Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

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(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF ROTHMANS, BENSON & HEDGES INC.

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INDEX

LIST OF AUTHORITIES

TAB	CASE
1.	Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, (Carswell, 2013) (**extracts**)
2.	*Stelco Inc., Re*, 2004 CanLII 24849 (ON SC)
3.	*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
4.	*Timminco Limited (Re)*, 2014 ONSC 3393
5.	*R. v. Chaulk (Application)*, [1989] 1 SCR 369
6.	*OpenHydro Technology Canada Ltd. (Re)*, 2018 NSSC 283
7.	*Stelco Inc. (Bankruptcy), Re*, 2005 CanLII 8671 (ON CA)
8.	*1511419 Ontario Inc. v. Canaccord Genuity Corp.*, 2017 ONSC 3448
9.	*Livent. Inc. (Special Receiver) v. Deloitte & Touche*, 2011 ONSC 648
10.	*Crudo Creative Inc. v. Marin*, 2007 CanLII 60834 (ON SCDC)
11.	*Doncaster v. Field*, 2015 NSCA 83
12.	*Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] 3 SCR 443 (**extracts**)
13.	*Re Les Oblats de Marie Immaculee du Manitoba*, 2004 MBQB 71
14.	*Industries Cover inc. (Syndic des)*, 2015 QCCS 136
15.	*Royal Bank of Canada v. Oxford Medical Imaging Inc.*, 2019 ONSC 1020
16.	*Robitaille v. American Biltrite (Canada)*, [1985] 1 SCR 290
17.	*Stelco Inc. (Re)*, 2007 ONCA 483
18.	*JTI-MacDonald Corp., Re*, 2006 CanLII 4505 (ON SC)
19.	*Nortel Networks Corporation (Re)*, 2009 CanLII 31600 (ON SC), appeal dismissed in 2009 ONCA 833
20.	*Re Essar Steel Algoma Inc. et al*, 2016 ONSC 6459
21.	*Grant Forest Products Inc. (Re),* 2013 ONSC 5933, appeal dismissed in 2015 ONCA 570

22.	*Sino-Forest Corporation (Re)*, Ontario Superior Court of Justice (Commercial List), Court File No. CV-12-9667-00CL, Order of Morawetz J. issued May 8, 2012 (**extracts**)
23.	*Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009
24.	Janis Sarra, *Imhotep's Ingenuity, Developing Canada's Capacity to Address Corporate Group Insolvency*
25.	*Marciano (Séquestre de),* 2012 QCCA 1881
26.	*CanaSea PetroGas Group Holdings Ltd., Re*, 2014 ONSC 6116, leave to appeal denied in 2014 ONCA 824
27.	*Re Hester Creek Estate Winery Ltd.*, 2004 BCSC 345
28.	*Nelson Education Limited (Re)*, 2015 ONSC 3580
29.	*GuestLogix Inc. (Re)*, 2016 ONSC 1047
30.	*General Motors v. Trillium Motor World Ltd.*, 2019 ONSC 520

Rescue!

The Companies' Creditors Arrangement Act

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rights of creditors to realize on their claims. For example, in *A & M Cookie Co.*, the Ontario Superior Court of Justice granted an initial *CCAA* order that also approved an interim financing agreement.[28] The issue that caused concern for the court was that the debtor had agreed to guarantee obligations of an affiliated US entity that had concurrently filed US Chapter 11 bankruptcy protection.[29] Justice Morawetz noted that it would have been helpful if the proposed monitor had been involved in the process at an earlier stage, as the court would have benefited from its analysis of the situation.[30] On balance, Justice Morawetz concluded that the agreement, combined with the breathing space afforded by *CCAA* stay protection, would have the greatest potential in an attempt to preserve value for stakeholders of the debtor, including the prospect of preserving several hundred jobs, as well as the preservation of the business for customers and suppliers.[31]

Even where the initial stay has been granted, the courts are prepared to scrutinize the initial order granted, particularly where the debtor has failed to make full disclosure. The British Columbia Supreme Court considered the test for setting aside an *ex parte* order for nondisclosure.[32] The court will consider whether the facts that were not disclosed at the time the application was made might have affected the outcome if they had been known.[33] In this case, the Court found that there was a realistic standard of disclosure met by the petitioner, which resulted in full and fair disclosure.[34] The Court also held, in accordance with the principles set out in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*,[35] that the debtor had shown an intention to put a plan before its creditors, and was satisfied that the financing was in place that would allow sufficient time to bring forward a plan for the consideration of the creditors.[36]

3. Come-back Provisions

An important provision in initial orders is the "come-back provision". Interested persons who wish to have an initial *CCAA* order granting a stay of proceedings in respect of a debtor set aside or varied, can bring the matter before the court on notice before the expiry of the initial stay period or when the debtor seeks an extension of the stay. The courts now commonly add a "come-back" provision

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[28] *Re A & M Cookie Co. Canada*, 2008 CarswellOnt 7136 (Ont. S.C.J. [Commercial List]).

[29] *Ibid.* at para. 8. In considering whether the order should be granted, the Court observed that if there was a shortfall on the realization of US assets, up to US$5 million of assets of the Canadian debtor would not be available to the current creditors of the Canadian debtor. *Ibid.* at para. 14.

[30] *Ibid.* at para. 19.

[31] *Ibid.* at paras. 20, 23.

[32] *Re Hayes Forest Services Ltd.*, 2008 CarswellBC 1946 (B.C.S.C. [In Chambers]).

[33] *Ibid.* at para. 5.

[34] *Ibid.* at para. 11.

[35] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 CarswellBC 1758 (B.C.C.A.).

[36] *Re Hayes Forest Services Ltd.*, 2008 CarswellBC 1946 (B.C.S.C. [In Chambers]) at para. 10.

in the initial *CCAA* order, which specifies that parties can come before the court in an application to vary or amend the order. The Model Initial Order in Ontario provides an example of a come-back clause in an initial *CCAA* order:

> ¶9 THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order or seek other relief on not less than seven (7) days notice to the Debtors and the Foreign Representative and their respective counsel, and to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.[37]

The Ontario Superior Court has held that such persons should not feel constrained about relying on the come-back clause in the *CCAA* order to seek a variance of the initial stay order. Mr. Justice Farley in *Re MuscleTech Research & Development Inc.* particularly stressed the parties' ability under the come-back provisions:

> ¶5 As this order today is being requested without notice to persons who may be affected, I would stress that these persons are completely at liberty and encouraged to use the comeback clause found at paragraph 59 of the Initial Order. In that respect, notwithstanding any order having previously been given, the onus rests with the applicants (and the applicants alone) to justify *ab initio* the relief requested and previously granted. Comeback relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question. This endorsement is to be provided to the creditors and others receiving notice.[38]

Hence, the court has held that the *CCAA* debtor or other applicant for the initial *CCAA* order has the onus on a come-back motion to satisfy the court that the existing terms of the *CCAA* order should be upheld.[39] Placing the onus here helps to discourage debtors from trying to unduly gain an advantage in the workout negotiations through the terms of the stay order. It allows creditors or other stakeholders that did not receive notice, or received notice only on very short notice, the opportunity to come before the court to make submissions on the order that has been issued.

However, as one counsel observed, first day motions are all about jockeying for position and advantage. As discussed in chapter 1, it is important that applicants seeking first day orders on short notice or no notice do so on the basis of full disclosure, including advising the court of issues that are likely to be contested. Where the court is not advised of issues or positions likely to be taken by creditors who were not given notice, the court may rescind the order, particularly where the debtor or

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[37] Ontario Model Order, at para. 44. See Appendices 4 to 12 for full text of model orders.

[38] *Re MuscleTech Research & Development Inc.*, 2006 CarswellOnt 264, [2006] O.J. No. 167 (Ont. S.C.J. [Commercial List]).

[39] *Re Warehouse Drug Store Ltd.*, 2005 CarswellOnt 1724 (Ont. S.C.J. [Commercial List]).

another party has inappropriately received an order that prejudices other parties without the court being given full information on which to make a decision.

The reality is that the come-back provision is not used often, either because the provision is buried in the order, or interested stakeholders do not have the resources to bring a motion to the court to vary the order. In some instances, the 'sorting out' period takes close to the full 30 days of an initial stay and disputes are dealt with in connection with an extension request by the debtor.

Even if there is no come-back clause, the court still has jurisdiction at any time to vary the order where the circumstances make it appropriate, pursuant to the court's broad statutory authority. Hence the provision serves more as a signalling to parties.[40]

4. The Scope of the Stay Order

As noted above, the court's authority to issue a stay order is broad. The court may make an order on any terms that it may impose, effective for the period that the court considers necessary, staying most proceedings.[41] There are limited exceptions set out in the statute, as discussed below. The stay order does not have the effect of prohibiting a supplier or landlord from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or requiring the further advance of money or credit.[42]

The court has authority to make stay orders against third parties. The court has held that it can make stay orders against parties who are not creditors of the debtor, where the actions of the third party could potentially prejudice the success of a proposed plan.[43]

Mr. Justice David Tysoe, then of the British Columbia Supreme Court, in *Re Doman Industries Ltd.* gave a helpful summary of the scope of the stay under a *CCAA* proceeding:

> ¶15 The law is clear that the court has the jurisdiction under the *CCAA* to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor

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40 Under the Québec *Code of Civil Procedure*, c. C-25, s. 46 specifies that the courts and judges have all the powers necessary for the exercise of their jurisdiction.

41 Section 11.02(1), *CCAA*.

42 Section 11.01, *CCAA*.

43 *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.); *Re Cansugar Inc.*, 2005 CarswellNB 308, [2005] N.B.J. No. 277 (N.B.Q.B.).

5.[265] In *Indalex*, the debtor applied for *CCAA* protection without notice to the pension plan beneficiaries; and then, shortly after initiating *CCAA* proceedings, the debtor moved to obtain interim financing with a super-priority charge at a time that *Indalex* knew its pension plans were underfunded. On appeal, the Supreme Court of Canada in *Indalex* held that the debtor company employer, as pension plan administrator, may have put itself in a position of conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process.[266] The Court further held that a corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function.[267] The directors may have fulfilled their fiduciary duty to the debtor, but they placed the debtor in the position of failing to fulfil its obligations as plan administrator. In the context of this case, the plan administrator's duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments; this duty meant that they were entitled to reasonable notice of the interim financing motion. However, the Court also held that there was no realistic possibility that, had the members received notice and had the *CCAA* court found that they were secured creditors, it would have ordered the priorities differently, and consequently, it would not be appropriate to order an equitable remedy such as constructive trust.[268]

2. Who is Entitled to Notice?

Prior to 2009, an application for a stay under the *CCAA* could be made without notice. The reason for an *ex parte* order was often because the debtor was trying to prevent creditors from moving to realize on their claims, essentially a "stampede to the assets" once creditors learn of the debtor's financial distress. If the *CCAA* application is made *ex parte*, the court has held that there must be full and frank disclosure of all relevant facts, although the material filed does not need to set out all the details of the company's financial position.[269] Absent notice, the court's expectation is that the applicant will explain to the court why notice was not possible or appro-

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[265] *Re Indalex Ltd.*, 2011 ONCA 265 (Ont. C.A.), additional reasons 2011 CarswellOnt 9077 (Ont. C.A.), reversed in part 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734 (S.C.C.).

[266] *Re Indalex Ltd.*, 2013 SCC 6 (S.C.C.).

[267] *Ibid.*

[268] *Ibid.* The Supreme Court of Canada held that the wind-up deemed trust concerns "employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus, the liabilities of the employer are complete, have accrued, before the wind-up. The relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions on the wind-up of their pension plan. For a discussion of this judgment, see chapter 6.

[269] *Re Philip's Manufacturing Ltd.* (1991), 9 C.B.R. (3d) 1 (B.C.S.C.); *Re 229531 B.C. Ltd.* (1989), 72 C.B.R. (N.S.) 310 (B.C.S.C.).

priate, and will place before the court the arguments likely to be made by a party that has not been given notice. In *Re Hester Creek Estate Winery Ltd.*, the Court held that it had been misled and that full and fair disclosure of relevant information had not been made; hence an *ex parte* order was not granted.[270]

Notice was considerably more codified effective 2009. There had previously been a problem of debtors seeking orders *ex parte*, without creditors having the opportunity to make submissions to the court, a concern raised by a number of practitioners across Canada.[271] In other jurisdictions, there has been a practice of notifying material stakeholders before seeking an initial stay or the applicant runs the risk of being stood down until such stakeholders arrive in court. Advance notice, albeit short notice, to materially interested parties with a determining interest in the outcome of the case, including union bargaining representatives, has increasingly become a standard practice on initial applications, given clear direction by the courts regarding concern about what views are not before it in the courtroom. There are notice requirements when parties seek to stay regulatory authorities that otherwise are exempted from the stay.[272]

Pursuant to s. 23(1) of the *CCAA*, when an order is made on the initial application in respect of a debtor company, the monitor is to publish the initial order on its website, send a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and publish a notice in a newspaper for two consecutive weeks.[273]

Notice must be given to secured creditors who are likely to be affected by the security or charge relating to interim financing.[274] The notice allows affected creditors to appear before the court and argue that the debtor does not fall within the statutory criteria, or perhaps argue that the creditor would be materially prejudiced as a result of the security or charge.

Notice is also required to every party to an agreement before the debtor can seek to assign rights and obligations under such agreements.[275] When a court order is made, there is an obligation to send a copy of the order to every party to the agreement.[276]

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[270] *Re Hester Creek Estate Winery Ltd.*, 50 C.B.R. (4th) 73, 2004 CarswellBC 542, 2004 BCSC 345 (B.C.S.C. [In Chambers]).

[271] For a discussion, see Janis Sarra, *Examining the Insolvency Toolkit*, Report of Public Hearings, Canadian Insolvency Foundation (Toronto: CIF, 2012).

[272] Section 11.1(3), *CCAA*. See the discussion on regulatory bodies above.

[273] Section 23(1), *CCAA*. Sections 6 to 8 Companies' Creditors Arrangement Regulations.

[274] Section 11.2, *CCAA*. See the discussion in chapter 4 on interim financing.

[275] Section 11.3, *CCAA*. See the discussion on assignments in chapter 7.

[276] Section 11.3(5), *CCAA*.

Notice is also required to every party to an agreement before the debtor can seek to disclaim or resiliiate an agreement with the monitor's consent, or at the time of an application to the court to be authorized to disclaim or resiliate the agreement, if the monitor did not approve such disclaimer or resiliation.

Notice must be given to any affected creditor where the debtor is making an application to declare a supplier a critical supplier within the meaning of the statute.[277] Notice must be given to secured creditors who are likely to be affected by a security or charge to indemnify directors during the proceedings.[278] Notice must be given to affected secured creditors before the court will consider or grant a priority charge for the monitor's fees and expenses; or for any financial, legal or other experts engaged by the company or other stakeholders for the purpose of the proceeding.[279]

Although it is now necessary to give notice to persons that are affected by the proceedings, it would be impossible for the debtor to give notice to all parties who may be affected or may be interested, as they are not always known. However, notice should be as broad as possible. As noted above, the courts frequently add a come-back clause, whether or not the order is made without notice, whereby parties can return to court at a later date to seek to set aside some or all of the order. The come-back clause is viewed by the courts as the counterbalance to any prejudice suffered by creditors as a result of failing to receive notice.

In considering notice, a common issue in practice is how, pragmatically, to provide notice to all stakeholders. The use of representatives has been very helpful in this respect, including union leaders, pension administrators and other representative individuals or entities that can facilitate as broad notice as possible given the constraints of timing, cost and administration.[280]

Section 23(1)(a)(ii) of the *CCAA* requires a monitor, within five days of the initial order, to send a notice to every known creditor who has a claim against the company of more than $1,000 advising the creditor that the order is publicly available. The Court in *Re Futura Loyalty Group Inc.* held that where the monitor had not sent such notice to prepaying merchant customers because the debtor was concerned it could cause them to cancel their participation in the program, the Court was not prepared to vary the initial order to excuse the monitor from providing the requisite creditor notice.[281] The Court held that transparency is

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[277] Section 11.4(1), *CCAA*. See the discussion on critical suppliers in chapter 4.

[278] Section 11.51, *CCAA*.

[279] Section 11.52, *CCAA*.

[280] Recent proceedings in *Indalex*, Dura Automotive (2009) and Northern Sawmills (Receivership 2011) regarding representation and notification to employees in pension related matters. See the discussion of the Supreme Court of Canada judgment in *Indalex* in chapter 6.

[281] *Re Futura Loyalty Group Inc.*, 2012 ONSC 6403 (Ont. S.C.J. [Commercial List]).

the foundation on which *CCAA* proceedings rest. The *CCAA* requires the debtor to provide its creditors, in a court proceeding, with the information they require in order to make informed decisions about the compromises or arrangements of their rights that the debtor may propose. The monitor had published a notice in the newspaper and established a website; the Court could not see any principled basis on which to excuse the monitor from giving specific notice to one group of creditors. One of the tasks of the debtor's management is to persuade suppliers or customers that in the long run it would be better to support the debtor than to abandon it. Brown J. declined the request to vary the notice provisions of the initial order.

In the context of proceedings under the *BIA*, in *Concrete Equities*, the Alberta Court of Appeal allowed an appeal from the chambers judge on the issue of whether service of disallowances of claim by a trustee on the address provided in the proof of claim was effective service.[282] The Court of Appeal noted that in order to demonstrate proper service of the disallowance of the claims, it must be shown that the respondents received notice in a context that made it clear that their rights were being engaged. That is an objective test; a party cannot argue that it subjectively did not realize what the documents were. It is important that the parties to litigation be able to rely on the address for service that is given. Parties should not have to guess to determine where service should be effected.

Notice is also important in respect of appeal processes. Also in the bankruptcy context, the British Columbia Court of Appeal held that it is necessary to file as well as serve a notice of appeal within 30 days from the decision of a trustee in bankruptcy disallowing a claim under s. 135 of the *BIA*. On appeal, the Court held that a proper construction of the *BIA* shows that it provides for general unanimity in bringing an appeal by requiring it to be brought by motion to the court. It leaves to the procedural rules of the jurisdiction hearing an appeal the determination how such motions, appeals, are to be launched.

3. Transparency and Potential Prejudice in Current Practice

For many years, employees, and where there were trade unions representing them, the trade unions, did not receive notice of the application for an initial stay order. For example, in each of the cases of *Anvil Range, Red Cross* and *Royal Oak Mines Inc.*, the workers and their unions were not given any notice of the proceedings until some discrete issue of pension liability, other fixed claims, or stays on grievance arbitration proceedings arose. Since the Court of Appeal judgment in

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[282] *Re Concrete Equities Inc.*, 2012 CarswellAlta 1572 (Alta. C.A.).

management incentive plan should be approved. The board was in the best position to assess which employees were essential to the success of Crystallex's restructuring efforts. Employee retention provisions are frequently authorized before a plan is negotiated and the Court of Appeal found that the supervising judge was alive to the exceptionally large amounts that might be paid to beneficiaries of the management incentive plan; and that the judge took specific care to assess the extent to which the independent committee of the board that recommended the plan was truly independent, and the steps taken by that committee to address those concerns.[219]

The role of managers is often not visible to participants in the *CCAA* proceeding, because the "face" of the negotiator may not be the officer that is calling the shots. Yet corporate managers can be a pivotal force in either developing the workout plan or standing in the way of development of an effective plan.

V. THE ROLE OF THE CHIEF RESTRUCTURING OFFICER

In the past two decades, there has been the growing use of chief restructuring officers (CRO) in *CCAA* workouts, frequently appointed in the initial stay order. This development is a governance response to creditor concerns that directors and officers that may have skills appropriate to oversight of financially healthy corporations may not have the skills or expertise to deal with a turnaround situation.

The CRO is vested with responsibility to steer the insolvent firm through the negotiation for a plan and the restructuring process. CRO tend to be "turnaround experts" who can take over control of the restructuring process and sometimes take over control of the operations, replacing most of the functions of both the CEO and the directors, if required. Algoma Steel, Loewen and Consumers Packaging Inc. are all examples of *CCAA* cases that utilized a CRO.[220] The appointment of a CRO can result in higher creditor confidence, particularly where creditors attribute the firm's financial distress to failures of governance. The CRO can also serve as a buffer between equity investors, directors, officers and creditors, undertaking the often tough negotiations required for an effective workout. As a new participant, the CRO has the advantage of a fresh assessment of the financial distress and the potential for refinancing and a viable workout.

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[219] *Ibid.* at para. 95.

[220] *Re Consumers Packaging Inc. et al* (2001), Toronto File No. 01-CL-4147 (Ont. S.C.); M. Forte, "The Recognition and Roles of the Chief Restructuring Officer in Canadian Insolvency Proceedings" (2001) 14 Comm. Insolvency Review 4.

In *Ivaco,* the Court permitted the participation of a chief restructuring officer in the sale process of an insolvent company.[221] The CRO assessed the various bids and weighed each against the possibility of a stand-alone restructuring, and ultimately made recommendations. The Court held that it would consider the following factors in examining the appropriate role of a CRO involved in the sale of an insolvent company: (1) that fairness to all creditors is a pre-requisite to a satisfactory sale process; (2) that a sale process should not result in one unsecured creditor receiving a secret benefit or advantage over other unsecured creditors; (3) that the sale process must be seen to be fair and transparent; and (4) that the sale process ought to be determined by the court after considering the advice of the monitor, the position of the insolvent company and the positions of the creditors.[222]

A CRO was successfully utilized in the *Consumers Packaging Inc.* (CPI) proceeding, a company that supplied most of the domestic glass bottle market in Canada. It was publicly listed on the Toronto Stock Exchange, but 63.6% held by a shareholder who was also CEO and chair of the board. CPI faced problems that included a pension deficit liability, aging capital assets, long-term fixed price contracts and enormous increases in input costs. When the corporation began to experience financial distress in 2001, the corporate board struck an independent restructuring committee, recognizing the need for an independent assessment of the financial distress while preventing a control change and acceleration of financial obligations that would have been triggered by debt defaults or dilution of majority shareholder interest.[223] The committee hired a CRO, who assumed operational control of the corporation, facilitated a complex debt arrangement and going-concern sale process of CPI's principal operating assets under the supervision of the *CCAA* judge.

The workout in *Consumers Packaging Inc.* ultimately generated a value of $61 million greater than CPI's estimated liquidation value. The purchaser assumed the pension plan deficit of $35-45 million and other employee obligations.[224] Edward Sellers observes that the workout was facilitated by early recognition that an independent committee of directors and an independent CRO were needed to effectively assess and implement the corporation's options for a viable plan. The restructuring was accomplished by the going-concern sale, driven by factors that

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[221] *Re Ivaco Inc.*, 2004 CarswellOnt 2397, 3 C.B.R. (5th) 33 (Ont. S.C.J. [Commercial List]). For a general discussion, see Edward Sellers *et al,* "Governance of the Financially Distressed Corporation: Selected Aspects of the Financing and Governance of Canadian Enterprises in Cross-Border Workouts" and Geoffrey Morawetz, "Under Pressure: Governance of the Financially Distressed Corporation", in Janis Sarra, *Corporate Governance in Global Capital Markets* (UBC Press, 2003).

[222] *Ivaco, ibid.*

[223] Edward Sellers *et al,* "Governance of the Financially Distressed Corporation: Selected Aspects of the Financing and Governance of Canadian Enterprises in Cross-Border Workouts", in Janis Sarra, *Corporate Governance in Global Capital Markets* (UBC Press, 2003) at 38.

[224] *Ibid.* at 44.

included value maximization for almost all interested parties, preservation of supply relationships for ordinary trade creditors, preservation of more than 2,400 direct jobs, successor protection of the pension plan, and prevention of major disruption to the glass container and beverage market in Canada.[225]

In the *Aveos Fleet Performance* proceeding, the Québec Superior Court appointed a CRO when all the directors save one resigned a few hours after the filing under the *CCAA*.[226] The last director resigned after the CRO was appointed. The CRO was given the authority to manage and operate, and to supervise the management and operations and affairs of the debtor, subject to execution of an engagement letter on terms satisfactory to the monitor and the administrative agent for the third-party secured lenders.[227] The court order directed that the former directors, current and former officers, shareholders, current and former employees and others were to cooperate fully with the CRO in the discharge of its duties. The CRO concluded that the debtor had to be sold and the monitor agreed. The Court approved a divestiture program that sought to separate the debtor into its three functional operating divisions and sell them as going concerns.[228] While the CRO's efforts gave rise to ten transactions, only one was sold as a going concern.[229]

CRO engagements are now quite varied in terms of scope – some involve principally stakeholder management and engagement related activities, for example, in the *AbitibiBowater* and *Yellow Media* cases. Others involve an operations focus as well, such as in the *Canwest Media* and *Canwest Publishing* cases. In all those cases, however, the CRO did not supplant the CEO or the board functions, but augmented existing senior management functions.

1. Compensation of CRO

Section 11.52(1) authorizes the court to make any order it considers appropriate declaring that all or part of the property of the debtor company is subject to a security or charge to cover any financial, legal or other experts engaged by the company for purposes of the *CCAA* proceeding.[230] Thus the CRO can be assured of its compensation in offering its services. Typically these services are billed by

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225 *Ibid.* at 45.

226 *Re Aveos Fleet Performance Inc./Aveos Fleet Performance aéronautique inc. Arrangement*, Judgment of Mr. Justice Mark Schrager, Québec Superior Court, 20 March 2012, Court File No. 500-11-042345-120.

227 *Ibid.* at para. 7.

228 *Re Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc.*, 2012 CarswellQue 14439 (Que. S.C.).

229 *Ibid.*, at the time this book goes to press, there was one party interested in a possible going-concern sale.

230 Section 11.52(1)(b), *CCAA*.

time expended, usually on a monthly 'work fee' basis, but there are also economic incentives built into the compensation package.

The Alberta Court of Queen's Bench in *Royal Bank v. Cow Harbour Construction* upheld the provisions of a chief restructuring advisor's agreement that provided for a success fee, but later directed the parties to attempt to negotiate a reduced success fee in the circumstances.[231] The case raised a number of unresolved issues, including the circumstances in which such fees should be permissible, whether the correct questions were asked at the outset in terms of approving the agreement, and the principles that the court should apply in considering such requests. One issue is whether there is sufficient transparency in the terms of engagement, which is usually included in an engagement letter but does not form part of the court order that is easily accessible to creditors.

2. Issues of CRO Accountability

To the extent that the CRO is a court-appointed officer or the terms of the CRO's contract have been approved by the court or granted some form of court protection, the supervision of the court can ensure a measure of accountability that is normally a function of the relationship between the corporate board and senior managers, notwithstanding that the CRO may formally report to the board or the CEO. In such instances, arguably the CRO has obligations to the court and must act neutrally with responsibility to stakeholders. If a CRO has taken over the oversight or management of the affairs of the debtor corporation, arguably the CRO also acquires a statutory duty of care and should consider the interests of all stakeholders with an interest in the process, as directed by the Supreme Court of Canada in *People's Department Stores*.[232] CRO also have reporting obligations to the court.

