	Clerk's Stamp
COURT FILE NUMBER	2303-06543
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	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 J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
APPLICANT:	MICHAEL G. BROADFOOT
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS** **(Distribution Order)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	**Norton Rose Fulbright Canada LLP** 400 3rd Avenue SW, Suite 3700 Calgary, AB T2P 4H2 Gunnar Benediktsson | Miranda Sharpe Telephone: 403.267.8256 Facsimile: 403.264.5973 Email: gunnar.benediktsson@nortonrosefulbright.com | Miranda.sharpe@nortonrosefulbright.com File Number: 1001236005

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I. INTRODUCTION

1 This brief is submitted on behalf of the Applicant, Michael G. Broadfoot (**Broadfoot**) in support of an application to authorize and direct the Monitor to pay to Broadfoot the net proceeds from the sale of certain assets in which he has a valid security interest.

2 Broadfoot is the Principal of MGB Investments Limited Partnership (**MGB**), Interim Lender to J.W. Carr Holdings Ltd. (**Carr Holdings**), Spruce Grove Industrial Park Inc., 272649 Alberta Ltd. (**272**), 279896 Alberta Ltd., Grande Prairie Place Enterprises (1996) Inc., 1170292 Alberta Ltd. and 627612 Alberta Ltd. (collectively, the ***CCAA* Entities**) in these proceedings under the *Companies' Creditors Arrangement Act* (the ***CCAA***).

3 Broadfoot is also a lender, in his personal capacity, to (among other borrowers and guarantors) the *CCAA* Entities. The *CCAA* Entities (pursuant to various guarantees) are indebted to Broadfoot in the amount of approximately $6.3 million as at March 31, 2023 (collectively with related obligations, the **Broadfoot Debt**).

4 The Broadfoot Debt is validly secured by various security, all as set out in the affidavits of Michael G. Broadfoot dated November 14, 2023 (the **Broadfoot Affidavits**). As a secured creditor, Broadfoot was entitled to take steps to perfect his interests in various assets of Carr Holdings and the *CCAA* Entities, and did so. The proposed distributions are fair, equitable, consistent with Broadfoot's legal rights and do not prejudice or impair the rights or security of any other creditor. The proposed distribution order should be granted.

II. FACTS

5. Broadfoot first became involved with the *CCAA Entities* in October of 2017. Broadfoot's long-time friend, and the principal of Carr Holdings, James Carr (**Mr. Carr**), had recently passed away; in the wake of this unfortunate event, Carr Holdings began to experience financial difficulties, largely relating to cash flow issues created by mounting debt service obligations. Broadfoot was approached by Marj Carr (**Mrs. Carr**) to discuss the potential financial consequences of Mr. Carr's passing, and how Broadfoot could help.[1] Broadfoot agreed to provide bridge financing in his personal capacity to Carr Holdings, in order to provide Mrs. Carr with the time and space to sort out the financial ramifications of Mr. Carr's passing.[2]

[1] Affidavit of Michael G. Broadfoot, affirmed November 14, 2023, filed November 17, 2023, at para 6 [**Broadfoot Affidavit**].
[2] Broadfoot Affidavit at para 6.

6. Accordingly, in October 2017 Broadfoot loaned $4,500,000 to Mrs. Carr, which flowed ultimately to Carr Holdings (the **Initial Advance**).[3] The Initial Advance was loaned to Mrs. Carr pursuant to a Promissory Note between dated October 20, 2017 (the **Broadfoot Note**) and was secured by Mrs. Carr's assignment of the proceeds of two insurance policies (the **Insurance Assignment**). Mrs. Carr then loaned the same funds to Carr Holdings pursuant to a second promissory note, also dated October 20, 2017 (the **Carr Note**). Mrs. Carr then assigned her rights under the Carr Note to Broadfoot, also on October 20, 2017 (the **Loan Assignment**).[4]

7. The Initial Advance was reflected as a shareholder loan to Carr Holdings from Mrs. Carr and the proceeds were used to pay various creditors of Carr Holdings.[5]

8. The Broadfoot Note and the Carr Note were to accrue interest at 4% annually, and were payable on demand.[6] However, during the period from 2017 to 2021 Broadfoot agreed with Mrs. Carr and with Carr Holdings that he would forbear from issuing any such demand, and would not require either payments of principal or interest on the Initial Advance, again in order to give Carr Holdings time and space to address and resolve its ongoing balance sheet and financial issues.[7]

9. The Broadfoot Note, the Carr Note, the Loan Assignment, and the Insurance Assignment were restated in October 2020 to reflect the parties' ongoing understanding, including Broadfoot's forbearance under the Initial Advance (the **October 2020 Agreements**).[8] Broadfoot continued to forbear on the Broadfoot Debt until 2023, when Carr Holdings and the *CCAA* Entities obtained protection from creditors under the *CCAA*.[9]

A. 2022 Financing

10. In early summer of 2022, Broadfoot approached Mrs. Carr to request that Carr Holdings, or an affiliate, repay all or some of the Broadfoot Debt. At that time, he learned that Carr Holdings' financial difficulties were continuing, and that Carr Holdings was seeking professional advice in respect of a financial restructuring.[10] Broadfoot agreed to a further forbearance of the Broadfoot Debt, and entered into discussions with Carr Holdings and the *CCAA* Entities about how their ongoing financial difficulties could be resolved.

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[3] Broadfoot Affidavit at paras 7 and 8.
[4] Broadfoot Affidavit at para 10 and Exhibit H.
[5] Broadfoot Affidavit at para 9 and Exhibit F.
[6] Broadfoot Affidavit at para 11 and Exhibits A and C.
[7] Broadfoot Affidavit at para 12.
[8] Broadfoot Affidavit at para 13 and Exhibit I.
[9] Broadfoot Affidavit at para 12.
[10] Broadfoot Affidavit at para 14.

11. By the end of the summer 2022, it was clear that Carr Holdings and the *CCAA* Entities required additional support from Broadfoot. Carr Holdings was of the view that its total asset value likely exceeded its collective liabilities, and believed that an orderly asset sale would maximize the value to Carr Holdings, its stakeholders, and its existing creditors (including secured creditors). Unfortunately, Carr Holdings was not able to fund its immediate cash flow needs; it received an immediate injection of $500,000 from Broadfoot in mid October to make debt service payments to a creditor in order to avoid being placed into receivership, and a total of $2,500,000 in additional bridge financing to fund operating, debt service and professional costs in the immediate future which in turn enabled Carr to communicate to creditors that they had a further funding source.[11]

12. Without that additional financing from Broadfoot, Carr Holdings (and the CCAA Entities) would be unable to meet their immediate debt service obligations, many of the *CCAA* Entities would have been placed into receivership and foreclosure proceedings in respect of real property assets of the *CCAA* Entities were imminent.[12] In other words, an orderly liquidation would be impossible.

13. Therefore, Broadfoot agreed to forbear on the Broadfoot Debt for an additional period of time, and made a commitment to Carr Holdings that he would provide further bridge financing of up to $2,500,000, and support an orderly restructuring of the Carr Holdings balance sheet, but required as consideration that Carr Holdings and its affiliates would provide further adequate security both in respect of future advances and the existing Broadfoot Debt.[13] Carr Holdings agreed.

14. As outlined above, instead of demanding payment of the Initial Advance, and with a view of supporting Carr Holdings and the *CCAA* Entities pursuing a financial restructuring plan, Broadfoot provided additional bridge financing of $500,000 with a further commitment of providing additional bridge financing totalling up to $2,500,000.[14] Without that injection of funds and the additional funding commitment, Carr Holdings would likely have been placed in receivership before the end of 2022.[15] This cash injection was evidenced by an additional promissory note between Broadfoot, Carr Holdings, Mrs. Carr and 272 (the **Additional Note**).[16]

15. The Additional Note accrues interest at 4 % annually, and became payable in full on October 12, 2023. By then, the *CCAA* Entities had obtained protection from creditors; however, Broadfoot provided a further forbearance under the Additional Note between October of 2022 and April 19,

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[11] Broadfoot Affidavit, paras 20 and 21 and Exhibit K.
[12] Broadfoot Affidavit, paras 17, 20, 21.
[13] Broadfoot Affidavit, paras 18, 21.
[14] Broadfoot Affidavit at para 21.
[15] Broadfoot Affidavit, para 20.
[16] Broadfoot Affidavit at para 23 and Exhibit M.

2023, in respect of the interest accrued and owing thereunder. The Additional Note is secured by Mrs. Carr's life insurance policies and security agreements relating to the assets of Carr Holdings.

16. In December 2022, Broadfoot entered into amended and restated loan and security agreements with respect to the Broadfoot Debt and its security (the **December 2022 Agreements**).[17] These agreements memorialize the understanding that that Broadfoot would continue to forbear on the Broadfoot Debt, would commit to further advances of up to $2,500,000 in bridge financing, and would support a financial restructuring of Carr Holdings and the *CCAA* Entities, among others. As part of that agreement, Carr Holdings agreed to provide further adequate security in respect of the Broadfoot Debt.[18]

17. The December 2022 Agreements include:

    a. a Loan Agreement between Broadfoot and Carr Holdings dated December 12, 2022 (the **Loan Agreement**);[19]

    b. a Fixed and Floating Charge Demand Debenture effective as of October 15, 2022 granted to Broadfoot by Carr Holdings (the **Carr Debenture**);[20]

    c. a Debenture Pledge Agreement effective as of October 15, 2022 from Carr Holdings (the **Carr Debenture Pledge**);[21]

    d. a Fixed and Floating Charge Demand Debenture effective as of October 15, 2022 with 272 (the **272 Debenture**);[22]

    e. a Debenture Pledge Agreement effective as of October 15, 2022 with 272 (the **272 Debenture Pledge**);[23]

    f. a Guarantee effective as of October 15, 2022 from various affiliates of Carr Holdings, including (among others) the *CCAA* Entities, (the **Guarantee**);[24]

    g. a Supplemental Debenture dated March 3, 2023 from Carr Holdings;[25] and

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[17] Broadfoot Affidavit at para 35 and Exhibits N to U.
[18] Broadfoot Affidavit at para 19.
[19] Broadfoot Affidavit at para 35 and Exhibit N.
[20] Broadfoot Affidavit at para 35 and Exhibit O.
[21] Broadfoot Affidavit at para 35 and Exhibit P.
[22] Broadfoot Affidavit at para 35 and Exhibit Q.
[23] Broadfoot Affidavit at para 35 and Exhibit R.
[24] Broadfoot Affidavit at para 35 and Exhibit S.
[25] Broadfoot Affidavit at para 35 and Exhibit T.

h. a First Amending Agreement to the Loan Agreement, dated April 3, 2023.[26]

18. Consistent with these agreements and with notice to the Monitor, Mrs. Carr, Carr Holdings, and legal counsel for Carr Holdings and the *CCAA* Entities, Broadfoot registered security interests as permitted by the aforementioned agreements, debentures, and guarantees pursuant to the Alberta *Personal Property Security Act* (the ***PPSA***) and (where appropriate) the *Land Titles Act*. These registrations included:

a. All present and after-acquired property of Carr Holdings; [27]

b. A second mortgage granted by 272 on civic address of 11517 – 89 Avenue in Grande Prairie, and a legal description as follows (the **Tundra Assets**):

PLAN 8020127
BLOCK 17
LOT 1
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA: 1.05 HECTARES (2.59 ACRES) MORE OR LESS[28]

c. A second mortgage granted by 272 on civic address of 9502 – 117 Street in Grande Prairie, and a legal description as follows (the **Iron Nation Assets**):

PLAN 0625015
BLOCK 3
LOT 3
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA: 0.611 HECTARES (1.51 ACRES) MORE OR LESS[29]

d. A first mortgage granted by Carr Holdings on civic address of 8222-96 Ave. in Fort Saskatchewan Alberta, and a legal description as follows (the **Fort Saskatchewan Duplex**):

PLAN 7520666
BLOCK 45
LOT 6[30]

19. On April 3, 2023, Broadfoot entered into a Securities Pledge Agreement with Carr Holdings (the **Securities Pledge**). Pursuant to the Securities Pledge, Carr Holdings pledged to Broadfoot 3,466

[26] Broadfoot Affidavit at para 35 and Exhibit U.
[27] Broadfoot Affidavit at para 36 and Exhibit V (page 52).
[28] Broadfoot Affidavit at para 44.
[29] Broadfoot Affidavit at para 47.
[30] Broadfoot Affidavit at para 51.

Class "A" common shares issued by R'ohan Well Services Ltd. in the name of Carr Holdings the **R'ohan Shares**), pursuant to Broadfoot's prior security in the present and after-acquired property of Carr Holdings as granted to Broadfoot in the December 2022 Agreements.[31] 3,466 is 82% of the R'ohan Shares held by Carr Holdings at the time of the Securities Pledge.

20. In addition to registering a security interest over the R'ohan Shares pursuant to the *PPSA* on December 15, 2022, Broadfoot took delivery of the R'ohan Share certificate on April 12, 2023, and was in control of that share certificate on the date of the sale of the R'ohan Shares to Gondor Investment Corp.[32]

B. CCAA Proceedings

21. On April 19th, 2023, this Honourable Court granted an order (as amended, the **ARIO**), in which the applicant entities noted hereon obtained protection from creditors pursuant to the *Companies' Creditors Arrangement Act,* RSC 1985, c. C-36, as amended (the ***CCAA***) and Ernst & Young Inc. was appointed Monitor.

22. After the filing date, Broadfoot directed the Interim Lender to fund the Interim Loan Facility, which has been used since the filing date to pay operating, professional, administrative and other costs incurred by Carr Holdings and the *CCAA* Entities. His commitment to provide this funding has directly benefited Carr Holdings and the *CCAA* Entities, as well as their various secured creditors.

23. On June 29th, 2023, and as part of the *CCAA* process, the Honourable Justice M.E. Burns issued an Approval and Vesting Order in relation to the purchase and sale of the R'ohan Shares, as contemplated by a Share Purchase Agreement dated June 16th, 2023 (the **R'ohan Order**).

24. On August 24th, 2023, and as part of the *CCAA* process, the Honourable Justice G.S. Dunlop issued an Approval and Vesting Order in relation to the purchase and sale of the Tundra Assets, as contemplated by an Agreement of Purchase and Sale dated July 26th, 2023 (the **August 24th SAVO**).

25. On September 14th, 2023, and as part of the *CCAA* process, the Honourable Justice J.T. Neilson issued an Approval and Vesting Order in relation to the purchase and sale of the Iron Nation Assets, as contemplated by an Agreement of Purchase and Sale dated August 25h, 2023 (the **September 14th SAVO**).

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[31] Broadfoot Affidavit at para 35 and Exhibits CC and DD.
[32] Broadfoot Affidavit at para 41 and Exhibits GG.

III. ISSUES

26 The issues addressed in this brief are as follows:

(a) whether Broadfoot has valid and enforceable security interests in certain assets of Carr Holdings and the *CCAA* Entities;

(b) if so, whether Broadfoot took the steps necessary to perfect his security interests in certain assets of Carr Holdings and the *CCAA* Entities;

(c) whether the proposed distributions from the sales of certain assets of Carr Holdings and the *CCAA* Entities are appropriate; and

(d) whether a sealing order for the Confidential Broadfoot Affidavit is appropriate.

