predecessor corporations have been engaged in the production and sale of tobacco products in Canada (the “**Business**”) for over 100 years. It is a Canadian company that employs approximately 800 people directly and benefits numerous other Canadians engaged in the production, sale and distribution of RBH’s product in Canada.
- (b) It also generates substantial revenue for the federal and provincial governments due to Canada’s tax and regulatory schemes. In 2018, RBH had income net of

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taxes of approximately \$647 million and estimates that government revenue was approximately \$3.745 billion in respect of RBH's production and sale of tobacco.

- (c) RBH is in the process of transforming its business by developing smoke-free alternatives to cigarettes with a view to switching existing smokers to new and innovative Reduced Risk Products.

Insolvency and Other Statutory Requirements

- (d) On March 1, 2019, the Court of Appeal of Quebec upheld in most aspects the 2015 Quebec Trial Judgment and awarded compensatory and punitive damages against RBH and its co-defendants, Imperial Tobacco Canada Limited (“**ITCAN**”) and JTI-Macdonald Corp. (“**JTIM**”) (collectively, the “**Co-Defendants**”).
- (e) As a result, (i) RBH is liable to deposit \$257 million within 60 days (subject to taking into account, to the extent applicable, amounts already deposited with the Quebec court) and (ii) RBH and the Co-Defendants have joint and several contingent liability in respect of nearly the entire remainder of the \$13.529 billion Global Damages Award (inclusive of interest). Twenty percent (or approximately \$2.706 billion) was allocated to RBH.
- (f) The timing and quantum of any additional portion of the Global Damages Award that RBH will be liable to pay in the future over and above the \$257 million deposit are uncertain. The likelihood any such payments will be required depends on, among other things, the number of claimants who come forward.
- (g) In addition to the Global Damages Award in the Quebec Class Actions, RBH is one of a number of defendants in the Other Pending Litigation, consisting of government-initiated Health Care Actions, where plaintiffs seek damages that are in the aggregate exponentially more than the Global Damages Award.

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- (h) The Co-Defendants, JTIM and ITCAN each filed for creditor protection pursuant to the CCAA following the Quebec Appellate Decision on the basis they were insolvent and unable to pay their liabilities.
- (i) In light of the Quebec Appellate Decision and all the present circumstances, including the insolvency of JTIM and ITCAN, RBH too is insolvent. The realizable value of RBH's property, including the amounts deposited with the Quebec court, is not sufficient to satisfy all of RBH's liabilities, including RBH's allocated portion of the Global Damages Award and the other amounts allocated to JTIM and ITCAN for which RBH is jointly and severally liable.
- (j) As calculated by the trial judge, the amount for which RBH is jointly and severally liable on a contingent basis vastly exceeds the realizable value of RBH's assets. In addition, the realizable value of RBH's assets would be insufficient to satisfy even one judgment if liability were to be found in any one of the Health Care Actions to the extent of the amount claimed.
- (k) Accordingly, RBH is insolvent, it has claims against it that total more than the statutory threshold of \$5 million, and RBH has met the other requirements imposed by section 10 of the CCAA.

Initial Order Appropriate

- (l) RBH requests that this Court grant the relief in the proposed Initial Order to provide RBH with an opportunity to deal in an orderly manner with the litigation claims against it while enabling it to continue to operate the Business and generate positive cash flow for the benefit of its Stakeholders.
- (m) The stay of proceedings, including a stay of the Pending Litigation, as against or in respect of RBH is appropriate and necessary. It will, among other things, provide a forum to explore a CCAA plan and permit RBH to address its litigation exposure in a collective manner while preventing prejudice to certain claimants arising from the happenstance of one massive judgment leading to enforcement

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proceedings before other claims have been heard. Similarly, the stay of proceedings requested in respect of the other members of the PMI Group is appropriate to ensure the stay of proceedings as against RBH is truly effective.