However, another view is that the CRO's objective is to maximize enterprise value or the value of fixed capital claims while managing the turnaround of the company; that it is appointed as an officer of the company, although the appointment is approved by the court, in which case, to whom does the CRO owe obligations? It may depend on the mandate of the CRO in terms of whether to restructure internally, seek a sale of the debtor corporation to third parties as a going concern, or facilitate a liquidation outcome. These issues have not yet been canvassed by Canadian courts, leaving the issue of fiduciary obligations of CRO an open question. It is fair to observe that there are varying degrees of the requirement of

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[231] *Royal Bank v. Cow Harbour Construction Ltd.*, 2011 CarswellAlta 255 (Alta. Q.B.) at para. 69.

[232] *People's Department Stores* was discussed at length earlier in this chapter; *People's Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461 (S.C.C.).

objective dealings and duties to all interested parties, depending on the type of court-appointed officer.

Where most of the CRO's compensation is performance-incentive driven, if performance is typically measured by return to creditors, there is some risk that the CRO will fail to recognize or take into account the interests of all stakeholders. Where the CRO is selected by the interim financing lender, there may also be a risk of the CRO deferring to the interests of the interim financing lender to the detriment of other creditors' interests.

CRO have also taken the benefit of D&O liability protection charges in interim financing or stay orders. *CCAA* orders tend to protect the CRO from all of the usual liability that directors and officers face in respect of wage and other claims.[233] While the CRO frequently performs an important business function and can enhance the debtor's prospects of successfully restructuring in a *CCAA* proceeding, agency issues arise in terms of CRO decision-making that can shift value to senior secured creditors to the disadvantage of longer term, but junior, secured or unsecured creditors. These risks are mitigated somewhat by the supervisory role of the court. However, just as the agency costs of management of the solvent firm may be a key factor in firm success or failure, the potential agency costs of CRO needs further study.

Whereas monitors must be licenced trustees and are supervised by the Office of the Superintendent of Bankruptcy, there are no similar requirements for CRO and there is no express code of conduct for them. It may be timely to consider such professional standards, as well as create a mechanism of oversight for CRO, in order to increase the degree of accountability in the performance of their duties in *CCAA* proceedings. It is the logical counter-point to the kinds of liability protections given to such officers.

VI. A GOVERNANCE ROLE FOR EMPLOYEES?

For the solvent corporation, creditors generally exercise a governance function by their pricing and terms of debt.[234] Operating lenders exercise a monitoring function, because of re-evaluation processes for loan renewals, access to information about cash-flow and expenditures through provision of banking services

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[233] There remains some concern about the validity of such orders granting blanket protection to court-appointed officers without notice to affected parties, in particular as regard to employment-related claims. See for instance *Re Big Sky Living Inc.*, 2002 CarswellAlta 875 (Alta. Q.B.), and *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc.*, 2006 SCC 35 (S.C.C.).

[234] G. Triantis and R. Daniels, "The Role of Debt in Interactive Corporate Governance" (1985), 83 Cal. Law Review 1073; M. Jensen and W. Meckling, "Theory of the Firm: Managerial Behaviour, Agency Cost and Ownership Structure" (1976), 3 Journal of Fin. Econ. 305; B. Adler, "An Equity-Agency Solution to the Bankruptcy-Priority Puzzle" (1993) J. of Legal Studies 73.

and early warning signals on payment default.[235] Most employees, however, do not have the bargaining power to acquire a governance role in the corporation, even though their investment is almost exclusively with the company in terms of their labour inputs and the deferred compensation system and hence their risk is highly undiversified.[236] Only when a firm is financially distressed is there a possibility that employees or their union in a representative capacity can acquire a governance role as part of the workout and compromise of their claims. That is what occurred in the first Algoma Steel restructuring; employees and their union acquired a governance role under a co-determination model that was enshrined in the corporate articles, a model that allowed employees to participate directly on the corporate board and allowed for joint decision-making on numerous operational and fundamental change issues. The co-determination structure carried the corporation through another decade of operations and wealth generating activity before Algoma was required to file under the *CCAA* once again because of market competition and less than ideal timing on accessing the debt market.

In the second *Algoma Steel CCAA* restructuring, secured creditors utilized the threat of exit to force governance change during negotiations for the workout, notwithstanding the fact that the insolvency was not attributed to the governance structure. Rather, Algoma's financial distress was primarily attributed to long-term debt load, and market and currency fluctuations. Nevertheless, the price of the compromise for noteholders as the senior affected creditors was a majority of seats on the corporate board. Arguably, they were able to use their bargaining leverage to extract a premium in debt terms and percentage of equity ownership for their support of the plan because they would receive 85% realization on liquidation and because they were not "high value" creditors in the sense of a long-term interest in the corporation's viability. The union did not have much bargaining leverage during the 2001 negotiations, primarily because of its concern for the 8,000 pension beneficiaries whose interests were at risk, as well as the current job security of members. Moreover, the union recognized that in order for Algoma to survive and remain competitive in global markets, additional capital expenditures were needed, and capital would necessarily have to be raised through equity as opposed to debt. While the union retained some residual governance rights, such as three nominee directors and a role in material change to

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[235] Triantis and Daniels, *ibid.* at 1083-4.

[236] Canada is widely recognized as having a deferred compensation system, which is one that means that employees work today for future promised benefits, such as pensions or health benefits. Hence, the compensation for current work performed is deferred until some later point in the employment relationship. It also refers to the fact that historically, many employees work hard in their earlier years, but continue to be paid a full wage in their pre-retirement years, because full compensation for the earlier labour was deferred until these years.

operations, its voting shares were eliminated and many of the governance rights associated with them.[237]

The Algoma Steel experience suggests that while there is a role for employees in the governance of the corporation, such a role is only possible when the equity of the corporation is available at such a severely discounted price that employees can afford to make a further investment in a firm where their investments are already at risk. While employees and their trade unions often do not wish a governance role and prefer to retain the traditional relationship between labour and management, the Algoma experience suggests that there can be considerable benefits for employees and other stakeholders implicated in the debtor corporation's activities, in terms of not only maximizing the firm's health, but also creating a healthier and sustained work environment for employees.[238]

The treatment of employee claims and collective agreements in *CCAA* proceedings are discussed in the next chapter.

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[237] Steve Boniferro, Vice-President Algoma Steel (21 December 2001). *Memorandum of Agreement*, Algoma 2001 Plan, on file with author.

[238] For a full discussion of the Algoma Steel co-determination experience, see Janis P. Sarra, *Creditor Rights and the Public Interest, Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003).

COURT FILE NO.: 04-CL-5306
DATE: 20040129

SUPERIOR COURT OF JUSTICE – ONTARIO
(Commercial List)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: FARLEY J.

COUNSEL: *Michael E. Barrack, James D. Gage* and *Geoff R. Hall*, for Stelco Inc.

Gale Rubenstein, for Superintendent of Financial Services (Ontario)

Kevin J. Zych, for Informed Committee of Stelco Bondholders

E.A. Sellers and *Jeremy Dacks*, for Ernst & Young Inc.

P. Griffin, for Stelco Inc. Directors

Ken Rosenberg and Marcus Knapp, for United Steelworkers of America

M. Forte, for Fleet Bank

K. McElcheran, for GECC

Paul R. Basso, for CIBC

D. Byers, for CIT

K.D. Kraft, for EDS Canada Inc.

Murray Gold, for Stelco Salaried Pensioners Association

HEARD: January 29, 2004

E N D O R S E M E N T

[1] I am satisfied that the conditions have been met for Stelco Inc. and its various subsidiary applicants to be granted the requested relief and protection under the CCAA. As per the draft Order presented this morning (with the adjustment to s. 66(a)). All applicants are affiliated, owe debt collectively of more than $5 million and are insolvent. As I have indicated in other CCAA

proceedings – indeed it should be taken as a standard given without mentioning it (I do mention this in case in any other case I forget to so observe), that given the limited or no notice to interested and affected parties, this initial order is approved, but that anyone who has a concern about any of its terms should use the comeback clause on a timely basis and that the onus continues to remain with the CCAA applicants to justify the relief. In other words, no one should think that any CCAA applicant in any case is able to get a preemptive upper hand with any initial order.

[2] I also understand that the DIP facility will not be utilized before this matter returns to court before me at a hearing to be scheduled for February 13, 2004.

[3] Order to issue as per my fiat.

J. M. Farley

Released: January 29, 2004

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?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Facts and Decisions of the Courts Below

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

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

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

1. Faits et décisions des juridictions inférieures

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

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

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

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

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

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

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

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

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

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

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

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

2. Issues

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

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

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

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

2. Questions en litige

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

(1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?

(2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?

(3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

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

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

3.1 *Purpose and Scope of Insolvency Law*

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

3. Analyse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2 *GST Deemed Trust Under the CCAA*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

222. . . .

. . .

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

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

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

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

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 . . .

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** . . .
>
> . . .
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution . . . .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

> **18.4** . . .
>
> . . .
>
> (3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :
>
> *a*) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;
>
> *b*) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation . . .

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

conflicts, apparent or real, and resolve them when possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy,

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l'égard de la TPS dans le cadre de la *LACC*. Dans l'arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d'appel de l'Ontario a invoqué la doctrine de l'abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d'appel de l'Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu'en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

> [TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d'appel de l'Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s'estimait donc tenue de suivre l'arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu'une disposition d'une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d'abroger une disposition plus spécifique

the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

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

[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

[53] A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

[56] My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

[62] Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

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

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

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

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

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

3.4 *Fiducie expresse*

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l'existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*.

[98] La première est la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l'effet contraire n'a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . .

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[102] Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC que* sous celui de la *LFI.*

[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit

security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

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

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[108] In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

[115] Section 11[1] of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

1 Section 11 was amended, effective September 18, 2009, and now states:

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

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

[115] L'article 11[1] de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

11. Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

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

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) . . . [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) . . . [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* . . . . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

[123] Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

[125] The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> . . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, . . . at p. 239 . . . :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> > On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as

2 The amendments did not come into force until September 18, 2009.

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

"new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

. . .

(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

[130] Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[131] The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

> Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the *CCAA* proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

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

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou

as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou

effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii),

in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

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

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

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la

creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

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

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Appeal allowed with costs, ABELLA J. *dissenting.*

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

CITATION: Timminco Limited (Re), 2014 ONSC 3393
COURT FILE NO.: CV-12-9539-00CL
DATE: 2014-07-07

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jane Dietrich* and *Kate Stigler*, for the Board of Directors, except John Walsh

Kenneth D. Kraft, for Chubb Insurance Company of Canada

James C. Orr, for St. Clair Pennyfeather, Plaintiff in the Class Action

Maria Konyukhova, for Timminco Entities

Robert Staley, for John Walsh

Linc Rogers, for the Monitor

HEARD: July 22, 2013

SUPPLEMENTARY WRITTEN SUBMISSIONS RECEIVED MARCH 2014

ENDORSEMENT

Introduction

[1] On May 14, 2009, Kim Orr Barristers PC, counsel to the representative plaintiff Mr. St. Clair Pennyfeather ("Plaintiff's Counsel"), initiated the proposed class action (the "Class Action"), which names as defendants Timminco Limited ("Timminco"), a third party, Photon Consulting LLC, and certain of the directors and officers of Timminco, (the "Directors").

[2] The Class Action focusses on alleged public misrepresentations that Timminco possessed a proprietary metallurgical process that provided a significant cost advantage in manufacturing solar grade silicon for use in manufacturing solar cells.

[3] Mr. Pennyfeather alleges that the representations were first made in March 2008, after which the shares of Timminco gained rapidly in value to more than $18 per share by June 5,

2008. Subsequently, Mr. Pennyfeather alleges that as Timminco began to acknowledge problems with the alleged proprietary process, the share price fell to the point where the equity was described as "penny stock" prior to its delisting in January 2012.

[4] In the initial order, granted January 3, 2012 in the *Companies' Creditors Arrangement Act*., R.S.C. 1985, c. C-36, as amended (the "CCAA") proceedings, Timminco sought and obtained stays of all proceedings including the Class Action as against Timminco and the Directors (the "Initial Order").

[5] Timminco also obtained a Claims Procedure Order on June 15, 2012 (the "CPO"). Among other things, the CPO established a claims-bar date of July 23, 2012 for claims against the Directors. Mr. Pennyfeather did not file a proof of claim by this date.

[6] No CCAA plan has been put forward by Timminco and there is no intention to advance a CCAA plan.

[7] Mr. Pennyfeather moves to lift the stay to allow the Class Action to be dealt with on the merits against all named defendants and, if necessary, for an order amending the CPO to exclude the Class Action from the CPO or to allow the filing of a proof of claim relating to those claims.

[8] The Class Action seeks to access insurance moneys and potentially the assets of Directors.

[9] The respondents on this motion, (the Directors named in the Class Action), contend that the failure to file a claim under the CPO bars any claim against officers and directors or insurance proceeds.

[10] Neither Timminco nor the Monitor take any position on this motion.

[11] For the reasons that follow, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action.

The Stay and CPO

[12] The Initial Order contains the relevant stay provision (as extended in subsequent orders):

> 24. This Court Orders that during the Stay Period… no Proceeding may be commenced or continued against any former, current or future directors or officers of the Timminco Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Timminco Entities whereby the directors or officers are alleged under any law to be liable in their capacities as directors or officers for the payment or performance of such obligations, **until a compromise or arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this court or is refused by the creditors of the Timminco Entities or this Court.**

[emphasis added]

[13] In May and June 2012, The Court approved sales transactions comprising substantially all of the Timminco Entities' assets. In their June 7, 2012 Motion, the Timminco Entities sought an extension of the Stay Period to "give the Timminco Entities sufficient time to, among other things, close the transactions relating to the Successful Bid and carry out the Claims Procedure". The Timminco Entities sought court approval of a proposed claims procedure to "identify claims which may be entitled to distributions of potential proceeds of the … transactions…" The Timminco entities took the position that the Claims Procedure was "a fair and reasonable method of determining the potential distribution rights of creditors of the Timminco Entities".

[14] The mechanics of the CPO are as follows. Paragraph 2(h) of the CPO defines the Claims Bar Date as 5:00 p.m. on July 23, 2012. "D&O Claims" are defined in para. 2(f)(iii):

> Any existing or future right or claim of any person against one or more of the directors and/or officers of the Timminco Entity which arose or arises as a result of such directors or officers position, supervision, management or involvement as a director or officer of a Timminco Entity, whether such right, or the circumstances giving rise to it arose before or after the Initial Order up to and including this Claims Procedure whether enforceable in any civil, administrative, or criminal proceeding (each a "D&O Claim") (and collectively the "D&O Claims"), including any right:
>
> a. relating to any of the categories of obligations described in paragraph 9 of the Initial Order, whether accrued or falling due before or after the Initial Order, in respect of which a director or officer may be liable in his or her capacity as such;
>
> b. in respect of which a director or officer may be liable in his or her capacity as such concerning employee entitlements to wages or other debts for services rendered to the Timminco Entities or any one of them or for vacation pay, pension contributions, benefits or other amounts related to employment or pension plan rights or benefits or for taxes owing by the Timminco Entities or amounts which were required by law to be withheld by the Timminco Entities;
>
> c. in respect of which a director or officer may be liable in his or her capacity as such as a result of any act, omission or breach of duty; or
>
> d. that is or is related to a penalty, fine or claim for damages or costs.
>
> Provided however that in any case "Claim" shall not include an Excluded Claim.

[15] The CPO appears to bar a person who fails to file a D&O Claim by the Claims Bar Date from asserting or enforcing the claim:

> 19. This Court orders that any Person who does not file a proof of a D&O Claim in accordance with this order by the claims-bar date **or such other later date as may be**

> **ordered by the Court**, shall be forever barred from asserting or enforcing such D&O Claim against the directors and officers and the directors and officers shall not have any liability whatsoever in respect of such D&O Claim and such D&O Claim shall be extinguished without any further act or notification. [emphasis added]

Mr. Pennyfeather's Position

[16] Mr. Pennyfeather advances a number of arguments. Most significantly, he argues that it is not fair and reasonable to allow the defendants to bar and extinguish the Class Actions claims through the use of an interim and procedural court order. He submits that the respondents attempt to use the CCAA in a tactical and technical fashion to achieve a result unrelated to any legitimate aspect of either a restructuring or orderly liquidation. The operation of the fair and reasonable standard under the CCAA calls for the exercise of the Court's discretion to lift the stay and, if necessary, amend the CPO to either exclude the Class Action claims or permit submissions of a class proof of claim.

[17] In support of this argument, Mr. Pennyfeather adds that there is no evidence that any of the Directors who are defendants in the class action contributed anything to the CCAA process, and that the targeted insurance proceeds are not available to other creditors. Thus, he submits, a bar against pursuing these funds benefits only the insurance companies who are not stakeholders in the restructuring or liquidation.

[18] Mr. Pennyfeather advances a number of additional arguments. Because I am persuaded by this first submission, it is not necessary to discuss the additional arguments in great detail. However, I will give a brief summary of these additional arguments below.

[19] First, Mr. Pennyfeather submits, since the stay was ordered, he has attempted to have the stay lifted as it relates to the Class Action.

[20] Second, Mr. Pennyfeather submits that the CPO did not permit the filing of representative claims, unlike, for example, claims processed in *Labourers' Pension Fund of Canada and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078, 100 C.B.R. (5th) 30. Representative claims are generally not permitted under the CCAA and the solicitors for the representative plaintiff do not act for class members prior to certification (see: *Muscletech Research and Development Inc. (Re)* (2006), 25 C.B.R. (5th) 218 (Ont. S.C.)). Therefore, Mr. Pennyfeather submits that the omission in the order obtained by the Timminco entities, of the type of provision contained in the *Sino-Forest* Claims Order, precluded the action that they now assert should have been taken.

[21] Third, Mr. Pennyfeather responds to the significant argument made by the responding parties that the CPO bars the claim. He submits that the Class Action, which alleges, *inter alia*, misrepresentations and breaches of the *Securities Act*, R.S.O. 1990, c. S.5, is unaffected by the CPO. There are several reasons for this. First, the CPO excludes claims that cannot be compromised as a result of the provisions of s. 5.1(2) of the CCAA. Alternatively, even if Mr. Pennyfeather and other class members are not creditors pursuant to section 5.1(2), he submits that Parliament has clearly intended to exclude claims for misrepresentation by directors

regardless of who brought them. In addition, insofar as the Class Action seeks to recover insurance proceeds, the CPO did not, according to Mr. Pennyfeather, affect that claim.

[22] In summary, Mr. Pennyfeather's most significant argument is that the CCAA process should not be used in a tactical manner to achieve a result collateral to the proper purposes of the legislation. The rights of putative class members should be determined on the merits of the Class Action, which are considerable given the evidence. Further, the lifting of the stay is fair and reasonable in all of the circumstances.

Directors' Position

[23] Counsel to directors and officers named in the proposed class action, other than Mr. Walsh (the "Defendant Directors") submit there are three issues to be considered on the motion: (a) should the CPO be amended to grant Mr. Pennyfeather the authority to file a claim on behalf of the class members in the D&O Claims Procedure? (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, should the claims-bar date be extended to allow him the opportunity to file a late claim against the Defendant Directors? and (c) if Mr. Pennyfeather is permitted to file a late claim against the Defendant Directors, should the D&O stay be lifted to allow the proposed class action to proceed against the Defendant Directors?

[24] The Defendant Directors take the position that: (a) Mr. Pennyfeather does not have the requisite authority and/or right to file a claim on behalf of the class action members and the CPO and should not be amended to permit such; (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, the claims-bar date should not be extended to allow Mr. Pennyfeather to file a late claim; and (c) if Mr. Pennyfeather is permitted to file a late claim, the D&O stay should not be lifted to allow the proposed class action to proceed against the Defendant Directors.

[25] The Defendant Directors counter Mr. Pennyfeather's arguments with a number of points. They take the position that while they were holding office, they assisted with every aspect of the CCAA process, including (i) the sales process through which the Timminco Entities sold substantially all of their assets and obtained recoveries for the benefit of their creditors; and (ii) the establishment of the claims procedure, resigning only after the claims-bar date passed.

[26] The Defendant Directors also submit that Mr. Pennyfeather has been aware of, and participated in, the CCAA proceedings since the weeks following the granting of the Initial Order. They submit that at no time prior to this motion did Mr. Pennyfeather take any position on the claims procedures established to seek the authority to file a claim on behalf of the class members. They submit that, at this point, Mr. Pennyfeather is asking the court to exercise its discretion to (i) amend the CPO to grant him the authority to file a claim on behalf of the class members; (ii) extend the claims-bar date to allow him to file such claim; and (iii) lift the stay of proceedings. They submit that Mr. Pennyfeather asks this discretion be exercised to allow him to pursue a claim against the Defendant Directors which remains uncertified, is in part statute barred, and lacks merit.

[27] Counsel to the Defendant Directors submits that the D&O Claims Procedure was initiated for the purpose of determining, with finality, the claims against the directors and officers. They submit that the D&O Claims Procedure has at no time been contingent on, tied to, or dependent on the filing of a Plan of Arrangement by the Timminco Entities.

[28] Simply put, the Defendant Directors submit that the CPO sets a claims-bar date of July 23, 2012 for claims against Directors and Mr. Pennyfeather did not file any Proof of Claim against the Defendant Directors by the claims-bar date. Accordingly, they submit that the claims against the Defendant Directors contemplated by the Class Action are currently barred and extinguished by the CPO.

[29] The arguments put forward by Mr. Walsh are similar.

[30] Counsel to Mr. Walsh attempts to draw similarities between this case and *Sino-Forest*. Counsel submits this is a case where Mr. Pennyfeather intentionally refused to file a Proof of Claim in support of a securities misrepresentation claim against Timminco and its directors and officers.

[31] They further submit that Mr. Pennyfeather is asking for the Court to exercise its discretion in his favour to lift the stay of proceedings, in order to allow him to pursue a proceeding which has been largely, if not entirely neutered by the Court of Appeal (leave to appeal to the Supreme Court of Canada dismissed). They point out that just like in *Sino-Forest*, to lift the stay would be an exercise in futility where the Court commented that "there is no right to opt out of any CCAA process…by virtue of deciding, on their own volition, not to participate in the CCAA process", the objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

[32] Counsel to Mr. Walsh also takes the position that Mr. Pennyfeather's only argument is a strained effort to avoid the plain language of the CPO in an effort to say that his claim is an "excluded claim" and therefore a Proof of Claim was never required. Even if Mr. Pennyfeather was right, counsel to Mr. Walsh submits that Mr. Pennyfeather still would have been required to file a Proof of Claim, failing which his claim would have been barred. Under the CPO, proofs of such claims were still called for, even if they were not to be adjudicated.

[33] They note that Mr. Pennyfeather was aware of the CCAA proceeding and the Initial Order. As early as January 17, 2012, counsel to Mr. Pennyfeather contacted counsel for Timminco, asking for consent to lift the Stay.

[34] Counsel contends that the "excluded claim" language that Mr. Pennyfeather relies on is not found in the definition of D&O Claim. Under the terms of the CPO, the language is a carve-out from the larger definition of "claim", not the subset definition of D&O Claim. As a result, counsel submits that proofs of claim are still required for D&O Claims, regardless of whether they are excluded claims. In that way, the universe of D&O Claims would be known, even if excluded claims would ultimately not be part of a plan.

[35] Mr. Walsh also takes the position that Mr. Pennyfeather made an intentional decision not to file a claim. Mr. Walsh emphasizes that Mr. Pennyfeather had full notice of the motion for the CPO and chose not to oppose or appear on the motion. Further, at no time did Mr. Pennyfeather request the Monitor apply to court for directions with respect to the terms of the CPO.

[36] Mr. Walsh submits he is prejudiced by the continuation of the Class Action and he wants to get on with his life but is unable to do so while the claim is extant.

Law and Analysis

[37] For the purposes of this motion, I must decide whether the CPO bars Mr. Pennyfeather from proceeding with the Class Action and whether I should lift the stay of proceedings as it applies to the Class Action. For the reasons that follow, I conclude that the CPO should not serve as a bar to proceeding with the Class Action and that the stay should be lifted.

[38] As I explain below, the application of the claims bar order and lifting the stay are discretionary. This discretion should be exercised in light of the purposes of both claims-bar orders and stays under the CCAA. A claim bar order and a stay under the CCAA are intended to assist the debtor in the restructuring process, which may encompass asset realizations. At this point, Timminco's assets have been sold, distributions made to secured creditors, no CCAA plan has been put forward by Timminco, and there is no intention to advance a CCAA plan. It seems to me that neither the stay, nor the claims bar order continue to serve their functional purposes in these CCAA proceedings by barring the Class Action. In these circumstances, I fail to see why the stay and the claim bar order should be utilized to obstruct the plaintiff from proceeding with its Class Action.

The Purpose of Stay Orders and Claims-Bar Orders

[39] For the purposes of this motion, it is necessary to consider the objective of the CCAA stay order. The stay of proceedings restrains judicial and extra-judicial conduct that could impair the ability of the debtor company to continue in business and the debtor's ability to focus and concentrate its efforts on negotiating of a compromise or arrangement: *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. S.C.).

[40] Sections 2, 12 and 19 of the CCAA provide the definition of a "Claim" for the purposes of the CCAA and also provide guidance as to how claims are to be determined. Section 12 of the CCAA states

> 12. The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

The use of the word "may" in s. 12 indicates that fixing deadlines, which includes granting a claims bar order, is discretionary. Additionally, as noted above the CPO provided at para. 19 that a D&O Claim could be filed on "such other later date as may be ordered by the Court".

[41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

[42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".

[43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

[44] Stakeholders in this context can also include directors and officers, as it is not uncommon for debtor applicants to propose a plan under the CCAA that compromises certain claims against directors and officers. In this context, the provisions of s. 5.1 of the CCAA must be respected.

[45] In the case of Timminco, there have been distributions to secured creditors which are not the subject of challenge. The Class Action claim is subordinate in ranking to the claims of the secured creditors and has no impact on the distributions made to secured creditors. Further, there is no CCAA plan. There will be no compromise of claims against directors and officers. I accept that at the outset of the CCAA proceedings there may very well have been an intention on the part of the debtor to formulate a CCAA plan and further, that plan may have contemplated the compromise of certain claims against directors and officers. However, these plans did not come to fruition. What we are left with is to determine the consequence of failing to file a timely claim in these circumstances.

[46] In the circumstances of this case, i.e., in the absence of a plan, the purpose of the claims bar procedure is questionable. Specifically, in this case, should the claims bar procedure be used to determine the Class Action?

[47] In my view, it is not the function of the court on this motion to determine the merits of Mr. Pennyfeather's claim. Rather, it is to determine whether or not the claims-bar order operates as a bar to Mr. Pennyfeather being able to put forth a claim. It does not act as such a bar.

[48] It seems to me that CCAA proceedings should not be used, in these circumstances, as a tool to bar Mr. Pennyfeather from proceeding with the Class Action claim. In the absence of a CCAA proceeding, Mr. Pennyfeather would be in position to move forward with the Class Action in the usual course. On a principled basis, a claims bar order in a CCAA proceeding,

where there will be no CCAA plan, should not be used in such a way as to defeat the claim of Mr. Pennyfeather. The determination of the claim should be made on the merits in the proper forum. In these circumstances, where there is no CCAA plan, the CCAA proceeding is, in my view, not the proper forum.