IV. LAW AND ANALYSIS

A. Broadfoot has valid and enforceable security interests in certain assets of Carr Holdings and the CCAA Entities

27 A valid and enforceable grant of security requires that security properly attach to the subject collateral.[33] Attachment occurs where three prerequisites are met:

1. the debtor has rights in the subject collateral; [34]

2. the security interest becomes enforceable within the meaning set out in s.10 of the *PPSA*; and

3. value passes in respect of the security. [35]

28 There is no question that Carr Holdings and the *CCAA* Entities hold rights in the subject collateral, or that they granted enforceable rights to Broadfoot.[36]

[33]*Personal Property Security Act* RSA 2000, c P-7 [***PPSA***] [**TAB 1**] at s.19(a): a security interest is not valid and enforceable against third parties unless it is perfected; attachment is a prerequisite to perfection.
[34] *1231640 Ontario Inc., Re*, 2007 ONCA 810 **[TAB 6]** at para 60 notes "if the debtor has no "rights" in the collateral, the debtor has nothing to give as security to the creditor."
[35] *PPSA* [**TAB 1**], *supra* at ss. 10 and 12.
[36] Carr Holdings and the *CCAA* Entities signed various security agreements with Broadfoot, starting in 2017 with the Broadfoot Note, Insurance Assignment and Loan Assignment, which were amended and restated in the October 2020 Agreements. Further security agreements were signed between Carr Holdings or the *CCAA* Entities and Broadfoot as part of the December 2022 Agreements. Pursuant to both the 272 Debenture and the 272 Debenture Pledge, 272 granted Broadfoot a security interest in the Tundra Assets and Iron Nation Assets. Pursuant to both the Carr Debenture and the Carr Debenture Pledge, Carr Holdings granted security in all present and after-acquired personal property of Carr Holdings, which includes, among other things, the R'ohan Shares and the Fort Saskatchewan Duplex.

29 A grant of security attaches under the PPSA where it is granted for value. Valuable consideration for a grant of security may be "any consideration sufficient to support a simple contract, and includes an antecedent debt or antecedent liability."[37] Fresh consideration is not necessary in an agreement to collateralize an antecedent debt. Other forms of valuable consideration may include forbearance of enforcement. [38]

30 For example, in *Toronto Dominion Bank v Nova Entertainment Inc*.,[39] the receiver-manager of the defendant company sought the court's direction regarding the validity of security held by one of the defendant's secured creditors. The secured creditor had made a series of advances between June 1987 and June 1990; in November 1990, the defendant entered a security agreement in respect of all of the defendant's indebtedness (both past and present) in favour of the secured creditor. The issue, among other things, was whether consideration had passed in respect of the grant. To resolve this issue, the Court turned to the definition of "'value" in the *PPSA*:

> In short, the definition of "value" on my reading the section has been expanded from that of consideration in a simple contract to include past indebtedness. Even if that is not the case I am satisfied on a review of the authorities that forbearance to sue may well constitute consideration or the entering into an agreement for some form of security inter alia.[40]

31 On this basis, the Court found the secured creditor held good and valid security as against all parties. As such, the receiver-manager was instructed to make a distribution of the surplus proceeds from the receivership estate to the secured creditor.

32 In the instant case, consideration passed in respect of the December 2022 Agreements that granted Broadfoot security interests in certain assets of Carr Holdings and the *CCAA* Entities. Consideration was supplied in the form of:

(a) continued forbearance on the Initial Advance, and the accrued interest thereon;[41]

(b) $500,000 of bridge financing, required as an immediate cash injection to make debt service payments demanded by a creditor;[42]

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[37] *PPSA* [**TAB 1**], *supra* at s.1(ww), emphasis added.
[38] *Royal Bank v Kiska*, 1967 CarswelOnt 125, 63 DLR (2d) 582 (ONCA) [**TAB 7**] at paras 19-24: no express arrangement for forbearance is required; acts of forbearance will suffice.
[39] 1992 Carswell Alta 206, 7 Alta LR (3d) 132 [***Nova Entertainment***] [**TAB 8**].
[40] *Nova Entertainment* [**TAB 8**], *ibid* at para 3.
[41] Broadfoot Affidavit, paras 12, 13, 21 and 30.
[42] Broadfoot Affidavit, paras 20 to 21.

(c) a commitment to provide up to an additional $2,500,000 in bridge financing;[43]

(d) a further advance of $250,000 to fund a retainer for professional fees incurred by Carr Holdings and the *CCAA* Entities prior to the filing date;[44] and

(e) a commitment to support the restructuring of Carr Holdings and the *CCAA* Entities.[45]

33 The Initial Advance is an antecedent debt; under the PPSA security for that debt is considered to be for value. Without more, that is dispositive; however, in this case further good and valuable consideration passed, to the benefit not only of Carr Holdings and the *CCAA* Entities but all of their creditors and stakeholders. Broadfoot's continued forbearance, his injection of much needed cash to make urgent debt service payment, his funding of a professional fees retainer, and his commitment to provide additional bridge financing were crucial; without Broadfoot's support for Carr Holdings and the *CCAA* Entities, these proceedings could never have been commenced at all.

34 The conclusion is clear: Broadfoot holds valid and enforceable security interests in the relevant assets of Carr Holdings and the *CCAA* Entities.

B. Broadfoot took the steps necessary to perfect his interests in certain assets of Carr Holdings and the CCAA Entities

35 A security interest is perfected when it has attached and all steps required for perfection under the *PPSA* have been completed.[46] The steps a secured party can take to complete perfection include registration of the interest or taking control of the subject collateral.[47] Perfection of an interest in investment property in the form of a certificated security, like the R'ohan Shares, requires that the secured party take control thereof in the manner set out in section 23 of the *Securities Transfer Act*.[48] Section 23 of the *Securities Transfer Act* deems control to be established where a party has taken delivery of the certificated security and it has been endorsed thereto.[49]

36 Priority among conflicting security interests is addressed under s. 35.1 of the *PPSA*. A security interest of a secured party having control of investment property has priority over a secured party not having control of the investment property, meaning control takes priority over registration.[50]

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[43] Broadfoot Affidavit, paras 21 and 30.
[44] Broadfoot Affidavit, para 28.
[45] Broadfoot Affidavit, paras 21, 28 and 30.
[46] *PPSA* [**TAB 1**], *ibid* at s.19.
[47] *PPSA* [**TAB 1**], *ibid* at ss.24.1(1) and s.25.
[48] *PPSA* [**TAB 1**], *ibid* at s.24.1(1) and s.1(1.1).
[49] *Securities Transfer Act*, SA 2006, c S-4.5 at s.23(2) [**TAB 3**].
[50] *PPSA* [**TAB 1**], *supra* at s.35.1(2).

37 In accordance with the *PPSA* and (where appropriate) the *Land Titles Act*,[51] Broadfoot registered the following security interests thereby perfecting his interest in certain assets of Carr Holdings and the *CCAA* Entities:

(a) An interest in all present and after-acquired personal property of Carr Holdings;[52]

(b) A second mortgage granted by 272 on the Tundra Assets;[53]

(c) A second mortgage granted by 272 on the Iron Nation Assets; and[54]

(d) A first mortgage granted by Carr Holdings on the Fort Saskatchewan Duplex.[55]

38 Broadfoot's security interest in all present and after-acquired personal property of Carr Holdings is inclusive of the R'ohan Shares. That interest was first perfected by registration on December 15, 2022. On April 3rd, 2023, a Securities Pledge Agreement between Broadfoot and Carr Holdings was executed in respect of the R'ohan Shares. Broadfoot took the additional step of perfecting his interest in the R'ohan shares by control, taking delivery of the R'ohan share certificates on April 12, 2023, and receiving an endorsement in respect thereof, thereby establishing priority over any conflicting security interests in accordance with section 35.1(2) of the *PPSA*.

39 Therefore, Broadfoot took all steps necessary to perfect his security interests in the relevant assets of Carr Holdings and the *CCAA* Entities.

C. The Broadfoot Security was Validly Granted and is Not Reviewable.

40 In the Eleventh Report of the Monitor, dated November 17, 2023, the Monitor has opined that subject to the customary qualifications (which includes whether the transaction is reviewable), the Broadfoot Security is valid and enforceable.[56] The grants of security to Broadfoot were *bona fide*, and granted by Carr Holdings and the CCAA Entities in good faith, for valuable consideration, for the sole object of securing the money advanced. They are not reviewable, under the *BIA* or otherwise. [57]

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[51] RSA 2000, c L-4 [**TAB 2**], at ss. 14, 103, and 104.
[52] Broadfoot Affidavit at para 36 (a) and Exhibit V.
[53] Broadfoot Affidavit at para 36 (b) and Exhibit W.
[54] Broadfoot Affidavit at para 36 (c) and Exhibit X.
[55] Broadfoot Affidavit at para 36 (d) and Exhibit Z.
[56] Eleventh Report of the Monitor, dated November 17, 2023 at para 34 [**Eleventh Report**].
[57] *First Royal Enterprises Ltd. v. Armadillo's Restaurant Ltd*.,1995 Carswell BC, 15 BCLR (3d) 245 (BCCA) [**Tab 9**] at paras 32, 33 and 37. The operative sections of the *Fraudulent Preferences Act, RSA 2000, c. F-24 (**FPA**),* (sections 1 to 5) do not apply where the transactions was *bona fide* with valid consideration *FPA,* [**TAB 4**] at s 6. In order to challenge a transaction under the *Fraudulent Conveyances Act 1571* (13 Eliz 1. c. 5) (**FCA**), the applicant must show, among other things, that there was "no or nominal consideration" and there was an "intent to defraud, delay or hinder creditors" see *1007374 Alberta Ltd. v Ruggieri*, 2014 ABQB 641

41 For a transaction to be reviewable, it must either be a preference or a transfer at undervalue. The consideration given for the Broadfoot Security was ample and valuable; without it, Carr Holdings would have been unable to service its debts, and would have been placed in receivership in 2022. There is no transfer at undervalue. Moreover, there is no intent to prefer Mr. Broadfoot, and in fact no preference to him. The purpose of the funds advanced by Mr. Broadfoot was consistent with the objective of an orderly liquidation of the assets of Carr Holdings and the *CCAA* Entities for the general benefit of their stakeholders, including secured creditors whose claims are and remain in priority to Broadfoot's.[58]

D. The proposed distributions from the sales of certain assets of Carr Holdings and the CCAA Entities are appropriate

R'ohan Shares

42 Pursuant to the R'ohan Order, the Monitor is holding the Net Share Sale Proceeds as defined in that order in trust pending further direction of this court. The Net Share Sale Proceeds stand in the place of the R'ohan Shares for the purpose of any Claims as defined in the R'ohan Order.

43 Given Broadfoot's first priority security interest in the R'ohan Shares (subject only to the Court-ordered charges granted in this proceeding) a distribution of 82% of the Net Share Sale Proceeds to Broadfoot is fair and appropriate. Payment to Broadfoot of that portion of the Net Share Sale Proceeds will not be sufficient to repay the Broadfoot Debt but will substantially reduce the overall obligations of Carr Holdings and creditors.[59]

44 Broadfoot is proposing that the amount of $300,000 be held back from any distribution pending a future application by Canadian Western Bank (**CWB**) or Broadfoot for a further distribution from that hold back.

Tundra

45 Pursuant to the 272 Debenture and the 272 Debenture Pledge, Broadfoot was granted and registered a mortgage against the Tundra Assets. There are three liens registered against the

at para 29 [**TAB 10**] As discussed above, there was good consideration for the transactions with the intent to increase the return to creditors. Accordingly, the *FCA* does not apply

[58] Even if there were a preference, any presumption under s 95(2) of the *BIA* [**TAB 5**] can be rebutted if the debtor's dominant intent was not to prefer, where the transaction was undertaken for the purpose of generating income or liquidating assets to satisfy the insolvent's creditors see *Orion Industries Ltd. v Neil's General Contracting Ltd*., 2013 ABCA 330 at paras 8 - 12. [**TAB 11]**

[59] CWB is concurrently applying for an order distributing the remaining 18% of the Net Share Sale Proceeds to CWB; Broadfoot does not oppose that relief.

Tundra Assets. It is unclear at this time whether these liens are valid or their priority with respect to other creditors.

46 There are also two writs of creditors registered against the Tundra Assets. Writs of creditors' against the Tundra Assets are subordinate to Broadfoot's secured interest. Writ holders are not secured creditors, and secured creditors take priority in a court ordered distribution.[60]

47 Pursuant to the Tundra Order, the Monitor is holding the net proceeds derived from the sale of the Tundra Assets in trust until further direction of this court. Those sale proceeds stand in the place of the Tundra Assets for the purpose of any Claims as defined in the August 24th SAVO.

48 Once the distributions as set out at paragraphs 9(a)-(e) of the August 24th SAVO have been made, Broadfoot's mortgage and security interest in the Tundra Assets will become a first priority mortgage against the remaining net proceeds from the sale of the Tundra Assets.

49 Broadfoot is proposing that the amount of $207,039 be held back from this distribution pending a further order from this Court, once the lienholders have had an opportunity to prove the validity and priority of their respective liens.

50 Payment to Broadfoot of the remaining net sale proceeds of the Tundra Assets will not be sufficient to repay the Broadfoot Debt but will substantially reduce the overall obligations of the *CCAA* Entities and creditors.

Iron Nation

51 Pursuant to the 272 Debenture and the 272 Debenture Pledge, Broadfoot was granted and registered a mortgage against the Iron Nation Assets, ranking behind only the first-charge mortgage granted to Canadian Western Bank.

52 Pursuant to the September 14th SAVO, the Monitor is holding the net proceeds derived from the sale of the Iron Nation Assets in trust until further direction of this court. Those sale proceeds stand in the place of the Iron Nation Assets for the purpose of any Claims as defined in the September 14th SAVO.

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[60] The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [***BIA***] [**TAB 5**] scheme of distribution applies in liquidating CCAA proceedings; see *Arrangement relatif à Bloom Lake*, 2017 QCCS 4057 at para 205-208 [**TAB 12**], referencing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 47 [**TAB 13**]. Under the *BIA* [**TAB 5**], secured creditors (as defined in section 2) rank first in the distribution of proceeds (s.136). Writ holders are not secured creditors within the meaning of the section 2 of the *BIA* see *MNP Ltd v Canada Revenue Agency*, 2022 ABQB 320 at paras 16, 17 and 40 [**TAB 14**].

53 Once the distributions as set out at paragraphs 9(a)-(e) of the September 14th SAVO have been made, Broadfoot's mortgage and security interest in the Iron Nation Assets will become a first priority charge against the remaining net proceeds from the sale of the Iron Nation Assets.[61]

54 Payment to Broadfoot of the remaining net sale proceeds of the Iron Nation Assets will not be sufficient to repay the Broadfoot Debt but will substantially reduce the overall obligations of the *CCAA* Entities and creditors.

Fort Saskatchewan Condo

55 Pursuant to the Broadfoot Debt and related security, Broadfoot was granted, and registered, a first-charge mortgage in the Fort Saskatchewan Condo. Since the commencement of these proceedings, the Fort Saskatchewan Condo has been sold by Carr Holdings, and the proceeds of that sale are being held by the Monitor pending further direction of this Court.

56 Pursuant to the terms of the ARIO, the first-priority mortgage of Broadfoot is a First Charge Encumbrances, subject only to the remaining Court-ordered charges granted in this proceeding.[62] We understand that the City of Fort Saskatchewan tax debt related to this property has been paid leaving only writs registered by judgment creditors as remaining encumbrances. As discussed above, writ holders are not secured creditors; therefore writs of creditors' against the Fort Saskatchewan Condo are subordinate to Broadfoot's secured interest.

57 Payment to Broadfoot of the net sale proceeds of the Fort Saskatchewan Condo will not be sufficient to repay the Broadfoot Debt but will substantially reduce the overall obligations of the *CCAA* Entities and creditors.