- (n) RBH also seeks authority to pay, among other things, employee-related amounts whether incurred before or after the filing date, payments in respect of RBH Trade Programs and pre-filing obligations that are necessary or desirable for the preservation of the Business, with Monitor consent. It is RBH's current intention that all third-party trade suppliers will be paid in full for pre-filing expenses since doing so is necessary or desirable for RBH's ongoing operations.
- (o) The authorizations sought by RBH in the Initial Order are appropriate and necessary to minimize disruption to the Business. It is in the best interests of all Stakeholders to minimize disruption to the Business, preserve its goodwill and to enable RBH to continue to generate additional revenue while under CCAA protection.

Charges

- (p) Granting the following charges with the priority sought is appropriate and important to the restructuring:
 - A. First – Administration Charge (to the maximum amount of \$3,000,000);
 - B. Second – Directors' Charge (to the maximum amount of \$7,000,000); and
 - C. Third – Sales and Excise Tax Charge (to the maximum amount of \$270,000,000);

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- (q) The continued involvement of the beneficiaries of the Administration Charge and the Directors' Charge is critical for the ongoing operation of the Business and the continuation of the CCAA proceedings.
- (r) RBH has significant ongoing liabilities relating to Sales & Excise Taxes, which are amounts for which directors and officers may have personal liability. Given the substantial amounts of tax and the delay between the time of accrual or collection and the time of remittance, it is appropriate to provide assurances to the relevant tax authorities and RBH's directors by mandating continued remittance of Sales & Excise Taxes, permitting the Applicant to continue to post Cash Collateral in relation to Excise Taxes, and granting the Sales and Excise Tax Charge. The amount of the Sales and Excise Tax Charge sought is appropriate as it takes into consideration the average exposure for the Sales & Excise Taxes and the value of Cash Collateral.

Initial Order Appropriate in the Circumstances

- (s) The circumstances that exist make the Initial Order sought by the Applicant appropriate.
 - (t) RBH relies on the provisions of the CCAA and this Court's inherent and equitable jurisdiction.
 - (u) RBH also relies on Rules 1.04, 1.05, 2.01, 2.03, 3.02, 14.05(2), 16, 38 and 39 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.
 - (v) RBH may rely on such further and other grounds as counsel may advise and this Court may permit.
3. The following documentary evidence will be used at the hearing of the application:
- (a) the affidavit of Peter Luongo and the exhibits attached thereto;
 - (b) the pre-filing report of Ernst & Young Inc. in its capacity as the Proposed Monitor of RBH, and the appendices attached thereto;

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- (c) the consent of Ernst & Young Inc. to act in these proceedings; and
- (d) such further and other materials as counsel may advise and this Court may permit.

Date: March 22, 2019

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Lawyers for the Applicant,
Rothmans, Benson & Hedges Inc.

Schedule “A”**SERVICE LIST**

TAB 17

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF IMPERIAL TOBACCO CANADA
LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

Applicants

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING has been commenced by the Applicants. The claim made by the Applicants appears on the following pages.

THIS APPLICATION will come on for a hearing before a Judge on March 12, 2019, or as soon after that time as the application can be heard at the Court House, 330 University Avenue, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the rules of court, serve it on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

If you wish to oppose this application but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

Date: March 12, 2019

Issued by: _____
Local registrar

Address of court office:
330 University Ave.
Toronto, ON M5G 1E6

TO: FTI CONSULTING CANADA INC. AND TO: DAVIES WARD PHILLIPS & VINEBERG LLP

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Suite 2010, P.O. Box 104
Toronto, ON M4K 1G8

RBC Centre
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Toronto, ON M5V 3J7

Greg Watson

Tel: 416.649.8077

Paul Bishop

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The Proposed Monitor

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**AND TO: LAX O'SULLIVAN LISUS
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Lawyers to the Proposed Tobacco
Claimant Representative

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Lawyers to British American Tobacco p.l.c.,
B.A.T Industries p.l.c., and British
American Tobacco (Investments) Limited

APPLICATION

1. The Applicants make this application for an Order substantially in the form attached as Schedule “A” hereto (the “Draft Initial Order”), *inter alia*:

- (a) Abridging the time for service of this notice of application and dispensing with service on any person other than those served;
- (b) Declaring that the Applicants are parties to which the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “CCAA”) applies;
- (c) Appointing FTI Consulting Canada Inc. (“FTI”) as an officer of this Honourable Court to monitor the assets, businesses and affairs of the Applicants (in such capacity, the “Monitor”);
- (d) Appointing the Honourable Warren K. Winkler (the “Tobacco Claimant Representative”) as an officer of this Honourable Court to represent Tobacco Claimants in connection with any Tobacco Claim (both terms as defined in the Draft Initial Order) on an interim basis;
- (e) Staying all proceedings taken or that might be taken in respect of the Applicants, their directors or officers, the Monitor, or the Tobacco Claimant Representative until and including April 11, 2019, subject to further Order of the Court (the “Stay of Proceedings”);
- (f) Extending the Stay of Proceedings to the ITCAN Subsidiaries (as defined in the Draft Initial Order);
- (g) Extending the Stay of Proceedings in respect of the Tobacco Claims and proceedings related to the Applicants, their business, or their property to the BAT Group (as defined in the Draft Initial Order);

(h) Granting the following charges over the property of the Applicants (all as defined in the Draft Initial Order), listed in order of priority:

(A) First – Administration Charge (to the maximum amount of \$5 million) and the Tobacco Claimant Representative Charge (to the maximum amount of \$1 million), *pari passu*;

(B) Second – Directors’ Charge (to the maximum amount of \$16 million);

(C) Third – Sales & Excise Tax Charge (to the maximum amount of \$580 million); and

(i) Such further and other relief as this Honourable Court may deem just.

2. The grounds for the application are:

GENERAL

3. The Applicants are insolvent;

4. The Applicants are companies to which the CCAA applies;

5. The claims against the Applicants exceed \$5 million;

6. The Applicant Imperial Tobacco Canada Limited (“ITCAN”) primarily purchases finished tobacco products and imports them into Canada;

7. The Applicant Imperial Tobacco Canada Company is a direct subsidiary of ITCAN and is the exclusive distributor of tobacco products imported into Canada by ITCAN;

8. Both Applicants are incorporated under the *Canadian Business Corporations Act*, RSC 1985, c C-44;

9. Collectively, the Applicants’ operations generated taxes payable to various levels of government totalling approximately \$4.0 billion in 2018;

10. Approximately 466 permanent, full-time and 98 contract employees across Canada rely on the continued existence of the Applicants for their livelihoods;

11. The Applicants face an existential threat from litigation across Canada, including multiple class actions, government claims seeking to recover health care costs, and other ongoing proceedings (collectively, the “Tobacco Litigation”);

12. The plaintiffs in the Tobacco Litigation collectively seek hundreds of billions of dollars in damages, which exceeds the Applicants’ total assets by many orders of magnitude;

13. On March 1, 2019, the Court of Appeal for Quebec issued an appeal judgment condemning ITCAN to pay a potential maximum amount that, with interest, is over \$9 billion in the Letourneau and Blais class actions in Quebec (bearing court file numbers 500-06-00070-983 and 500-06-000076-80);

14. The Applicants do not have the financial resources to pay their current and contingent liabilities;

15. FTI has consented to act as the Monitor;

STAY OF PROCEEDINGS

16. The Applicants require the Stay of Proceedings so that they are provided with the time to restructure their affairs and attempt to maximize enterprise value;

17. It is necessary and in the best interests of the Applicants and their stakeholders that the Stay of Proceedings be extended to the ITCAN Subsidiaries as they are highly integrated with the Applicants and are indispensable to the Applicants’ business and restructuring;

18. It is necessary and in the best interests of the Applicants and their stakeholders that the Stay of Proceedings in respect of Tobacco Claims be extended to the BAT Group for several reasons:

- (a) ITCAN and the BAT Group are named as co-defendants in class actions and health care recovery proceedings across Canada. These claims against ITCAN and the BAT Group can only be effectively determined in one

forum and permitting the claims to continue against the BAT Group while they are also being resolved in the CCAA proceedings creates the risk of inconsistent outcomes;

- (b) Such a stay will allow ITCAN and the BAT Group to focus on developing and implementing a plan of compromise or arrangement without the costs and distraction that would inevitably ensue if plaintiffs were to continue pursuing the Tobacco Litigation against the BAT Group at the same time as this CCAA proceeding;
- (c) The ongoing and future contributions to the success of the Applicants' restructuring by the BAT Group justifies the extension of the CCAA Stay to protect these entities in this proceeding;