[49] Similar considerations apply to the Stay Order. With no prospect of a compromise or arrangement, and with the sales process completed, there is no need to maintain the status quo to allow the debtor to focus and concentrate its efforts on negotiating a compromise or arrangement. In this regard, the fact that neither Timminco nor the Monitor take a position on this motion or argue prejudice is instructive.

Applicability of Established Tests

[50] The lifting of a stay is discretionary. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of (a) the balance of convenience; (b) the relative prejudice to the parties; and (c) where relevant, the merits of the proposed action: *Canwest Global Communications Corp., Re*, 2011 ONSC 2215, 75 C.B.R. (5th) 156, at para. 27.

[51] Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay; (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[52] These are factors that have been considered by the courts on numerous occasions (see, for example, *Sino-Forest*; *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), *Blue Range Resource Corp. (Re)*, 2000 ABCA 285, 193 D.L.R. (4th) 314, leave to appeal to S.C.C. refused, [2000] SCCA No. 648; *Canadian Red Cross Society (Re)* (2000), 48 C.B.R. (5th) 41 (Ont. S.C.); and *Ivorylane Corp.* v. *Country Style Realty Ltd.*, [2004] O.J. No. 2662 (S.C.)).

[53] However, it should be noted that all of these cases involved a CCAA Plan that was considered by creditors.

[54] In the present circumstances, it seems to me there is an additional factor to take into account: there is no CCAA Plan.

[55] I have noted above that certain delay can be attributed to the CCAA proceedings and the impact of *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, at the Court of Appeal. That is not a full answer for the delay but a partial explanation.

[56] The prejudice experienced by a director not having a final resolution to the proposed Class Action has to be weighed as against the rights of the class action plaintiff to have this matter heard in court. To the extent that time constitutes a degree of prejudice to the defendants, it can be alleviated by requiring the parties to agree upon a timetable to have this matter addressed on a timely basis with case management.

[57] I have not addressed in great detail whether the CPO requires excluded claims to be filed. In my view, it is not necessary to embark on an analysis of this issue, nor have I embarked on a review of the merits. Rather, the principles of equity and fairness dictate that the class action plaintiff can move forward with the claim. The claim may face many hurdles. Some of these have been outlined in the factum submitted by counsel to Mr. Walsh. However, that does not necessarily mean that the class action plaintiff should be disentitled from proceeding.

[58] In the result, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action. The CPO is modified so as to allow Mr. Pennyfeather to file his claim.

Morawetz, R.S.J.

Date: July 7, 2014

Francis Darren Morrissette and Robert Matthew Chaulk *Applicants*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada *Intervener*

INDEXED AS: R. *v.* CHAULK (APPLICATION)

File Nos.: 21035, 21012.

1989: March 13*.

Present: Dickson C.J. and Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka and Cory JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Jurisdiction — Applications for leave to appeal — Supreme Court of Canada jurisdiction — Determination of applications on the basis of written material without oral hearing — Supreme Court Act, R.S.C. 1970, c. S-19, ss. 41, 45.

Criminal law — Indictable offence — Applications for leave to appeal — Supreme Court of Canada jurisdiction — Determination of applications on the basis of written material without oral hearing — Criminal Code, R.S.C. 1970, c. C-34, s. 618 — Supreme Court Act, R.S.C. 1970, c. S-19, ss. 41, 45.

Applicants, whose murder convictions were upheld on appeal, sought leave to appeal to this Court pursuant to s. 618(1)(*b*) of the *Criminal Code*. After filing the application for leave to appeal, counsel for applicant Morrissette argued that, under the newly adopted s. 45 of the *Supreme Court Act*, the Court did not have jurisdiction to decide the application without according applicant an oral hearing.

Held: The application is dismissed.

The Court held that it had jurisdiction to determine the application on the basis of the written material and without according an oral hearing. It is important to distinguish (1) grounds for appeal from (2) procedure to be followed and the criteria to be applied in deciding whether to grant leave to appeal. The right to appeal to this Court from a judgment dismissing an appeal from a conviction for an indictable offence is conferred by the

* Reasons delivered on April 27, 1989.

Francis Darren Morrissette et Robert Matthew Chaulk *Requérants*

c.

Sa Majesté La Reine *Intimée*

et

Le procureur général du Canada *Intervenant*

RÉPERTORIÉ: R. *c.* CHAULK (REQUÊTE)

N^os^ du greffe: 21035, 21012.

1989: 13 mars*.

Présents: Le juge en chef Dickson et les juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka et Cory.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Compétence — Demandes d'autorisation de pourvoi — Compétence de la Cour suprême du Canada — Demandes d'autorisation tranchées sur le fondement de conclusions écrites sans audience — Loi sur la Cour suprême, S.R.C. 1970, chap. S-19, art. 41, 45.

Droit criminel — Acte criminel — Demandes d'autorisation de pourvoi — Compétence de la Cour suprême du Canada — Demandes d'autorisation tranchées sur le fondement de conclusions écrites sans audience — Code criminel, S.R.C. 1970, chap. C-34, art. 618 — Loi sur la Cour suprême, S.R.C. 1970, chap. S-19, art. 41, 45.

Les requérants, dont les déclarations de culpabilité de meurtre ont été confirmées en appel, s'adressent à cette Cour pour obtenir l'autorisation de se pourvoir conformément à l'al. 618(1)*b*) du *Code criminel*. Après production de la demande d'autorisation, l'avocat du requérant Morrissette a allégué qu'en vertu du nouvel art. 45 de la *Loi sur la Cour suprême*, la Cour n'avait pas compétence pour trancher la demande d'autorisation sans accorder une audience au requérant.

Arrêt: La requête est rejetée.

La Cour juge qu'elle a compétence pour trancher la demande d'autorisation sur le fondement de conclusions écrites sans accorder d'audience. Il est important de distinguer (1) les moyens d'appel de (2) la procédure à suivre et des critères à appliquer pour décider s'il faut accorder l'autorisation de pourvoi. C'est le *Code criminel* et non la *Loi sur la Cour suprême* qui accorde le droit d'en appeler à cette Cour du rejet d'un appel

* Motifs déposés le 27 avril 1989.

Criminal Code and not by the *Supreme Court Act*. Section 41(3) of the *Supreme Court Act* relates only to the grounds for appeal and, even when read with s. 45, bears no relation to the procedure to be followed or to the criteria to be applied when the Court is deciding whether or not to grant leave. Section 45 was intended by Parliament to establish a procedure of general application and to afford this Court the authority to control its own docket. Hence s. 45, in its present form, should be interpreted in that light.

Cases Cited

Applied: *R. v. Gardiner*, [1982] 2 S.C.R. 368; *Argentina v. Mellino*, [1987] 1 S.C.R. 536.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, ss. 618 [am. S.C. 1987, c. 42, s. 10], 620, 621.
Supreme Court Act, R.S.C. 1970, c. S-19, ss. 41, 45 [am. S.C. 1987, c. 42, ss. 3, 4].

APPLICATION challenging the jurisdiction of the Supreme Court of Canada to determine without oral hearing a motion for leave to appeal brought under the *Criminal Code*. Application dismissed.

G. Greg Brodsky, *Q.C.*, for the applicant Morrissette.

Heather Leonoff, for the applicant Chaulk.

J. G. B. Dangerfield, for the respondent.

S. R. Fainstein, *Q.C.*, for the intervener.

The following is the judgment delivered by

THE COURT—The issue to be addressed on this application is whether the Court has jurisdiction to decide, on the basis of written material and without an oral hearing, an application for leave to appeal from a judgment of a court of appeal affirming a conviction for an indictable offence.

I Statutory Provisions

For ease of reference, the relevant statutory provisions may be set out here:

Supreme Court Act

41. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of

contre une déclaration de culpabilité relative à un acte criminel. Le paragraphe 41(3) a trait exclusivement aux moyens d'appel et, même lorsqu'on l'interprète en regard de l'art. 45, il n'a aucun rapport avec la procédure à suivre ou avec les critères à appliquer lorsque la Cour décide si elle doit accorder ou refuser l'autorisation. Le législateur a voulu que l'art. 45 offre une procédure d'application générale et a choisi d'accorder à la Cour le pouvoir de contrôler son propre rôle. L'article 45, dans sa forme actuelle, doit donc être interprété dans ce contexte.

Jurisprudence

Arrêts appliqués: *R. c. Gardiner*, [1982] 2 R.C.S. 368; *Argentine c. Mellino*, [1987] 1 R.C.S. 536.

Lois et règlements cités

Code criminel, S.R.C. 1970, chap. C-34, art. 618 [mod. S.C. 1987, chap. 42, art. 10], 620, 621.
Loi sur la Cour suprême, S.R.C. 1970, chap. S-19, art. 41, 45 [mod. S.C. 1987, chap. 42, art. 3, 4].

REQUÊTE contestant la compétence de la Cour suprême du Canada pour trancher sans audience une demande d'autorisation de pourvoi présentée en vertu du *Code criminel*. Requête rejetée.

G. Greg Brodsky, *c.r.*, pour le requérant Morrissette.

Heather Leonoff, pour le requérant Chaulk.

J. G. B. Dangerfield, pour l'intimée.

S. R. Fainstein, *c.r.*, pour l'intervenant.

Version française du jugement rendu par

LA COUR—La présente requête vise à faire déterminer si la Cour a compétence pour trancher, sur le fondement de conclusions écrites et sans audience, une demande d'autorisation de pourvoi contre un arrêt d'une cour d'appel confirmant une déclaration de culpabilité relative à un acte criminel.

I Les textes législatifs

À des fins de commodité, les textes législatifs pertinents sont reproduits ci-dessous:

Loi sur la Cour suprême

41. (1) Sous réserve du paragraphe (3), il peut être interjeté appel à la Cour suprême de tout jugement,

the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from such judgment is accordingly granted by the Supreme Court.

(2) An application for leave to appeal under this section shall be brought in accordance with paragraph 64(1)(*a*).

(3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

45. (1) Notwithstanding any other Act of Parliament, an application to the Supreme Court for leave to appeal shall be made to the Court in writing and the Court shall

(*a*) grant the application if it is clear from the written material that the application comes within the provisions of section 41 and does not warrant an oral hearing;

(*b*) dismiss the application if it is clear from the written material that the application does not come within the provisions of section 41 and does not warrant an oral hearing; and

(*c*) order an oral hearing to determine the application, in any other case.

Criminal Code

618. (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(*a*) on any question of law on which a judge of the court of appeal dissents, or

(*b*) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

définitif ou autre, rendu par la plus haute cour du dernier ressort habilitée, dans une province, à rendre jugement dans l'affaire en question, ou par l'un des juges de cette cour, que l'autorisation d'en appeler à la Cour suprême ait ou non été refusée par un autre tribunal, lorsque la Cour suprême estime, étant donné l'importance de l'affaire pour le public, l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou sa nature ou son importance à tout autre égard, qu'elle devrait en être saisie et lorsqu'elle accorde dès lors l'autorisation d'interjeter appel de ce jugement.

(2) Les demandes d'autorisation d'appel présentées au titre du présent article sont régies par l'alinéa 64(1)*a*).

(3) Nul appel à la Cour suprême ne peut être interjeté selon le présent article, du jugement d'une cour acquittant ou déclarant coupable, ou annulant ou confirmant une déclaration de culpabilité ou un acquittement, d'un acte criminel ou, sauf sur une question de droit ou de juridiction, d'une infraction autre qu'un acte criminel.

45. (1) Par dérogation à toute autre loi fédérale, toute demande d'autorisation d'appel est présentée par écrit à la Cour qui, selon le cas:

a) l'accueille si sa conformité avec l'article 41 ressort des conclusions écrites et si elle ne justifie pas la tenue d'une audience;

b) la rejette si sa non-conformité avec l'article 41 ressort des conclusions écrites et si elle ne justifie pas la tenue d'une audience;

c) ordonne, dans les autres cas, la tenue d'une audience pour en décider.

Code criminel

618. (1) La personne déclarée coupable d'un acte criminel et dont la condamnation est confirmée par la cour d'appel peut interjeter appel à la Cour suprême du Canada

a) sur toute question de droit au sujet de laquelle un juge de la cour d'appel est dissident, ou

b) sur toute question de droit, si l'autorisation d'appel est accordée par la Cour suprême du Canada.

II Facts

The applicants were convicted of first degree murder and their appeals to the Manitoba Court of Appeal were dismissed. They now seek leave to appeal to this Court pursuant to s. 618(1)(*b*) of the *Criminal Code*. Upon filing the application for leave to appeal, counsel for the applicant Morrissette indicated that he took the position that the Court did not have jurisdiction to decide the application for leave to appeal without according him an oral hearing. A hearing was ordered to determine the jurisdictional point, and by order of the Court, notice was given to the Attorney General of Canada and to the provincial Attorneys General of the motion challenging the Court's jurisdiction. The Attorney General of Canada intervened, making both written and oral submissions. At the conclusion of the argument on the jurisdictional issue, the Court gave judgment holding that it did have jurisdiction to determine the application on the basis of the written material and without according an oral hearing and indicated that reasons would follow. The Court also held, however, that in the circumstances, a panel of three judges would hear oral submissions on the application for leave to appeal itself. These reasons deal solely with the question of the Court's jurisdiction.

III Submission of the Applicant

The applicant contends that a literal reading of ss. 41 and 45 of the *Supreme Court Act* leads to the conclusion that the Court cannot dispose of an application for leave to appeal without an oral hearing where, as in the case at bar, the right to seek leave is conferred by s. 618(1)(*b*) of the *Criminal Code*. This argument is based upon s. 41(3) of the *Supreme Court Act* which expressly provides that no appeal lies to the Supreme Court of Canada "under this section" from the judgment of a court affirming a conviction for an indictable offence. The applicant contends that s. 45 expressly exempts cases which fall within s. 41(3) from the procedure whereby the Court has jurisdiction to dispose of an application for leave to appeal on

II Les faits

Les requérants ont été déclarés coupables de meurtre au premier degré et leurs appels à la Cour d'appel du Manitoba ont été rejetés. Ils demandent maintenant l'autorisation d'en appeler à cette Cour conformément à l'al. 618(1)*b*) du *Code criminel*. En produisant la demande d'autorisation de pourvoi, l'avocat du requérant Morrissette a allégué que la Cour n'avait pas compétence pour trancher la demande d'autorisation de pourvoi sans lui accorder une audience. On a ordonné la tenue d'une audience sur la question juridictionnelle et, sur l'ordre de la Cour, le procureur général du Canada et les procureurs généraux des provinces ont reçu avis de la requête contestant la compétence de la Cour. Le procureur général du Canada, qui est intervenu, a produit un mémoire et a plaidé à l'audience. À la fin du débat sur la question juridictionnelle, la Cour a jugé qu'elle avait compétence pour trancher la demande sur le fondement de conclusions écrites et sans audience et dit que ses motifs suivraient. Cependant, la Cour a également décidé que, vu les circonstances, trois juges entendraient les plaidoiries relativement à la demande d'autorisation de pourvoi elle-même. Les présents motifs traitent exclusivement de la question de la compétence de la Cour.

III Les arguments du requérant

Le requérant prétend qu'une interprétation littérale des art. 41 et 45 de la *Loi sur la Cour suprême* amène à conclure que la Cour ne peut trancher une demande d'autorisation de pourvoi sans accorder d'audience lorsque, comme en l'espèce, le droit de demander l'autorisation est conféré par l'al. 618(1)*b*) du *Code criminel*. Cet argument est fondé sur le par. 41(3) de la *Loi sur la Cour suprême* qui prévoit expressément qu'aucun appel ne peut être interjeté à la Cour suprême du Canada «selon le présent article» du jugement d'une cour confirmant une déclaration de culpabilité relative à un acte criminel. Le requérant prétend que l'art. 45 exempte expressément les affaires qui relèvent du par. 41(3) de la procédure qui

the basis of written materials and without according an oral hearing. Section 45(1)(*a*) provides that the Court shall grant the application for leave to appeal where "it is clear . . . that the application comes within the provisions of section 41 . . ." and s. 45(1)(*b*) provides that the Court shall dismiss the application where "it is clear . . . that the application does not come within the provisions of section 41 . . .". As appeals from conviction for an indictable offence are expressly excluded from s. 41 by virtue of s. 41(3), it will always be clear that the application does not come within s. 41, and the applicant therefore submits that the procedure contemplated by s. 45 can have no application to him.

IV Analysis

It is our view that the applicant's argument is unpersuasive and that a careful analysis of the relevant statutory provisions leads to the conclusion that the Court does indeed have jurisdiction pursuant to s. 45 to determine the application for leave to appeal without affording the applicant an oral hearing.

We do not believe that the approach to interpretation relied upon by the applicant yields the conclusion he urges upon the Court. As counsel for the Attorney General of Canada contended, a strictly literal approach taken to its logical conclusion would produce a highly implausible, indeed absurd result, namely, that the Court could not grant leave without an oral hearing under s. 45(1)(*a*), but it could refuse leave without a hearing pursuant to s. 45(1)(*b*). The latter subsection provides that an application is to be dismissed where it is clear from the written materials that it does not come within the provisions of s. 41. The applicant contends that he does not fall within s. 41 and hence, the reference to s. 41 in s. 45(1)(*b*) would create no impediment to the Court's dismissing the application on the basis of the written material alone. On the other hand, the Court could not grant the application without a hearing, as s. 45(1)(*a*) only applies to applications coming within s. 41. Parliament could not possibly have intended to require an oral hearing where the Court considers it appropriate to grant the application, but not where the Court decides to dismiss it.

permet à la Cour de trancher une demande d'autorisation de pourvoi sur le fondement de conclusions écrites et sans audience. L'alinéa 45(1)*a*) dispose que la Cour accueille la demande d'autorisation de pourvoi lorsqu'il y a «conformité avec l'article 41 . . .» et l'al. 45(1)*b*) dispose que la Cour rejette la demande lorsqu'il y a «non-conformité avec l'article 41 . . .» Comme les appels contre une déclaration de culpabilité relative à un acte criminel sont expressément exclus de l'art. 41 en vertu du par. 41(3), il y aura toujours non-conformité de la demande avec l'art. 41; le requérant allègue donc que la procédure envisagée par l'art. 45 ne peut lui être appliquée.

IV Analyse

Nous sommes d'avis que l'argument du requérant est peu convaincant et qu'une analyse fouillée des dispositions législatives pertinentes amènent à conclure que la Cour a effectivement compétence en application de l'art. 45 pour trancher la demande d'autorisation de pourvoi sans accorder d'audience au requérant.

Nous ne croyons pas que l'interprétation invoquée par le requérant amène la conclusion qu'il a fait valoir devant la Cour. Comme l'avocat du procureur général du Canada l'a allégué, une interprétation strictement littérale poussée à sa conclusion logique produirait un résultat tout à fait invraisemblable, et même absurde. En effet, la Cour ne pourrait accorder l'autorisation sans audience en vertu de l'al. 45(1)*a*), mais elle pourrait refuser l'autorisation sans audience selon l'al. 45(1)*b*). Ce dernier alinéa dispose qu'une demande doit être rejetée si sa non-conformité avec l'art. 41 ressort des conclusions écrites. Le requérant prétend qu'il ne relève pas de l'art. 41 et, partant, que la mention de l'art. 41 dans l'al. 45(1)*b*) ne ferait pas obstacle à ce que la Cour rejette la demande sur le fondement de conclusions écrites seulement. D'autre part, la Cour ne pourrait accueillir la demande sans audience, car l'al. 45(1)*a*) ne s'applique qu'aux demandes qui relèvent de l'art. 41. Il n'est pas possible que le législateur ait voulu exiger une audience lorsque la Cour estime approprié d'accueillir la demande, mais non lorsque la Cour décide de la rejeter. Une interprétation de la loi

A reading of the statute which would distinguish between applications to be granted and applications to be dismissed for procedural purposes should surely be avoided, particularly where the result would be to accord greater procedural rights where the application is to be allowed than where it is to be denied. An intention to produce an unreasonable result should not be imputed to a statute, particularly where another interpretation is available.

To come to a proper understanding of the interaction between ss. 41 and 45 of the *Supreme Court Act*, it is important to distinguish (1) grounds for appeal from (2) procedure to be followed and the criteria to be applied in deciding whether to grant leave to appeal. The right to appeal to this Court from a judgment dismissing an appeal from a conviction for an indictable offence is conferred by the *Criminal Code* and not by the *Supreme Court Act*: hence, s. 41(3) which makes it clear that the grounds for an appeal in such a case must be those prescribed by the *Criminal Code* and not by s. 41(1). Section 618 of the *Criminal Code* restricts appeals from conviction for an indictable offence to questions of law. Sections 620 and 621 of the *Criminal Code* impose similar restrictions on appeals from a verdict of insanity, unfitness to stand trial, and appeals by the Attorneys General. The effect of s. 41(3) of the *Supreme Court Act* is to make it clear that resort cannot be had to the broader grounds for appeal conferred by s. 41(1), according a right of appeal not only on a question of law, but as well on issues of mixed law and fact. In our view, s. 41(3) relates solely to the grounds for appeal and, even when read with s. 45, bears no relation to the procedure to be followed or to the criteria to be applied when the Court is deciding whether or not to grant leave. When s. 45(1) asks whether the case "comes within the provisions of section 41" (s. 45(1)(*a*)) or "does not come within the provisions of section 41" (s. 45(1)(*b*)), the question concerns the legal standard prescribed by s. 41(1), in other words, whether or not the case is, by reason of its public importance or the importance of any issue of law, one that ought to be decided by the Supreme Court.

qui établirait une distinction entre des demandes qui doivent être accueillies et des demandes qui doivent être rejetées à des fins procédurales doit sûrement être écartée, surtout si elle a pour conséquence d'accorder plus de droits procéduraux lorsque la demande doit être accueillie que lorsqu'elle doit être rejetée. On ne doit pas attribuer à une loi une intention de produire un résultat déraisonnable, surtout lorsqu'il existe une autre interprétation.

Pour bien comprendre l'interaction des art. 41 et 45 de la *Loi sur la Cour suprême*, il est important de distinguer (1) les moyens d'appel de (2) la procédure à suivre et des critères à appliquer pour décider s'il faut accorder l'autorisation de pourvoi. C'est le *Code criminel* et non la *Loi sur la Cour suprême* qui accorde le droit d'en appeler à cette Cour du rejet d'un appel contre une déclaration de culpabilité relative à un acte criminel; d'où le par. 41(3) qui dit clairement que les moyens d'appel en pareil cas doivent être ceux prescrits par le *Code criminel* et non par le par. 41(1). L'article 618 du *Code criminel* restreint aux questions de droit les appels d'une déclaration de culpabilité relative à un acte criminel. Les articles 620 et 621 du *Code criminel* imposent des restrictions similaires aux appels d'un verdict d'aliénation mentale, d'incapacité à subir un procès et aux appels interjetés par les procureurs généraux. Le paragraphe 41(3) de la *Loi sur la Cour suprême* a pour effet d'établir clairement qu'on ne peut pas recourir aux moyens d'appel plus larges conférés par le par. 41(1) qui accorde un droit d'appel non seulement sur une question de droit, mais aussi sur des questions mixtes de droit et de fait. À notre avis, le par. 41(3) a trait exclusivement aux moyens d'appel et, même lorsqu'on l'interprète en regard de l'art. 45, il n'a aucun rapport avec la procédure à suivre ou avec les critères à appliquer lorsque la Cour décide si elle doit accorder ou refuser l'autorisation. Lorsque le par. 45(1) demande s'il y a «conformité avec l'article 41» (al. 45(1)*a*)) ou s'il y a «non-conformité avec l'article 41» (al. 45(1)*b*)), la question porte sur la norme juridique prescrite par le par. 41(1), en d'autres mots, si, en raison de son importance pour le public ou de l'importance de toute question de droit, la demande doit être tranchée par la Cour suprême.

Section 45 was intended by Parliament to provide for uniform and universally applicable procedure for the determination of applications for leave to appeal, a conclusion supported by the opening words of the section which indicate that it is to apply notwithstanding any other act of Parliament; nothing in s. 41(3) undermines that basic purpose. The French version of s. 45(1)(*a*) and (*b*), which reads as follows, supports this position:

> **45.** (1) Par dérogation à toute autre loi fédérale, toute demande d'autorisation d'appel est présentée par écrit à la Cour qui, selon le cas:
>
> *a*) l'accueille si sa conformité avec l'article 41 ressort des conclusions écrites et si elle ne justifie pas la tenue d'une audience;
>
> *b*) la rejette si sa non-conformité avec l'article 41 ressort des conclusions écrites et si elle ne justifie pas la tenue d'une audience; [Emphasis added.]

In our view, the use of the word "conformité" in the French version is indicative of Parliament's intention that all leave applications should be made in writing so that the Court may determine the "compliance" or "non-compliance" of the arguments with the standards set in s. 41(1).

The statutory history of ss. 41 and 45 lends strong support to the conclusion that the purpose of s. 45 is to establish a procedure of general application. As noted in the factum of the applicant, s. 45 was first enacted in 1956 and "was obviously intended as a comprehensive procedural measure, affecting all applications for leave brought under all statutes, including the *Criminal Code*." The amended version of s. 45 now in force retains the character of its precursor as a comprehensive scheme establishing the procedure to be followed in relation to all applications for leave to appeal. Indeed, amendments to the *Supreme Court Act* since s. 45 was first enacted have transformed the jurisdiction. Formerly, our caseload was predominantly comprised of appeals as of right; now it is predominantly appeals by leave. As was stated in *R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 393, "It is difficult to overestimate the significance of this transition." Parliament has chosen to afford this Court the authority to control its own docket and s. 45, in its present form,

Le législateur a voulu que l'art. 45 offre une procédure uniforme et d'application universelle pour trancher les demandes d'autorisation de pourvoi. Cette conclusion est appuyée par les premiers mots de l'article qui indiquent qu'il s'applique par dérogation à toute autre loi du Parlement. Rien au par. 41(3) n'ébranle cet objectif fondamental. Le texte français des al. 45(1)*a*) et *b*) appuie cette position. Nous les citons de nouveau pour des fins de commodité:

> **45.** (1) Par dérogation à toute autre loi fédérale, toute demande d'autorisation d'appel est présentée par écrit à la Cour qui, selon le cas:
>
> *a*) l'accueille si sa conformité avec l'article 41 ressort des conclusions écrites et si elle ne justifie pas la tenue d'une audience;
>
> *b*) la rejette si sa non-conformité avec l'article 41 ressort des conclusions écrites et si elle ne justifie pas la tenue d'une audience; [Je souligne.]

À notre avis, l'emploi du mot «conformité» dans le texte français indique qu'il était dans l'intention du législateur que toutes les demandes d'autorisation soient faites par écrit de sorte que la Cour puisse déterminer la «conformité» ou la «non-conformité» des arguments avec les normes établies au par. 41(1).