E. A sealing order for the Confidential Broadfoot Affidavit is appropriate

58 The common law test for sealing orders was first articulated *in Sierra Club of Canada v Canada (Minister of Finance)*[63] and more recently modified in *Sherman Estate v Donovan.*[64] Under the test, a sealing order should only be granted where:

(a) court openness poses a serious risk to an important public interest;

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[61] As discussed above, writ holders are not secured creditors and therefore writs of creditors' against the Iron Nation Assets are subordinate to Broadfoot's secured interest.
[62] ARIO, at para 43.
[63] 2002 SCC 41 at paras 53 to 57 [**TAB 15**].
[64] 2021 SCC 25 [***Sherman Estate***] [**TAB 16**].

(b) the sealing order is necessary to prevent the serious risk identified because reasonably alternative measures will not prevent the risk; and

(c) as a matter of proportionality, the benefits of the sealing order outweigh the negative effects.[65]

59 The Confidential Broadfoot Affidavit contains property valuations and other commercially sensitive documents, all of which are relevant to the ongoing sales process for the remaining assets of the *CCAA Entities*. Disclosure of this information would pose a serious risk to an important public interest. That public interest being the protection of the sales process and the ability to maximize recovery on the remaining assets.[66]

60 There are no reasonable alternatives to mitigate this risk, and the benefits of a sealing order outweigh any negative effects associated therewith. A sealing order mitigates against interference with any further attempts to market and sell the remaining assets, and the requested order is limited in scope, containing only a select number of exhibits. On this basis, the Applicant respectfully submits the requested sealing order is appropriate in the circumstances and should therefore be granted until the sales of *CCAA* Entities' properties are complete.

V. CONCLUSION

61 Broadfoot is a secured creditor of Carr Holdings and the *CCAA* Entities and holds valid and enforceable security interests in the assets thereof. This proposed interim distribution is fair and is in the best interests of the *CCAA* Entities, its creditors and stakeholders. A sealing order made in respect of the Confidential Broadfoot Affidavit is appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Gunnar Benediktsson | Miranda Sharpe
Norton Rose Fulbright Canada LLP
Solicitor for the Applicant, Michael G. Broadfoot

[65] *Sherman Estate* [**TAB 16**], *ibid* at para 38.
[66] See *Rose-Isli Corp. v Frame Tech Structures*, 2023 ONSC 832 at paras 137-141 [**TAB 17**].

TABLE OF AUTHORITIES

Legislation

1. Alberta *Personal Property Security Act*, RSA 2000, c P-7
2. Alberta *Land Titles Act*, RSA 2000, c L-4
3. Alberta *Securities Transfer Act*, SA 2006, c S-4.5
4. *Fraudulent Preferences Act*, RSA 2000, c. F-24
5. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3

Jurisprudence

6. *1231640 Ontario Inc., Re*, 2007 ONCA 810
7. *Royal Bank v Kiska*, 1967 CarswelOnt 125, 63 DLR (2d) 582 (ONCA)
8. *Toronto Dominion Bank v Nova Entertainment Inc.*, 1992 Carswell Alta 206, [1992] AJ No 1266
9. *First Royal Enterprises Ltd. v. Armadillo's Restaurant Ltd.*,1995 Carswell BC, 66 BCAC 170
10. *1007374 Alberta Ltd. v Ruggieri*, 2014 ABQB 641
11. *Orion Industries Ltd. v Neil's General Contracting Ltd.*, 2013 ABCA
12. *Arrangement relatif à Bloom Lake*, 2017 QCCS 4057
13. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
14. *MNP Ltd v Canada Revenue Agency*, 2022 ABQB 320.
15. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
16. *Sherman Estate v Donovan*, 2021 SCC 25
17. *Rose-Isli Corp. v Frame Tech Structures*, 2023 ONSC 832

Evidence

18. Affidavit of Michael G. Broadfoot, sworn November 14, 2023, filed November 17, 2023.
19. Confidential Affidavit of Michael G. Broadfoot, sworn November 14, 2023, to be filed.
20. Fifth Supplemental Affidavit of Marjorie Carr, sworn November 16, 2023.
21. Eleventh Report of the Monitor, dated November 17, 2023

Province of Alberta

PERSONAL PROPERTY SECURITY ACT

Revised Statutes of Alberta 2000
Chapter P-7

Current as of November 16, 2022

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contained in the bylaws, rules or regulations of the futures exchange, and cleared and settled by a clearing house, to do one or more of the following at a price established by or determinable by reference to the agreement and at or by a time established by or determinable by reference to the agreement:

(i) make or take delivery of the underlying interest of the agreement;

(ii) settle the obligation in cash instead of delivery of the underlying interest;

(vv) "trust indenture" means any deed, indenture or document, however designated, including any supplement or amendment to it, by the terms of which a person issues or guarantees, or provides for the issue or guarantee of debt obligations secured by a security interest and in which a person is appointed as trustee for the holder of the debt obligations issued, guaranteed or provided for under it;

(vv.1) "uncertificated security" means an uncertificated security as defined in the *Securities Transfer Act*;

(ww) "value" means any consideration sufficient to support a simple contract, and includes an antecedent debt or antecedent liability.

(1.1) For the purposes of this Act,

(a) a secured party has control of a certificated security if the secured party has control in the manner provided for in section 23 of the *Securities Transfer Act*;

(b) a secured party has control of an uncertificated security if the secured party has control in the manner provided for in section 24 of the *Securities Transfer Act*;

(c) a secured party has control of a security entitlement if the secured party has control in the manner provided for in section 25 or 26 of the *Securities Transfer Act*;

(d) a secured party has control of a futures contract if

(i) the secured party is the futures intermediary with which the futures contract is carried, or

(ii) the futures customer, the secured party and the futures intermediary have agreed that the futures intermediary will apply any value distributed on account of the futures

(c) substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.

(2) For the purposes of sections 5, 6, 7 and 7.1, a security interest is perfected under the law of a jurisdiction when the secured party has complied with the law of the jurisdiction with respect to the creation and continuance of a security interest, and the security interest has a status in relation to the interests of other secured parties, buyers, judgment creditors or a trustee in bankruptcy of the debtor, similar to that of an equivalent security interest created and perfected under this Act.

RSA 2000 cP-7 s8;2006 cS-4.5 s108(7)

Law of a jurisdiction

8.1 For the purposes of section 7.1, a reference to the law of a jurisdiction means the internal law of that jurisdiction excluding its conflict of law rules.

2006 cS-4.5 s108(8)

Part 2
Validity of Security Agreements and Rights of Parties

Effectiveness of security agreement

9 Subject to this Act or any other Act, a security agreement is effective according to its terms.

1988 cP-4.05 s9

Enforceability of security interest

10(1) Subject to subsection (2) and section 12.1, a security interest is enforceable against a third party only where

(a) the collateral is not a certificated security and is in the possession of the secured party,

(b) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 68 of the *Securities Transfer Act* pursuant to the debtor's security agreement,

(c) the collateral is investment property and the secured party has control under section 1(1.1) pursuant to the debtor's security agreement, or

(d) the debtor has signed a security agreement that contains

(i) a description of the collateral by item or kind or as “goods”, “chattel paper”, “investment property”, “documents of title”, “instruments”, “money” or “intangibles”,

(ii) a description of collateral that is a security entitlement, securities account, or futures account if it describes the collateral by those terms or as “investment property” or if it describes the underlying financial asset or futures contract,

(iii) a statement that a security interest is taken in all of the debtor’s present and after-acquired personal property, or

(iv) a statement that a security interest is taken in all of the debtor’s present and after-acquired personal property except specified items or kinds of personal property or except personal property described as “goods”, “chattel paper”, “investment property”, “documents of title”, “instruments”, “money” or “intangibles”.

(2) For the purposes of subsection (1)(a), a secured party is deemed not to have taken possession of collateral that is in the apparent possession or control of the debtor or the debtor’s agent.

(3) A description is inadequate for the purposes of subsection (1)(d) if it describes the collateral as consumer goods or equipment without further reference to the kind of collateral.

(4) A description of collateral as inventory is adequate for the purposes of subsection (1)(d) only while it is held by the debtor as inventory.

(5) A security interest in proceeds is not unenforceable against a third party by reason only that the security agreement does not contain a description of the proceeds.

RSA 2000 cP-7 s10;2006 cS-4.5 s108(9);2016 c18 s14

Delivery of copy of security agreement

11 Where a security agreement is in writing, the secured party shall deliver a copy of the security agreement to the debtor not later than 10 days after the execution of the security agreement, and if the secured party fails to do so after a request by the debtor the Court may, on application by the debtor, make an order for the delivery of a copy to the debtor.

1988 cP-4.05 s11

Attachment of security interests

12(1) A security interest, including a security interest in the nature of a floating charge, attaches when

(a) value is given,

(b) the debtor has rights in the collateral or power to transfer rights in the collateral to a secured party, and

(c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10,

unless the parties specifically agree in writing to postpone the time for attachment, in which case the security interest attaches at the time specified in the agreement.

(2) For the purposes of subsection (1)(b) and without limiting other rights that the debtor may have in the collateral, a debtor has rights in goods leased to the debtor or consigned to the debtor when the debtor obtains possession of them in accordance with the lease or consignment.

(3) For the purposes of subsection (1), a debtor has no rights in

(a) crops until they become growing crops,

(b) the young of animals until they are conceived,

(c) minerals until they are extracted, and

(d) trees other than crops until they are severed.

(4) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(5) The attachment of a security interest in a futures account is also attachment of a security interest in the futures contracts carried in the futures account.

RSA 2000 cP-7 s12;2006 cS-4.5 s108(10)

Securities intermediary

12.1(1) A security interest in favour of a securities intermediary attaches to a person's security entitlement if

(a) the person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase, and

Part 3
Perfection and Priorities

Perfection of security interest

19 A security interest is perfected when

(a) it has attached, and

(b) all steps required for perfection under this Act have been completed,

regardless of the order of occurrence.

1988 cP-4.05 s19

Perfection of security interest - securities or futures account

19.1(1) Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(2) Perfection of a security interest in a futures account also perfects a security interest in the futures contracts carried in the futures account.

2006 cS-4.5 s108(14)

Perfection on attachment

19.2(1) A security interest arising in the delivery of a financial asset under section 12.1(3) is perfected when it attaches.

(2) A security interest in investment property created by a broker or securities intermediary is perfected when it attaches.

(3) A security interest in a futures contract or a futures account created by a futures intermediary is perfected when it attaches.

2006 cS-4.5 s108(14)

Priority of unperfected and certain perfected security interests

20 A security interest

(a) in collateral is not effective against

(i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or

(ii) a liquidator appointed under the *Winding-up and Restructuring Act* (Canada) if the security interest is unperfected at the date the winding-up order is made;

(b) in goods, chattel paper, a negotiable document of title, an instrument, an intangible or money is subordinate to the interest of a transferee who

Perfection of security interest in investment property

24.1(1) Subject to section 19, a security interest in investment property may be perfected by control of the collateral under section 1(1.1).

(2) Subject to section 19, a security interest in investment property is perfected by control under section 1(1.1) from the time the secured party obtains control and remains perfected by control until

(a) the secured party does not have control, and

(b) one of the following occurs:

(i) if the collateral is a certificated security, the debtor has or acquires possession of the security certificate,

(ii) if the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner, or

(iii) if the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

2006 cS-4.5 s108(17)

Perfection by registration

25 Subject to section 19, registration of a financing statement perfects a security interest in collateral.

1988 cP-4.05 s25

Temporary perfection

26(1) A security interest perfected under section 24 in

(a) an instrument or a certificated security that a secured party delivers to the debtor for the purpose of

(i) ultimate sale or exchange,

(ii) presentation, collection or renewal, or

(iii) registering a transfer,

or

(b) a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of

(i) ultimate sale or exchange,

(7) Subsection 8 applies to the re-registration of a security interest the registration of which has lapsed as a result of a failure to renew the registration or has been discharged in error or without authorization.

(8) If the secured party re-registers a security interest within 30 days after the lapse or discharge of its registration, the lapse or discharge does not affect the priority status of the security interest in relation to a competing perfected security interest or registered writ of enforcement that, immediately prior to the lapse or discharge, had a subordinate priority position, except to the extent that the competing security interest secures advances made or contracted for after the lapse or discharge and prior to the re-registration.

(9) Where a debtor transfers an interest in collateral that, at the time of the transfer, is subject to a perfected security interest, that security interest has priority over any other security interest granted by the transferee before the transfer, except to the extent that the security interest granted by the transferee secures advances made or contracted for

(a) after the expiry of 15 days from the day the secured party who holds the security interest in the transferred collateral has knowledge of the information required to register a financing statement disclosing the transferee as the new debtor, and

(b) before the secured party referred to in clause (a) amends the registration to disclose the name of the transferee as the new debtor or takes possession of the collateral.

(10) Subsection (9) does not apply where the transferee acquires the debtor's interest free from the security interest granted by the debtor.

1988 cP-4.05 s35;1990 c31 s24;1994 cC-10.5 s148;1997 c18 s21

Priority among conflicting security interests

35.1(1) The rules in this section govern priority among conflicting security interests in the same investment property.

(2) A security interest of a secured party having control of investment property under section 1(1.1) has priority over a security interest of a secured party that does not have control of the investment property.

(3) A security interest in a certificated security in registered form that is perfected by taking delivery under section 24(3) and not by

Province of Alberta

LAND TITLES ACT

Revised Statutes of Alberta 2000
Chapter L-4

Current as of December 15, 2022

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Business on premises

11 The Registrar or Deputy Registrar, Assistant Deputy Registrar or clerk in any Land Titles Office shall not carry on or transact within the Land Titles Office any business or occupation whatever other than that official's duties as Registrar, Deputy Registrar, Assistant Deputy Registrar or clerk.

RSA 2000 cL-4 s11;2006 c21 s9

Office hours

12 Every Land Titles Office shall be kept open during the hours and on the days fixed by the Minister.

RSA 1980 cL-5 s15;1985 c48 s2(5);1994 cG-8.5 s40

Keeping of records

13 Where records are required to be kept under this Act, the Registrar may keep those records

(a) in written form,

(b) by any graphic, photographic, magnetic or electronic means, or

(c) by any other means or combination of means,

as the Registrar considers appropriate.

1988 c27 s6

Daily record

14(1) The Registrar shall keep a record that shall contain particulars of every instrument and caveat accepted by the Registrar for filing or registration.

(2) The Registrar shall cause each instrument or caveat received by the Registrar for filing or registration to be examined and if it is found to be complete and in the proper form and fit for filing or registration, the Registrar shall endorse on the instrument or caveat the serial number assigned to it and the date on which the serial number is assigned.

(3) For purposes of priority between mortgagees, transferees and others, the serial number assigned to the instrument or caveat shall determine the priority of the instrument or caveat filed or registered.

(4) Notwithstanding subsections (2) and (3), instead of assigning a serial number to an instrument or caveat, the Registrar may identify the instrument or caveat by a means other than a serial number so long as that other means of identification allows for the determination of priority between mortgagees, transferees and others.

RSA 1980 cL-5 s16;1985 c48 s2(6);1988 c27 s7;
1994 cC-10.5 s134;1996 c32 s5(5);1999 c10 s3

Pending registration queue

14.1(1) Subject to the regulations, this section applies to instruments and caveats affecting a parcel of land to which a land identification number has been assigned under section 51.

(2) The Registrar shall establish and maintain a pending registration queue.

(3) The Registrar shall ensure that instruments and caveats are entered in the pending registration queue in an order acceptable to the Registrar.

(4) Instruments and caveats in the pending registration queue must be examined and registered in accordance with section 14(2) in the order in which they are entered in the pending registration queue.

(5) Notwithstanding subsection (4), the regulations may provide that instruments and caveats in the pending registration queue may be examined and registered in an order other than the order in which they are entered in the pending registration queue.