TOBACCO CLAIMANT REPRESENTATIVE

19. The litigation against the Applicants consists of a patchwork of overlapping claims that have been advanced on behalf of various subgroups of Canadian consumers over the years;

20. The Applicants need to identify and resolve all potential, yet-unasserted claims in addition to claims that have been asserted;

21. It will be critical for the success of the Applicants' restructuring initiatives that the claims of all Tobacco Claimants be considered under one umbrella to ensure uniformity of treatment, to avoid economic tensions as between Tobacco Claimants, to deal with competing claims of class counsel, and to streamline the process for the resolution of such claims;

22. The Applicants are requesting that the Tobacco Claimant Representative be appointed on an interim basis until April 30, 2019, or a later date agreed to by the Applicants and the Monitor;

OTHER GROUNDS

23. The provisions of the CCAA and the inherent and equitable jurisdiction of this Honourable Court;

24. Rules 2.03, 3.02, 14.05(2) and 16 of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended and section 106 of the Ontario *Courts of Justice Act*, RSO 1990, c C-43 as amended; and

25. Such further and other grounds as counsel may advise and this Honourable Court may permit.

26. The following documentary evidence will be used at the hearing of the application:

- (a) The Affidavit of Eric Thauvette sworn March 12, 2019 and the exhibits attached thereto;
- (b) The Affidavit of Nancy Roberts sworn March 12, 2019;
- (c) The Consent of FTI to act as Monitor;
- (d) The Pre-Filing Report of the proposed Monitor; and
- (e) Such further and other evidence as counsel may advise and this Honourable Court may permit.

March 12, 2019

OSLER, HOSKIN & HARCOURT LLP

P.O. Box 50, 1 First Canadian Place
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Lawyers to the Applicants,
Imperial Tobacco Canada Limited and
Imperial Tobacco Company Limited

TAB 18

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF **JTI-MACDONALD CORP.**



NOTICE OF APPLICATION

TO THE RESPONDENT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following pages.

THIS APPLICATION will come on for hearing before a Judge on March 8, 2019 at 3:00 p.m., or as soon after that time as the application can be heard at 330 University Avenue, in the City of Toronto, in the Province of Ontario, M5G 1E6.


IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2:00 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, AN ORDER MAY BE MADE IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. If you wish to oppose this application but are unable to pay legal fees, legal aid may be available to you by contracting a Local Legal Aid office.

DATE: March 8, 2019

Issued by:



C. Irwin

Registrar

Address of Court office:

330 University Avenue, 7th floor
Toronto, Ontario M5G 1E6

TO: THIS HONOURABLE COURT

AND TO: Deloitte Restructuring Inc.

Bay Adelaide East
8 Adelaide Street West
Suite 200
Toronto, Ontario M5H 0A9
Fax: 416-601-6690

Paul Casey

Tel: 416-775-7172

Email: paucasey@deloitte.ca

Warren Leung

Tel: 416-874-4461

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The Monitor

AND TO: BLAKE, CASSELS & GRAYDON LLP

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Toronto, ON M5L 1A9
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Pamela Huff

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Counsel to the Monitor

AND TO: BLUE TREE ADVISORS

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William E. Aziz

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Email: baziz@bluetreeadvisors.com

Chief Restructuring Officer

APPLICATION

THE APPLICANT, JTI-Macdonald Corp. (the “**Applicant**” or “**JTIM**”), makes an application for an Initial Order (the “**Initial Order**”) pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) substantially in the form attached at Tab 3 to the Applicant’s application record (the “**Application Record**”), *inter alia*:

- (a) abridging the time for service of this Notice of Application and the materials filed in support of the application and dispensing with further service thereof;
- (b) declaring that JTIM is a company to which the CCAA applies;
- (c) appointing Deloitte Restructuring Inc. (“**Deloitte**”) as Monitor in these CCAA proceedings to monitor the Applicant’s business and affairs (in such capacity, the “**Monitor**”);
- (d) approving the engagement letter and appointment of BlueTree Advisors Inc. as Chief Restructuring Officer (the “**CRO**”) of the Applicant;
- (e) granting a stay of proceedings in respect of the Applicant, its directors and officers, the Monitor and the CRO until April 5, 2019, subject to further Order of the Court;
- (f) granting a stay of proceedings in respect of certain litigation involving the Applicant and other persons named as a defendant or respondent to such litigation until April 5, 2019, but not staying the Applicant’s ability to continue the appeal of the Class Actions (as defined in the Affidavit of Robert McMaster sworn March 8, 2019 (the “**McMaster Affidavit**”));
- (g) authorizing the Applicant to pay all reasonable ordinary course operational expenses incurred by the Applicant prior to, on or after the commencement of these proceedings, including the payment of interest when due on the Applicant’s secured obligations;
- (h) requiring the Applicant to pay all sales taxes, excise taxes and municipal taxes that are required to be remitted by the Applicant in connection with its business;

- (i) authorizing the Applicant to post cash collateral or other forms of security from time to time in an aggregate amount not exceeding \$18 million, to satisfy ordinary course regulatory or administrative requirements in relation to the collection and remittance of federal excise taxes and customs and import duties and federal, provincial and territorial tobacco taxes;
- (j) granting the following charges over the property and assets of the Applicant:
 - (i) a charge in favour of counsel to the Applicant, the Monitor, counsel to the Monitor and the CRO in the maximum amount of \$3 million;
 - (ii) a charge in favour of the officers and directors of the Applicant in the maximum amount of \$4.1 million; and
 - (iii) a charge in favour of the Canadian, provincial and territorial authorities that are entitled to receive payments or collect monies from the Applicant in respect of sales taxes and excise taxes in the maximum amount of \$127 million;
- (k) authorizing a protocol for the service and filing of materials in these proceedings; and
- (l) granting such other relief as counsel may request and this Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

Overview

- (a) The Applicant is a private company that was continued under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, and maintains its registered head office in Mississauga, Ontario. The Applicant is the third largest tobacco company in Canada. JTIM's products consist of cigarettes, fine-cut tobacco, cigars and accessories branded under various trademarks and brand names for distribution throughout Canada and for export;
- (b) the Applicant's business is based largely on its brand identity. JTIM licenses or has the right to use all of its trademarks from related parties. If such license arrangements were

terminated, the Applicant's business would effectively cease in its current form. A significant licensor of these trademarks is JTI-Macdonald TM Corp. ("TM"), a subsidiary of JTIM;

- (c) The Applicant has approximately 500 full time employees, 1,300 suppliers and pays approximately \$1.3 billion in taxes annually in relation to its operations and the sale of the Applicant's products;
- (d) This application has been commenced as a result of the current financial circumstances of the Applicant due to recent adverse developments in certain litigation that the Applicant is a defendant of;
- (e) JTIM is a debtor company to which the CCAA applies with total claims against it in excess of \$5 million;
- (f) The Applicant is currently subject to financial judgments that, if enforced and not stayed, will put the Applicant out of business and destroy value for its employees, suppliers and customers;

Litigation

- (g) JTIM is a defendant, together with Imperial Tobacco Canada Limited and Rothmans, Benson & Hedges Inc. (collectively, the "**Defendants**"), in two significant class action proceedings that were tried together in the Province of Quebec (collectively, the "**Class Actions**");
- (h) A judgment in the Class Actions was publically released by Mr. Justice Riordan on June 1, 2015 and subsequently amended on June 9, 2015 (the "**Judgment**"). The Defendants were found liable for moral damages in the aggregate amount of approximately \$6.8 billion on a collective and solidary basis against the Defendants and punitive damages on an individual basis (representing an aggregate value of approximately \$13.5 billion including interest and the additional indemnity as of the date of the Judgment);
- (i) The Applicant was unsuccessful in overturning the Judgment at the Quebec Court of Appeal for the reasons described in the decision released on March 1, 2019 (the "**QCA**

Judgment”). There is uncertainty as to whether the QCA Judgment is immediately enforceable or provides JTIM with a maximum of up to 60 days to make an initial deposit payment in the amount of \$145 million;