L'historique législatif des art. 41 et 45 apporte un appui solide à la conclusion que l'art. 45 a pour objet d'établir une procédure d'application générale. Comme le signale le mémoire du requérant, l'art. 45 a été adopté pour la première fois en 1956 et [TRADUCTION] «était de toute évidence conçu comme une mesure procédurale globale visant toutes les demandes d'autorisation présentées en vertu de toutes les lois, y compris le *Code criminel*». La version modifiée de l'art. 45 maintenant en vigueur conserve le caractère de son précurseur en tant que régime global établissant la procédure à suivre pour toutes les demandes d'autorisation de pourvoi. En fait, les modifications apportées à la *Loi sur la Cour suprême* depuis que l'art. 45 a été adopté pour la première fois ont transformé la compétence de cette Cour. Autrefois, la charge de travail était surtout formée d'appels de plein droit; maintenant elle est surtout formée d'appels sur autorisation. Comme le dit l'arrêt *R. c. Gardiner*, [1982] 2 R.C.S. 368, à la p. 393, «On ne saurait attacher trop d'importance à ce changement». Le

should be interpreted in that light. While the 1987 amendments (of which the present s. 45 forms a part) did not eliminate all appeals as of right, they did further enhance the capacity of this Court to manage its docket by conferring jurisdiction to decide leave applications on the basis of written material. Had Parliament intended to limit this important newly-conferred jurisdiction by excepting applications for leave in certain criminal cases, it would have said so explicitly. This Court has recently affirmed the desirability of "an expansive reading" of the provisions relating to leave to appeal "the better to enable this Court to discharge its role at the apex of the Canadian judicial system as the court of last resort for all Canadians": *Argentina v. Mellino*, [1987] 1 S.C.R. 536 at p. 547, quoting *R. v. Gardiner*, *supra*, at p. 404. The result of the foregoing analysis is entirely consistent with this approach and in keeping with the important objective of enhancing this Court's capacity to control and manage its docket in a manner consistent with its role at the apex of the Canadian judicial hierarchy.

V Conclusion

For these reasons, we conclude that the applicant's claim to an oral hearing as of right and challenge to the Court's jurisdiction to decide his application for leave to appeal without according him an oral hearing must fail.

Application dismissed.

Solicitors for the applicant Morrissette: Walsh, Micay and Co., Winnipeg.

Solicitors for the applicant Chaulk: Wolch, Pinx, Tapper, Scurfield, Winnipeg.

Solicitor for the respondent: The Department of the Attorney General, Winnipeg.

Solicitor for the intervener: John C. Tait, Ottawa.

législateur a choisi d'accorder à cette Cour le pouvoir de contrôler son propre rôle et l'art. 45, dans sa forme actuelle, doit être interprété dans ce contexte. Les modifications de 1987 (dont le présent art. 45 fait partie) n'ont pas éliminé tous les appels de plein droit, mais elles ont encore accru la capacité de cette Cour de gérer sa charge de travail en lui accordant la compétence de trancher les demandes d'autorisation sur le fondement de conclusions écrites. S'il avait voulu limiter cette importante compétence nouvelle en en retranchant les demandes d'autorisation dans certaines affaires criminelles, le législateur l'aurait dit explicitement. Cette Cour a récemment affirmé qu'il était souhaitable de donner aux dispositions relatives à l'autorisation de pourvoi «une interprétation plus libérale qui permet à cette Cour de remplir son rôle au sommet du système judiciaire canadien en tant que cour de dernier ressort pour tous les Canadiens»: *Argentine c. Mellino*, [1987] 1 R.C.S. 536, à la p. 547, citant *R. c. Gardiner*, précité, à la p. 404. L'analyse qui précède offre un résultat tout à fait compatible avec cette conception et en accord avec l'objectif important d'accroître la capacité de cette Cour de contrôler et de gérer sa charge de travail d'une manière compatible avec son rôle au sommet de la hiérarchie judiciaire canadienne.

V Conclusion

Pour ces motifs, nous concluons que la prétention du requérant à une audience de plein droit et la contestation de la compétence de la Cour de trancher sa demande d'autorisation de pourvoi sans lui accorder une audience doivent échouer.

Requête rejetée.

Procureurs du requérant Morrissette: Walsh, Micay and Co., Winnipeg.

Procureurs du requérant Chaulk: Wolch, Pinx, Tapper, Scurfield, Winnipeg.

Procureur de l'intimée: Le ministère du Procureur général, Winnipeg.

Procureur de l'intervenant: John C. Tait, Ottawa.

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INVOLVENCY

Citation: *OpenHydro Technology Canada Ltd. (Re)*, 2018 NSSC 283

Date: 2018-11-07
Docket: HFX480604 (B-42615)
Registry: Halifax

IN THE MATTER OF:

The Proposal of OpenHydro Technology Canada Ltd.

Decision

Judge: The Honourable Justice Michael J. Wood

Heard: November 5, 2018, in Halifax, Nova Scotia

Counsel: Gavin MacDonald and Devon Cassidy for OpenHydro Technology Canada Ltd.

Eric Machum for RMI Marine Limited

Jakub Vodsedalek for DP World Saint John Inc.

Marc Isaacs for BBC Chartering Carriers GmbH & Co. K.G.

Ryan Brothers for the Province

By the Court :

[1] OpenHydro Technology Canada Limited ("OpenHydro") is insolvent. On September 24, 2018, the company filed a notice of intention to make a proposal pursuant to the *Bankruptcy and Insolvency Act (Canada)*. On October 23, 2018, it filed a motion requesting that the proceeding be converted to an application pursuant to the *Companies' Creditors Arrangement Act* ("*CCAA*") with the issuance of an Initial Order and a Charging Order. That motion was heard on November 5, 2018.

[2] OpenHyro is a Canadian subsidiary of an Irish energy technology company involved in the business of design and manufacture of marine turbines for electrical generation.

[3] In July 2018 OpenHydro deployed two turbines in the Minas Basin near Parrsboro, Nova Scotia, as part of a demonstration project exploring the generation of electricity through tidal energy. By September 2018 the turbines had been damaged beyond repair and were incapable of generating electricity.

[4] In August 2018 a number of creditors of OpenHydro commenced proceedings in the Federal Court of Canada against the "Scotia Tide", a vessel owned by the company. On August 2, 2018, the Scotia Tide was arrested pursuant to a Federal Court warrant. Seven creditors have advanced *in rem* claims against the vessel in Federal Court.

[5] Also in August 2018 another creditor of OpenHydro, BBC Chartering Carriers GmbH & Co. K.G. ("BBC"), began *in rem* proceedings in the Federal Court asserting a claim against the Turbine Control Centre, which was associated with the submerged turbines. That equipment was also arrested pursuant to a Federal Court warrant. On November 1, 2018, the Federal Court granted default judgement in favour of BBC and ordered the sale of the Turbine Control Centre.

[6] OpenHydro provided notice of its motion to HSBC, a secured creditor, and all creditors who had commenced legal proceedings against the company in Federal Court or the Nova Scotia Supreme Court. The only parties who responded were RMI Marine Limited, BBC, DP World Saint John Inc., SGS Saint John Diving, and Spar Marine Limited, all of whom were making *in rem* claims against the Scotia Tide or the Turbine Control Centre in Federal Court.

[7] None of the responding parties objected to the issuance of the Initial Order or the Charging Order on the terms proposed by OpenHydro, except with respect to the scope and application of the proposed stay of proceedings.

[8] A stay of proceedings is a common element of an Initial *CCAA* Order. The purpose is to give some breathing room to the debtor company so that they can begin formulating a plan of arrangement for presentation to creditors. The statutory authority for the stay is found in s. 11.02(1) of the *CCAA*, which reads as follows:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[9] The stay of proceedings requested by OpenHydro is for a 30 day period and reads as follows:

> **No Proceedings Against the Applicant or the Property**
>
> 11. Until and including the day December __, 2018, or such later date as this Court may order (the "Stay Period"), no claim, grievance, application, action, suit, right or remedy, or proceeding or enforcement process in any court, tribunal, or arbitration association (each, a "Proceeding") shall be commenced, continued, or enforced against or in respect of any of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.
>
> **No Exercise of Rights or Remedies**
>
> 12. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall:

i. empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on;

ii. affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

iii. exempt the Applicant from compliance with statutory or regulatory provisions relating to health, safety, or the environment;

iv. prevent the filing of any registration to preserve or perfect a security interest; or

v. prevent the registration of a claim for lien and the related filing of an action to preserve the right of a lien holder, provided that the Applicant shall not be required to file a defence during the stay period.

[10] I have reviewed the material filed and am prepared to grant the Initial Order and Charging Order on the terms proposed, subject to my decision on the scope of the temporary stay. OpenHydro has satisfied me that it should have a short period to consider whether a reasonable plan of arrangement might be developed and that is why a stay of proceedings is appropriate. The 30 day maximum period found in s. 11.02(1) of the *CCAA* should allow the company and monitor to carry out an initial feasibility assessment. Whether the stay should be extended beyond that will obviously require a further motion and evidentiary basis.

[11] The respondents say that the Court should not issue an order which purports to stay the Federal Court *in rem* proceedings. If there is to be such a stay, they argue that it should be decided by the Federal Court on the motion of OpenHydro and not the Nova Scotia Supreme Court.

[12] The respondents rely on the companion decisions of the Supreme Court of Canada in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90, and *Antwerp Bulkcarriers, N.V. (Re)*, 2001 SCC 91. Those decisions arose out of the bankruptcy of a Belgian ship owner, whose vessels were arrested and subject to *in rem* proceedings in the Federal Court of Canada. In *Holt* the issue was whether the Federal Court should have deferred to the Quebec Superior Court (in Bankruptcy) and stayed the Federal Court proceedings. The Supreme Court held that Federal Court had jurisdiction to deal with the claims and, after carrying out a *forum non conveniens* analysis, concluded that the Federal Court was correct in not issuing the stay.

[13] In the *Antwerp* case, the Quebec Court issued an injunction restraining the Federal Court from proceeding *in rem* against the vessels. The Supreme Court

concluded that the Quebec Court had no power to issue the order because the Federal Court had jurisdiction over the claims and the asset in question (i.e. the vessel) had been captured by the Federal Court orders.

[14] Although those cases dealt with the relationship between superior courts exercising bankruptcy jurisdiction and the Federal Court's maritime law jurisdiction, I am satisfied that the principles apply to some extent in proceedings under the *CCAA*. On the basis of these decisions, it is clear that the Federal Court continues to have jurisdiction over the *in rem* claims advanced by the respondents. On the basis of the *Antwerp* decision, I am also satisfied that this Court should not issue the equivalent of an anti-suit injunction preventing the Federal Court from dealing with those claims.

[15] In deciding how to address the interaction between the *CCAA* proceeding and the Federal Court actions, I would take the approach found in two recent British Columbia Supreme Court decisions. In *Sargeant III v. Worldspan Marine Inc.*, 2011 BCSC 767, the circumstances were virtually identical to those before me. The Court was dealing with a request for an Initial Order under the *CCAA* and the accompanying temporary stay. Creditors had started proceedings in the Federal Court and obtained *in rem* judgements against the company's vessel. The Court concluded that it should not issue an order directing the Federal Court to take any particular action, but rather the courts should exercise their respective jurisdictions cooperatively. The Court explained the issue this way:

> 40 In my view, as a matter of comity between two Canadian superior courts each exercising its own jurisdiction, an order by this court directing the Federal Court to stay its proceedings is neither appropriate nor necessary.
>
> 41 In *Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 S.C.R. 951 at para. 51, the Court referred to the faith and credit owed by Canadian courts to each other when acting appropriately within their respective jurisdictions.
>
> 42 In *Always Travel Inc. v. Air Canada*, 2003 F.C.J. No. 933, a case decided subsequent to *Antwerp* and its companion case, *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustee of)*, 2001 SCC 90, Mr. Justice Hugessen of the Federal Court Trial Division granted an application for a stay of proceedings in the Federal Court brought by Air Canada, which had previously obtained an order for protection under the *CCAA* in the Ontario Superior Court of Justice.
>
> 43 Mr. Justice Hugessen expressed the view that an order made under sections 11.3 and 11.4 of the *CCAA* does not have the effect of automatically staying proceedings in the Federal Court. In reaching that conclusion, he referred to the relevant provisions of the *CCAA*, including those provisions defining courts

to include the superior courts of each province, and s. 16 of the *CCAA*, which provides:

> Every order made by the court in any province in the exercise of jurisdiction conferred by this Act in respect of any compromise or arrangement shall have full force and effect in all the other provinces and shall be enforced in the court of each of the other provinces in the same manner in all respects as if the order had been made by the court enforcing it.

44 At para. 9 Mr. Justice Hugessen said this:

> It seems to me to be quite clear from the statutory provisions that Parliament did not intend that orders made by the superior courts of the provinces in the exercise of their CCAA jurisdiction should extend so as to oblige this Court to suspend its proceedings in any matter properly belonging to its jurisdiction. There are examples, and section 16 of the CCAA is one of them, where Parliament has given specific jurisdiction to one superior court to stay proceedings in another superior court. In my view, such a disposition requires express language.

45 Mr. Justice Hugessen continued at para. 10:

> Superior courts do not order each other about or make orders interfering with each other's process. Rather, it is essential that they should cooperate. Conflicts between courts, or other bodies having ultimate judicial power, may well have serious results, including perhaps even loss of liberty. In Canada, superior courts do not compete with one another. They accord to one another "full faith and credit," as was said in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and repeated in the *Brussel* decisions. Justice Farley's order specifically requests that this Court, in comity, and more than that, in recognition of the fact that both courts are engaged in a single legal system in the administration of Canadian justice, should lend its aid to the order of the Ontario Superior Court of Justice staying proceedings.

46 Mr. Justice Hugessen went on to discuss what he described as the proper attitude of respectful cooperation which the Federal Court should have, and does have, to judgments of a provincial superior court, and stated that:

> ... as a matter of course, in virtually every case where an order is given by a provincial superior court in the exercise of its CCAA jurisdiction, and that order requests the Federal Court's aid, the Federal Court will give such aid on proper application being made.

47 I respectively agree with Mr. Justice Hugessen's statement of the principles of comity which should apply between a provincial superior court exercising jurisdiction under the *CCAA* and a Federal Court exercising its jurisdiction, in this case, its maritime law jurisdiction. In my view, for reasons I shall shortly explain, this court and the Federal Court of Canada, working

cooperatively and each exercising its own jurisdiction, should be able to avoid any insuperable conflicts between their respective jurisdictions.

[16] The Court summarized its conclusion on the issue as follows:

> 58 Here, again at this preliminary stage in the proceedings, in my view the appropriate course is that this court, as a matter of comity, requests the recognition and aid of the Federal Court with respect to an initial order under the *CCAA*. The Federal Court, of course, has jurisdiction under s. 50 of the *Federal Courts Act* to grant a stay.
>
> …
>
> 60 The petitioners should have the opportunity to present a viable plan for restructuring and for the orderly payment of their creditors. I am satisfied that this is an appropriate case for the court to make an initial order containing terms for a temporary stay to June 23, 2011 in the standard terms of the model order and a request which specifically requests the assistance of the Federal Court to recognize the initial stay. Questions of priority will arise, including the priority of any financial charge for monies that may be advanced to complete the construction of the vessel, as well as the priorities of the maritime lien claimants. Again, none of those are matters which I am required to resolve, or which require resolution at this stage. All of those matters are, in my view, capable of resolution by the two courts working cooperatively.

[17] In *Hanjin Shipping Co. (Re)*, 2016 BCSC 2213, the Court was asked to recognize a foreign proceeding under ss. 46-49 of the *CCAA*, which included a request for a stay of proceedings. As here, there were existing *in rem* proceedings in the Federal Court. The Court adopted the comments of Justice Pearlman in *Sargeant III* quoted above, and included an additional clause in the order to address the Federal Court proceedings. That clause read as follows:

> 19. …
>
> In recognition that *in rem* proceedings are before the Federal Court in respect of the vessels, *Hanjin Vienna*, *Hanjin Scarlet*, and *Hanjin Marine*, this order shall not apply to those proceedings (including caveators) unless and to the extent the Federal Court of Canada may determine in the exercise of its own unfettered jurisdiction and discretion.

[18] Six weeks after the Initial Order, the Court issued another order setting out a claims procedure. It specifically exempted the *in rem* claims from that process,

which were to be determined through the Federal Court. The order included a clause requesting the aid and recognition of that Court.

[19] These decisions make it clear to me that the proper outcome is to exempt the *in rem* claims of the respondents being advanced in Federal Court from the stay created by the Initial Order with a request to the Federal Court for aid and recognition. It would be up to that Court to determine whether it should stay the *in rem* claims and, if so, on what terms. To give effect to this decision, I direct that the Initial Order include a clause as follows:

> In recognition that *in rem* proceedings are before the Federal Court in respect of the vessel, Scotia Tide, and the OTC03 Turbine Control Centre, this order shall not apply to those proceedings (including caveators) unless and to the extent the Federal Court of Canada may determine in the exercise of its own unfettered jurisdiction and direction. This Court specifically requests the aid and recognition of the Federal Court in carrying out the terms of this order as required.

[20] I would ask Mr. MacDonald to revise the Initial Order accordingly, following which I will issue both orders on the terms proposed.

Wood, J.

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended and in the Matter of a Proposed Plan of Compromise or Arrangement with respect to Stelco Inc., and other Applicants listed in Schedule "A" Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

[Indexed as: Stelco Inc. (Re)]

[* Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]

75 O.R. (3d) 5
[2005] O.J. No. 1171
Docket: M32289

Court of Appeal for Ontario,
Goudge, Feldman and Blair JJ.A.
March 31, 2005

Corporations -- Directors -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under Companies' Creditors Arrangement Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation -- In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Debtor and creditor -- Arrangements -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under the Companies' Creditors Arrangement

Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation - In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

On January 29, 2004, Stelco Inc. ("Stelco") obtained protection from creditors under the Companies' Creditors Arrangement Act ("CCAA"). Subsequently, while a restructuring under the CCAA was under way, Clearwater Capital Management Inc. ("Clearwater") and Equilibrium Capital Management Inc. ("Equilibrium") acquired a 20 per cent holding in the outstanding publicly traded common shares of Stelco. Michael Woollcombe and Roland Keiper, who were associated with Clearwater and Equilibrium, asked to be appointed to the Stelco board of directors, which had been depleted as a result of resignations. Their request was supported by other shareholders who, together with Clearwater and Equilibrium, represented about 40 per cent of the common shareholders. On February 18, 2005, the Board acceded to the request and Woollcombe and Keiper were appointed to the Board. On the same day as their appointments, the board of directors began consideration of competing bids that had been received as a result of a court-approved capital raising process that had become the focus of the CCAA restructuring.

The appointment of Woollcombe and Keiper to the Board incensed the employees of Stelco. They applied to the court to have the appointments set aside. The employees argued that there was a reasonable apprehension that Woollcombe [page6] and Keiper would not be able to act in the best interests of Stelco as opposed to their own best interests as shareholders. Purporting to rely on the court's inherent jurisdiction and the discretion provided by the CCAA, on February 25, 2005, Farley J. ordered Woollcombe and Keiper removed from the Board.

Woollcombe and Keiper applied for leave to appeal the order of Farley J. and if leave be granted, that the order be set

aside on the grounds that (a) Farley J. did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test had no application to the removal of directors, (c) he had erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) in any event, the facts did not meet any test that would justify the removal of directors by a court.

Held, leave to appeal should be granted, and the appeal should be allowed.

The appeal involved the scope of a judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process of the CCAA. In particular, it involved the court's power, if any, to make an order removing directors under s. 11 of the CCAA. The order to remove directors could not be founded on inherent jurisdiction. Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, and it permits the court to maintain its authority and to prevent its process from being obstructed and abused. However, inherent jurisdiction does not operate where Parliament or the legislature has acted and, in the CCAA context, the discretion given by s. 11 to stay proceedings against the debtor corporation and the discretion given by s. 6 to approve a plan which appears to be reasonable and fair supplanted the need to resort to inherent jurisdiction. A judge is general ly exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it was designed to supervise the company's process, not the court's process.

The issue then was the nature of the court's power under s. 11 of the CCAA. The s. 11 discretion is not open-ended and unfettered. Its exercise was guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. What the court does under s. 11 is establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of

its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. In the course of acting as referee, the court has authority to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. The court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructurin g efforts. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. The court is not catapulted into the shoes of the board of directors or into the seat of the chair of the board when acting in its supervisory role in the restructuring.

The matters relating to the removal of directors did not fall within the court's discretion under s. 11. The fact that s. 11 did not itself provide the authority for a CCAA judge to order the removal of directors, however, did not mean that the supervising judge was powerless to make such an order. Section 20 of the CCAA offered a gateway to the oppression remedy and other provisions of the Canada [page7] Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA") and similar provincial statutes. The powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute.

Court removal of directors is an exceptional remedy and one that is rarely exercised in corporate law. In determining whether directors have fallen foul of their obligations, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. The evidence in this case was far from reaching the standard for removal, and the record would not support a finding of oppression, even if one had been sought. The record did not support a finding that there was a sufficient risk of misconduct to warrant a conclusion of oppression. Further, Farley J.'s borrowing the administrative law notion of

apprehension of bias was foreign to the principles that govern the election, appointment and removal of directors and to corporate governance considerations in general. There was nothing in the CBCA or other corporate legislation that envisaged the screening of directors in advance for their ability to a ct neutrally, in the best interests of the corporation, as a prerequisite for appointment. The issue to be determined was not whether there was a connection between a director and other shareholders or stakeholders, but rather whether there was some conduct on the part of the director that would justify the imposition of a corrective sanction. An apprehension of bias approach did not fit this sort of analysis.

For these reasons, Farley J. erred in declaring the appointment of Woollcombe and Keiper as directors of Stelco of no force and effect, and the appeal should be allowed.

Cases referred to

Alberta Pacific Terminals Ltd. (Re), [1991] B.C.J. No. 1065, 8 C.B.R. (3d) 99 (S.C.); Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194 (C.A.); Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71, 39 C.B.R. (4th) 5 (C.A.), revg in part [2001] O.J. No. 5046, 30 C.B.R. (4th) 163 (S.C.J.); Babcock & Wilcox Canada Ltd. (Re) [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75 (S.C.J.); Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, 5 N.R. 515, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240; Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, 25 O.R. (3d) 480n, 128 D.L.R. (4th) 73, 187 N.R. 241, 24 B.L.R. (2d) 161; Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1 B.L.R. (2d) 225 (C.A.); Catalyst Fund General Partne r I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, 4 C.B.R. (3d) 311 (C.A.); Clear Creek Contracting Ltd. v. Skeena Cellulose Inc. [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (C.A.); Country Style Foods Services Inc.

(Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.); Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.); Ivaco Inc. (Re), [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.); Lehndorff General Partner Ltd. (Re), [1993] O.J. No. 14, 9 B.L.R. (2d) 275, 17 C.B.R. (3d) 24 (Gen. Div.); London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1 (Gen. Div.) (sub nom. Olympia & York Dev. v. Royal Trust Co.); Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, 244 D.L.R. (4th) 564, 2004 SCC 68, 49 B.L.R. (3d) 165, 4 C.B.R. (5th) 215; R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] [page8] S.C.J. No. 3, 88 B.C.L.R. (3d) 1, 194 D.L.R. (4th) 1, [2001] 6 W.W.R. 1, 86 C.R.R. (2d) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, [2001] SCC 2; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251, 7 C.B.R. (5th) 294 (S.C.J.); Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 36 O.R. (3d) 418n, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC 210-006 (sub nom. Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd., Adrien v. Ontario Ministry of Labour); Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293, 96 O.T.C. 279 (Gen. Div.); Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Stephenson v. Vokes (1896), 27 O.R. 691, [1896] O.J. No. 191 (H.C.J.); Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 14 C.B.R. (3d) 88, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331 (S.C.)

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 2 [as am.], 102 [as am.], 106(3) [as am], 109(1) [as am.], 111 [as am.], 122(1) [as am.], 145 [as am.], 241 [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [as am.], 20 [as am.]

Authorities referred to

Driedger, E.A., The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983)

Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --),

Jacob, I.H., "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28

Peterson, D.H., Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis--Butterworths, 1989)

Sullivan, R., Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002)

APPLICATION for leave to appeal and, if leave is granted, an appeal from the order of Farley J., reported at [2005] O.J. No. 729, 7 C.B.R. (5th) 307 (S.C.J.), removing two directors from the board of directors of Stelco Inc.

Jeffrey S. Leon and Richard B. Swan, for appellants Michael Woollcombe and Roland Keiper.

Kenneth T. Rosenberg and Robert A. Centa, for respondent United Steelworkers of America.

Murray Gold and Andrew J. Hatnay, for respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. And Welland Pipe Ltd.

Michael C.P. McCreary and Carrie L. Clynick, for USWA Locals 5328 and 8782.

John R. Varley, for Active Salaried Employee Representative.

Michael Barrack, for Stelco Inc.

Peter Griffin, for Board of Directors of Stelco Inc.

K. Mahar, for Monitor.

David R. Byers, for CIT Business Credit, Agent for DIP Lender. [page9]

The judgment of the court was delivered by

BLAIR J.A.: --

Part I -- Introduction

[1] Stelco Inc. and four of its wholly-owned subsidiaries obtained protection from their creditors under the Companies' Creditors Arrangement Act (the "CCAA") [See Note 1 at the end of the document] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

[2] Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

[3] The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies -- Clearwater Capital Management Inc. and Equilibrium Capital Management Inc. -- which, respectively, hold approximately 20 per cent of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

[4] The Stelco board of directors (the "Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in

being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40 per cent of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

> After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.
>
> Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their [page10] experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

[5] On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

[6] The appointments of the appellants to the Board incensed the employee stakeholders of Stelco (the "Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability -- exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as "the bare knuckled arena" of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

[7] The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

[8] The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation -- as opposed to their own best interests as shareholders -- in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as the "Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse. [page11]

[9] On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

[10] For the reasons that follow, I would grant leave to appeal, allow the appeal and order the reinstatement of the applicants to the Board.

Part II -- Additional Facts

[11] Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected 11 directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

[12] Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of 20 directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

[13] Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

[14] In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids and report on the bids to the court.

[15] On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a [page12]capital proposal to Stelco. The proposal involved the raising of $125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase

substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

[16] A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

[17] Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately five per cent as at November 19, to 14.9 per cent as at January 25, 2005, and finally to approximately 20 per cent on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

> Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

[18] On February 1, 2005, Messrs. Keiper and Woollcombe and other representatives of Clearwater and Equilibrium met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this

view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20 per cent of the company's common shares. [page13]

[19] At paras. 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

> 17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40 per cent of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.
>
> 18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

[20] In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole", Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters". Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed

that:

(a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;

(b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and

(c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

[21] On the basis of the foregoing -- and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" -- the Board made the appointments on February 18, 2005.

[22] Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but [page14] because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

> In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the

Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

Part III -- Leave to Appeal

[23] Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

[24] This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": Country Style Food Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

(a) whether the point on appeal is of significance to the practice;

(b) whether the point is of significance to the action;

(c) whether the appeal is prima facie meritorious or frivolous;

(d) whether the appeal will unduly hinder the progress of the action.

[25] Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on [page15] which there is

little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision-making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be e vident that in my view the appeal has merit.

[26] Leave to appeal is therefore granted.

Part IV -- The Appeal

The Positions of the Parties

[27] The appellants submit that,

(a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;

(b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,

(c) even if there is jurisdiction, the motion judge erred:

(i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;

(ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,

(iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and

> therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

[28] The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, second, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the [page16] ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: Re Algoma Steel Inc., [2001] O.J. No. 1943, 25 C.B.R. (4th) 194 (C.A.), at para. 8.