(6) If an instrument or caveat in the pending registration queue is found to be incomplete, not in the proper form or not fit for registration, the Registrar may

(a) return the instrument or caveat for correction, in which case the instrument or caveat shall,

(i) if it is returned to the Registrar within the time prescribed by the regulations, retain its place in the pending registration queue, or

(ii) if it is not returned to the Registrar within the time prescribed by the regulations, be removed from the pending registration queue,

or

(b) reject the instrument or caveat if, in the Registrar's opinion, it was submitted in bad faith or its defects are such that they cannot reasonably be corrected, in which case the instrument or caveat shall be removed from the pending registration queue.

(a) contain an accurate statement of the estate or interest intended to be mortgaged or encumbered, and

(b) give a description of the land intended to be dealt with that is sufficient to identify the land,

and a memorandum of the mortgage or encumbrance shall be made on the certificate of title.

(3) A mortgage or encumbrance providing for the delivery to the mortgagee or encumbrancee of grain is registerable in the same manner as any other mortgage or encumbrance if there is set out in it the amount of grain of any specified description and grade as being the amount of grain deliverable pursuant to it, and all the provisions of this Act relating to other mortgages or encumbrances apply, with all necessary modifications, to any mortgage or encumbrance to which this subsection relates.

RSA 1980 cL-5 s105;1988 c27 s39

Mortgage as security

103 A mortgage or encumbrance under this Act has effect as security but does not operate as a transfer of the land charged by it.

RSA 1980 cL-5 s106

Priority of mortgage

104(1) On registration of a mortgage for a specific principal sum, the mortgage obtains priority in accordance with section 14 of this Act for all advances and obligations secured pursuant to the terms of the mortgage, notwithstanding that they are made or incurred subsequent to the registration, on or after January 1, 1983, of any other instrument or caveat.

(2) On registration of a mortgage that provides for a revolving line of credit up to a specific principal sum, the mortgage obtains priority in accordance with section 14 of this Act for all advances and obligations secured pursuant to the terms of the mortgage notwithstanding

(a) that the advances and obligations are made or incurred subsequent to the registration, after December 31, 1982, of any other instrument or caveat, and

(b) that at any time during the term of the mortgage there may not be any outstanding advances to be secured.

(3) If a mortgagee refuses to make, or a mortgagor has and exercises a right to refuse to accept or be bound by, any further advances that would be secured under subsection (1) or (2), the mortgagee shall, on the request of the mortgagor, provide a discharge of the mortgage as to the further advances.

(4) The rights given under the *Prompt Payment and Construction Lien Act* and the *Personal Property Security Act* are not affected by this section.

RSA 2000 cL-4 s104;2020 c30 s29

Mortgages affected by conditional sales agreement

105(1) A mortgage, charge or encumbrance on land or on any estate or interest in land contained in, endorsed on or annexed to a written order, contract or agreement for the purchase or delivery of any chattel or chattels, is void to all intents and purposes whatsoever, notwithstanding anything in any Act.

(2) No such mortgage, charge or encumbrance, and no caveat founded on it, or on any such writing or instrument, shall be registered or filed under this Act.

(3) If any such writing or instrument, by inadvertence, accident or otherwise howsoever, is registered or filed in any Land Titles Office contrary to this section, the registration or filing is ineffective and nugatory to all intents and purposes whatsoever, and may be cancelled by a judge of the Court of King's Bench on the application of any person interested.

RSA 2000 cL-4 s105;2009 c53 s95;AR 217/2022

Discharge of mortgage or encumbrance

106(1) The Registrar shall discharge a mortgage or an encumbrance wholly or in part, or the land comprised in it wholly or in part, according to the tenor of the discharge, and shall make an entry of the discharge on the certificate of title affected by the discharge, in any of the following cases:

(a) on the production to the Registrar of a discharge in the prescribed form signed by the mortgagee or encumbrancee and accompanied with the proper affidavit of execution, but

(i) when it is expressly stated in a mortgage or encumbrance to 2 or more mortgagees or encumbrancees that the money has been advanced on a joint account, it is sufficient if the discharge of the mortgage or encumbrance is signed by any one of the mortgagees or encumbrancees, or

(ii) when it is expressly stated in a mortgage or encumbrance that the mortgage or encumbrance is held in joint tenancy by 2 or more mortgagees or encumbrancees, it is sufficient, on the death of a joint

Province of Alberta

SECURITIES TRANSFER ACT

Statutes of Alberta, 2006
Chapter S-4.5

Current as of January 1, 2007

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Delay

20 An act or event that creates a right to immediate performance of the principal obligation represented by a security certificate, or that sets a date on or after which a security certificate is to be presented or surrendered for redemption or exchange, does not by itself constitute notice of an adverse claim except in the case of a transfer that takes place more than

(a) one year after a date set for presentation or surrender for redemption or exchange, or

(b) 6 months after a date set for payment of money against presentation or surrender of the security certificate, if money was available for payment on that date.

Statement on security certificate

21(1) A purchaser of a certificated security has notice of an adverse claim if the security certificate,

(a) whether in bearer form or registered form, has been endorsed "for collection" or "for surrender" or for some other purpose not involving a transfer, or

(b) is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor.

(2) For the purposes of subsection (1)(b), the mere writing of a name on a security certificate does not by itself constitute an unambiguous statement that the security certificate is the property of a person other than the transferor.

Registration of financing statement

22 The registration of a financing statement under the *Personal Property Security Act* is not notice of an adverse claim.

Control of Financial Assets

Purchaser's control of certificated security

23(1) A purchaser has control of a certificated security that is in bearer form if the certificated security is delivered to the purchaser.

(2) A purchaser has control of a certificated security that is in registered form if the certificated security is delivered to the purchaser and

(a) the security certificate is endorsed to the purchaser or in blank by an effective endorsement, or

(b) the security certificate is registered in the name of the purchaser at the time of the original issue or registration of transfer by the issuer.

Purchaser's control of uncertificated security

24(1) A purchaser has control of an uncertificated security if

(a) the uncertificated security is delivered to the purchaser, or

(b) the issuer has agreed that the issuer will comply with instructions that are originated by the purchaser without the further consent of the registered owner.

(2) A purchaser to whom subsection (1) applies in relation to an uncertificated security has control of the uncertificated security even if the registered owner retains the right

(a) to make substitutions for the uncertificated security,

(b) to originate instructions to the issuer, or

(c) to otherwise deal with the uncertificated security.

Purchaser's control of security entitlement

25(1) A purchaser has control of a security entitlement if

(a) the purchaser becomes the entitlement holder,

(b) the securities intermediary has agreed that it will comply with entitlement orders that are originated by the purchaser without the further consent of the entitlement holder, or

(c) another person has control of the security entitlement on behalf of the purchaser or, having previously obtained control of the security entitlement, acknowledges that the person has control on behalf of the purchaser.

Province of Alberta

FRAUDULENT PREFERENCES ACT

Revised Statutes of Alberta 2000
Chapter F-24

Current as of January 1, 2002

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section 3, if by the transaction a creditor is given or realizes or is placed in a position to realize payment, satisfaction or security for the debtor's indebtedness to that creditor or a portion of it greater proportionately than could be realized by or for the unsecured creditors generally of the debtor or for the unsecured portion of that creditor's liabilities out of the assets of the debtor left available and subject to judgment, writ proceedings, attachment or other process.

(2) Independently of the intent with which the transaction was entered into or of whether it was entered into voluntarily or under pressure, the preferential effect or result of the impeached transaction governs, and no pressure by a creditor or want of notice to the creditor alleged to have been so preferred of the debtor's circumstances, inability or knowledge as aforesaid, or of the effect of the transaction, avails to protect the transaction except as provided by sections 6 and 9.

RSA 1980 cF-18 s4;1994 cC-10.5 s126

Definition

5 In sections 2 to 4, "creditor" includes

(a) a surety, and the endorser of a promissory note or bill of exchange, who would, on payment by the surety or endorser of the debt, promissory note or bill of exchange in respect of which the suretyship was entered into or endorsement was given, become a creditor of the person giving the preference within the meaning of sections 2 to 4, and

(b) a cestui que trust or other person to whom liability is equitable only.

RSA 1980 cF-18 s5

Bona fide transactions

6 Nothing in sections 1 to 5 applies to

(a) a bona fide sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties, or

(b) a payment of money to a creditor, or a bona fide conveyance, assignment, transfer or delivery over of any goods, securities or property, of any kind as above mentioned, that is made in consideration of a present actual bona fide sale or delivery of goods or other property or of a present actual bona fide payment in money, or by way of security for a present actual bona fide advance of money, if the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration for it.

RSA 1980 cF-18 s6

Payment to creditor

7 When there is a valid sale of goods, securities or property and the consideration or part of it is paid or transferred by the purchaser to the creditor of the vendor under circumstances that would render the payment or transfer void if it were made by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, is void as respects the creditor to whom it is made.

RSA 1980 cF-18 s7

Restoration of security to creditor

8 When a payment that is void under this Act has been made and a valuable security has been given up in consideration of the payment, the creditor is entitled to have the security restored or its value made good to the creditor before or as a condition of the return of the payment.

RSA 1980 cF-18 s8

Saving of payment to creditor

9 Nothing in this Act

(a) affects a payment of money to a creditor when the creditor by reason or on account of the payment has lost or been deprived of or has in good faith given up a valid security that the creditor held for the payment of the debt so paid, unless the value of the security is restored to the creditor,

(b) affects the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not lessened in value to the other creditors because of the substitution, or

(c) invalidates a security given to a creditor for the pre-existing debt when, by reason or on account of the giving of the security, an advance is made in money to the debtor by the creditor in the bona fide belief that the advance will enable the debtor to continue the debtor's trade or business and pay the debtor's debts in full.

RSA 1980 cF-18 s9

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l’insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to October 31, 2023

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person includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person; (*personne*)

prescribed

(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules; (*prescrit*)

property means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; (*bien*)

proposal means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement; (*proposition concordataire* ou *proposition*)

public utility includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services; (*entreprise de service public*)

resolution or ***ordinary resolution*** means a resolution carried in the manner provided by section 115; (*résolution* ou *résolution ordinaire*)

secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security

a) Sont assimilés aux personnes les sociétés de personnes, associations non constituées en personne morale, personnes morales, sociétés et organisations coopératives, ainsi que leurs successeurs;

b) sont par ailleurs assimilés aux personnes leurs héritiers, liquidateurs de succession, exécuteurs testamentaires, administrateurs et autres représentants légaux. (*person*)

personne insolvable Personne qui n’est pas en faillite et qui réside au Canada ou y exerce ses activités ou qui a des biens au Canada, dont les obligations, constituant à l’égard de ses créanciers des réclamations prouvables aux termes de la présente loi, s’élèvent à mille dollars et, selon le cas :

a) qui, pour une raison quelconque, est incapable de faire honneur à ses obligations au fur et à mesure de leur échéance;

b) qui a cessé d’acquitter ses obligations courantes dans le cours ordinaire des affaires au fur et à mesure de leur échéance;

c) dont la totalité des biens n’est pas suffisante, d’après une juste estimation, ou ne suffirait pas, s’il en était disposé lors d’une vente bien conduite par autorité de justice, pour permettre l’acquittement de toutes ses obligations échues ou à échoir. (*insolvent person*)

personne morale Personne morale qui est autorisée à exercer des activités au Canada ou qui y a un établissement ou y possède des biens, ainsi que toute fiducie de revenu. Sont toutefois exclues les banques, banques étrangères autorisées au sens de l’article 2 de la *Loi sur les banques*, compagnies d’assurance, sociétés de fiducie ou sociétés de prêt constituées en personnes morales. (*corporation*)

prescrit

a) Dans le cas de la forme de documents à prescrire au titre de la présente loi et des renseignements qui doivent y figurer, prescrit par le surintendant en application de l’alinéa 5(4) e);

b) dans les autres cas, prescrit par les Règles générales. (*prescribed*)

proposition concordataire ou ***proposition*** S’entend :

a) à la section I de la partie III, de la proposition faite au titre de cette section;

and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights; (*créancier garanti*)

settlement [Repealed, 2005, c. 47, s. 2]

shareholder includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; (*actionnaire*)

sheriff [Repealed, 2004, c. 25, s. 7]

special resolution means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution; (*résolution spéciale*)

Superintendent means the Superintendent of Bankruptcy appointed under subsection 5(1); (*surintendant*)

Superintendent of Financial Institutions means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; (*surintendant des institutions financières*)

time of the bankruptcy, in respect of a person, means the time of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment by or in respect of the person, or

b) dans le reste de la présente loi, de la proposition faite au titre de la section I de la partie III ou d'une proposition de consommateur faite au titre de la section II de la partie III.

Est également visée la proposition ou proposition de consommateur faite en vue d'un concordat, d'un atermoiement ou d'un accommodement. (*proposal*)

réclamation prouvable en matière de faillite ou ***réclamation prouvable*** Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l'autorité de la présente loi par un créancier. (*claim provable in bankruptcy*, *provable claim* or *claim provable*)

réclamation relative à des capitaux propres Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment :

a) un dividende ou un paiement similaire;

b) un remboursement de capital;

c) tout droit de rachat d'actions au gré de l'actionnaire ou de remboursement anticipé d'actions au gré de l'émetteur;

d) des pertes pécuniaires associées à la propriété, à l'achat ou à la vente d'un intérêt relatif à des capitaux propres ou à l'annulation de cet achat ou de cette vente;

e) une contribution ou une indemnité relative à toute réclamation visée à l'un des alinéas a) à d). (*equity claim*)

Règles générales Les Règles générales établies en application de l'article 209. (*General Rules*)

résolution ou ***résolution ordinaire*** Résolution adoptée conformément à l'article 115. (*resolution* or *ordinary resolution*)

résolution spéciale Résolution décidée par une majorité en nombre et une majorité des trois quarts en valeur des créanciers titulaires de réclamations prouvées, présents personnellement ou représentés par fondés de pouvoir à une assemblée des créanciers et votant sur la résolution. (*special resolution*)

séquestre officiel Fonctionnaire nommé en vertu du paragraphe 12(2). (*official receiver*)

surintendant Le surintendant des faillites nommé aux termes du paragraphe 5(1). (*Superintendent*)

Statutory Crown securities

87 (1) A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or of a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered under a prescribed system of registration before the date of the initial bankruptcy event.

Idem

(2) In relation to a bankruptcy or proposal, a security referred to in subsection (1) that is registered in accordance with that subsection

(a) is subordinate to securities in respect of which all steps necessary to make them effective against other creditors were taken before that registration; and

(b) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.

R.S., 1985, c. B-3, s. 87; 1992, c. 27, s. 39; 1997, c. 12, s. 74; 2004, c. 25, s. 53; 2005, c. 47, s. 70.

Priority of Financial Collateral

Priority

88 In relation to a bankruptcy or proposal, no order may be made under this Act if the order would have the effect of subordinating financial collateral.

R.S., 1985, c. B-3, s. 88; 1992, c. 27, s. 39; 1994, c. 26, s. 6; 2007, c. 29, s. 99, c. 36, s. 112; 2009, c. 31, s. 65.

89 and 90 [Repealed, 1992, c. 27, s. 39]

Preferences and Transfers at Undervalue

91 [Repealed, 2005, c. 47, s. 71]

92 and 93 [Repealed, 2000, c. 12, s. 12]

94 [Repealed, 2005, c. 47, s. 72]

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

Garanties créées par législation

87 (1) Les garanties créées aux termes d'une loi fédérale ou provinciale dans le seul but — ou principalement dans le but — de protéger des réclamations mentionnées au paragraphe 86(1) ne sont valides, dans le cadre d'une faillite ou d'une proposition, que si elles ont été enregistrées, conformément à un système d'enregistrement prescrit, avant l'ouverture de la faillite.