- (j) The Applicant is also the subject of significant health care cost recovery litigation (the “**HCCR Actions**”) that were commenced as a result of legislation passed in each province related to alleged “tobacco related wrongs”;
- (k) The total potential quantum of damages claimed against several defendants, including the Applicant on a joint and several basis, is not yet known, however, over \$500 billion have been claimed to be owing by all of the defendants in the five provinces where amounts have been specified in the claims or that have been detailed in expert reports;
- (l) The quantum of claims in the HCCR Actions are vastly in excess of the total value of the Applicant’s business and the total value of the entire tobacco industry in Canada;
- (m) The QCA Judgment and the HCCR Claims have forced the Applicant to seek a collective solution for the benefit of all stakeholders. The requested stay under the CCAA will allow the Applicant time and a platform to achieve such a solution in an orderly manner;

Secured Creditors

- (n) As more particularly described in the McMaster Affidavit, the acquisition of the Canadian assets of the RJR Group (as defined in the McMaster Affidavit) was accomplished by a leveraged buyout. Through a series of intercompany transactions, TM made a secured advance in the principal amount of approximately \$1.2 billion to the Applicant’s predecessor corporation;
- (o) TM is the first registered secured creditor of the Applicant and the principal balance is approximately \$1.18 billion;
- (p) The Applicant is seeking relief to continue to pay interest on its secured loan obligations in light of the potential adverse tax and other consequences to its senior secured creditor if such payments were suspended for a significant period of time;

- (q) JT International Holding B.V., a credit-worthy entity related to JTIM, has provided an undertaking to repay any post-filing interest received during these CCAA proceedings in the event that any stakeholder successfully challenges these secured obligations;
- (r) To ensure that the Applicant has access to sufficient liquidity to make all ordinary course payments, JT Canada LLC Inc. ("**ParentCo**") agreed to provide a secured borrowing facility to the Applicant in the principal amount of \$70 million (the "**Cash Flow Loan**"). As at the date of filing, there are no amounts outstanding under the Cash Flow Loan;

Treatment of Ordinary Creditors

- (s) Consistent with the approach authorized in the 2004 CCAA Proceedings (as defined in the McMaster Affidavit), the Applicant proposes to pay its suppliers, trade creditors, taxes, duties and employees in the ordinary course of business for amounts owing both before and after this application in order to minimize any disruption of its business;
- (t) Maintaining the Applicant's operations as a going concern and avoiding any disruption to its business operations is in the best interests of all of the Applicant's stakeholders;

Tax Charge

- (u) The Applicant directly pays, on its own behalf, more than \$500 million annually each year to the various provincial and federal governments. The Applicant proposes the establishment of a charge on its property to secure the payment of any excise tax or duties, import or customs duties and provincial and territorial tobacco tax and any harmonized sales or provincial sales taxes required to be remitted by the Applicant after the commencement of the CCAA proceedings;

Chief Restructuring Officer

- (v) Based on past experience, the Applicant believes that the restructuring will be complicated and time consuming. In order to minimize disruption to the business and the distraction of senior executives away from the task of managing the business and maintaining positive cash flow, the Applicant seeks approval of the CRO to oversee the

stakeholder engagement and negotiation process and the terms of the CRO's engagement letter;

Sealing Order

- (w) The Applicant is of the view that an unredacted copy of the CRO engagement letter should be sealed as the letter contains commercially sensitive terms of the CRO's engagement. Sealing of the unredacted CRO engagement letter should not materially prejudice any third parties;
- (x) Deloitte has consented to act as the Monitor in the CCAA proceedings;
- (y) The provisions of the CCAA and the statutory, inherent and equitable jurisdiction of this Honourable Court;
- (z) Rules 2.03, 3.02, 14.05(2) and 16 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, and sections 106 and 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended; and
- (aa) such other grounds as counsel may advise and this Honourable Court may deem just.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this application:

- (a) the McMaster Affidavit;
- (b) the Pre-Filing Report of the proposed Monitor, Deloitte, dated March 8, 2019;
- (c) the Consent of Deloitte to act as Monitor dated March 1, 2019; and
- (d) such further and other evidence as counsel may advise and this Court may permit.

March 8, 2019

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