[29] The crux of the respondents' concern is well-articulated in the following excerpt from para. 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group -- particular investment funds that have acquired Stelco shares during the CCAA itself -- have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

[30] The respondents submit that fairness, and the perception

of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see Re Olympia & York Development Ltd. (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.); Re Ivaco Inc., [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.), at paras. 15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, Chef Ready Foods Ltd. v. Hong Kong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; Re Lehndorff General Partners Ltd., [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17]Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see Re Dylex Ltd., [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the

statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent jurisdiction

[34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --), vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[35] In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above [See Note 2 at the end of the docuemnt], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to

control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19]process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose" [See Note 3 at the end fo the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The section 11 discretion

[39] This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion -- in spite of its considerable breadth and flexibility -- does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the Canada Business Corporation Act, R.S.C. 1985, c. C-44 ("CBCA"), and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy gr ounds.

[40] The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court

11(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . . . .

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1); [page20]

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . . . .

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

[41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, at para. 33, and Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, is articulated in E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) as follows:

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

See also Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002), at p. 262.

[42] The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions [page21]made by directors and officers in the course of managing the business and affairs of the corporation.

[43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a) -- (c) and 11(4)(a) -- (c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

[44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in

conducting what are in substance the company's restructuring efforts.

[45] With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

[46] I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Stephenson v. Vokes, [1896] O.J. No. 191, 27 O.R. 691 (H.C.J.). The authority to remove must therefore be found in statute law.

[47] In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: [page22] CBCA, ss. 106(3) and 111 [See Note 4 at the end of the document]. The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court -- where it finds that oppression as therein defined exists -- to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, Catalyst Fund General Partner I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.).

[48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other

applicable statute. There is no legislative "gap" to fill. See Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., supra, at p. 480 S.C.R.; Royal Oak Mines Inc. (Re), supra; and Richtree Inc. (Re), supra.

[49] At para. 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem. The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.

(Emphasis added)

[50] Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

[51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in [page23] the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power -- which the courts are disinclined to exercise in any event -- except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The oppression remedy gateway

[52] The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

> 20. The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

[53] The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

[54] I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority. [page24]

The level of conduct required

[55] Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in Catalyst Fund General Partner I Inc. v. Hollinger Inc., supra. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

> Director removal is an extraordinary remedy and certainly should be imposed most sparingly. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada". [See Note 5 at the end of the document]
>
> SS. 18.172 Removing and appointing directors to the board is an extreme form of judicial intervention. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. By tampering with a board, a court directly affects the management of the corporation. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be a measure of last resort. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.

(Emphasis added)

[56] C. Campbell J. found that the continued involvement of the Ravelston directors in the Hollinger situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark,

however, and the record would not support a finding of oppression, even if one had been sought.

[57] Everyone accepts that there is no evidence the appellants have conducted themselves, as directors -- in which capacity they participated over two days in the bid consideration exercise -- in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk -- a reasonable apprehension -- that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future. [page25]

[58] The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium -- the shareholders represented by the appellants on the Board -- had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

[59] Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They

are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, at paras. 42-49.

[60] In Peoples the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well -- in the context of "the shifting interest and incentives of shareholders and creditors" -- the court stated (para. 47):

> In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in [page26]its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

[61] In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs. Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

[62] The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over 14 months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

[63] There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71 (C.A.), at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

[64] The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The business judgment rule

[65] The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings -- and courts in general -- will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in Peoples, supra, at para. 67:

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ... [page27]

[66] In Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683 (C.A.), at p. 320 O.R., this

court adopted the following statement by the trial judge, Anderson J.:

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority. [See Note 6 at the end of the document]

[67] McKinlay J.A. then went on to say [at p. 320 O.R.]:

> There can be no doubt that on an application under s. 234 [See Note 7 at the end of the document] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not meant that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

[68] Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., supra; Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Olympia & York Developments Ltd. (Re), supra; Re Alberta Pacific Terminals Ltd., [1991] B.C.J. No. 1065, 8 C.B.R. (4th) 99 (S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

[69] Here, the motion judge was alive to the "business

judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

> With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a [page28]situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

[70] I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) -- which describes the directors' overall responsibilities -- and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e., in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 2 of the CBCA as meaning "the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate". Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business and affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

[71] This is not to say that the conduct of the Board in

appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

[72] The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion -- not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and [page29] flexible supervisory jurisdiction -- a jurisdiction which feeds the creativity that makes the CCAA work so well -- in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of di rectors.

The reasonable apprehension of bias analogy

[73] In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias ... with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual aebias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and

responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40 per cent of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

[74] In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

[75] Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably [page30]prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants -- including the respondents in this case -- but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

[76] If the respondents are correct, and reasonable

apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V -- Disposition

[77] For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

[78] I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

[79] Counsel have agreed that there shall be no costs of the appeal.

Order accordingly.

[page31]

Notes

Note 1: R.S.C. 1985, c. C-36, as amended.

Note 2: The reference is to the decisions in Dyle, Royal Oak Mines and Westar, cited above.

Note 3: See para. 43, infra, where I elaborate on this decision.

Note 4: It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

Note 5: Dennis H. Peterson, Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis -- Butterworths, 1989), at 18-47.

Note 6:Or, I would add, unpopular with other stakeholders.

Note 7: Now s. 241.

CITATION: 1511419 Ontario Inc. v. Canaccord Genuity Corp., 2017 ONSC 3448
COURT FILE NO.: CV-14-10773-00CL
DATE: 20160605

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

1511419 ONTARIO INC. (FORMERLY KNOWN AS THE CASH STORE FINANCIAL SERVICES INC.), Plaintiff

– and –

CANACCORD GENUITY CORP., Defendant

BEFORE: F.L. Myers J.

COUNSEL: *Pat Flaherty and Emilia Galan*, counsel for Canaccord Genuity Corp.
Gerald C.R. Ranking and Dylan Chocla, counsel for KPMG LLP
Daniel Murdock and Michael Currie, counsel for Cassels Brock & Blackwell LLP
John Finnigan and Megan Keenberg, counsel for the plaintiff
Heather Meredith, counsel for FTI Consulting Canada Inc., the Monitor

HEARD: June 2, 2017

ENDORSEMENT

[1] The endorsement applies as well to the action brought by the plaintiff against KPMG LLP under Court File No. CV-14-010771-00CL and to the action brought by the plaintiff against Cassels, Brock & Blackwell LLP under Court File No. CV-14-010774-00CL. A copy of this endorsement is to be placed in each court file.

[2] The plaintiff in these three actions concedes that it has insufficient assets to pay the costs of the defendants if they successfully defend the actions. The plaintiff also concedes it has not met the test to show that it is impecunious (i.e. it cannot prove that those who will benefit from the plaintiff's success in the litigation cannot afford to fund the plaintiff).

[3] The action is brought by the plaintiff on behalf of substantial, commercial creditors who suffered very substantial losses on the plaintiff's insolvency. The creditors have provided some funding to the plaintiff in a litigation trust established and funded in the plaintiff's CCAA proceeding. The plaintiff has approximately $1.5 million available to fund security for costs in the litigation trust fund. The plaintiff delivered no evidence to establish that the creditors lack the means (as distinct from the desire) to fund the trust further if called upon to do so.

[4] The creditor-directed plaintiff points to what appear to have been significant misstatements made by the plaintiff in its public disclosures prior to the plaintiff and the bulk of its funding creditors entering into the transaction by which the creditors made their ill-fated loans to the plaintiff. The plaintiff claims that the defendants ought to have known of and prevented the plaintiff's misstatements. Had the defendants not violated their obligations, the plaintiff and its creditors say they could not have completed the impugned transaction and incurred their losses. Moreover, the plaintiff seeks to blame the defendants for its insolvency which it claims was caused by the impugned transaction among other things (like its regulatory non-compliance which it lays at the feet of the defendants or Cassels Brock & Blackwell at least).

[5] The merits are very hard to assess at this early stage of three complex cases. Incorrect public disclosures can but do not inexorably lead to a finding of auditor's negligence. The assessment of claimed breaches of applicable auditing standards can be a difficult task. Similarly, assuming that an I-banker gives a fairness opinion based on erroneous facts, this merely begs the next questions, like: what did it know; what ought it to have known; and was any loss caused by any negligence that may be proved against the banker, for example. Finally, while there is a smell of conflict wafting from CBB's offices, that is but a single hurdle on a long track to prove lawyers' liability.

[6] I do not doubt that there are legitimate claims being made in that some valid causes of action are asserted that have some evidentiary support from a 30,000 foot overview of a few select documents. But, nothing in my quick survey of the documents affects the balancing of interests in relation to the key factors affecting security for costs. That is, I do not see a meritless or vexatious claim. Nor do I see an especially strong claim that cries out for justice for a marginalized or powerless plaintiff regardless of the cost. Rather, I see three complex, sophisticated, hotly contested, commercial claims that may be provable after a thorough analysis of a very significant amount of documentation and testimony spanning several years.

[7] These are heavy duty, expensive pieces of commercial litigation. The plaintiff seeks damages of more than $150 million. I agree with Charney J. in *Proxema Ltd. v. Birock Investments*, [2016] OJ No. 4701, at paragraph 25, that there is an imbalance in an action that is being pursued by a shell company for the benefit of creditors who are not parties. The creditors are quite properly realizing on the plaintiff's causes of action. They will be entitled to the benefit of costs awards if they win. But as things currently stand, the creditors will not be liable for costs if the plaintiff loses. That is the imbalance that security for costs was designed to remedy.

[8] I agree with Mr. Finnegan that the court's discretion is always to be exercised based on seeking a just outcome balancing the relevant inputs. See *Georgian Windpower Corporation v. Stelco Inc.*, 2012 ONSC 292 (CanLII) at paras. 20 to 37. Security for costs is always a discretionary matter in which the court seeks to do justice - to be fair as between and among the parties. In this case, the merits are a neutral factor in my view as discussed above. As was the case in *Georgian Windpower*, assessing blame for the plaintiff's insolvency in this case necessarily becomes bound up in the assessment of the merits of the actions.

[9] I do not agree with the thrust of Mr. Finnegan's argument that due to the losses they have already suffered, the creditors get to choose how much they will fund towards the defendants' costs if the plaintiff loses. Decisions as to the funding of a litigation trust in a CCAA proceeding do not limit the amount of security for costs that the trustee may be obliged to post in litigation that it brings. The consequences of the creditors' funding choices affect themselves not the defendants. That is, they can choose to fund the plaintiff as required or choose not to sue. They do not get to underfund the plaintiff to meet the costs burden that it undertook by suing - at least not in the absence of impecuniosity, a sufficiently strong case that justice demands be allowed to proceed, or other, sufficiently weighty equitable grounds.

[10] I note that the creditors have already received substantial distributions in the millions of dollars under the CCAA plan successfully implemented by the plaintiff. Their outstanding losses are many times greater than the distributions that they have received. Nevertheless, they plainly can fund the litigation if they choose to do so.

[11] The defendants seek over $10 million for security for their costs in the aggregate. The plaintiff did not deliver a bill of costs or provide much information as to its costs to date for comparison. I reviewed the draft omnibus discovery plan which is still not finalized despite months of negotiation. The parties have done an excellent job agreeing on a large number of specific categories for document production. This should aid their computer search efforts. But the parties advise that the sheer number of categories will lead to productions in the tens of thousands of documents by each party. Combined discoveries provide some efficiencies but they also require each defendant to review all the documents and participate in the discovery of the other defendants. Ms. Keenberg argues that the defendants are not entitled to security for the costs of such efforts. But she agreed that the defendants were being reasonable and she could not articulate why costs reasonably incurred by a party in defending the claim could not be included in its bill of costs. It is not an expansion of any party's liability to have to pay the other side its reasonably incurred costs.

[12] The plaintiff also chose to bring its *Pierringer* agreement approval motion as part of its CCAA plan approval process. It is appropriate for the defendants to seek those costs which quite properly are considered costs of these proceedings to which the *Pierringer* provisions relate.

[13] I am satisfied that it is fair and just for the plaintiff to post security for the costs of the defendants. The order should be staged to fairly reflect the outcome of the upcoming summary judgment motion(s) and to allow for better refinement of expensive pre-trial and trial steps once the facts are better understood.

[14] In my view, the plaintiff should pay into court the aggregate sum of $1.6 million in relation to steps 1 to 3 on Mr. Finnegan's chart at this time. I have reduced the chart total from $1.846 million to account for some liberality in costs estimates. The plaintiff is to pay $533,333 into court for each action within 60 days. Order to go in form 56A. Security should be in cash or by an unconditional letter of credit with no time limit drawn on a bank listed in Schedule I of the *Bank Act*, SC 1991, c 46.

[15] There will be a further amount to be posted 45 days before the date scheduled for the first examination for discovery. That amount will be set by agreement of the parties or further order made at a case conference. A final instalment will be set at the pretrial conference if not on consent before then.

[16] Defendants may each deliver no more than five pages of costs submissions by June 12, 2017. The plaintiff may deliver no more than five pages of costs submissions by June 19, 2017. All parties, other than the Monitor, will deliver costs outlines regardless of whether they seek costs. In addition, any party relying on an offer to settle may also deliver a copy of the offer. All documents shall be delivered to my office as attachments to an email in searchable PDF format. No case law or statutory material is to be delivered. References to case law or statutory material, if any, are to be made by hyperlink embedded in the party's submissions. There are no costs awarded to or against the Monitor.

F.L. Myers J.

Date: June 5, 2017

CITATION: Livent. Inc. (Special Receiver) v. Deloitte & Touche; 2011 ONSC 648
COURT FILE NUMBER: (02 CV 225823CM2) 04-CL-5321
MOTION HEARD: 20100723
ENDORSEMENT RELEASED: 20110310

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Livent Inc., Through Its Special Receiver and Manager, Roman Doroniuk

Plaintiff

v.

Deloitte & Touche, and Deloitte & Touche LLP

Defendants

BEFORE: MASTER D. E. SHORT

COUNSEL: Counsel for the Defendant (Deloitte & Touche [Canada] **(**Moving Party):
Brian Leonard & Jeremy Millard: fax 416-863-4592

Counsel for the Plaintiff (Responding Party):
Patrick O'Kelly, Jonathan Levy &
Sinziana Tugulea fax 416-947-0866

HEARD: July 23, 2010

REASONS FOR DECISION

Second Act

[1] Litigation relating to the affairs of the theatrical production company Livent was first launched in 1998. In 2002 this action was commenced on behalf of Livent against its former auditors for damages, originally claimed, in the amount of $450 million dollars.

[2] These reasons relate the next portion of a motion for security for costs, originally brought under Rule 56.01 of the *Rules of Civil Procedure* by the defendants, Deloitte & Touche LLP in Canada ("Deloitte Canada"), [incorrectly named in the title of proceedings as Deloitte & Touche] and the Defendant, Deloitte & Touche LLP, which is based in the United States ("Deloitte US").

[3] The motion was brought seeking security for costs against the plaintiff, Livent Inc. ("Livent") which brought the action through its Special Receiver and Manager, Roman Doroniuk ("Doroniuk").

[4] The Deloitte Defendants (collectively “Deloittes”) asserted that they had “good reason to believe” that the Plaintiff, and its Special Receiver and Manager, (the “Special Receiver”), has insufficient assets in Ontario, or no ability to pay the costs of this proceeding if ordered to do so at the end of the trial in this action.

[5] When this matter originally came before me I was concerned at the court's ability to make an order for security for costs in a case where the plaintiff is a court appointed representative of the creditors of Livent

[6] I therefore split the motion into two portions. In my earlier decision [2010 ONSC 2267] I determined that I had the jurisdiction to make an award against this plaintiff, in appropriate circumstances.

[7] At the argument of the second half of this motion, I was advised that during the intermission following the first portion of the argument, the claims against Deloitte US had been resolved by the parties. Thus, I am now required to address the request of Deloitte Canada that security, for its costs alone, be posted.

[8] It should be noted that only prospective costs for this matter, on a “go forward” basis are being sought. Essentially what are sought are the costs for preparing for, and conducting the trial.

[9] It is important to note that the issue before me has been further narrowed by virtue of the plaintiff resisting exclusively on the basis of the delay of the defendant in initiating the motion for security for costs.

[10] If I determine that the delay in bringing the motion is not fatal to the claim, then the plaintiff is also challenging the quantum and components of the amount proposed by counsel for the remaining defendant.

I. Synopsis

[11] In my previous reasons, I included a preliminary consideration of portions of a 2005 decision of the Divisional Court which addressed the issue of delay in seeking costs.

[12] In *Kawkaban Corp. v. Second Cup Ltd.*, [2005] O.J. No. 4197; 260 D.L.R. (4th) 352; 202 O.A.C. 367; 16 C.P.C. (6th) 178, on the facts of that case, the Ontario Divisional Court held that delay in seeking security for costs can disentitle a party from obtaining such an order. There, the court found the defendant had knowledge the plaintiff was impecunious from the point in time that a particular letter, which gave rise to the action, was written.

[13] The delay in that case, ran from when the plaintiff commenced the action on March 1, 2000until the point the defendant served the motion for security for costs more than four years later on May 18, 2004. The court allowed the appeal from an order requiring the posting of costs by an impecunious plaintiff, where there was no suggestion that the lawsuit was frivolous or vexatious *and* the defendant provided no adequate reason for delay in bringing motion.

[14] In *Kawkaban*, Mr. Justice O’Driscoll specifically observed:

> In *Re 423322 Ontario Ltd. et al. and Bank of Montreal* (1988), 66 O.R. (2d) 123, 128, Granger J., in dismissing an appeal from Master Peppiatt (65 O.R. (2d) 136), said:
>
> > "In his reasons the learned master found that the defendants had failed to satisfy him as to their reason for delaying in bringing their application for security for costs, and this finding would appear to be fatal to the

> defendants' motion. It is also important to note that the learned master did not find the litigation to be frivolous or vexatious.
>
> Accepting that the action is not frivolous or vexatious and the defendants cannot explain their delay, I am not prepared to order the plaintiffs to provide security for costs **as I am convinced on the material that such an order will result in the plaintiffs being unable to continue with these proceedings.** I am advised that this action is fixed for trial commencing in December, 1988.
>
> In *John Wink Ltd. v. Sico Inc.* (1987), 57 O.R. (2d) 705 at pp. 708-9, 15 C.P.C. (2d) 187 (H.C.J.), Reid J. stated:
>
> There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of the plaintiff. If the consequence of an order for costs would be to destroy such a claim no order shall be made. Injustice would be even more manifest if the impoverishment of the plaintiff were caused by the very acts of which the plaintiff complains in the action. [my emphasis]

[15] Justice O'Driscoll concluded by citing the words of Justice Granger in *Re 423322 Ontario Ltd.* (supra):

> "In my opinion, having regard to the delay in bringing the motion and the fact that the plaintiffs' action is not frivolous or vexatious and is founded upon the actions of the defendants which the plaintiffs alleged caused its insolvency, I am not prepared to exercise my discretion and order the plaintiffs to submit to an order for security for costs at this stage. If I was to make such an order it would cause an injustice."

[16] In my earlier reasons I expressed the view that I felt there was certainly a difference between the situation in the present case and that in *Second Cup*. At that time, I indicated that in this phase I would be looking to the assistance of counsel in crafting an order that would, in all the circumstances of this case, not cause an injustice to either party.

[17] I will return to an analysis and review of what I regard as applicable caselaw later in these reasons.

II. Plaintiff's position

[18] On the argument of this phase, Mr. O'Kelly for the plaintiff conceded at the outset of his submissions that no specific prejudice was being alleged flowing from a possible order for the posting of security for costs.

[19] He acknowledged that an obligation to post security for costs is created when there is good reason to believe that the plaintiff has no available assets to satisfy a potential costs award against the plaintiff.

[20] He readily admits there are no assets. It is clear in this case that there was a requirement in the receivership proceeding for "debtor-in-possession" ("D.I.P") financing. As a

consequence, it would seem a “given” that plaintiff will have no assets to satisfy a possible costs award.

[21] However the plaintiff’s counsel points out that the sale of the Livent assets, by a court appointed liquidator took place in November of 2003, more than 7 years ago.

[22] Relying on a number of cases, Mr. O'Kelly asserts that the motion ought to have been brought "as soon as there was good reason to believe, the plaintiff was insolvent."

[23] The Deloittes Defendants made claims in the liquidation for unpaid fees. Their entitlement was challenged largely on the grounds raised in this action. For the purposes of dealing with the Deloittes claims they were included in Creditors Group Six, which was largely made up of creditors with unsecured claims against Livent.

[24] There was disclosure to this defendant as part of Group Six of the general terms of the distribution. Mr. O’Kelly asserts that they knew all that was going on. There was no doubt that their claim within the class was disputed. There was no evidence before me of any assertion by the remaining defendant that the proposed sale or the scheme of distribution was "not right".

[25] The plaintiff notes that under the terms of the sale and distribution it was clear that a several million dollar war chest was being established. It would seem likely that a variation of the confirmation order was negotiated at the time to take into account the bringing of this action on behalf of the creditors. No provision for security for the defendant’s costs was sought by either side at that time. Therefore, counsel for the plaintiff concludes that Deloitte Canada ought not now, at this much later stage, to be entitled to look for security for its costs of this litigation.

[26] When no other actual prejudice is being asserted, is that delay, alone, sufficient, to justify refusing the provision of *any* security?

[27] The plaintiff argues that it would have been much easier, more than ten years ago, at the outset of this action, to find willing contributors to the costs of what has since become a very long piece of litigation. Conversely it seems to me that sophisticated purchasers of debt instruments who had the foresight to set aside a “war-chest” to fund their legal costs from the Class Six distribution, ought, as well, reasonably to have anticipated the real possibility of an application such as this, being made by the defendants.

[28] While it is clear that this defendant had every reason to know from the outset, that it was being sued by a judgment proof plaintiff. Does the law of Ontario establish a rigid requirement that once that information is available, the defendant must move promptly or it will always be denied access to any order for security for costs?

[29] I believe that there is and must be a greater flexibility in the present legal environment that permits, and in fact requires, a proportional consideration of, not only any delay, but also a number of other relevant factors.

III. The Plaintiff’s Legal Argument

[30] Mr. O'Kelly asserts that November of 2003 was the point in time is when the clock started for the bringing of this motion. Put at its most basic, his position is that the defendant waited far too long in bringing this motion.

[31] There has been no change in the plaintiff’s financial situation since that date. Relying on a number of cases he asserts that long-standing jurisprudence indicates that the motion ought to have been brought as soon as there was good reason to suspect that the plaintiff will have no available funds to satisfy a costs award at trial.

[32] For example he refers to the assertion in *Park Street Plaza Ltd. v. Standard Optical Inc.*, [2003] O.J. No.4487, where the plaintiff asserted that "the failure of the defendant to apply for costs in a timely manner lulled it into a false sense of security to its prejudice."
[33] However, in that case, J. Wright J. held that such a defence could not prevail in that case and that historically, particularly where the application was not brought on the eve of trial, the wisdom of waiting until the completion of discoveries had been recognized. The rationale for such an approach was succinctly put: "This exposes the merits of the action".
[34] I will examine the delay issues and a number of cases put before me later in these reasons. From its perspective, the defendant points to the need to consider the progress of the related criminal prosecutions in assessing at what point "the merits of the action" could most appropriately be determined.

IV. The Defendant's Case

[35] The history of the various civil actions starting in 1998 is outlined at the outset of my earlier reasons in this matter at 2010 O.J. No. 1919. Mr Drabinsky and Mr. Gottlieb were also subject to a prolonged criminal prosecution which resulted in findings of guilt, following a lengthy trial.
[36] Those verdicts were appealed to the Ontario Court of Appeal. Obviously, if those defendants had been acquitted of those allegations of fraudulent behaviour, a very different assessment of "the merits of the action" might have resulted. In August of 2009 the sentencing decisions resulting from the verdicts were released. The criminal convictions remain under appeal at this point in time.
[37] This motion was launched in October of 2009.
[38] Companion civil actions against those individuals were directed to be tried with this action. Clearly there was greater uncertainty as to the length of the combined trial prior to the initial trial verdict. It appears to me that if the appeals are unsuccessful it is very possible the civil claims against the individuals will not be as strenuously defended, if at all. Moreover, as discussed below, due to the quantum of existing American judgments, there may be little incentive to defend.
[39] For the purposes of my calculations I have applied a proportional approach and have treated the Deloitte matter as likely to come to trial, largely as a standalone matter. Thus I have determined to use a roughly 2 month estimate for the duration of the trial rather than the six months suggested as possible if all actions are fully defended. If the actual ultimate situation differs, there would seem to be good reason to seek a variation of my ultimate decision on this motion.

V. New Rules and Older Cases

[40] In this case I am obliged to apply what is now Rule 56.01. The applicable portion now reads:

> **56.01** (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> ...

> (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

[41] The new subrule 1.1, added to Rule 1.04 in 2010 may have a bearing on this matter as well:

> **1.04**(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> (1.1)In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[42] I have considered a number of previous cases dealing with the impact of delay in bringing a motion for security for costs. The law appears to have been developing towards a more flexible approach to such motions with the result that it is difficult to fully reconcile cases decided over the last quarter century. I have in particular considered a number of key decisions, as described in the paragraphs that follow.

[43] In 1987 in *Smith Bus Lines Ltd. v. Bank of Montreal*, 61 O.R. (2d) 688; Justice Sutherland observed:

> "43. The term "impecuniosity" does not appear in the rule; it is a term introduced as part of the judicial gloss upon the rule in response to the words "as is just" in the part of the rule stating that (upon satisfaction of the stated conditions precedent**) "the court ... may make such order as is just". The corporate plaintiff wishing to be allowed to proceed with its action, without either showing sufficient assets or putting up security, must first show "impecuniosity" meaning not only that it does not have sufficient assets itself but also that it cannot raise the security for costs from its shareholders and associates, partly because the courts do not want a successful defendant to be effectively deprived of costs where, for example, wealthy shareholders have decided to carry on business and litigation through a shell corporation.** To go the impecuniosity route the plaintiff must establish by evidence that it cannot raise security for costs because, if a private company, its shareholders have not sufficient assets. As expressed by Reid J. in *John Wink Ltd. v. Sico Inc*. (1987), 57 O.R. (2d) 705 at p. 709, 15 C.P.C. (2d) 187: **"If an order for security stops a plaintiff in its tracks it has disposed of the suit."** To raise impecuniosity there must be evidence that if security is required the suit will be stopped -- because the amount of the security is not only not possessed by the plaintiff but is not available to it. Here there is simply no evidence to that effect."[my emphasis]

[44] In the case before me there is no such evidence nor any assertion made that an order will stop the action "in its tracks".

[45] In 1989, Justice Doherty, in allowing an appeal from the Master, held that security for costs *ought* to be posted in a case where delay was raised as one of the reasons to refuse such an

order. In his reasons in *Hallum v. Canadian Memorial Chiropractic College***,** 70 O.R. (2d) 119, he considered the two stage process to be undertaken in such a case:

> "10. Rule 56.01 which empowers a court to order security for costs establishes a two step inquiry. First, the defendant must show that it "appears" that one of the six factors set out in cls. (a) through (f) of rule 56.01 exists. Secondly, if the defendant can clear the first hurdle, the court may make any order as to security for costs "as is just". I take this second stage to require an inquiry into all factors which may assist in determining the justice of the case. I also take the discretion created by this second stage as permitting orders which range from an order requiring full security for costs in a lump sum payment to an order which provides that no security for costs need be posted: *Horvat v. Feldman* (1986), 15 C.P.C. (2d) 220 (Ont. H.C.J.)."