Rang

(2) Dans le cadre d'une faillite ou d'une proposition, les garanties visées au paragraphe (1) et enregistrées conformément à ce paragraphe :

a) prennent rang après toute autre garantie à l'égard de laquelle les mesures requises pour la rendre opposable aux autres créanciers ont toutes été prises avant l'enregistrement;

b) ne sont valides que pour les sommes dues à Sa Majesté ou à l'organisme mentionné au paragraphe 86(1) lors de l'enregistrement et les intérêts échus depuis sur celles-ci.

L.R. (1985), ch. B-3, art. 87; 1992, ch. 27, art. 39; 1997, ch. 12, art. 74; 2004, ch. 25, art. 53; 2005, ch. 47, art. 70.

Rang des garanties financières

Rang

88 Il ne peut être rendu au titre de la présente loi, dans le cadre de toute faillite ou proposition, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

L.R. (1985), ch. B-3, art. 88; 1992, ch. 27, art. 39; 1994, ch. 26, art. 6; 2007, ch. 29, art. 99, ch. 36, art. 112; 2009, ch. 31, art. 65.

89 et 90 [Abrogés, 1992, ch. 27, art. 39]

Traitements préférentiels et opérations sous-évaluées

91 [Abrogé, 2005, ch. 47, art. 71]

92 et 93 [Abrogés, 2000, ch. 12, art. 12]

94 [Abrogé, 2005, ch. 47, art. 72]

Traitements préférentiels

95 (1) Sont inopposables au syndic tout transfert de biens, toute affectation de ceux-ci à une charge et tout paiement faits par une personne insolvable de même que toute obligation contractée ou tout service rendu par une telle personne et toute instance judiciaire intentée par ou contre elle :

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

a) en faveur d'un créancier avec qui elle n'a aucun lien de dépendance ou en faveur d'une personne en fiducie pour ce créancier, en vue de procurer à celui-ci une préférence sur un autre créancier, s'ils surviennent au cours de la période commençant à la date précédant de trois mois la date de l'ouverture de la faillite et se terminant à la date de la faillite;

b) en faveur d'un créancier avec qui elle a un lien de dépendance ou d'une personne en fiducie pour ce créancier, et ayant eu pour effet de procurer à celui-ci une préférence sur un autre créancier, s'ils surviennent au cours de la période commençant à la date précédant de douze mois la date de l'ouverture de la faillite et se terminant à la date de la faillite.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Préférence — présomption

(2) Lorsque le transfert, l'affectation, le paiement, l'obligation ou l'instance judiciaire visé à l'alinéa (1)a) a pour effet de procurer une préférence, il est réputé, sauf preuve contraire, avoir été fait, contracté ou intenté, selon le cas, en vue d'en procurer une, et ce même s'il l'a été sous la contrainte, la preuve de celle-ci n'étant pas admissible en l'occurrence.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Exception

(2.1) Le paragraphe (2) ne s'applique pas aux opérations ci-après et les parties à celles-ci sont réputées n'avoir aucun lien de dépendance :

a) un dépôt de couverture effectué auprès d'une chambre de compensation par un membre d'une telle chambre;

b) un transfert, un paiement ou une charge qui se rapporte à une garantie financière et s'inscrit dans le cadre d'un contrat financier admissible.

Definitions

(3) In this section,

clearing house means a body that acts as an intermediary for its clearing members in effecting securities transactions; (*chambre de compensation*)

clearing member means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary; (*membre*)

Définitions

(3) Les définitions qui suivent s'appliquent au présent article.

chambre de compensation Organisme qui agit comme intermédiaire pour ses membres dans les opérations portant sur des titres. (*clearing house*) a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Effet de la décision

(4) La décision et le rejet sont définitifs et péremptoires, à moins que, dans les trente jours suivant la signification de l'avis, ou dans tel autre délai que le tribunal peut accorder, sur demande présentée dans les mêmes trente jours, le destinataire de l'avis n'interjette appel devant le tribunal, conformément aux Règles générales, de la décision du syndic.

Expunge or reduce a proof

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

R.S., 1985, c. B-3, s. 135; 1992, c. 1, s. 20, c. 27, s. 53; 1997, c. 12, s. 89.

Rejet total ou partiel d'une preuve

(5) Le tribunal peut rayer ou réduire une preuve de réclamation ou de garantie à la demande d'un créancier ou du débiteur, si le syndic refuse d'intervenir dans l'affaire.

L.R. (1985), ch. B-3, art. 135; 1992, ch. 1, art. 20, ch. 27, art. 53; 1997, ch. 12, art. 89.

Scheme of Distribution

Priority of claims

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;

(b) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),

(ii) the expenses and fees of the trustee, and

(iii) legal costs;

(c) the levy payable under section 147;

(d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid;

(d.01) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor;

Plan de répartition

Priorité des créances

136 (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli sont distribués d'après l'ordre de priorité de paiement suivant :

a) dans le cas d'un failli décédé, les frais de funérailles et dépenses testamentaires raisonnables, faits par le représentant légal ou, dans la province de Québec, les successibles ou héritiers du failli décédé;

b) les frais d'administration, dans l'ordre suivant :

(i) débours et honoraires de la personne visée à l'alinéa 14.03(1)a),

(ii) débours et honoraires du syndic,

(iii) frais légaux;

c) le prélèvement payable en vertu de l'article 147;

d) les gages, salaires, commissions, rémunérations ou sommes déboursées visés aux articles 81.3 et 81.4 qui n'ont pas été versés;

d.01) la différence entre la somme que le créancier garanti aurait reçue n'eut été l'application des articles 81.3 et 81.4 et celle qu'il reçoit effectivement;

(d.02) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.5 and 81.6 and the amount actually received by the secured creditor;

(d.1) claims in respect of debts or liabilities referred to in paragraph 178(1)(b) or (c), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

(e) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding the bankruptcy, that do not constitute a secured claim against the real property or immovables of the bankrupt, but not exceeding the value of the interest or, in the Province of Quebec, the value of the right of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;

(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

(g) the fees and costs referred to in subsection 70(2) but only to the extent of the realization from the property exigible thereunder;

(h) in the case of a bankrupt who became bankrupt before the prescribed date, all indebtedness of the bankrupt under any Act respecting workers' compensation, under any Act respecting unemployment insurance or under any provision of the *Income Tax Act* creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

(i) claims resulting from injuries to employees of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and

(j) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (a) to (i), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary.

d.02) la différence entre la somme que le créancier garanti aurait reçue n'eut été l'application des articles 81.5 et 81.6 et celle qu'il reçoit effectivement;

d.1) les réclamations pour les dettes ou obligations mentionnées aux alinéas 178(1)b) ou c), si elles constituent des réclamations prouvables en raison du paragraphe 121(4), pour le total des sommes payables périodiquement qui se sont accumulées au cours de l'année qui précède la date de la faillite et de toute somme forfaitaire payable;

e) les taxes municipales établies ou perçues à l'encontre du failli dans les deux années précédant sa faillite et qui ne constituent pas une créance garantie sur les immeubles ou les biens réels du failli, mais ne dépassant pas la valeur de l'intérêt ou, dans la province de Québec, la valeur du droit du failli sur les biens à l'égard desquels ont été imposées les taxes telles qu'elles ont été déclarées par le syndic;

f) le locateur quant aux arriérés de loyer pour une période de trois mois précédant la faillite, et, si une disposition du bail le prévoit, le loyer exigible par anticipation, pour une somme correspondant à trois mois de loyer au plus, mais le montant total ainsi payable ne peut dépasser la somme réalisée sur les biens se trouvant sur les lieux sous bail; tout paiement fait par le locataire au titre d'une telle disposition est porté au compte du montant payable par le syndic pour le loyer d'occupation;

g) les honoraires et droits mentionnés au paragraphe 70(2), mais jusqu'à concurrence seulement de la réalisation des biens exigibles en vertu de ce paragraphe;

h) dans le cas d'un failli qui est devenu un failli avant la date prescrite, toutes dettes contractées par le failli sous l'autorité d'une loi sur les accidents du travail, d'une loi sur l'assurance-chômage, d'une disposition de la *Loi de l'impôt sur le revenu* créant une obligation de rembourser à Sa Majesté des sommes qui ont été déduites ou retenues, au prorata;

i) les réclamations résultant de blessures subies par des employés du failli, que les dispositions d'une loi sur les accidents du travail ne visent pas, mais seulement jusqu'à concurrence des montants d'argent reçus des personnes garantissant le failli contre le préjudice résultant de ces blessures;

j) dans le cas d'un failli qui est devenu un failli avant la date prescrite, les réclamations, non mentionnées aux alinéas a) à i), de Sa Majesté du chef du Canada ou d'une province, au prorata, nonobstant tout privilège prévu par une loi à l'effet contraire.

CITATION: 1231640 Ontario Inc. (Re) , 2007 ONCA 810
DATE: 20071126
DOCKET: C45883

COURT OF APPEAL FOR ONTARIO

WEILER, FELDMAN and LAFORME JJ.A.

IN THE MATTER OF THE BANKRUPTCY OF 1231640 ONTARIO INC. (formerly known as The State Group Limited) OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

BETWEEN:

THE ROYAL BANK OF CANADA, in its capacity as administrative agent for certain lenders

Appellant

and

PRICEWATERHOUSECOOPERS LLP, TRUSTEE OF THE ESTATE OF 1231640 ONTARIO INC., A BANKRUPT and ST. PAUL GUARANTEE INSURANCE COMPANY

Respondents

Peter H. Griffin and Matthew Sammon for the appellant, Royal Bank of Canada in its capacity as Administrative Agent for Certain Lenders

John D. Marshall for the respondent, St. Paul Guarantee Insurance Company

Alex MacFarlane for the respondent, PricewaterhouseCoopers Inc., in its capacity as Trustee in Bankruptcy of 1231640 Ontario Inc. (formerly known as The State Group Limited)

Heard: May 10, 2007

> and duties of the receiver and manager by agreement
> [Emphasis added.]

As the word "rights" is specifically used in relation to receivers in s. 60(1), the argument that "person" in s. 20(2) must have proprietary rights akin to those of a trustee in bankruptcy cannot succeed.

[60] Zeigel and Denomme also discuss the word "rights" in relation to one of the prerequisites for attachment under s. 11 of the *PPSA*: that the debtor have "rights" in the collateral. See *The Ontario PPSA Commentary and Analysis*, *supra*, at pp. 124-27. They begin by saying that the section merely states the obvious, namely, that if the debtor has no "rights" in the collateral, the debtor has nothing to give as security to the creditor. One subheading asks the question: "Is it sufficient that the debtor only has a 'power' to transfer rights in the collateral?" The authors conclude that the power to vest a good title in the goods of a third party is a sufficient right to create a security interest. They also ask the question whether anything turns on the distinction between "power" and "rights" and conclude at p. 127 that nothing turns on the distinction:

> "Rights" is used elliptically in paragraph [11(2)(c)] to describe collateral to which the secured party's security interest is capable of attaching, and is not concerned with the purity of the debtor's title.

[61] In addition, under s. 1 of the *PPSA*, a "debtor" is defined as: "a person who … owns or has rights in the collateral, including a transferee of or a successor to a debtor's interest in collateral." The construction of this definition makes it clear that the word rights has a broader meaning than ownership.

[62] I would adopt the same approach to interpreting the word "rights" in s. 20(2). In my opinion, the phrase "a person who represents the creditors of the debtor" is not limited to persons with the same proprietary rights in the collateral as an assignee for the benefit of creditors and a trustee in bankruptcy, but includes a receiver appointed by the court pursuant to s. 47 of the *BIA* who has the right to take possession of the collateral and the right to sell it. If "rights" in s. 20(2) were read as only referring to ownership rights, then the phrase "including" in s. 20(1)(b) would have no significance because only the named representatives hold title in the debtor's collateral. My interpretation of the word "rights" in s. 20(2) as referring to the receiver's rights to possess and sell the debtor's collateral gives effect to the phrase "including" in s. 20(1)(b).

1967 CarswellOnt 125
Ontario Court of Appeal

Royal Bank v. Kiska

1967 CarswellOnt 125, [1967] 2 O.R. 379, [1967] O.J. No. 1028, 63 D.L.R. (2d) 582

Royal Bank of Canada v. Kiska

Kelly, McLennan and Laskin, JJ.A.

Judgment: June 28, 1967

Counsel: *S. G. Fisher*, for appellant.
Dennis F. O'Leary, Q.C., for respondent.

Subject: Contracts

***Kelly, J.A.*:**

1 Although the question of law involved in this case is not uncommon, the facts are sufficiently unusual to warrant recounting in detail.

2 The defendant is a young man who attained his majority on March 16, 1963. At and prior to this time he, along with two partners, had been engaged in business under the name of Pee-Wee Pizzeria. His brother John, who is older by 15 years, conducted a hairdressing business, of which the plaintiff was the banker; in connection with credit extended by the plaintiff to the brother the plaintiff held a demand note for $6,000 and certain securities which had been pledged to the plaintiff by the brother.

3 As a result of continued importuning of his brother, the defendant, sometime shortly after March 16, 1963, went to the plaintiff's Gage and Mohawk Branch in the City of Hamilton and there signed a document in the form of a guarantee to the extent of $3,000 of the brother's indebtedness to the bank. This will be referred to as the "first guarantee".

4 The defendant was aware that the plaintiff was threatening to realize upon the security it held for the brother's indebtedness and that the first guarantee was intended to obligate him to the plaintiff. He believed, though not as a result of anything communicated to him by the plaintiff, that the security held by the plaintiff was sufficient to satisfy the plaintiff's claim against the brother and that he himself would not be called upon to pay anything.

5 At the time he wrote his name on the first guarantee no wafer seal was affixed to it; the word "seal" in brackets was printed upon the document immediately to the right of the space in which his signature was written and an attesting witness signed his name.

6 Late in May, 1963, the defendant was requested to go to the same branch office to discuss a programme of payments to reduce or discharge the brother's indebtedness. When he realized that the security, other than his guarantee, held by the plaintiff was not adequate to discharge the brother's indebtedness, the defendant became upset and, in the belief that without his signature the first guarantee would not be enforceable, tore from the guarantee and swallowed the portion bearing his signature. Having been told that the witness could prove that his signature had been on the document, the plaintiff tore off a further portion of paper upon which the witness' signature appeared and swallowed that also. The police were immediately called and while they were present a new form of guarantee, ex. 1, was signed by the plaintiff. To distinguish this from the first guarantee, I will refer to the document signed under these conditions, ex. 1, as the "second guarantee". The second guarantee was on the plaintiff's printed form identical with the first guarantee: on the occasion of signing the second guarantee a red wafer seal had been affixed to it before the defendant wrote his signature, and the signature had been properly witnessed.

> The defendant without any communication to him by the plaintiff, other than through the medium of the brother, attended at the plaintiff's place of business and signed the first guarantee: this was sometime shortly after his 21st birthday which occurred on March 16, 1963.
>
> On May 30, 1963, the defendant went to the plaintiff's branch office at the request of the plaintiff's manager Brook to discuss a programme of payments to meet his guarantee of the brother's account. On this occasion the defendant destroyed the first guarantee signed in March and signed ex. 1, the second guarantee, in substitution therefor.
>
> From the statement of the account of the brother with the plaintiff, ex. 3(a), produced by the witness Brook, it must be inferred that the plaintiff did not realize upon the security deposited with it by the brother till June 7, 1963, the date upon which, according to that exhibit, there was credited to the brother's account $2,729.56, identified as "paid on account via Investors Syndicate — redemption of Contract".

14 The learned trial Judge in his reasons for judgment dealt with this defence in the following words:

> There was no evidence adduced that any promises or offers to forbear in the prosecution of a civil action against Joseph Kiska or promise or offer to forbear on the realizing of the security held by the bank was made to the defendant by the bank; nor is there evidence that the bank truly intended to take action or realize on the securities. Forbearance being the only consideration alleged, and there having been no evidence of forbearance, there is no evidence of consideration passing from the plaintiff to his defendant.