[46] In his reasons Justice Doherty considerers other factors enumerated in the rule and then particularly notes that the delay in bringing this motion "is explained by the fact that much of the factual basis for the motion was uncovered on the discovery" and continues:

> "20. I am satisfied that justice demands that Mr. Hallum post security for costs. **The quantum and the mode of payment are matters for my discretion: *City Paving Co. v. Port Colborne (City)*, … [(1985) 3 C.P.C. (2d) 316] I conclude, <u>because of the timing of this motion, that the quantum should reflect the costs of the proceedings from this point onward.</u>** The material filed suggests that this trial may consume five days. I order that Mr. Hallum pay into court security in the amount of $10,000. I am also told that this trial is several months away. I order that Mr. Hallum pay $3,000 into court within 90 days of the release of these reasons; that he pay an additional $3,000 within the following 60 days and that he pay the remaining $4,000 within 60 days following the expiration of the first 60-day period. Mr. Hallum has, in total, 210 days to pay the total amount into court. **Should the matter proceed to trial before the expiration of that period, the trial judge shall determine what part, if any, of the outstanding amount should be paid into court before the trial proceeds."** [my emphasis]

[47] In 1993, Mr Justice O'Driscoll considered the delay in bringing a motion for security for costs, in and of itself, to be sufficient to *refuse* to order security in a case where there was not any explanation for the delay of the defendants in bringing the motion. His reasons in *John R. Hollingsworth Co. v. Advance Power (1984) Inc*.[1993] O.J. No. 933 read in part:

> **23** Nowhere in the material is there any explanation for the delay of the defendants in bringing the motion for security for costs. [Fourteen months after the completion of the examinations for discovery of the plaintiff's representative and some twenty-one months after the service of the Trial Record and Notice of Readiness on the defendant's solicitors].
>
> **24** In my view, the affidavit material filed on behalf of the plaintiff does not show that the plaintiff suffered prejudice because of the defendants' delay in bringing the motion.

> **25** In my view, the case resolves itself into the situation dealt with in *423322 Ontario Ltd. v. Bank of Montreal* (1988), 66 O.R. (2d) 123, (Ont. H.C.) per Granger J.:
>
> > As I have found that the Master has erred in law, I am required to hear this matter afresh and exercise my discretion as required in *Marleen Investments Ltd. v. McBride* (1979), 23 O.R. (2d) 125, 13 C.P.C. 221 (H.C.J.). I must decide if the plaintiff satisfied the onus to show that there was prejudice as a result of the delay. I have read carefully the affidavits filed by the plaintiff and, in my opinion, the plaintiff has failed to satisfy such onus.
> >
> > Accordingly, I must decide if the defendants are entitled to succeed on their motion as a result of my previous finding.
> >
> > In his reasons the learned master found that the defendants had failed to satisfy him as to their reason for delaying in bringing their application for security for costs, and this finding would appear to be fatal to the defendants' motion. It is also important to note that the learned master did not find the litigation to be frivolous or vexatious.
> >
> > Accepting that the action is not frivolous or vexatious and the defendants cannot explain their delay, I am not prepared to order the plaintiffs to provide security for costs....
>
> **27** In this case, there is no allegation or evidence that the action is frivolous and/or vexatious. There is, likewise, no evidence to explain the defendants' delay to bring the motion.

[48] Four years later, in *Linshalm v. Haberler,* [1997] O.J. No. 2842, E.M. Macdonald J. dealt with a motion for an order for security for costs where the action had been pending for four years. Discoveries were incomplete until three years after the action was commenced. Both parties had retained sophisticated legal counsel early in the fourth year. This led to refocusing of the legal issues and a motion for security for costs. The plaintiff argued the delay in seeking security would prejudice him.

[49] In directing that security *should* be posted Justice McDonald held:

> 5 Delay, in and of itself, is not sufficient to defeat the moving party. Prejudice must be demonstrated; on this latter issue Mr. Linshalm's evidence is, at its highest, tentative. These proceedings are distinguished by lethargy at least until the fall of 1996. Further, I have no evidence that an order for security for costs will prevent the claim from reaching trial because of the poverty of the plaintiff. Accordingly an order shall go for security for costs.

[50] This finding is important in the *Livent* case in light of the plaintiff not asserting any prejudice, but rather electing to rely solely of delay, *per se*.

[51] In *Patrick Harrison & Co. v. Devran Petroleum Ltd.*[1999] O.J. No. 3948; 92 A.C.W.S. (3d) 206; Justice Lamek weighed the factor of delay and observed:

> **“3** Mr. Chapman argued, primarily, that the learned Master failed to give any or proper weight to the delay that had occurred prior to the defendants' moving for security. Notice of the plaintiff's weak financial condition had been available from the very beginning of this action: a search would have disclosed executions registered against the plaintiff in respect of substantial unpaid judgments. A motion for security for costs, he says, could and should have been brought at that time rather several years later by which time the plaintiff had expended many thousands of dollars to carry the action forward.
>
> **4** Ms. Webster argues that there was no delay in bringing the motion and that the defendants had no actual knowledge of the facts which might justify seeking security until some time in 1993. Upon acquiring that knowledge, the defendants gave prompt notice of their intention to move for security for costs.
>
> 5 I accept that there may not have been actual knowledge of the plaintiff's financial condition until 1993 but the whole world had been on notice by the filing of executions since 1991. In my view this imputed knowledge did not disqualify the defendants from moving for security for costs and I cannot conclude that the learned Master was clearly wrong in exercising his discretion in favour of the defendants. ***The lateness of the making of the motion does, however, in my opinion, make this one of those cases where the proper thing to do is to order security in respect of costs incurred after the bringing of the motion.*** I believe that the learned Master was in effect doing this when he fixed the amount of security at the relatively small amount of $10,000, of which I shall say more later.
>
> …
>
> **8** The defendants' appeal from the Order of Master Sedgwick turns on whether his fixing of the amount of $10,000 was so clearly a wrong exercise of his discretion that my view should be substituted for his. Ms. Webster argues that the amount ordered is a merely token amount and should be increased to $100,000. If security for costs is to be ordered, the amount of security should reasonably reflect the exposure of the party seeking security. In my respectful view, the Order in appeal does not do so. Even on the basis (referred to above) that the Order should relate only to costs to be incurred after the date of the motion, and even assuming, as I do, that the amount in some measure reflects the Master's view of the delays involved, $10,000 seems to me to be totally inadequate to provide the defendants with security.”

[52] Justice J.W. Quinn, in 2001, addressed this issue in *Susin v. Genstar Development Co., a Division of Imasco Enterprises Inc.,* [2001] O.J. No. 3825; 108 A.C.W.S. (3d) 440. There two years had passed since the beginning of the suit and a trial date was set prior to the motion being brought. His Honour held that he motion was unfair to the plaintiff and the moving party’s supporting affidavits “failed to indicate why security for costs was not sought earlier and why it was reasonable to do so now.”

[53] Justice Quinn observed:

> **"7.** The defendant brings this motion pursuant to rule 56.01(1) (e):
>
> > 56.01(1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
> >
> > ...
> >
> > there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
>
> Presumably, if the action is frivolous and vexatious it did not become so yesterday. And if the plaintiff has insufficient assets in Ontario to pay the costs of the defendant, this state of affairs did not arise overnight. Counsel for the defendant says that one may move for security for costs at any stage of a proceeding. I agree. Nonetheless, when security is sought two years into a law suit and eight weeks before the trial, **the defendant must explain why the motion was not initiated earlier and why it is reasonable for it to be brought now. Absent such an explanation, it is unfair for a plaintiff to face a security-for-costs motion at this late date."** [my emphasis]

[54] Two years later, in *Park Street Plaza Ltd. v. Standard Optical Inc.* [2003] O.J. No. 4487; 126 A.C.W.S. (3d) 580; J. Wright, J. again considered the impact of delay on such motions:

> **2** The respondent plaintiff resists this motion on the ground of delay. The respondent notes that this action was commenced in May of 1998, and that examinations for discovery were conducted in April of 2002 after motions were brought. The respondent argues that it is now prejudiced by this motion, that earlier in the proceedings the corporation was still functioning, had assets and might have made other arrangements. **The respondent argues that the failure of the defendant to apply for costs in a timely manner lulled it into a false sense of security to its prejudice.**
>
> **3** **The defence of delay cannot prevail in this case.** The authorities relied upon by the respondent are almost all cases where a motion for security for costs was brought on the eve of trial. There is no justification for bringing such a motion while a corporation has assets. The prevailing view is that motions for security for costs should not be disposed of until after examinations for discovery have been completed. This exposes the merits of the action. See *Leffen v. Zellers Inc.*, [1986] 9 C.P.C. (2d) 149 (Wright, J.) and re*: 423322 Ontario Limited v. Bank of Montreal*, [1988] 66 O.R. (2d) 123 (Granger, J.). [my emphasis]

[55] In 2005, twelve years after his decision in *Hollingsworth*, Justice O'Driscoll, then as the chair of a panel of the Divisional Court, again came to consider the issue of delay in *Kawkaban Corp. v. Second Cup Ltd.*, 260 D.L.R. (4th) 352; 202 O.A.C. 367; 16 C.P.C. (6th).

There, as noted above the court set aside an order made by a motion's court judge and instead held that an order for security would not be "just" in the circumstances:

> "[27]....The factum of the appellants contains the following paragraph:
>
> > 32. The appellant respectfully submits that on the above facts, a finding that the respondents did not have good reason to believe that the appellant had insufficient assets in Ontario until they received the financial statements in January 20, 2004 is not reasonably supported by the evidence. Rather, the appellant submits the respondents have unreasonably delayed in bringing the motion and are using it as a tactical ploy to stifle a valid claim."
>
> [28] The record persuades me that this submission of appellant's counsel is valid. The respondents have not supplied any satisfactory explanation for the delay in bringing their motion under rule 56.01(1)."

[56] Do the reasons of the defendant amount to a satisfactory explanation for the delay in this case?

VI. More Recent Trends in Jurisprudence

[57] Many recent security for costs decisions reflect upon the consequences of impecuniosity and the court's endeavours, in those cases, to do justice.

[58] While delay was not an element in the 2007 decision of the Divisional Court in *Crudo Creative Inc. v. Marin*, 90 O.R. (3d) 213, nevertheless the court's approach is instructive. There the original motion judge found that an order for security for costs would entirely defeat the plaintiff's right to seek a remedy. The defendants successfully appealed. Hill J. writing for the appellate court noted that evidence of financial difficulties "does not necessarily equate with impecuniosity" and continued :

> "[32] The key question here is whether the respondent has access to assets or funds: *Di Paola (Re)* (2006), 84 O.R. (3d) 554, [2006] O.J. No. 4381 (C.A. (Chambers)), at para. 23 (whether assets "available to it to fund the appeal. Presumably, its appeal is being funded by some source outside of the company"); *Rhonmont Properties Ltd. v. Yeadon Manufacturing Ltd.*, [2003] O.J. No. 1883 (C.A.), at para. 5 (corporation "not impecunious in the extended sense that the shareholders and principals of the corporation are unable to fund security for costs"); *Burgalia*, at para. 5 quoting *Superior Salmon Farms Ltd. v. Corey Feed Mills Ltd.*, [1991] N.B.J. No. 500, 115 N.B.R. (2d) 265 (Q.B.), at pp. 269-70 N.B.R. ("Obviously someone is prepared to finance the prosecution of the action. That person or persons should also be prepared to either provide security for the costs of the defendants in the event the claim fails or to establish that security cannot be raised."); *Smith Bus Lines*, at para. 43 (evidence that "amount of the security is not only not possessed by the plaintiff but is not available to it"); *Han Holdings Ltd.*, at para. 18 ("There was

> evidence ... that certainly raised the possibility that Han had access to funds"); see also *Kurzela v. 526442 Ontario Ltd.* (1988), 66 O.R. (2d) 446, [1988] O.J. No. 1884 (Div. Ct.), at pp. 447-48 O.R.; *ABI Biotechnology Inc. v. Apotex Inc.*, [2000] M.J. No. 14, [2000] 3 W.W.R. 217 (C.A.), at paras. 45-46; *1056470 Ontario Inc. v. Goh* (1997), 34 O.R. (3d) 92, [1997] O.J. No. 2545 (Gen. Div.), at pp. 95-96 O.R.
>
> ...
>
> [34] On the record here, it has not been established by compelling evidence that the respondent does not have access through its shareholder to the means to post security for costs. In this sense, the respondent is not impecunious in the extended sense ....
>
> [35] While not essential to determination of the appeal, given the finding as to impecuniosity, I am of the view that no injustice, in the broader sense of unfair defeat or hindrance of the respondent's claim, is made out on the existing record. **There is no evidence that the rule 56.01 motion was used in any oppressive way to stifle or block the respondent's action**..." [my emphasis]

[59] Three of my colleagues have recently written extensive reasons in this area. I have considered the guidance on the issues before me from each of their reasons.

[60] Master Graham in *Pelz v. Anderson*, [2006] O.J. No. 4726; 153 A.C.W.S. (3d) 815, dealt with tactical delay and commented on the Divisional Court's ruling in *Kawkaban*:

> "12 The Divisional Court, in considering the evidence on the motion under appeal, accepted the appellant's (plaintiff's) submission that the defendants had unreasonably delayed bringing the motion and were "using it as a tactical ploy to stifle a valid claim". The Court also held:
>
> > "The respondents (i.e. moving defendants) have not supplied any satisfactory explanation for the delay in bringing their motion under rule 56.01(1)."
>
> 13 In allowing the appeal, the Divisional Court did not specifically address the question of whether the moving defendants' failure to explain the delay in itself precluded an order for security for costs, but did overrule the finding of the motions court judge that the defendant's motion was brought reasonably promptly. The fact that the Court made a specific determination that there was no satisfactory explanation for the delay indicates that the failure to explain the delay was a factor in its decision."

[61] Master Graham then considers many of the cases discussed by me above and concludes his discussion with a consideration of shifting onuses:

> "**23** A distillation of the cases reviewed above yields the following principles to be applied in considering the effect of a defendant's delay in bringing a motion for security for costs:
>
> > Although Rule 56.03(1) states that a motion for security for costs may be made only after the defendant has delivered a statement of defence, and imposes no deadline

> by which the motion should be brought, the motion should be made promptly after the defendant learns that it has a reasonable basis for bringing the motion. One of the reasons for the rule against delay is that the plaintiff should not be placed in the position of having to post security for costs after having incurred considerable expense in advancing the lawsuit....
>
> If the plaintiff can provide evidence that the delay in bringing the motion has resulted in prejudice, the moving party should not be entitled to an order for security for costs....
>
> Even if the plaintiff cannot establish prejudice arising out of the delay in bringing the motion, the failure of the moving defendant to explain the delay is still fatal to the motion for security... [citations omitted].
>
> **24** In this case, the moving defendant has had evidence of the basis for the motion, being the plaintiff's residency outside of Ontario, for at least three years and nine months. .... I therefore conclude that the defendant did delay in bringing the motion.
>
> **25** The onus is on the plaintiff to establish prejudice arising out of the defendant's delay in bringing the motion. Neither the plaintiff's affidavit[s] ...contain any evidence of any prejudice to the plaintiff arising out of the defendant's delay in bringing the motion. The plaintiff has therefore not satisfied the onus upon her to show evidence of prejudice.
>
> **26** As indicated ....the moving defendant's evidence does not contain any explanation for the delay in bringing the motion. In the context of the action as a whole, the defendant delayed three years and nine months from examinations for discovery to bring this motion four and a half months before the scheduled trial date. I am bound by the ruling in *423322 Ontario Ltd. v. Bank of Montreal, supra* that the failure of the moving defendant to explain the delay in bringing the motion for security is fatal to the motion. In view of my decision in this regard, I do not need to consider the plaintiff's financial circumstances."

[62] I find that subsequent jurisprudence and rule changes raise doubt in my mind as to the extent to which I am presently bound by the 1988 decision in *423322 Ontario Ltd.* on the issue of whether delay, in and of itself, is fatal to this application.

[63] A year after *Pelz*, Master Haberman in *Shuter v. Toronto Dominion Bank*, [2007] O.J. No. 3435; 2007 CanLII 37475, held:

> 100 The plaintiffs rely on a number of cases that stand for the proposition that an order for security for costs should be pursued at an early stage and, failing that, the delay to move earlier must be satisfactorily explained (see *Kawkaban Corporation v. Delutis*, 16 C.P.C. (6th) 178; *423322 Ontario Ltd. v. Bank of Montreal* (1988) 66 O.R. (2d) 123).

> 101 What is clear from the cases is that delay, in and of itself, is not the determining factor. The delay must be found to have been unreasonable for it to have an impact on the end result. Thus, in some instances, failure to provide a satisfactory explanation for the delay has been fatal to the motion (see *Cohen v. Power* [1971] 2 O.R. 742; *Gosselin v. Wong* 33 C.P.C. 262). In other cases, however, the court has looked for evidence from the plaintiff demonstrating that the delay in moving has somehow caused them prejudice - in other words, evidence showing that they might have acted differently had they been aware that such a motion would be brought down the road (see *Stepps Investment Ltd. v. Security Capital Corp*., 2 O.R. (2d) 648; *408466 Ontario Ltd. v. Fidelity Trust Co.* 10 C.P.C. (2d) 278).
>
> **....**
>
> **105** A few cases suggest that a motion of this nature should not be brought before completion of examinations for discovery and in *Park Street Plaza Ltd. v. Standard Optical Inc.* [2003] O.J. No. 4487, Wright J. states that as long as undertakings remain outstanding, the discovery is not completed.
>
> **106** What is clear from the cases is that the motion should be brought once the basis for it has become known to the defendant**. A hard and fast rule that it be initiated upon the completion of a particular step such as pleadings, examinations for discovery or mediation is simply not workable or fair. Each case will therefore turn on its own facts regarding the appropriate timing.**"[my emphasis]

[64] Master Haberman then reviews the distillation of the relevant factors by Master Graham in *Pelz* and indicates her agreement with his statement of the law and indicates that she approached her decision in *Shuter* on the basis of it.

[65] Later in her reasons she addresses the impact of delay in detail and concludes:

> **190** It is unfortunate that the plaintiffs must now come to terms with their action and decide if, and if so, how, to fund a security for costs order, but there is nothing unusual about this, aside from the delay caused by the bank having agreed to forebear from moving to enforce its judgment. The time to forebear has now ended.
>
> **191 On the basis of all of the foregoing, I find that the explanation for the delay indicates that the bank's failure to move earlier was reasonable and that, in any event, the plaintiffs have failed to demonstrate that they have suffered any prejudice by virtue of that delay. There is therefore no reason to refrain from making an order for security for costs in favour of the bank against all three plaintiffs**.

[66] Two years later, in 2009, Master Sproat noted in *Malamas v. National Bank of Greece* [2009] O.J. No. 4368:

> **91** Recent case law suggests that relevant factors be considered in the exercise of the court's discretion and that the court is loathe to adhere to a set list of criteria or relevant factors. The aim is to arrive at a result that is just on the facts of the case. The Court of Appeal's

> approach in *Scaini v. Prochnicki* (2008), 85 O.R. (3d) 179 (C.A.) is an illustration of the proper contextual approach wherein the court considers a multitude of factors to arrive at a just result in the circumstances of the case.
>
> **...**
>
> **94** I consider the following factors to be relevant:
>
> 1. the merits of the case;
> 2. whether the Bank caused the plaintiffs' impecuniosity;
> 3. the Bank's delay in bringing the motion for security and whether the plaintiffs have been prejudiced

[67] On the motion the plaintiffs submitted that the Bank had delayed in bringing its motion for security and, as a result, the motion should be denied. Master Sproat held:

> "**113** In any event, I do not see the delay as prejudicial to the plaintiffs. .... I do not see this as a case where the plaintiffs were lulled into a false sense that the Bank would forego its right to seek security.
>
> **114** The delay does not in and of itself justify, in my view, the denial of the security sought but is a factor that can be considered in determining the quantum of security sought. See *Hallum v. Canadian Chiropractic College* (1989), 70 O.R.(2d) 119 (S.C.) at paras. 2 and 20.

[68] Now a further two years later, in 2011, I come to this motion endeavouring to craft an order "that is just" in the circumstances of this case.

VII. An Order "That Is Just" in the Circumstances

[69] Master Haberman in *Shuter, supra* also provides helpful guidance on establishing a just order once it has been determined that security ought to be provided.

> **63** The motion only proceeds to its second stage if the moving party has fulfilled the stage 1 requirement. Once they have done so, the onus shifts to the responding party, in most cases, the plaintiff. In the second stage, the court must make the order "as is just". In arriving at the appropriate order, the court must inquire into all factors that have a bearing on the "justice of the case", including the merits of the case. The end result could be an order that no security is required, notwithstanding that the moving party cleared the first hurdle (see also *Horvat et al. v. Feldman et al.* (1986), 15 C.P.C. (2d) 220).
>
> **64** It is important, at the second stage of the inquiry, to bear in mind what Rule 56.01 is intended to address. An order for security for costs is consistent with the overall philosophy of our Rules, which emphasises a number of objectives, including streamlining proceedings so that matters move through our courts within a reasonable timeframe; encouraging early and reasonable settlements; and discouraging litigation or steps in litigation that are doomed to fail. As a result, in this jurisdiction, costs generally follow the event - the party whose position fails is generally required to pay a significant portion of the costs of the party who has prevailed. This approach is

> intended to deter parties from launching frivolous actions, from dragging their heels to court and from initiating unnecessary or unmeritorious steps along the way.
>
> **65** In keeping with this general set of goals, our Rules recognize that this approach to costs provides no such deterrent if a party is unable to pay costs at the end of the day. Hence, in certain cases where the court agrees that there is genuine cause for concern about a plaintiff's ability to do so, it will entertain a motion requiring that party, either a plaintiff or plaintiff by counterclaim, to post security during the course of the litigation so that funds are available to pay a cost order if and when required. In this way, a defendant is partially protected from having to bear the costs of an action that ought not to have been started.
>
> **66** This Rule must be applied carefully, however. One thing it was not intended to do was to bring an end to actions that are well founded in the event that a plaintiff is clearly unable to post security. Further, where it appears that a plaintiff is without funds as a result of the acts of the defendant that have given rise to the litigation, caution must be exercised before ordering the plaintiff to post security if he is without the means to do so. As a result, case law has created an exception from the Rule for the impecunious plaintiff who appears to have a meritorious claim. If a plaintiff can establish that he is truly impecunious and that his claim is not totally devoid of merit, it has been held that the order "that is just" includes one where no security at all need be posted.
>
> **67** In *Warren Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd. et al.* [1986] O.J. No. 2364, Trainor J. made it clear that the onus was on the plaintiff to do two things in order to avoid the application of the Rule:
>
> > The case law is unanimous in holding that in order to obtain relief on the basis of impecuniosity, a plaintiff must lead evidence to demonstrate its impecuniosity and to show why justice demands that it be allowed to proceed without posting security for costs, notwithstanding that impecuniosity.

[70] In September of 2009 Justice Code considered the developments in this area to that point in time in his reasons in *Cigar500.com Inc. v. Ashton Distributors Inc.* 99 O.R. (3d) 55. There the defendants applied successfully to the master for an order requiring the plaintiff to post security for costs. In allowing the appeal, Justice Code delivered a 25 page judgment reversing the master and following the decision of the Divisional Court in, *Zeitoun v. Economical Insurance Group*, (2008), 91 O.R. (3d) 131, [2008] O.J. No. 1771, 292 D.L.R. (4th) 313, 53 C.P.C. (6th) 308, 165 A.C.W.S. (3d) 770, 236 O.A.C. 76, 64 C.C.L.I. (4th) 52 .

[71] The Divisional Court decision in that case was subsequently affirmed by a unanimous five Justice panel of the Court of Appeal in *Zeitoun v. Economical Insurance Group*, 2009 ONCA 415;73 C.P.C. (6th) 8; 307 D.L.R. (4th) 218; 73 C.C.L.I. (4th) 255;2009 CarswellOnt 2665; 96 O.R. (3d) 639.

[72] In his reasons in *Cigars500.com* Justice Code observed:

> "[65] … At first instance, the Master had found that the non-resident plaintiff was not impecunious and, after considering the merits, found that the plaintiff had not met the burden of establishing that "the claim had a good chance of success". Accordingly, a rule 56.01 order was made. Pitt J. reversed, holding that the Master had erred both in relation to impecuniosity and in relation to the merits. Accordingly, both issues were before the Divisional Court on further appeal.
>
> [66] It is also not tenable to assert that the broad principles in *Zeitoun* have no application to corporate plaintiffs. In *Zeitoun*, *supra*, at para. 44, the Divisional Court put an end to the old idea that success at the first stage of analysis gives rise to a prima facie right or entitlement to a rule 56.01 order:
>
> …
>
> This idea about "right" or "entitlement" at the first stage of analysis was central to much of the older case law on which the defendants rely. Indeed, they continue to assert in their factum that success at the first stage "prima facie entitled" the defendants to a rule 56.01 order. This is clearly wrong, post-Zeitoun.
>
> …
>
> [68] In any event, the court's decision in Zeitoun is simply the culmination of a clear trend or evolution in the modern rule 56.01 case law towards flexible consideration of the merits at the second stage of analysis. A number of the pre-Zeitoun decisions, cited above to this effect, involved corporate plaintiffs on rule 56.01(1) (d) motions…..:
>
> [69] For all these reasons, I am satisfied that Zeitoun is a binding decision to the effect that the merits of a plaintiff's claim remain a relevant factor at the second stage of rule 56.01 analysis, even when the plaintiff is not "impecunious". Furthermore, this principle applies generally to rule 56.01 motions, including to corporate plaintiffs under rule 56.01(1) (d). This is not to say that the courts will not take a stricter approach to corporate plaintiffs who lack assets in Ontario but who have wealthy shareholders. Indeed, the courts are likely to give considerable weight to this factor for the policy reasons set out by Nordheimer J. in *Aviaco*, *supra*. In this regard, it is to be remembered that the burden in *Zeitoun* for a plaintiff who is not "impecunious" is a high one. It must establish that its claim "has a good chance of success". Furthermore, this remains only one factor to be balanced with other relevant factors, such as the existence of "wealthy shareholders [who] have decided to carry on business and litigation through a shell corporation", as Sutherland J. put it in *Smith Bus Lines Ltd.*, supra, at p. 705 O.R. All of these factors should be considered at the second-stage inquiry under rule 56.01."

[73] While in *Cigars500.com* Justice Code refused to grant security for costs his analysis of the relevant caselaw and the definition by those cases of the extent of the court's jurisdiction and the factors to be considered is instructive for this case :

> [74] However, I am equally satisfied that it would not be "just" to make an order for security for costs against the plaintiff in all the circumstances of this case and on the present record filed on this motion. The relevant factors to this second-stage exercise of discretion are as follows:
>
> (i) Accepting Master Egan's determination that the plaintiff has "insufficient assets", it is nevertheless relevant that the plaintiff does have some assets in Ontario. Indeed, it has all the assets that it needs to operate its online cigar-sales business. It has simply made an interim commercial decision to suspend its business, pending the outcome of the present litigation. This commercial decision has been made as a result of the alleged misconduct by the defendants that is the subject of the litigation. The degree to which that misconduct can be assessed, on the present record, will be discussed below.
>
> (ii) The plaintiff is not "impecunious" as it has shareholders or backers who are capable of satisfying an order for security for costs. However, this is not a case where "wealthy shareholders have decided to carry on business and litigation through a shell corporation", as Sutherland J. put it in Smith Bus Lines Ltd., supra [at p. 705 O.R.]. Nor is it a case involving "litigious abuses by artificial persons manipulated by natural persons", as Megarry V-C put it in *Pearson v. Naydler*, [1977] 3 All E.R. 531, [1977] 1 W.L.R. 899 (Ch. Div.).
>
> (iii) The plaintiff's most significant liabilities have been caused by the two U.S. actions commenced by the defendants. The evidence filed on the present motion indicates that the U.S. actions are weak and are unlikely to succeed. The defendants on this motion have not challenged that evidence. In any event, the fact that the defendants have themselves commenced causes of action that raise similar or closely related issues is a relevant factor. In this regard, see *Better Business Bureau*, *supra*, and *ICC International Computer*, *supra*.
>
> (iv) As to the merits of the plaintiff's claim, thorough materials have been filed in support of the causes of action alleged. The materials, absent any challenge, suggest that the plaintiff has a good chance of success at trial. The defendants have not filed any evidence in response concerning the merits. In these circumstances, and on this record, the *Zeitoun* test of "good chance of

> success" has been met. On this point, the case bears considerable resemblance to two decisions of Master Haberman, in *Mirza v. Pervaiz*, *supra*, and *Shah v. Becamon*, *supra*. In both cases, the defendants succeeded at the first stage of analysis and the plaintiff did not establish "impecuniosity" at the second stage. Master Haberman, nevertheless, declined to order security for costs because the plaintiffs filed strong evidence in support of the merits of their claims and the defendant left this evidence "unchallenged". I agree with Master Haberman's reasoning in these two cases.
>
> [75] Weighing the above factors, they all infer that it would not be "just" to grant a rule 56.01 order.

[74] I agree with Justice Code's conclusion that the ultimate decisions in *Zeitoun* are simply the culmination of a clear trend or evolution in the modern, rule 56.01 case law, towards flexible consideration of applications for security for costs. In my view this includes not only a consideration of the merits at the second stage of analysis but also a consideration of all relevant factors.

[75] Furthermore, this principle applies generally to rule 56.01 motions, including to corporate plaintiffs under rule 56.01(1) (d). This is not to say that the courts will not take a stricter approach to corporate plaintiffs who lack assets in Ontario but who have wealthy shareholders. I agree that the courts are likely to give considerable weight to this factor for the policy reasons set out by Nordheimer J. in *Aviaco, supra*. Impecuniosity remains only one factor to be balanced with other relevant factors. In my view, of those factors should be considered at the second-stage inquiry under rule 56.01.

VIII. Delay Explained

[76] This motion was brought in October 2009, more than a year before the then anticipated trial date. The moving party asserts that the timing of this motion was a result of the particular circumstances of the Livent court proceedings. In particular the trial of the criminal charges against Mr. Drabinsky and Mr. Gottlieb, the outcome of which would obviously greatly affect the conduct of this action, concluded only in August 2009 when the sentencing decision was released. (see ***R .v. Drabinsky*** (2009), 246 C.C.C. (3d) 214)

[77] Counsel for the moving part asserts Deloitte Canada brought this motion at an appropriate point in the proceedings, "namely shortly after the conclusion of its oral examinations for discovery." Relying upon *Park Street Plaza Ltd.* v. *Standard Optical Inc.*, [2003] 0.1. No. 4487 and *Leffen* v. *Zellers Inc.*, [1986] O.J. No. 2567 it is asserted by the defendant that the prevailing view is that motions for security for costs should not be disposed of until after examinations for after discovery has concluded.

[78] I agree with this general view particularly in cases where the motion involves a consideration of the merits of the action. If such a motion is brought after examinations have concluded, the merits are already exposed as a result of that discovery. However, if oral discovery has not yet occurred then the motion is brought, the merits would need to be canvassed through a separate cross-examination in respect of the motion. That cross-examination would be

wastefully duplicative of elements of the examination for discovery that would ultimately occur. However, I acknowledge that in cases where extensive discoveries are anticipated an earlier motion may make practical sense.

[79] While I have no doubt that he did intend to prejudge this matter, I nevertheless note that Justice Campbell's Order of May 2009, assigning responsibilities to this Court, specifically foresaw at that time that a motion for security for costs would be brought in the future.

[80] As I have noted earlier, the plaintiff only relies on delay and has not attempted to prove any actual, specific, irreparable prejudice flowing from that delay. I believe that the law has been moving towards the position where a corporate plaintiff seeking to avoid posting any security by virtue of delay must demonstrate at least some prejudice.

[81] A motion for security for costs involves balancing the interests of the plaintiff and the defendant, but the justice of this case calls for granting the order as requested by Deloitte Canada. The plaintiff will not be forced to discontinue or otherwise be prejudiced, and the plaintiff has filed no evidence to substantiate its opposition.

IX. Anticipated Length of Trial

[82] Counsel for Livent noted in argument that in July 2008 the Ontario Court of Appeal held that a United States civil judgment against Messrs Drabinsky and Gottlieb in the amount of USD $36,617,696.00 should be recognized and enforced in Ontario. *(* see *King v. Drabinsky*, [2008] O.J. No. 2961 (C.A.);

[83] It was argued as a consequence, there is little, if any, incentive for Messrs Drabinsky and Gottlieb to proceed with their defence of the Drabinsky Litigation, and in all likelihood trial of that matter will not proceed. I accept this as a reasonable probability and accordingly, as noted earlier, the time r required for trial in Deloitte's original costs estimate must be significantly reduced to reflect the probability that trial will more likely only proceed for 2 months as opposed to 6.

X. Quantum Reduction

[84] Ontario courts often exercise their discretion to reduce the amount claimed for security by a defendant. Such was the case in *Patrick Harrison & Co.* v. *Devan Petroleum Ltd.,* [1999] O.J. No. 3948. In that case the Court cut the quantum of security down to half of the defendant's requested amount where the defendant had delayed in bringing its motion.

[85] In *Malamas, supra* the court determined that while there was a legitimate basis for the delay in bringing the motion for security, the defendant could have brought the motion sooner. While the defendant had requested security in the amount of $259,571.55 on the basis of an "extraordinarily comprehensive" draft bill of costs, the court only ordered security in the amount of $75,000.00.

[86] Here, I feel that only a small reduction for delay is justified. The savings in potential costs flowing from my reduction, at this point in time, in the projected trial length has generated a saving in the potential exposure of the plaintiff. Had this motion been brought at the outset, a six month estimate for the trial could have been a realistic with the plaintiff being required to secure higher costs for that much longer time period, with lawyers' clocks spinning at "trial rates".

XI. Appropriate Scale

[87] Courts do not normally award substantial indemnity costs, and only do so in special circumstances such as when a party has behaved in an abusive manner, brought proceedings wholly devoid of merit, or unnecessarily run up the costs of the litigation. There are real and difficult factual and legal issues in this case raised by both sides. The circumstances present in this case do not warrant the granting of costs on a substantial indemnity scale.

[88] Deloitte has proposed a bare bones bill of costs in support of its request for security. Counsel for the Special Receiver requested a more detailed breakdown of the items listed in the original draft bill of costs, and now asserts that the response provided by Deloitte "failed to adequately substantiate the basis of its costs estimate in accordance with the Rules and relevant case law. Indeed, the lack of specificity provided by Deloitte is indicative of the overestimation of its costs."

[89] Counsel for Livent further submitted that "an estimate of $2 million represents the high end of the *substantial indemnity* costs Deloitte will incur to bring this matter through to trial."

[90] Livent asserts that Deloitte has taken a convoluted approach to arrive at is cost estimate which has resulted in use of an average hourly rate that is not countenanced by the applicable case law. Deloitte's costs estimate for lawyer fees is based upon a blended rate of $500 per hour, taking into account the hourly rate of 5 lawyers of varying call levels, as well as one law clerk. The hourly rate of these professionals ranges from $900 to $260.

[91] Counsel for Livent further argues that:

> "Deloitte has calculated its actual fees to the end of trial using the blended rate of $500 multiplied by an estimated number of hours, and then taken 60% of the resulting sum to arrive at its purported partial indemnity costs estimate of $2 million. The practical impact of Deloitte's approach is to yield a partial indemnity costs estimate using an average hourly rate of 300 (60% of $500). Courts rarely permit partial indemnity hourly rates in the amount of $300."

[92] In *Bluefoot Ventures Inc.* v. *Ticketmaster*,[2008] O.J. No. 5690; the Court found that the partial indemnity rates used by the successful defendants to calculate an amount for security for costs was too high and represented the top range for counsel of their experience. The Court held that:

> The defendants request payment of security in the amount of $254,966.9l. This amount is excessive. Specifically, partial indemnity rates of $350.00/hr [...] (1981 call), $300.00/hr [...] (1996 call) and $225.00/hr [...] (2003 call) are the top of the range for counsel of their experience and there is no explanation why costs should be awarded at the highest possible rates.

[93] On this basis, the security requested in *Bluefoot* was reduced from $254,966.91 down to $180,000.00. Here I feel that in light of the amounts in issue, rates at the highest generally allowable levels are justified. However, as will be seen below, I do not intend this position to be seen as unquestioning acceptance of liability for rates simply because a client has accepted the reasonableness of those amounts as "actual rates".

XII. Disbursements

[94] Rule 58.05(3) provides that:

> No disbursements other than fees paid to the court shall be assessed or allowed unless it is established by affidavit or by the lawyer appearing on the assessment that the disbursement was made or that the party is liable for it.

[95] This principle is brought to bear upon cases in which security for costs is ordered. In *Bluefoot Ventures Inc.* v. *Ticketmaster, supra,* though the defendant obtained an order for security for costs, the total amount requested was reduced by the Court, in part, because the defendant failed to adequately substantiate is estimate for disbursements. The Court held that:

> [...] the estimated disbursements include $25,000.00 for expert fees, appearance fees and travel expenses and $5,000.00 for photocopies. There is no evidence to substantiate what experts might be retained and how much their reports and testimony would costs and no evidence as to why the defendants might be required to make 20,000 photocopies (at $.25 each).

[96] Deloitte has provided even less evidence related to disbursements than was present in the *Bluefoot* case. Nevertheless, while far from ideal, the percentage method used by Deloitte with respect to disbursements is an attempt to make an educated estimate of the appropriate disbursements. However I am not convinced that taking 20% of the *actual* fees billed or to be billed is a reliable method of divining the actual disbursements. While clearly substantial disbursements will be incurred getting this case to trial, the lack of precision motivates me to adjust downward Deloitte's estimated costs for the purposes of my calculations.

[97] In particular reductions are specifically necessary with regard to the charges for the obtaining of expert evidence. In this case that evidence would seem to relate to what were the Generally Accepted Accounting Principles at the time. This exercise would not seem to involve complex scientific or unusual medical procedures. I expect the main issues for the trial judge will be “what were the standards?” and “were they met?” .

[98] Undoubtedly both sides will lead extensive evidence on these issues but I do not find the defendant’s approach of estimating a total of $700,000 for expert fees simply as a percentage of the overall legal costs helpful. Particularly where the evidence to be given, in all likelihood, relates to the day to day business of the defendant.

[99] With these factors in mind I come to an analysis of the specific positions of the parties.

XIII. *“All I Ask of You”*

[100] The affidavit filed in support of the motion, sworn in October of 2009, contained a single page document styled as a “Draft Partial Bill of Costs” which I refer to below as the “Ask”.

[101] At the time of the argument of this phase of the motion a more detailed and updated bill of costs was presented. The substance of that calculation based on the estimated actual fees (for a trial running between 12 and 24 weeks) is as set out below:

1. *Pre-Trial Matters*:

	ActualFee To Client	Hours
(a) Completion of examinations for discovery	$35,000	70
(b) Interlocutory motions and case management	$100,000	200
(c) Preparation and conduct of a two day mediation	$25000	
Pre- Trial Matters Total	**$ 160,000**	

2. *Preparation*:

(a) Interviewing and re-interviewing witnesses	$100,000	200
(b) Documentary preparation	$ 75,000	150
(c) Preparation of fact witnesses prior to trial	$ 80,000	360
(d) Preparation of briefs for trial witnesses	$85,000	170
(e) Preparation of expert witnesses for trial including:		
(i) counsels' involvement in preparing expert reports	$ 75,000	150
(ii) preparing experts to give evidence	$ 125,000	250
(iii) fees paid to experts for pre-trial work, including the preparation of their reports	$ 600,000	
(f) Legal research prior to trial	$ 120,000	240
(g) Computer support	$ 50,000	
Total for Trial Preparation	**$ 1,410,000**	

3. *Trial Fees*:

(a) Fees for counsel and support staff at trial ($75,000 per week for 12 to 24 weeks);	$ 900,000 to $1,800,000
(b) Trial fees for expert witnesses for attending to hear parts of the fact evidence and to give their own evidence	$ 100,000
Trial Total	**$1,000,000 to $1,900,000**

[102] Disbursement were not estimated individually in the draft partial bill of costs but rather a gross-up of 20% of the full indemnity fees was used to estimate disbursements ($440,000 to $660,000).

[103] Thus the total sought is based on what is estimated to be an actual "billed to client" overall cost of between $2,570,000 and $3,470,000.These figures were used to determine the fees amounts claimed on the basis of 60% of the billed to client amount for partial indemnity and 80% for substantial indemnity.

[104] When the plaintiff is seeking damages in the action in the hundreds of millions of dollars, what is fair and proportional when the anticipated actual costs range between 2.5 and 3.5 million dollars?

XIV. The Counter Proposal

[105] The plaintiff ,while denying any entitlement whatsoever, in the alternative, used the maximum rates for partial indemnity as reflected in the cases and a projected eight week trial to make this proposal:

Estimated Allowable Costs for a 2 Month Trial

(a) 8 week trial at 5 days a week/l0 hours per day (includes time spent preparing during trial)

	Rate	Total Hours	Total
Senior Counsel	$350	400	$140,000
Co-Counsel	$300	400	$120,000
Senior Associate	$150	400	$70,000
Law Clerk	$80	400	$32,000
			$362,000

(b) Estimated corresponding cost of preparation prior to commencement of trial

	Rate	Total Hours	Total
Senior Counsel	$350	100	$35000
Co-Counsel	$300	200	$60000
Senior Associate	$150	400	$70000
Law Clerk	$80	400	$32000
			$197,000

[106] Thus the most the plaintiff asserts that should be awarded, if any amount was to be allowed, was $559,000 for preparation and trial. In my view, some allowance for pre-trial activities as identified by the defendant, also needed to be addressed. But obviously there is a very wide gulf. I turn to cases dealing with quantum of costs allowed to assist in determining the most appropriate amount in the circumstances of this case.

XV. Costs Cases

[107] Shortly before the argument of this aspect of the motion, Mr. Justice D.G. Price delivered extensive reasons at the conclusion of a 23 day trial in *Wright v. Wal-Mart Canada Corp.* [2010] O.J. No. 2206. The plaintiff received a damages award of $314,834. The plaintiff's claims of $318,287 for fees, $15,914 for GST and $62,173 for disbursements were held to be reasonable and were allowed with some minor adjustments.

[108] The judgment is very helpful in consolidating the history in the past decade of the changing methods of cost calculations after trials in Ontario. It is on that basis that I have evaluated the proposed cost claim of the defendant's counsel.

[109] In his reasons he notes that several principles should guide a trial judge in an assessment of costs. First, in exercising his or her discretion under section 131(1) of The *Courts of Justice Act* and Rule 57.01 of the *Rules of Civil Procedure*, the judge must arrive at a costs award that is a fair and reasonable amount to be paid by an unsuccessful party and take into account the expectations of the parties concerning the quantum of a costs award: *Zesta Engineering Ltd. v. Cloutier,* [2002] O.J. No. 4495 (C.A.), at para. 4; *Boucher v. Public*

Accountants Counsel for the Province of Ontario, 2004 CanLII 14579 (On.C.A.) 71 O.R. (3d) 291

[110] Second, in reviewing a claim for costs, a trial judge need not undertake a line by line analysis of the hours claimed, nor should he second guess the amount claimed unless it is clearly excessive or overreaching. A trial judge must consider what is reasonable in the circumstances and, after taking into account all of the relevant factors, should award costs in a global fashion: see the cases referenced in *Fazio v. Cusumano*, 2005 CarswellOnt 4518 (S.C.J.), at para. 8

[111] Justice Price also held that the rates claimed were “within the reasonable range” and fell within “the reasonable expectations of the parties, having regard to the Costs Bulletin.”

[112] The Costs Bulletin referred to, is actually entitled "Information for the Profession" bulletin from the Costs Sub-Committee of the Rules Committee. This bulletin was initially issued by the Costs Sub-Committee of the Rules Committee issued to replace the Costs Grid, which it repealed in 2005. Justice Price notes that the Costs Bulletin has advisory status only and not statutory authority, as it was not included in the Regulation that repealed the Costs Grid.

[112] The Costs Bulletin suggests maximum hourly rates of $80.00 for law clerks, $225.00 for lawyers of less than 10 years experience, $300.00 for lawyers between 10 and 20 years experience, and $350.00 for lawyers with 20 years experience or more.

[113] The reasons also canvas the issues of the appropriate length of time per day of trial to allocate to hearing time and preparation. As well the correlation between the length of pre-trial preparation and the number of days of trial time is the subject of extended analysis. While every long trial is unique, I nevertheless find the following post-trial analysis helpful in focusing my pre-trial estimates and analysis:

> **177** The defendants' major complaint concerns the amount claimed for trial preparation. The trial lasted 23 days and I am satisfied that the time spent at trial was spent reasonably and constructively. Ms. Wright has claimed Mr. Cannings' fees for 124.5 hours of trial time. This translates as an average of 5.41 hours of trial time per day for the 23 days of the trial.
>
> **178** Ms. Wright has claimed Mr. Cannings' fees for 316.4 hours of trial preparation after November 13, 2008. An examination of Ms. Wright's Bill of Costs discloses 339 hours of time (for trial and trial preparation) from January 6, 2009, when the trial began, until February 9th, when it concluded. By deducting the 124.5 hours of trial time, I infer that 214.5 hours (339 hours less the 124.5 hours of trial time) of the 316.4 hours of trial preparation claimed by Mr. Cannings after November 13, 2008, were spent during the trial itself and the remaining 101 hours were spent in the interval from November 13 to the beginning of the trial. That is, two thirds of the preparation time which Mr. Cannings claims in the two months up to and including the trial was spent during the trial itself.
>
> **179** The time which Mr. Cannings claims for the trial dates themselves ranges from 11 to 14 hours per day and, on average, amounts to 13.21 hours per day. In addition, he spent 35 hours on weekends and non-sitting days during the trial in further preparation.
>
> ….

> **180** The question of what is reasonable trial preparation time, both before and during a trial, is a recurrent issue in assessments of costs and has been approached in different ways by counsel and the Court over the successive regimes that have governed costs assessments. Initially, the practice was to assess costs by applying hourly rates of counsel to the time spent. This approach was open to abuse owing to the absence of any objective standards or even counterbalancing principles to be applied to scrutinize the amount of time claimed and establish, in any given case, a reasonable limit on the costs allowed.
>
> **181** Concerns about excessive costs and, in some cases, "over-lawyering" eventually led to the enactment of the Costs Grid. It imposed hourly rates for counsel, based on years of experience, and a daily maximum of $4,000.00 for trial time, subject to a weekly maximum of $17,500.00, for the most experienced lawyer in the most difficult case. This regime still left unanswered questions. Counsel generally spent only six hours in court per day (based on the fact that courts normally sit from 10 a.m. to 1 p.m. and from 2 p.m. to 5 p.m.). Questions therefore arose as to whether "trial time" referred only to the time spent in the courtroom or included time spent conferring with witnesses and opposing counsel before and after court and trial preparation on the day of court.
>
> **182** Courts, in answering these questions, elaborated the rules contained in the Costs Grid in a way that reflected the reality that much of the work that lawyers are required to perform during a trial is done outside the sitting time of the court….
>
> **183** There still was uncertainty as to how much trial preparation it was reasonable to add to the "trial time" for a day of trial….
>
> **184** In *KJA Consultants Inc. v. Soberman*, [2003 Can LII 27144]; Sachs J. held that it was reasonable to charge a daily counsel fee of 10 hours per day (reduced from the 11.5 hours claimed) for trial time "reflective of the amount of time counsel spent both in court and preparing." In *Sherway Contracting (Windsor) Ltd. v. Kingsville (Town of)*, [2003 CanLII 45392] Ducharme J. held that 12 hours per day was reasonable for each of the 15 days of trial."

[114] I have considered the guidance in the extracts from numerous other cases referred to in the *Wright* decision. In it Justice Price highlights his conclusions :

> 186 The Costs Grid was rescinded in 2005 and the more flexible "Costs Bulletin" regime has emerged to replace it. The principles that inform the present regime were summarized by Justice Polowin at paragraphs 53 to 59 of the *Sommerard* case, [[2005] O.J. No. 4633] and restated by Justice Spies at paragraph 24 of *Diefenthal [v. Bilbija*, [2006] O.J. No. 2346 (S.C.J.)]:
>
> > In assessing costs, the principles that I must apply have been settled by our Court of Appeal. ***The fixing of costs is not a mechanical exercise of calculating hours times***

> ***hourly rates***. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding. In doing ***so I must stand back from the fee produced by the raw calculation of hours spent times hourly rate and assess the reasonableness of the counsel fee from the perspective of the reasonable expectations of the losing party***. ***Although the Costs Grid has been abolished*** since these decisions from the Court of Appeal, ***I see my function in this regard as unchanged.*** [Emphasis added]

[115] Justice Price also observes that in *Viola v. Hornstein,* 2009 CanLII 16584; in the post-Grid era, Brown J. held that allowing each of two counsel trial time of 10 hours per day and an equal time for trial preparation resulted in reasonable costs for an undefended trial over two days. This approach seems reasonable to me for a case having the duration and complexity of the matter before me.

[116] I concur with Justice Price's view that the Court must approach any proposed formula for assessing costs with due consideration to the context of the particular case. The context includes the seniority of counsel, his style of preparation, and the resources, such as support staff, counsel brings to bear on the case, the nature and complexity of the action and the issues that must be addressed, and the duration and procedural and evidentiary challenges of the trial.

[117] One of the decisions to which I was directed by counsel for the plaintiff was *1193430 Ontario Inc. v. Boa-Franc (1983) Ltée* (see [2004] O.J. No. 656; [2003] O.T.C. 1103; 41 B.L.R. (3d) 223; 129 A.C.W.S. (3d) 38).

[118] There, at trial, the plaintiff claimed damages of $1.75 million dollars. In 2003, the trial judge dismissed the action and determined, following an 8 1/2 day trial, that the defendants were entitled to costs of the action of $149,363.03, which amount was inclusive of fees of approximately $105,000 inclusive of GST.

[119] While I found this to be a helpful decision, I note, following my research, that this is also an instructive case because of a somewhat uncommon situation where the same trial judge was called upon, on a later occasion in the same action, to determine the amount of costs owing to a *different* winning party.

[120] Thus in 2006, following a successful appeal to the court of appeal which resulted in an award by that court of damages to the plaintiff of $252,000, a the trial judge determined that the appropriate costs to be awarded *to the plaintiff* for the entire action, on a partial indemnity basis, was roughly $55000 for fees and $49000 for expert fees which with taxes resulted in a total pre-tax award of about $112,011.86 (see [2006] O.J. No. 3667; 151 A.C.W.S. (3d) 777). In particular, the amount all out of for preparation for trial was only $15,000 and counsel fee at trial was established at $16,150.

[121] In the latter set of reasons, the trial judge observed with respect to the disparity in the fees amounts awarded:

> "…I note that the defendant was defending a claim of substantially more than the amount that was actually awarded to the plaintiff. At trial, the plaintiff was claiming damages in the amount of $1.75 million dollars. It was not unreasonable for a losing party to expect to pay $105,000.00 by way of legal fees to a party who is defending a claim of $1.75 million dollars. The same reasoning would not apply

> to the expectations of a losing party where the amount recovered was $252,000.00.

[122] In her 2006 reasons the trial judge observed with respect to the hourly rates to be awarded on a partial indemnity basis:

> - The hourly rates claimed by counsel on a partial indemnity basis is high, especially given the fact that this action went on for almost 10 years before it came to trial. Thus, I accept the defendant's submissions that the hourly rate claimed for Mr. Griffin should be reduced to $325.00 and for Ms. Hancock it is a should be reduced to $250.00.
> - Mr. Griffin claimed a counsel fee at trial, both for himself and Ms. Jones. The defendant, in its claim for costs, claimed a counsel fee at trial for only one lawyer, so as to eliminate any concern about the losing party having to pay for what could be, in effect, double billing. In my view, this adjustment was appropriate for the defendant and it is also appropriate for the plaintiff. This case was not of sufficient complexity or importance to justify an award of costs against the losing party for two counsel at trial, especially where one counsel is as experienced as Mr. Griffin.

[123] Here the claim is for hundreds of millions of dollars. Obviously, such an action calls for the maximum resistance that can be mounted by the party potentially liable for that claim. As a consequence it is my view that, for the purposes of establishing appropriate amount for security for costs in this case, it ought to be assumed that both sides are almost certain to have at least two very experienced counsel in attendance, throughout the trial.

[124] While the estimate of the actual fees to the defendant is realistic as between two unlimited war chests, I find the proposed amounts excessive and disproportionate for a trial team of one very senior counsel, one experienced partner, at least one junior and a clerk or student at law.

[125] Partial indemnity costs are not established as a percentage of what the traffic will bear. Rather they need to reflect a realistic but reasonable contribution to the costs necessary to properly defend an action.

[126] The courts have established upper limits which I am not prepared to expand simply because a large amount is in issue in the action.

[127] Similarly, while I am prepared to make an allowance at this stage for disbursements and expert fees, a blank cheque, based on scanty hard evidence and justification is not appropriate.

[128] In particular I note in passing that I am not making any specific allowance for what is referred to in the Ask as "counsels' involvement in preparing expert reports" I expect, given the now requirements of Rule 53.01, the description was intended to address the providing of directions to retained experts on issues to be addressed in their reports.

XVI. Calculation Components

[129] In the earlier portion of my reasons I referred to the lead article in the 2009 edition of the *Annual Review of Civil Litigation* (edited by Justices Archibald and Echlin of this court) which was entitled "The End of the Action at Its Beginning: The Relationship between Security

for Costs Motions and the Insolvent Corporate Plaintiff ". In that article, the authors considered the difficulty of addressing the competing interests in cases such as this:

> "In our current global economic climate, there would appear to be increased likelihood that lawsuits will be brought by insolvent corporate plaintiffs, or that corporate plaintiffs with lawsuits already in progress may become insolvent during the course of litigation. In the next decade, this issue will of great significance for both plaintiffs and defendants. Defendants' counsel will have an interest in seeking and obtaining security from corporate plaintiff with questionable finances. Plaintiffs' counsel will have an interest in resisting orders for security; or in assessing whether to bring suits on behalf of corporations with minimal assets...."