15 I look upon the concluding sentence of this quotation not as a finding of fact which, as such, I would be loath to disturb, but as a conclusion of law arrived at due to an erroneous view as to the legal consequence of the facts and inferences to be drawn from them.

16 The denial of consideration for the promise is twofold. First, that the plaintiff gave no promise nor did any act which could be qualified as consideration — second, even granted that the plaintiff did some act which, if it conferred some benefit on the defendant, would have constituted consideration, that consideration did not pass from the plaintiff to the defendant but to the defendant's brother.

17 In setting up the absence of any promise to extend time or to forbear from pursuing its remedies against the brother the defendant seeks to treat the relationship between himself and the plaintiff as if the defendant had been prepared to agree to guarantee his brother's indebtedness in return for the plaintiff agreeing to extend time or agreeing to forbear, *i.e.*, the offer of a promise for a promise. If this were the nature of the arrangement the defendant had intended to enter into, his defence would have been effective since the plaintiff does not contend that it agreed to extend time or agreed to any act of forbearance. The first guarantee, if it be treated as a contract complete on its face, does not contain any agreement or engagement on the part of the plaintiff which could have been enforced by the defendant in an action against the plaintiff. Its essential operative words are to be found in the opening paragraph whereby the defendant guarantees the indebtedness of the brother to the plaintiff. The balance of the documents sets out the terms and conditions applicable to that guarantee, some by way of restriction upon the rights which would otherwise accrue to the plaintiff by reason of the defendant becoming a guarantor, and some by way of limitation on the obligation which the plaintiff would otherwise owe to the defendant as a guarantor.

18 At the time the first guarantee was signed and given to the plaintiff's employee it was an expression of what the defendant was prepared to do in order to induce the plaintiff to accord some benefit to the brother or to incur some detriment to itself relative to the brother's indebtedness.

19 Reduced to its simplest terms, what took place was this. The first guarantee signed by the defendant, even though not a contract under seal, was an offer of what the defendant was prepared to do in exchange for future action on the part of the plaintiff and was offered to the plaintiff for the purpose of inducing the plaintiff to do some act or refrain from doing some act. At the time the defendant made this offer the plaintiff could have (a) ceased to deal with the brother; (b) demanded repayment and sued to recover the amount due to it by the brother, and (c) realized upon the other security held by it. The defendant's

offer was made on or about March 16, 1963, and was not withdrawn down to the date of the institution of this action on or about February 25, 1965. Subsequent to March 16, 1963, the plaintiff for two and a half months refrained from realizing upon the security it held. For an even longer period, at least down to September 17, 1964, when the brother made an assignment in bankruptcy, the plaintiff refrained from instituting action to recover from the brother the money due to it. It is obvious that some forbearance did occur after the offer was made. It is a reasonable inference from the conduct of the plaintiff that there was forbearance. There is evidence of forbearance apart from that to be inferred from the conduct of the plaintiff. The defendant in those parts of his examination for discovery which were read into the record at the trial, admitted that, on the occasion when he signed the guarantee, he went to the plaintiff's place of business at his brother's urging and that the brother had told him, if he did not go, the plaintiff was going to sell "the shares and insurance that they had there". Looking upon the guarantee at no higher than a promise offered for an act of forbearance, unless the offer be withdrawn before the act be performed, upon the performance of the act of forbearance the contract was complete and enforceable against the defendant.

20 The following passage from the judgment of Jessel, M.R., in *Re Barker's Estate* (1875), 44 L.J. Ch. 487 at p. 490:

> In the case of further security, the lender gives time and forbearance, or he gives some other advantage to the person giving the further security, and that is valuable consideration. But if, without that, after the voluntary instrument has been executed, its contents are communicated to the person taking the benefit of it, and acting upon the faith of it he does substantially alter his position, that is, he does communicate to the donor his acceptance of the further security, and by so doing he gives value to the donor, being the value which the donor expected him to give, he has, in fact, accepted the voluntary instrument as a consideration for the action he takes upon the faith of it. In that way it comes back again really to contract, and upon that ground it is that the Courts have refused to disturb voluntary deeds where consideration has been given for them, so to say, *ex post facto*.

21 It was further argued that since there was not an agreement by the plaintiff to forbear for a specified time there was no consideration. On this point the authorities are clear. In *Alliance Bank Ltd. v. Broom* (1864), 2 Dr. & Sm. 289, 62 E.R. 631, 34 L.J. Ch. 256, 143 R.R. 120, there had been a demand by the plaintiff for payment and a promise by the defendant to give security. This promise the defendant had not carried out and the action was to enforce the giving of the promised security. The question before the Court was stated by Kindersley, V.-C. to be "whether there must be a promise on the part of the plaintiffs to abstain from bringing an action in order to constitute a valid consideration" [p. 122 R.R.]. In holding in favour of the plaintiff the Vice-Chancellor said at p. 292 Dr. & Sm.:

> It appears to me that, when the Plaintiffs demanded payment of their debt, and, in consequence of that application the Defendant agreed to give certain security, although there was no promise on the part of the Plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the Plaintiffs did in effect give, and the Defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events, some extent of forbearance. If, on the application for security being made, the Defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it. It is very true that, at any time after the promise, the creditor might have insisted on payment of his debt, and have brought an action; but the circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance, which he would not have derived if he had not made the agreement.

22 This case was approved by the House of Lords in *Fullerton v. Provincial Bank of Ireland*, [1903] A.C. 309, where at pp. 313-4, Lord Macnaghten said:

> My Lords, this point seems to me to be settled by authority. In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it. That proposition seems to me to be established by the case of *Alliance Bank v. Broom* (1864), 2 Dr. & S. 289, to which my noble and learned friend Lord Lindley referred yesterday, and other cases, among which I may mention *Oldershaw v. King* (1857), 2 H. & N. 517, with the observations on that case and the

> case in Drewry and Smale, by Bowen L.J. in *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 289, and I may add that the proposition seems to be good sense.

23 I have to this point dealt with the general question as to whether forbearance as distinguished from a promise to forbear can be consideration. It remains to consider whether the forbearance must enure directly to the benefit of the guarantor or whether, as in this case, the forbearance in favour of the brother may be adequate consideration. I do not consider that the legal consequences resulting from the fact that the plaintiff abstained from taking action against the brother are any different from what they would have been if the plaintiff had refrained from taking action against the defendant. In circumstances similar to those prevailing in this case there is consideration if the promisee has conferred a benefit on the promisor in return for which the promisor's promise is given or if the promisee has incurred a detriment for which the promise was to compensate. If here, consideration be found in the detriment suffered by the plaintiff, it is immaterial to that issue that the direct benefit of the plaintiff's forbearance accrue to one other than the defendant. This proposition was laid down in *Morley v. Boothby* (1825), 3 Bing. 107, 130 E.R. 455, and has been supported ever since. That was a case of guarantee and Best, C.J., at p. 113 said:

> No court of common law has ever said that there should be a consideration directly between the persons giving and receiving the guaranty. It is enough if the person for whom the guarantor becomes surety has benefit, or the person to whom the guaranty is given suffer inconvenience, as an inducement to the surety to become guaranty for the principal debtor.

24 I therefore concluded that the forbearance shown by the plaintiff in pursuing the remedies against the brother available to it constitutes consideration.

25 The plaintiff's action being one "to charge the defendant upon a special promise to answer for the debt, default or miscarriage of another person", would not be maintainable unless there be some note or memorandum in writing signed by the party to be charged. Even though the first guarantee be not executed under seal either one satisfies the requirements of s. 4 of the *Statute of Frauds*, R.S.O. 1960, c. 381.

26 Being of the opinion that there was consideration for the first guarantee of the brother's indebtedness to the plaintiff and that there was a sufficient note or memorandum to forestall the operation of the *Statute of Frauds*, it is not necessary to consider what may be the rights of the parties under the second guarantee. If, as alleged, it be a nullity due to its execution having been obtained by duress, it can have no effect on the enforceability of the first guarantee.

27 I would allow the appeal with costs, set aside judgment below and direct that, in its place, judgment be entered for the plaintiff for the amount claimed in the writ of summons, with costs.

***McLennan, J.A.*, agrees with Kelly, J.A.:**

***Laskin, J.A.* (dissenting):**

28 The law is clear, even trite, that a promise of forbearance for no defined period is sufficient consideration for a guarantee of a third person's indebtedness to the promisor and that the guarantee, where given in writing, is enforceable against the guarantor although the benefit of the promise runs to the principal debtor only. Counsel for the respondent, the alleged guarantor in this case, did not challenge these propositions. He has in his favour the finding of the trial Judge on the evidence that there was no promise of forbearance by the plaintiff bank, and the further finding or conclusion that the document on which the bank's action is founded was not executed by the defendant under seal. I agree with these findings (which were, of course, strongly attacked by counsel for the bank), and they suffice to support dismissal of the action; but in deference to the submissions that were made on both sides I propose to make my own examination of the two main issues on which the appeal proceeded.

29 It is desirable to note at the outset that the plaintiff's claim is based squarely on a written guarantee, and there is no room for any transformation of the transaction between the parties into an offer of a unilateral contract by the defendant, calling for an act of forbearance by the plaintiff. Not only is the evidence inconsistent with even any suggestion of such a unilateral contract but, if that was the transaction the plaintiff would fail for want of compliance with s. 4 of the *Statute of Frauds*, R.S.O. 1960, c. 381. The long and the short of the matter, so far as the facts are concerned, is that the defendant's brother importuned him to go

Alberta Court of Queen's Bench
Toronto-Dominion Bank v. Nova Entertainment Inc.
Date: 1992-12-08

J.R. Houghton, for Blue Sky Enterprises Ltd.

C.J. Shaw, for Allied Film Laboratories Inc. c.o.b. "Allied Film & Video."

B.A.R. Smith, for receiver-manager of Nova Entertainment Inc.

(Doc. Calgary 9201-04019)

December 8, 1992.

[1] FORSYTH J. (orally):– This application comes before me by the Receiver Manager of the undertakings, property, and assets of the Defendant, in which the Receiver Manager is seeking advice and directions as to the disposition of surplus monies realized from its liquidation of the Defendant. In particular the Receiver Manager is asking for a direction as to the validity of certain security granted by the Defendant, and if such security is valid, an order authorizing the Receiver to make disbursements thereunder.

[2] The application of the Receiver Manager on the one hand has the support, or at least it is argued forceably by the "secured creditor", that its security is valid and that it is entitled to the surplus monies so realized. It is opposed vigorously by one of the ordinary creditors, but a creditor who is owed a substantial amount of money by the Defendant corporation, something in the order of $120,000. The secured creditor Blue Sky owns all of the issued and outstanding capital of the Defendant. It is alleged that as of July 28th, 1992, the Defendant owed Blue Sky a sum of approximately $800,000, incurred through a series of advances by repayments to Blue Sky made during the period commencing June of 1987, and ending in June 1990. On or about November 29th, 1990, the Defendant granted a general security agreement in favour of Blue Sky. The security seeks to create a security interest over all of the present and after acquired personal property of the Defendant and secures all of the Defendant's indebtedness in favour of Blue Sky. The security was registered on December 19, 1990 at the Personal Property Registry in accordance with the provisions of the *Personal Property Security Act*, S.A. 1988, c. P-4.05. Concurrently with granting of the security the Defendant entered into a loan agreement with Blue Sky and Vencap Equities Alberta Ltd. which provided, inter alia, that:

(a) the Defendant would grant security to Vencap;

(b) Vencap would advance $600,000 to the Defendant; and

(c) the Defendant would use the advance of $600,000 to repay Blue Sky the sum of $61,000 but thereafter Blue Sky would forebear any claim it had against the Defendant and postpone and subordinate its claim in favour of Vencap's claim.

[3] The creditor challenging this arrangement became involved with the Defendant in January, 1992, when it reached agreement to sell goods to the Defendant. Certain goods in February 1992 were delivered to the Defendant and as of the date of the Defendant's receivership, which is March 6, 1992, a substantial debt had been incurred. At first blush one would ordinarily consider whether of not in light of the non-arm's-length position between the Defendant and Blue Sky, whether a fraudulent preference had been involved in this case, but the matter was not argued on that basis. No evidence was forthcoming to support either the insolvency of the Defendant a the time of the loan agreement, or to challenge that position directly. Rather argument proceeded on the basis that there was no consideration given for the security agreement entered into between the parties. In addition it was argued there was no evidence, or the evidence was suspect, that the advances made by Blue Sky constituted a loan. It was further argued that there was no evidence that at the time of the advances Nova undertook or agreed that, at some future date, it would grant Blue Sky security for the advances. I think it is clear that there is no such evidence with respect to the latter proposition, but in my judgment nothing turns on that. There is affidavit evidence before me, uncontradicted, which indicates inter alia a series of cash injections made to the Defendant by Blue Sky commencing in June, 1987 and terminating in September 8, 1989, and in addition evidence by way of affidavit also uncontradicted, which indicates repayments to the shareholders concerning those loans commencing July, 1989 and continuing until October, 1990. Furthermore this affidavit evidence, made by a chartered accountant who has reviewed the books of Blue Sky, leads one to conclude in the absence of any evidence to the contrary, the advances were made as loans and should be so treated. I am not satisfied that anything turns, as I indicated previously, on the fact that there is no evidence to suggest that it was in the contemplation of the parties at the time of the original loans, that some form of a security would be taken in the future. But in my judgment nothing turns on that in the circumstances. Further there is nothing to suggest that the technical requirements of the Act have not been fully complied with, including registration and documentation. A further issue that was raised, however, was whether or not any consideration was given for the security in question, particularly in light of the fact that it is clear from the evidence and is clear in common law, past consideration is no consideration. However, when one turns to the definition of "value" as defined in s. 1(1)(*tt*) of the P.P.S.A. defines value as:

(*tt*) "value" means any consideration sufficient to support a simple contract, and *includes an antecedent debt or antecedent liability.* [italics are mine]

In short, the definition of "value" on my reading the section has been expanded from that of consideration in a simple contract to include past indebtedness. Even if that is not the case I am satisfied on a review of the authorities that forebearance to sue may well constitute consideration or the entering into an agreement for some form of security inter alia. Support for that proposition is found in the case of *O'Brien v. Stebbins*, [1927] 2 W.W.R. 176, 21 Sask. L.R. 478, [1927] 3 D.L.R. 274, a decision of the Court of Appeal of Saskatchewan, where the court in that decision stated at p. 180 [W.W.R.], after referring to a quotation from an English judgment of Justice Parker, Justice Lamont in the Saskatchewan Court of Appeal states:

> The authorities, in my opinion, support the proposition that, where a creditor grants an extension of time for payment of the past due debt, and at the same time obtains from the debtor security for the debt, the proper inference to be drawn in the absence of evidence to the contrary is that the extension was granted as a result of the creditor's obtaining the security …

I am satisfied that in this case, while one must be cautious in light of the non-arm's-length relationship between the parties, Blue Sky, recognizing the situation that existed, forbore taking any steps to try to recover its indebtedness, recognizing that by so doing an injection of capital from Vencap would take place and hopefully continue the operation. That in my view was sufficient consideration under standard contract law. In any event it is clearly consideration under the definition of value as contained in the P.P.S.A.

[4] Under all the circumstances I conclude, based on the evidence before me in the form of affidavits which are not contradicted, that the security granted to Blue Sky constituted good and valid security as against all parties including ordinary creditors and accordingly my advice and direction to the Receiver Manager is that he is at liberty to distribute the surplus proceeds to the beneficiary under the security, namely Blue Sky.

Security valid.

CA019248
Vancouver Registry

Court of Appeal for British Columbia

95 341 026

ORAL REASONS FOR JUDGMENT:

Before:

The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Cumming
The Honourable Mr. Justice Finch

November 10, 1995

Vancouver, B.C.

BETWEEN:

FIRST ROYAL ENTERPRISES LTD. and 351726 B.C. LTD.

PLAINTIFF (RESPONDENTS)

AND:

ARMADILLO'S RESTAURANT LTD., WING LEE CHEONG

DEFENDANTS (APPELLANTS)

COLUMBIA LEISURE CORPORATION and DEM BONES - 1990 LIMITED PARTNERSHIP

DEFENDANTS

P.A. Cote — appearing for the Appellants
D. Le Dressay — appearing for the Respondents

1 **CUMMING, J.A.:** This is an appeal by the defendant Wing Lee Cheong from the judgment of Madam Justice Saunders pronounced 26 July 1994, declaring that the general security agreement granted by

32 If the object of the security is simply to protect the creditor, then it is *bona fide*. Mr. Justice Middleton makes this point in *Perkins Electric*, supra, at p.408, where he quotes with approval Lord Jessel M.R. in the *Middleton*, supra:

> Assuming, therefore, that it had been proved not only that [the debtor] was insolvent but also that he was insolvent to his own knowledge, I think that, looking at the words of the statute and the authorities, the payment was bona fide if it was intended to be a payment, and the security was bona fide if it was intended to be a security. The meaning of the statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst the creditors of the debtor.

33 Lord Jessel M.R., in *Middleton*, supra, at p.109 goes on to make the point that a finding that the intent of the parties to the transaction was to give a preference is inconsistent with the transaction being anything other than *bona fide*:

> ... the real object of [the debtor] was to make the best security possible, with a view probably of giving preference to these creditors in case his worst anticipations were realized. Consequently, I think it was intended by him that these securities should have the exact operation which the law would give them, and in that sense, therefore, they were bona fide.

34 The Law Reform Commission, supra, at p.32, explained the rationale underlying the authorities as a justifiable reluctance on the part of the courts to interfere with commercial transactions:

(c) neither the appellant nor the company were under any duty to give creditors advance notice of the grant of the GSA, which became public knowledge on registration: see the judgment of Mr. Justice Taylor in ***Westinghouse Canada***, supra, at p.283, and no adverse inference can be drawn against them by reason of their not having done so.

37 To the contrary, the circumstances all point to a conclusion of *bona fides*, namely, the actual advances of money at the time, the existence of the debt which had to be paid, the advice of a lawyer to take security for the debt, the registration of the GSA, and the further advances of money in reliance on the GSA.

38 Accordingly, in my view, the GSA should have been found *bona fide* and not in violation of the Act.

39 For these reasons I would allow the appeal and vary the judgment of the court below to provide that the plaintiffs recover judgment for damages against the defendant Wing Lee Cheong in the amount of $4,907.37.

LAMBERT, J.A.: I agree.

FINCH, J.A.: I agree.

Court of Queen's Bench of Alberta

Citation: 1007374 Alberta Ltd. v Ruggieri, 2014 ABQB 641

Date: 20141020
Docket: 1201 15655
Registry: Calgary

Between:

1007374 Alberta Ltd.

Plaintiff

- and -

Antonio Ruggieri, A. Ruggieri Engineering Ltd., 857508 Alberta Ltd. Alberta Engineering Ltd. and GMR Management Corp.

Defendants

Reasons for Judgment
of the
Honourable Mr. Justice E.C. Wilson

Introduction

[1] On March 1, 2003 the Plaintiff and one of the Defendants before me, A. Ruggieri Engineering Ltd. (hereinafter "Ruggieri Engineering"), entered into a consulting agreement.

[2] When Ruggieri Engineering didn't pay, the Plaintiff sued. Ruggieri Engineering countersued. A trial ensued before Bensler, J. in May of 2011.

	of Ruggieri Engineering's assets in favour of himself in the amount of $500,000. Ruggieri Engineering granted a promissory note for $100,000 payable on demand to Mr Ruggieri The co-Defendant, G.M.R. Management Corp., executed a G.S.A. against all of Ruggieri Engineering's present and future assets in favour of itself in the amount of $500,000 Ruggieri Engineering granted a promissory note for $198,046.16 payable on demand to G.M.R.
December 21, 2011	Bensler, J. released her decision finding in favour of the Plaintiff
March 26, 2012	Writ of Enforcement in the amount of $476,498.86 registered against Ruggieri Engineering
June 2, 2012	Mr Ruggieri, on behalf of the debtor Ruggieri Engineering, executed a sworn financial statement declaring that the only corporate asset was a loan receivable of $6,400 in the name of Dawn Marshall

[27] Additional references to the evidence as well as findings of fact will be subsequently made at relevant points in this judgment.

Fraudulent Conveyance

[28] The Plaintiff alleges a fraudulent conveyance on either of two bases:

i) the *Statute of Fraudulent Conveyances*, 1571 (the *Statute of Elizabeth*) and
ii) the provincial *Fraudulent Preferences Act*, chapter F-24.

(i) Statute of Elizabeth

[29] In *Taylor & Associates Ltd. v Louis Bull Tribe No. 439*, 2011 ABQB 213, Germain, J. at paragraph 16 repeated the direction from an earlier decision of the Court of Appeal that in order to obtain a remedy under the Statute of Elizabeth, the Plaintiff has to establish the following:

1) there must be a conveyance of real or personal property;

2) for no or nominal consideration;

3) with intent to defraud, delay or hinder creditors;

4) the party challenging the conveyance must be someone who was a creditor at the time of the conveyance or someone with a legal or equitable right to claim against the transferor; and

5) the conveyance must have had the intended effect.

Each point will be discussed in the following pages.

In the Court of Appeal of Alberta

Citation: Orion Industries Ltd. v. Neil's General Contracting Ltd., 2013 ABCA 330

Date: 20130930
Docket: 1201-0233-AC
Registry: Calgary

Between:

Grant Thornton Alger Inc. in its capacity as Trustee of Orion Industries Ltd.

Appellant
(Applicant)

- and -

Neil's General Contracting Ltd.

Respondent
(Respondent)

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice S.J. LoVecchio
Dated the 29th day of August, 2012
Entered on the 26th day of September, 2012
(Docket: 25-1517829)

[7] Here it is acknowledged that the impugned payment gave the respondent creditor a preference over other creditors. It is also acknowledged that this occurred within three months of the insolvent company's bankruptcy. So, there was no doubt the payment was a preferential payment capable of being set aside at the instance of the trustee in the absence of evidence that it was not made with a view to giving the preference.

[8] The issue before the bankruptcy judge and on appeal was whether the creditor which received the preferential payment had rebutted the presumption in section 95(2) of the *Bankruptcy and Insolvency Act*, namely the presumption that a payment which has the effect of giving a preference is presumed to be a payment made with a view to giving a preference. The issue then was whether there was "evidence to the contrary", i.e., evidence that the payment was not made with a view to giving a preference or, put another way, evidence that the payment was not intended to be preferential.

[9] The bankruptcy judge found that the presumption had been rebutted by evidence about why the payment had been made. The evidence was that it was made by the insolvent company to secure access to an asset which might be sold to generate revenue. As such, the bankruptcy judge found that the payment was valid, not made with a view to giving a preference, and therefore not voidable at the instance of the trustee.

[10] It is settled law that the onus or burden of rebutting the presumption in section 95(2) is on the creditor receiving the preferential payment. Discharging that burden is difficult because the creditor receiving the payment may not know what motivated the payment. And though the onus is on the creditor receiving the payment to rebut the presumption of preference, it is the intention of the insolvent debtor which governs: *Salter & Arnold Ltd v Dominion Bank*, [1926] SCR 621, [1926] 3 DLR 684 at 686.

[11] It is also settled law that a payment made in the ordinary course of business, such as those made to discharge debts incurred in the conduct of the bankrupt's business, will not be found to have been made with a view to giving a preference. If it can be established that the preferential payment was made in the ordinary course of the bankrupt's business, the presumption that the payment was made with a view to giving a preference will be rebutted, see *Canadian Credit Men's Association Ltd v Jenkins*, [1928] 3 DLR 139 at 144, 10 CBR 77 (Ont SC App Div).

[12] What constitutes a payment made in the ordinary course of business is fact dependent. But, payments made to purchase goods or services required for the on-going conduct of the bankrupt's business have been found to be payments made in the ordinary course of business. Payments made to honor contractual obligations allowing the insolvent to carry on business have been found to be payments made in the ordinary course of business. And even a preferential payment made by an insolvent company at a time when its financial collapse is inevitable may be found to be legitimate if the payment was made with a view to generating income or liquidating assets to satisfy the

insolvent's creditors: *St Anne-Nackawic Pulp Co(Trustee of) v. Logistec Stevedoring (Atlantic) Inc.*, 2005 NBCA 55, 255 DLR (4^{th}) 137, *[St Anne-Nackawic]*.

[13] In this case, the evidence with respect to why the preferential payment was made came from the chief financial officer of the insolvent company which handled the insolvent company's accounting and financial affairs and which was also its majority shareholder and largest creditor. Evidence with respect to the payment also came from the principal of the creditor which received the payment.

[14] The insolvent company's chief financial officer testified that the preferential payment was made because he believed that the creditor which received the payment could and would deny the insolvent company access to, and thereby prevent the sale of, a piece of equipment which it was trying to sell in order to avoid bankruptcy. Additionally, he testified that the payment was made in the belief that the creditor who received the preferential payment could and would cause a major client of the insolvent company to quit doing business with it, thereby putting the insolvent company out of business.

[15] The creditor's evidence was that it had dismantled the insolvent company's asset and then, at the insolvent company's request, transported the components to a storage site which the creditor owned. The insolvent company's plan was to sell the asset to generate revenue. A similar asset had previously been sold for just that purpose. It was the creditor's evidence that more than half the money it was owed by the insolvent company was for dismantling and transporting the asset which the insolvent company hoped to sell to generate income. The creditor's evidence was that it would not release the asset unless it was paid for the services it had provided.

[16] Having considered the foregoing evidence and the parties' arguments, the bankruptcy judge found that the section 95(2) statutory presumption that the preferential payment was made with a view to giving the creditor which received the payment a preference had been rebutted. That is, the bankruptcy judge found that the evidence to the contrary rebutted the presumption that the preferential payment was intended to give a preference. We see no palpable or overriding error in that finding.

[17] The bankruptcy judge found that the "dominant intent" of the insolvent company in making the payment was "to ensure that a certain valuable asset ... could be protected because they (the insolvent company) wanted to liquidate it and hopefully get their money back." The bankruptcy judge found that to be a legitimate and sensible business decision.

[18] The New Brunswick Court of Appeal's decision in *St Anne-Nackawic* is instructive. There the Court held that when the insolvent debtor paid one creditor at the expense of others for the purposes of generating income to pay a secured creditor of the insolvent debtor, the payment was not a voidable preference.

SUPERIOR COURT

(*Commercial Division*)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-048114-157

DATE: September 11, 2017

PRESIDED BY: THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.
Debtors
And
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY, LIMITED
Mises en cause
And
MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON
SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285
MORNEAU SHEPELL LTD, IN ITS CAPACITY AS
REPLACEMENT PENSION PLAN ADMINISTRATOR
RETRAITE QUÉBEC
THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF
THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
HER MAJESTY IN RIGHT OF NEWFOUNLAND AND LABRADOR,

but also to other priorities established by the provinces in favour of the Crown which were not published and were not available generally to other creditors.

[197] The Monitor argues that this same argument applies in the present matter to invalidate the deemed trust and the lien and charge under the NLPBA as provincial attempts to change the scheme of distribution in the CCAA.

[198] For the argument to apply in the present matter, there must be two extensions:

(1) the argument must be extended from Crown claims to pension claims, and

(2) the argument must be extended from the BIA to the CCAA.

[199] As for extending the argument from Crown claims to pension claims, there are two important differences between a Crown claim and a pension claim: (1) the priority of Crown claims is expressly provided by Section 136(1)(j) BIA, whereas there is a pension charge created by Sections 81.5 and 81.6 BIA, and (2) the BIA was amended in 1992 to expressly provide that deemed trusts (Section 67(2)) and security (Section 86(1)) in favour of the Crown (whether federal or provincial) are generally not effective in bankruptcy, subject to a number of exceptions which are not relevant in this matter.

[200] Neither difference is fatal to the extension of the argument. Pension claims are not mentioned in Section 136 BIA because they are not preferred claims: some pension claims are secured claims under Sections 81.5 and 81.6 BIA and in principle the rest are ordinary unsecured claims in a bankruptcy. It is not necessary that they be mentioned specifically in Section 136 BIA.

[201] The provisions dealing expressly with Crown claims clearly have no application to pension claims. However, those provisions were not necessary to conclude that a provincial priority conflicts with the BIA scheme of distribution. Even though pension claims are treated differently from Crown claims, they are part of the scheme of distribution under the BIA and any attempt by the province to change that scheme of distribution is inoperative.

[202] The argument that the BIA scheme of distribution applies in CCAA proceedings is more difficult.

[203] There is no statutory scheme of distribution under the CCAA because the CCAA is not intended to be the vehicle for a liquidation of assets and distribution of the proceeds. The CCAA is intended as a vehicle for the restructuring of the debtor. In principle, a plan will be submitted to the creditors and they will have the right to vote on it. For that reason, there is no need to provide a scheme of distribution.

[204] However, as we have already discussed, the present matter involves a liquidating CCAA.

[205] In that context, it is clear that the scheme of distribution under the BIA is very relevant. If the creditors are offered a plan in the context of a liquidating CCAA, it will be limited to distributing the proceeds of the sale of the debtor's assets. The creditors will inevitably compare what they are getting under the plan to what they would get under

the BIA. If any creditor is offered less under the plan, he will likely vote against the plan or oppose its approval by the court, with a view to petitioning the debtor into bankruptcy. Justice Deschamps referred to this in *Indalex* as the creditors "bargain[ing] in the shadow of their bankruptcy entitlements"[85]. As Justice Deschamps wrote in *Century Services*:

> [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.[86]

[206] In the same way, if the Court concludes that the NLPBA deemed trusts are valid in a liquidating CCAA but not in a BIA proceeding, then the creditors affected by the deemed trust will simply put the Wabush CCAA Parties into bankruptcy.

[207] Alternatively, it is frequently the outcome of a liquidating CCAA that no plan is submitted and the debtor slips into a bankruptcy under the BIA for the purpose of distributing its assets.

[208] The bottom line is that a liquidating CCAA requires a scheme of distribution and the only one which makes sense is the scheme of distribution under the BIA. As a result, and unless there is a contradiction between the CCAA and the BIA, the BIA scheme of distribution should apply in a liquidating CCAA.

[209] Under Section 81.6 BIA, the same amounts which are protected by Sections 6(6) and 36(7) CCAA are secured by security on all of the bankrupt's assets. There is no asymmetry. There is no security for the unpaid special payments and wind-up deficit and those are treated as unsecured claims.[87]

[210] In light of all of these circumstances, the Court concludes that it would frustrate the purpose of Parliament if the deemed trust under the NLPBA operated in the context of a CCAA proceeding. The doctrine of federal paramountcy therefore renders the deemed trust under the NLPBA inoperable.

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85 *Indalex*, *supra* note 69, par. 51.

86 *Century Services*, *supra* note 77, par. 47.

87 Moreover, there is the argument that the pension administrator cannot be a « secured creditor » as a result of the lien and charge created by Section 32(4) NLPBA because the amounts owing by the employer are not due to the pension administrator. As a result, it cannot be a « secured creditor » as that term is defined in the BIA: *Harbert Distressed Investment Fund, L.P.* v. *General Chemical Canada Ltd.*, 2007 ONCA 600, par. 32, leave to appeal to Supreme Court refused, 2008 CanLII 6391.

Century Services Inc. *Appellant*

v.

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

Indexed as: Century Services Inc. *v.* Canada (Attorney General)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

Century Services Inc. *Appelante*

c.

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

Répertorié : Century Services Inc. *c.* Canada (Procureur général)

2010 CSC 60

N^o du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

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

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

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

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

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

in those Acts carving out an exception for GST claims.

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] 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).

[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] 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.

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édiction visait justement à prévenir.

Court of Queen's Bench of Alberta

Citation: MNP Ltd v Canada Revenue Agency, 2022 ABQB 320

Date: 20220503
Docket: BK03 115694
Registry: Edmonton

Between:

MNP Ltd., acting in its capacity as Trustee in Bankruptcy of the Estate of Skyrider Holdings Ltd. and not in its personal capacity

Applicant

- and -

Canada Revenue Agency and Royal Bank of Canada

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice M. J. Lema

A. Introduction

[1] What does a writ of enforcement's "binding interest", acquired on registration against a debtor's land, mean after the debtor's bankruptcy?

[2] The trustee in bankruptcy argues that the pre-bankruptcy priority arising from that interest continues after bankruptcy, that the trustee acquires that priority position on the debtor's bankruptcy, and that, on behalf of registered writ-holders (and, in fact, all unsecured creditors), the trustee can assert the binding interest and resulting priority position against a down-title

other dispositions by the debtor (now bankrupt) him-, her- or itself, and the trustee in bankruptcy is installed to realize the debtor's exigible assets and distribute the proceeds per the *BIA*'s priority scheme?

[14] The answer is none, as explained below.

Pre-bankruptcy position

[15] All agree that, before bankruptcy, writs of enforcement under the *Civil Enforcement Act* "[bind] all of the enforcement debtor's exigible land described in the certificate of title against which the writ is registered" (para 33(2)(b)) and that so-registered writs have priority over later registered security interests in such land (s. 35).

Binding interest not equating to secured position

[16] All also agree that a writ-holder's binding interest does not make it a "secured creditor" per the *BIA* i.e., does not equal or equate to a "mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to a person from the debtor …", per the *BIA*'s "secured creditor definition (s. 2).

Secured creditors rank first in bankruptcy

[17] Similarly, all agree that, per s. 136 *BIA*, secured creditors rank first in the distribution of proceeds realized in a bankruptcy.

CRA became a secured creditor on the debtor's bankruptcy

[18] As noted, all agree that CRA became a secured creditor on the debtor's bankruptcy, through the combined effect of ss. 223(11.1) *ITA* and ss. 86 and 87 *BIA*.

[19] So, if the non-CRA writ-holders are not secured creditors in the bankruptcy, and CRA is, and secured creditors trump other creditors, how can such writ-holders rank above CRA?

Trustee's "binding interest" arguments

[20] The trustee points to a continuing-after-bankruptcy "binding interest" for such writs, arguing:

> … the "binding effect of Writs of Enforcement" **continues to bind the lands (and the proceeds of sale of same**) [and] what has changed [on bankruptcy] is **who has the right to enforce payment** of those Writs of Enforcement, and **who has the right to receive the proceeds** from the sale of lands which are bound by the Writs of Enforcement. …
>
> **Bankruptcy does not disturb or obliterate the status of registered writs of enforcement against land**, but simply **removes the right of the writ holders to enforce upon same, thus leaving that duty to the Trustee** to enforce as a representative of all proven unsecured creditors. The Trustee in this case did just that: it undertook the expense and effort to liquidate properties subject to **Writs of Enforcement which were in first-place ranking position** as registered against the seven land parcels which were liquidated. …
>
> All CRA writs … were registered subsequent in time to Writs of Enforcement which were registered against the lands. Upon CRA becoming secured as at the date of bankruptcy, its security fell behind the interests of the **Writs of**

[39] I disagree, as explained below.

Continued operation of "binding interests" would conflict with BIA in many respects

[40] The trustee's interpretation gives no meaning to "takes precedence" in the current circumstances:

- subsection 70(1) draws no distinction between judgment creditors with writs, judgment creditors with registered writs, and judgment creditors generally: each is stood down unless he, she or it reached the judgment-enforcement finish line;

- per ss. 136 (priority-ranking provision, with secured creditors on top and various not-applicable-here preferred claims next) and 141 (unsecured creditors at the bottom of the ladder and sharing equally among themselves), the *BIA* recognizes three categories of creditors: secured, preferred, and unsecured. The trustee effectively seeks the recognition of a fourth category: unsecured but anchored by a binding-interest writ. Nothing in the *BIA* reflects any such category;

  Adopting the trustee's interpretation would up-end the *BIA*'s ladder of priorities: the seven or so unsecured creditors with prior ranking writs would be paid before the secured creditors (CRA and RBC here). Using the wording of ss. 72(1) *BIA*, that is starkly "in conflict" with the *BIA*'s express ranking of claims. As the Supreme Court of Canada confirmed in ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5:

  > It is well established that a **provincial law will be rendered inoperative in the context of bankruptcy where the effect of the law is to conflict with, reorder or alter the priorities established by the** *BIA*. Both Martin J.A. and the chambers judge dealt with the altering of bankruptcy priorities under the frustration of purpose branch of paramountcy. In my view, it could also be plausibly advanced **that a provincial law that has the effect of reordering bankruptcy priorities is in operational conflict with the** *BIA* — such was the conclusion in *Husky Oil*, at para. 87. For the purposes of this appeal, there is no need to decide which would be the appropriate branch of the paramountcy analysis. Under either branch, **the Alberta legislation authorizing the Regulator's use of its disputed powers will be inoperative to the extent that the use of these powers during bankruptcy alters or reorders the priorities established by the** *BIA* [para 116] [emphasis added];

- as noted above, none of the dangers at which a writ's "binding interest" are aimed (e.g., sales or other dispositions by the debtor) or other scenarios in which such interests are relevant (e.g., writ-holder initiating or sharing in a writ-enforcement sale) exist on bankruptcy, with the debtor sidelined and the trustee taking control of the asset-gathering-and-realizing process. Even if the binding interests here continued to operate after bankruptcy, they are not integral to, necessary for, or even of any benefit, to any realization or other steps taken or to be taken by the trustee here;

- subsection 70(2)'s express recognition of a limited costs priority for "the creditor who has first … filed with the executing officer an … execution or other process against the

Atomic Energy of Canada Limited *Appellant*

v.

Sierra Club of Canada *Respondent*

and

The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada *Respondents*

Indexed as: Sierra Club of Canada *v.* Canada (Minister of Finance)

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

Le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada *Intimés*

Répertorié : Sierra Club du Canada *c.* Canada (Ministre des Finances)

Référence neutre : 2002 CSC 41.

N° du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Pratique — Cour fédérale du Canada — Production de documents confidentiels — Contrôle judiciaire demandé par un organisme environnemental de la décision du gouvernement fédéral de donner une aide financière à une société d'État pour la construction et la vente de réacteurs nucléaires — Ordonnance de confidentialité demandée par la société d'État pour certains documents — Analyse applicable à l'exercice du pouvoir discrétionnaire judiciaire sur une demande d'ordonnance de confidentialité — Faut-il accorder l'ordonnance? — Règles de la Cour fédérale (1998), DORS/98-106, règle 151.

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

51 Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils.

In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(*b*) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is <u>seen</u> to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, at para. 22.

52 Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2*b*) de la *Charte* : *Nouveau-Brunswick*, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit <u>perçue</u> comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le « souffle même de la justice », la garantie de l'absence d'arbitraire dans l'administration de la justice : *Nouveau-Brunswick*, par. 22.

(3) <u>Adapting the *Dagenais* Test to the Rights and Interests of the Parties</u>

(3) <u>Adaptation de l'analyse de *Dagenais* aux droits et intérêts des parties</u>

Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

53 Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de *Dagenais* et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce :

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its 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.

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

Comme dans *Mentuck*, j'ajouterais que trois éléments importants sont subsumés sous le premier volet de l'analyse. En premier lieu, le risque en cause doit être réel et important, en ce qu'il est bien étayé par la preuve et menace gravement l'intérêt commercial en question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the <u>public</u> interest in confidentiality outweighs the public interest in openness" (emphasis added).

De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit <u>du public</u> à la confidentialité l'emporte sur le droit du public à l'accessibilité » (je souligne).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second

Outre l'exigence susmentionnée, les tribunaux doivent déterminer avec prudence ce qui constitue un « intérêt commercial important ». Il faut rappeler qu'une ordonnance de confidentialité implique une atteinte à la liberté d'expression. Même si la pondération de l'intérêt commercial et de la liberté d'expression intervient à la deuxième étape branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

de l'analyse, les tribunaux doivent avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires. Voir généralement *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (C.F. 1re inst.), p. 439, le juge Muldoon.

Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

Enfin, l'expression « autres options raisonnables » oblige le juge non seulement à se demander s'il existe des mesures raisonnables autres que l'ordonnance de confidentialité, mais aussi à restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question. 57

B. *Application of the Test to this Appeal*

B. *Application de l'analyse en l'espèce*

(1) Necessity

(1) Nécessité

At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself, or to its terms.

À cette étape, il faut déterminer si la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et s'il existe d'autres solutions raisonnables que l'ordonnance elle-même, ou ses modalités. 58

The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the Confidential Documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

L'intérêt commercial en jeu en l'espèce a trait à la préservation d'obligations contractuelles de confidentialité. L'appelante fait valoir qu'un préjudice irréparable sera causé à ses intérêts commerciaux si les documents confidentiels sont divulgués. À mon avis, la préservation de renseignements confidentiels est un intérêt commercial suffisamment important pour satisfaire au premier volet de l'analyse dès lors que certaines conditions relatives aux renseignements sont réunies. 59

Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed

Le juge Pelletier souligne que l'ordonnance sollicitée en l'espèce s'apparente à une ordonnance conservatoire en matière de brevets. Pour l'obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. no 1850 (QL) (C.F. 1re inst.), par. 29-30. J'ajouterais à cela 60

SUPREME COURT OF CANADA

CITATION: Sherman Estate *v.* Donovan, 2021 SCC 25

APPEAL HEARD: October 6, 2020
JUDGMENT RENDERED: June 11, 2021
DOCKET: 38695

BETWEEN:

Estate of Bernard Sherman and Trustees of the Estate and
Estate of Honey Sherman and Trustees of the Estate
Appellants

and

Kevin Donovan and
Toronto Star Newspapers Ltd.
Respondents

\- and -

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee
Interveners

physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and

CITATION: Rose-Isli Corp. v. Frame-Tech Structures Ltd., 2023 ONSC 832
COURT FILE NO.: CV-22-00682959-00CL
DATE: 20230202

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: ROSE-ISLI CORP., 2631214 ONTARIO INC., SEASIDE CORPORATION, and 2735440 ONTARIO INC., Applicants

AND:

FRAME-TECH STRUCTURES LTD., MICHAEL J. SMITH, FRANK SERVELLO, CAPITAL BUILD CONSTRUCTION MANAGEMENT CORP., and 2735447 ONTARIO INC., Respondents

BEFORE: Kimmel J.

COUNSEL: *See Counsel Slip (attached)*

HEARD: December 15, 2022, January 6, 2023 (with further written submissions provided on January 13, 2023) and January 26, 2023

ENDORSEMENT

(RECEIVER'S MOTION FOR AVO AND CROSS-MOTION TO REDEEM AND/OR APPROVAL OF CREDIT BID)

[1] The court appointed receiver, Ernst & Young Inc., (the "Receiver") of 2735447 Ontario Inc. (the "Company") brings this motion for an approval and vesting order ("AVO") and an order for ancillary relief. This proceeding has a unique procedural history that has resulted in several court attendances and interim endorsements.

[2] The circumstances are unusual because of the dealings between 2735440 Ontario Inc. ("273 Ontario") and the Receiver, as well as the different interests that 273 Ontario has in the Property (defined below). 273 Ontario is both a second mortgagee that wants to be paid and a joint venture participant in the Rosehill Project that was to be developed on the Property. The Receiver was appointed upon 273 Ontario's application under the oppression remedy, s. 248 of the *Business Corporations Act*, R.S.O. 1990, c. B-16.

e) Approval of the APS, Transaction and AVO

[132] Accordingly, the *Soundair* principles having been satisfied, the APS and Transaction are approved and the AVO is granted.

Should the Ancillary Order be Granted?

[133] Counsel for 273 Ontario suggested that the requested ancillary relief should be delayed, regardless of the outcome of the decision on the AVO because there are concerns about fees that 273 Ontario has not had time to address. However, the Receiver is not seeking approval of its fees under the Ancillary Order. The relief it is seeking is related to the AVO.

[134] If the *Soundair* requirements are found to have been met and the Receiver's conduct in carrying out the Sale Process is not impugned, it should not be open to further challenge. The Receiver's actions and activities during the relevant period should be approved. The approval of the statement of receipts and disbursements is simply a recognition of what amounts were received and paid. It is not an approval of any amounts that may have been paid to the Receiver and its counsel. The Receiver will still be required to seek those approvals in the normal course with the appropriate fee affidavits.

[135] In the meantime, establishing a reserve or holdback from the sale proceeds to satisfy the fees, in such amounts as may ultimately be approved, is a prudent and reasonable thing to do, particularly given the breakdown in the relationship between the Receiver and 273 Ontario.

[136] The proposed distributions, to the first mortgagee and on account of the Receiver's Borrowing Charge (for amounts borrowed and previously approved) appear to be reasonable. If the new first mortgagee, Toronto Capital, does not want to be paid out then that can be addressed in the context of the Ancillary Order being settled. I will hold off in signing it for now, but if it does want to be paid out, I would approve that distribution.

[137] Finally, the requested sealing order is appropriate.

[138] The requested partial sealing order is limited in its scope (only specifically identified confidential exhibits) and in time (until the Transaction is completed). It is necessary to protect commercially sensitive information that could negatively impact the Company and its stakeholders if this transaction is not completed and further efforts to sell the property must be undertaken.

[139] The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the property, and to avoid any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information prior to the completion of the now approved Ora Transaction.

[140] These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings. I am satisfied that the limited nature

and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38.

[141] Granting this order is consistent with the court's practice of granting limited partial sealing orders in conjunction with approval and vesting orders.

[142] The Receiver is directed to ensure that the sealed confidential exhibits are provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the confidential exhibits can be physically sealed. At the appropriate time, the Receiver shall also seek an unsealing order.

Costs and Final Disposition

[143] The Receiver's Motion for an AVO and Ancillary Order is granted on the terms indicated herein. 273 Ontario's cross-motion is dismissed.

[144] There was not sufficient time booked at any of the hearings to address the issue of costs. The parties should exchange cost outlines and try to reach an agreement on costs. If they are unable to do so they are directed to arrange a scheduling appointment before me so that an efficient procedure can be established for the costs of these motions to be determined.

[145] Before signing the proposed AVO and Ancillary Order, I wanted to give the parties the opportunity to consider if anything further needs to be changed in the forms that were originally submitted by the Receiver, given the passage of time and with the benefit of the court's endorsement. Updated forms of orders may be submitted to me for consideration (with blacklines to indicate changes made) by emailing them to my judicial assistant: lina.bunoza@ontario.ca

[146] The court recognizes that this decision will have significant implications for 273 Ontario and the Rosehill Project. However, after permitting the adjournments to allow for a full airing of the multitude of issues raised on the merits, this is the outcome that has been reached. I am appreciative of the efforts and helpful submissions provided by all counsel.

KIMMEL J.

Date: February 2, 2023