[130] The authors address a major concern I have had in coming to my ultimate conclusion:

> "In a great many cases, a successful motion for security for costs effectively spells the end of the litigation. This is especially true where the plaintiff is insolvent. ...if the plaintiff corporation is a shell company that is being directed to pursue a course of litigation by a risk-averse shareholder, the order for-security for costs effectively upends the shareholder's litigation strategy, and in most cases will also mean the end of the litigation. The difficulty for motions judges in these situations is to carefully balance the interests of the defendant in not being put to a costly defence by a plaintiff with nothing on the line, while also recognizing that an order for security could derail a prima facie meritorious claim."

[131] I am of the view that it is appropriate to allow the maximum "going rate" for costs awards as contemplated by the case law discussed. This is a long way from the actual costs. However those actual rates have increased from what might have been charged in 2003. Conversely there would have been a not insignificant interest cost on any funds which might have been ordered eight years ago.

[132] While not specifically addressed in the "Ask" set out earlier, as a proportional adjustment I have allowed for the equivalent of one full trial day each weekend during the trial in my calculations below. Thus the weekly trial period allowance is calculated on the basis of 48 hours per professional. As well I have utilized the probably over optimistic estimate of the plaintiff that the actual trial will only require 8 hearing weeks.

[133] The pre-trial period has been longer than anticipated in the 2009 estimate of the defendants. I have applied a 350 per hour rate for the time originally estimated for "Pre-trial Matters" in an effort to make a reasonable adjustment in that regard:

1. *Pre-Trial Matters (as adjusted)*:

	Fee@ $350	Hours
(a) Completion of examinations for discovery	$24,500	70
(b) Interlocutory motions and case management	$70,000	200
(c) Preparation for and conduct of a Two day mediation	$25000	
Pre- Trial Matters Total	**$ 119,500**	

[134] The determination of my base amount for the trial period follows:

Costs for 2 Month Trial

(a) 8 week Estimated Allowable trial at 6 days a week/l0 hours per day (includes time spent preparing during trial)

	Rate	Total Hours	Total
Senior Counsel	$350	480	$168,000
Co-Counsel	$300	480	$144,000
Senior Associate	$150	480	$84,000
Law Clerk	$80	480	$38,400
			$434,400

(b) Estimated corresponding cost of preparation prior to commencement of trial

	Rate	Total Hours	Total
Senior Counsel	$350	100	$35000
Co-Counsel	$300	200	$60000
Senior Associate	$150	400	$70000
Law Clerk	$80	400	$32000
			$197,000

Total Trial related fees: $631,000

[135] With respect disbursements rule 58.05 (3) deals with the assessment of disbursements by an assessment officer.

[136] At that point in the proceeding "no disbursements…shall be assessed or allowed unless it is established by affidavit or by the lawyer appearing …that the disbursement was made or that the party is liable for it."

[137] Here, I am satisfied that it is probable that significant disbursements will be incurred by both sides. While I would have preferred a more detailed breakdown by categories, I am confident that the allowing of an amount equal to 20% of the partial indemnity, preparation and trial costs I am allowing, will be "within the ballpark". In any event only payment of those fees and disbursements ultimately proven will be permitted out of the total security placed with the court.

[138] Thus, for future disbursements I am establishing an allowance of 20% of $631,000 being, $126,280.

[139] With respect to expert evidence the defendant sought $700,000. I am not satisfied that anywhere near this amount has been adequately proven at this stage. Clearly expert evidence will be required. In my view 40% of the amount sought is a more reasonable allowance for the obtaining and presenting such evidence for the purposes of my establishing a total sum to be posted. Thus, I have included $280,000 in my calculation.

[140] As outlined earlier I am satisfied that the pre-trial matters should be allocated a lump sum of $119,500.

[141] The various components of this estimation process are also ultimately subject to the payment of HST. Applying a 13% rate the total of the above amounts, I have come to a gross total, before adjustments, of $1,363,006. based upon this calculation:

Pre-trial matters	$168,000
Trial Preparation matters	$197,000

Trial period	$434,400
Experts	$280,000
Disbursements	$126,800
Sub-total	$1,206,200
HST	$156,806
TOTAL	$1,363,006

XVII. Conclusion

[142] The gross amount established is very substantial by any standard. Because of the factors of delay and proportionality as well as the fact this action is nominally brought by a court appointed special receiver I have determined to apply a roughly 10% reduction to yield an amount to be posted of $1,225,000.

[143] This amount is to be posted in two tranches. $225,000 is to be posted within 45 days of the release of these reasons. The balance is to be posted no less than 60 days prior to any date set hereafter for the commencement of the trial in this action.

[144] The remaining million may be posted by way of a lump sum or by instalments. The first instalment in this second tranche will be in the amount of $200,000 and shall be paid no later than 60 days before the date set for the commencement of the trial in this action.

[145] Given the size of the amounts to be posted and the degree of uncertainty as to the actual length of the trial, I am directing that the further instalments be paid at the rate of $100,000 per scheduled week of the trial with each instalment payable no later than the Monday of the week four weeks prior to the scheduled trial week. [e.g. if the first week of the trial was scheduled for May 30, 2011, the related $100,000 instalment would be due on or before Monday May 2nd]

[146] While this will require a number of notices of compliance under Rule 56.08, I still feel this is a practical approach to the quantum required in this case.

[147] As a consequence an Order in form 56A, as appropriately amended, will go pursuant to Rule 56.04 incorporating the above terms with the action proceeding in the interim, as long as each established date for posting additional security is met.

[148] Obviously matters of alteration of this timing and of any potential further security to be posted during the trial or otherwise, remains in the discretion of the trial judge.

[149] In particular, there are two factors upon which I place particular reliance in determining to exercise my discretion in this way. Firstly, the overall claim against this defendant being in the hundreds of millions of dollars and the concept of proportionality places this amount within the range of reasonableness.

[150] Secondly as noted paragraph 48 of my earlier reasons a very substantial fund (the D&T Litigation Fund) was set aside with respect to these actions. In the Plan that fund was defined as:

> "the fund in the amount of $3,171,000 to be established by the Liquidation Trustee and deposited in trust with Stikeman Elliott, counsel to Livent (Canada) in the D&T Litigation, on the Effective Date for the payment of the Estates' costs and expenses of prosecuting the Canadian Action, including the D&T Litigation".

[151] That a sum of over three million dollars was established for the prosecution of these issues, when the concept of “equality of arms” encompassed by the concept of proportionality would support a determination that funds, equal to slightly less than 40% of the initial balance

D&T Litigation Fund (as established in 2003) represent a reasonable quantum of security for costs in this case.

XVIII. Costs of Motions

[152] Firstly I commend all counsel for their advocacy in this matter. Their courtesy and assistance to me in addressing these important issues is greatly appreciated.

[153] Paragraph 33 of my earlier reasons noted the breaches of duties alleged to have been owed to the Livent Stakeholders:

> "210. in breach of the duties they owed to Livent and the Livent Stakeholders, Deloitte and Deloitte US:
>
> (a) negligently issued unqualified Independent Auditors' Reports, with respect to the audited Original Statements of GAAP in both the United States and Canada, Livent's own accounting policies, GAAS and Deloitte Auditing Standards;
>
> (b) negligently reviewed non-audited financial statements, books and records of Livent during the course of providing ongoing auditing accounting, consulting and regulatory compliance advice and services to Livent and, consequently, failed to uncover and disclose the reasonably discoverable fraudulent schemes of Drabinsky and Gottlieb and allowed Drabinsky and Gottlieb to publish non-audited financial statements of Livent which Deloitte ought to have known were not in compliance with GAAP or Livent's own accounting policies; and
>
> (c) **deprived the Livent Stakeholders of the opportunity to take collective action sooner.** "
>
> 211. These breaches of duty by Deloitte and Deloitte US:
>
> (a) **facilitated the continuance of the fraud being orchestrated by Drabinsky and Gottlieb thereby allowing them to inflict greater harm on Livent to the detriment of Livent and the Livent Stakeholders**; and
>
> (b) allowed Drabinsky and Gottlieb, to report improperly the Original Statements inflated revenues, net income, total assets, and shareholder's equity for Livent thereby enhancing the ability of Drabinsky and Gottlieb to cause Livent to assume further onerous liabilities." [my emphasis]

[154] Success has been somewhat divided. The question of jurisdiction to make any award was subject to conflicting authorities and the Special Receiver's circumstances virtually mandated the position which was taken.

[155] The defendants obtained significantly less than the amounts sought as security, but were successful to a meaningful degree.

[156] If the allegations which appear to sound in fraud are not proven, the trial judge may make an award of costs on a substantial indemnity basis. Such a determination could have impact on costs awards made throughout in this action.

[157] As a consequence of that possibility, I have elected to reserve the costs of this motion, throughout, to the trial judge who will be in a much better position ultimately to address the fairest disposition of the costs of this element of the overall litigation.

Postscript

[158] At the outset of the first portion of the reasons on this motion concerning the affairs of this theatrical production company, I set out an extract from *As You Like It*, describing the seven ages of man in the passage commencing "All the world's a stage". To the extent the passage may have had some tangential relevance to my analysis I conclude by observing that later in that speech Shakespeare wrote:

> *And one man in his time plays many parts,*
> *His acts being seven ages.*
> *...*
> *Then a soldier,*
> *Full of strange oaths, and bearded like the pard,*
> *Jealous in honour, sudden and quick in quarrel,*
> *Seeking the bubble reputation*
> *Even in the cannon's mouth.*
>
> *And then the justice,*
> *In fair round belly with good capon lin'd,*
> *With eyes severe and beard of formal cut,*
> *Full of wise saws and modern instances;*
> *And so he plays his part....*

Master D. E. Short

DATE: March 10, 2011

DS/ R33

Crudo Creative Inc. v. Marin et al.

[Indexed as: Crudo Creative Inc. v. Marin]

90 O.R. (3d) 213

Ontario Superior Court of Justice,
Divisional Court,
Cunningham A.C.J., Meehan and Hill JJ.
November 11, 2007 *

* This judgement was recently brought to the attention of the editors

Civil procedure -- Costs -- Security for costs -- Motion judge erring in failing to consider whether corporate plaintiff had access through its shareholder to means to post security for costs.

The plaintiff corporation was suing the defendants for damages in the approximate amount of $180,000 for unpaid invoices rendered for creative and design work. The defendants brought an unsuccessful motion for security for costs pursuant to rule 56.01(d) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The motion judge found that an order for security for costs would entirely defeat the plaintiff's right to seek a remedy. The defendants appealed.

Held, the appeal should be allowed. [page214]

On the evidence, the plaintiff was impecunious only in the narrow and limited sense that it was inactive and without assets. However, evidence of financial difficulties does not necessarily equate with impecuniosity. The key question was whether the plaintiff had access to assets or funds. It was not

established by compelling evidence that the plaintiff did not have access through its shareholder to the means to post security for costs. There was no evidence of unsuccessful attempts by the plaintiff to borrow or raise funds. The plaintiff was not impecunious in the extended sense. While it could not realistically be said that the action was plainly devoid of merit, the record did not suggest anything approaching a certainty of success. Considering the financial circumstances of the plaintiff and the nature of its claim, security for costs should be ordered, but not in the full estimated amount. The plaintiff was ordered to post $50,000 in two instalments of $25,000 each.

Cases referred to

1056470 Ontario Inc. v. Goh (1997), 34 O.R. (3d) 92, [1997] O.J. No. 2545, 32 O.T.C. 225, 13 C.P.C. (4th) 120, 72 A.C.W.S. (3d) 36 (Gen. Div.); 1465778 Ont. Inc. v. 1122077 Ont. Ltd., [2005] O.J. No. 5185, 144 A.C.W.S. (3d) 35 (C.A.); 671122 Ontario Ltd. v. Canadian Tire Corp. (1993), 15 O.R. (3d) 65, [1993] O.J. No. 2173, 107 D.L.R. (4th) 207, 66 O.A.C. 1, 20 C.P.C. (3d) 392, 42 A.C.W.S. (3d) 793 (C.A.); ABI Biotechnology Inc. v. Apotex Inc., [2000] M.J. No. 14, [2000] 3 W.W.R. 217, 142 Man. R. (2d) 80, 94 A.C.W.S. (3d) 242 (C.A.); Better Business Bureau of Metropolitan Toronto Inc. v. Tuz, [1999] O.J. No. 2001 (Div. Ct.); Bodnar v. Blackman (2006), 82 O.R. (3d) 423, [2006] O.J. No. 3675, 275 D.L.R. (4th) 536, 215 O.A.C. 85, 32 R.F.L. (6th) 236, 151 A.C.W.S. (3d) 261 (C.A.); Buraglia v. New Brunswick Research and Productivity Council, [1995] N.B.J. No. 177, 161 N.B.R. (2d) 197, 33 C.P.C. (3d) 213, 54 A.C.W.S. (3d) 855 (C.A.); Cabot v. Mikkelson, [2004] M.J. No. 240, 2004 MBCA 107, 242 D.L.R. (4th) 279, [2004] 10 W.W.R. 257, 187 Man. R. (2d) 104, 3 R.F.L. (6th) 269, 132 A.C.W.S. (3d) 321; Canadian Broadcasting Corp. Pension Plan (Trustee of) v. BF Realty Holdings Ltd., [2002] O.J. No. 2125, 160 O.A.C. 72, 214 D.L.R. (4th) 121, 26 B.L.R. (3d) 180, 35 C.B.R. (4th) 198, 114 A.C.W.S. (3d) 656 (C.A.); Design 19 Construction Ltd. v. Marks, [2002] O.J. No. 1091, [2002] O.T.C. 180, 22 C.P.C. (5th) 117, 115 A.C.W.S. (3d) 27 (S.C.J.); Di Paola (Re)

(2006), 84 O.R. (3d) 554, [2006] O.J. No. 4381, 217 O.A.C. 95, 26 C.B.R. (5th) 133, 37 C.P.C. (6th) 286, 152 A.C.W.S. (3d) 800 (C.A. (Chambers)); Diamond Auto Collision Inc. v. Economical Insurance Group, [2007] O.J. No. 2551, 2007 ONCA 487, 227 O.A.C. 51, 50 C.C.L.I. (4th) 213, 159 A.C.W.S. (3d) 281; Fat Mel's Restaurant v. Canadian Northern Shield Insurance Co., [1993] B.C.J. No. 507, 25 B.C.A.C. 95, 76 B.C.L.R. (2d) 231, 38 A.C.W.S. (3d) 1102 (C.A.); Han Holdings Ltd. v. MCG Opportunities Fund Ltd., [2005] O.J. No. 1183, [2005] O.T.C. 219, 138 A.C.W.S. (3d) 29 (S.C.J.); J.L. v. Montfils, [2004] O.J. No. 179, 181 O.A.C. 239, 44 C.P.C. (5th) 66, 128 A.C.W.S. (3d) 498 (C.A. (Chambers)); John Wink Ltd. v. Sico Inc. (1987), 57 O.R. (2d) 705, [1987] O.J. No. 5, 15 C.P.C. (2d) 187, 2 A.C.W.S. (3d) 323 (H.C.J.) [Leave to appeal to Div. Ct. granted [1987] O.J. No. 2318, 22 C.P.C. (2d) 311, 4 A.C.W.S. (3d) 3 (H.C.J.)]; Kallaba v. Bylykbashi, [2006] O.J. No. 545, 207 O.A.C. 60, 265 D.L.R. (4th) 320, 23 R.F.L. (6th) 235, 145 A.C.W.S. (3d) 879 (C.A.) [Leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 144]; Keephills Aggregate Co. Ltd. v. Parkland (County of) Subdivision and Appeal Board, [2003] A.J. No. 1017, 2003 ABCA 242, 348 A.R. 41, 2 C.E.L.R. (3d) 227, 42 M.P.L.R. (3d) 28, 125 A.C.W.S. (3d) 520 (Chambers); Kurzela v. 526442 Ontario Ltd. (1988), 66 O.R. (2d) 446, [1988] O.J. No. 1884, 31 O.A.C. 303, 32 C.P.C. (2d) 276, 12 A.C.W.S. (3d) 297 (Div. Ct.); Lawson v. Lawson (2006), 81 O.R. (3d) 321, [2006] O.J. No. 3179, 214 O.A.C. 94, 29 R.F.L. (6th) 8, 150 A.C.W.S. (3d) 422 (C.A.); Martel v. Martel, [2003] S.J. No. 341, 2003 SKCA 47, 49 R.F.L. (5th) 155, 123 A.C.W.S. (3d) 330; [page215] Petrowski v. Waskul, [2003] M.J. No. 151, 2003 MBCA 65, [2003] 10 W.W.R. 65, 173 Man. R. (2d) 237, 122 A.C.W.S. (3d) 733; Puma Canada Inc. v. Macaw Holdings Inc., [2003] O.J. No. 4660, [2003] O.T.C. 1021, 127 A.C.W.S. (3d) 38 (S.C.J.); Rhonmont Properties Ltd. v. Yeadon Manufacturing Ltd., [2003] O.J. No. 1883 (C.A.); Smallwood v. Sparling, (1983), 42 O.R. (2d) 53, [1983] O.J. No. 3048, 34 C.P.C. 24 at 29, 20 A.C.W.S. (2d) 55 (H.C.J.); Smith Bus Lines Ltd. v. Bank of Montreal (1987), 61 O.R. (2d) 688, [1987] O.J. No. 1197, 25 C.P.C. (2d) 255 (H.C.J.) [Leave to appeal to Div. Ct. refused (1987), 61 O.R. (2d) 688n (Div. Ct.)); Superior Salmon Farms Ltd. v. Corey Feed Mills Ltd., [1991] N.B.J. No.

500, 115 N.B.R. (2d) 265, 27 A.C.W.S. (3d) 174 (Q.B.); Warren Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd. (1986), 54 O.R. (2d) 213, [1986] O.J. No. 2364, 8 C.P.C. (2d) 1 (H.C.J.); Young v. Young (2003), 63 O.R. (3d) 112, [2003] O.J. No. 67, 223 D.L.R. (4th) 113, 168 O.A.C. 186, 34 R.F.L. (5th) 214, 119 A.C.W.S. (3d) 448 (C.A.)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 56.01

APPEAL from an order of Keenan J. dated September 2, 2005, dismissing a motion for security for costs.

D.J. Brown, for respondent.

S. Mannella, for appellants.

HILL J.: --

Introduction

[1] The appellants are the defendants in an action commenced by Crudo Creative Inc. ("Crudo") in which the respondent is seeking to recover the amount of about $180,000 against the appellants, jointly and severally, for unpaid work claimed to have been performed on behalf of Pre-Press Creative & Design Inc. ("Pre-Press").

[2] The appellants brought an unsuccessful motion for security for costs pursuant to rule 56.01(d) [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194]. On November 17, 2005, Lack J. granted leave to appeal stating in part:

> On the motion, there was no issue that the plaintiff is a corporation and has insufficient assets in Ontario to pay the costs of the defendants. One of the live issues was whether the sole shareholder o the plaintiff could raise the funds to post security. There was some evidence on the motion about his financial circumstances but he never alleged he was impecunious.

There is no analysis or finding in the reasons about the sole shareholder's ability to raise funds to post security. This is important because as sole shareholder he will benefit from any judgment and secondly in this case the plaintiff has joined the offices of the corporate defendant as defendants. It is [page216] entirely a case of "Heads I win, tails you lose" if the shareholder is not impecunious, but that issue is not dealt with in the reasons despite the reasoning in such cases as: Design 19 Construction Ltd. v. Marks, [2002] O.J. No. 1091 and the cases referred to therein. In my view, the appeal is important. It is important to the parties in the sense of not being trivial. It is also of wider importance given the number of cases in which corporate entities with no or few assets are plaintiffs. Leave to appeal granted for these reasons.

[3] For the reasons which follow, the appeal is allowed.

Overview of the Evidence

[4] The respondent, as plaintiff in the action, claims damages for unpaid invoices rendered to Pre-Press for creative and design work allegedly ordered by the appellants. The appellants deny the existence of any agreement for the supply of services and the provision of the services described in the Crudo invoices. The appellants have counterclaimed for loss of revenue and damage to goodwill on account of projects not completed on time by the respondent or in accordance with instructions.

[5] By 2001, the respondent corporation was sharing space at the same premises as Pre-Press Creative & Design Inc. Mario Crudo was the owner and sole shareholder of the respondent. According to Mr. Crudo, during 2001 and into the summer of 2002, the respondent performed creative and design work primarily on behalf of the appellants. The majority of the work the respondent claims to have performed on the appellant's behalf is said to have been undertaken between April and December 2001, with all its invoices dated September 3, 2002. Repeated requests for payment went unanswered.

[6] The appellants, as said, deny the existence of any agreement for the respondent to undertake creative and design work on its behalf. The appellants deny receipt in 2002 of the invoices dated September 3, 2002. On the appellants' version of events, an April 3, 2003 letter demanding about $180,000 was their first knowledge of the respondent's claim. According to the appellants, an April 16, 2003 request for particulars of the work allegedly performed went unanswered until September 10, 2003.

[7] The appellants point to this delay and the absence of any reference to additional receivables or bad debts in the respondent's financial statements as evidencing the illegitimacy of the respondent's claim. The respondent, through Mr. Crudo, maintains that it could not afford to pay the GST referable to the invoices in 2001 and 2002 without the prospect of the appellants paying for the work performed. [page217]

[8] In the summer of 2002, Mr. Crudo moved from the shared premises to become involved in Raw Integrated Inc. ("RAW") which was incorporated May 6, 2002. He owns half the shares of RAW for which he does creative and design work. In 2005, Mr. Crudo received about $1,000 weekly for this work.

[9] The financial statements of the respondent show it to be in a financial deficit and inactive. Mr. Crudo considers the respondent's trade name and goodwill to have value.

[10] Mr. Crudo's home is extensively mortgaged, he has a leased motor vehicle, credit card debt, and has personally guaranteed a defaulted loan of $33,000.

[11] RAW's revenues in 2003 and 2004 were respectively $843,887 and $585,807. Although RAW incurred a loss position in 2004, the company had been growing and had active clients. In 2004, RAW's wages and benefits expenses nearly doubled.

[12] Mr. Crudo has an unsecured line of credit, some mortgage-free equity in his home, and has paid down over $20,000 on a loan over three years.

[13] The court was informed that counsel estimate a ten-day trial. Pleadings and examinations are complete. Mr. Mannella stated that the appellants have incurred about $23,000 in costs to date and that further costs to completion of a trial in this matter would be approximately $86,000.

The Reasons of the Motions Court Judge

[14] At paras. 1-3 of his endorsement, the learned motion judge summarized the positions of the parties:

> Defendants move for an order for security for costs. Plaintiff says that the Plaintiff company and other related companies are without assets and unable to provide any security for costs. The Plaintiff says however that it has a good cause of action as the Plaintiff's present state of impecuniosity was brought about by the failure of the Defendants to meet their obligations to the Plaintiff as they came due. The Plaintiff says that the failure of the Defendants to make payments for work done had caused the Plaintiff to have to abandon its working premises and led to insolvency.
>
> Defendant denies the Plaintiff's claim and asserts that it had not notice of the claim until commencement of the action.
>
> Defendant asks that the Plaintiff be required to post security for costs. Plaintiff says that such requirement would disable the process of this action. Even an order for incremental security would effectively disable the Plaintiff because the Plaintiff would not be able to keep up with security orders brought on by protraction of the action.

[15] The court then cited the following passage from John Wink Ltd. v. Sico Inc. (1987), 57 O.R. (2d) 705, [1987] O.J. No. 5 (H.C.J.), at pp. 707-09 O.R.: [page218]

> The onus lies on defendant to show that there is good reason to believe that the plaintiff has insufficient assets. Thereupon the onus passes to plaintiff to show either that it has sufficient assets, or that it should be permitted to proceed to trial in spite of the lack of them . . .

. . . . .

> Injustice would be even more manifest if the impoverishment of plaintiff were caused by the very acts of which plaintiff complains in the action ... The onus on plaintiff is therefore not to show that the claim is likely to succeed. It is merely to show that it is not almost certain to fail.

[16] Austin J. gave leave to appeal to the Divisional Court from the decision of Reid J. ([1987] O.J. No. 2318, 22 C.P.C. (2d) 311 (H.C.J.)) stating at paras. 6-8:

> Reid J. on the appeal held that in the circumstances, the onus on the plaintiff was to show that its claim was not almost certain to fail. Putting it another way, he held that unless a claim is plainly devoid of merit, it should be allowed to proceed.
>
> This appears to me to be an appreciably lighter burden than is implicit in the decision of Trainor J. in Warren Industrial Feldspar Co. v. Union Carbide Can. Limited (1986), 54 O.R. (2d) 213.
>
> While the amount in issue is relatively small, the question of the appropriate burden or onus is one which must be dealt with every day. I am therefore of the view that it is desirable that leave to appeal be granted.

[17] Apparently, the Wink appeal did not succeed when the matter settled as has been noted at: Buraglia v. New Brunswick Research and Productivity Council, [1995] N.B.J. No. 177, 161 N.B.R. (2d) 197 (C.A.), at para. 4; Smith Bus Lines Ltd. v. Bank of Montreal (1987), 61 O.R. (2d) 688, [1987] O.J. No. 1197, 25 C.P.C. (2d) 255 (H.C.J.), at para. 43, leave to appeal to Div. Ct. refused (1987), 61 O.R. (2d) 688n). Some have continued to note differences between the test espoused by Reid J. in Wink and the test described by Trainor J. in Warren Industrial: see for example, Better Business Bureau of Metropolitan Toronto Inc. v. Tuz, [1999] O.J. No. 2001 (Div. Ct.), at para. 1. On the motion, and again on appeal, the parties were in agreement that the test applied by the motion

judge was correct. For the purposes of this appeal, I am prepared to accept that position.

[18] The remainder of the motion judge's reasons are as follows:

> An order for security for costs would entirely defeat the right of the Plaintiff to seek a remedy. That right should not be readily defeated where a cause of action has been asserted.

Adequacy of Reasons for Decision

[19] In the present case, from review of the reasons of the motion judge, and as became evident during argument of the [page219] appeal, the adequacy of those reasons was a real issue in determining the court's pathway through conflicting evidence as to the plaintiff's impecuniosity.

[20] The duty to give reasons for a decision is an inherent aspect of judicial responsibilities: Bodnar v. Blackman (2006), 82 O.R. (3d) 423, [2006] O.J. No. 3675, 275 D.L.R. (4th) 536 (C.A.), at p. 539 D.L.R.; Lawson v. Lawson (2006), 81 O.R. (3d) 321, [2006] O.J. No. 3179 (C.A.), at para. 9.

[21] The sufficiency of reasons is assessed on a pragmatic and functional approach having regard to three rationales -- the importance of informing the unsuccessful party the reasons for having lost, maintaining confidence in the administration of justice system, and facilitating meaningful appellate review: Young v. Young (2003), 63 O.R. (3d) 112, [2003] O.J. No. 67 (C.A.), at p. 118 O.R. These rationale apply to the work of application and motion judges: Bodnar, at pp. 539-42 D.L.R.; Cabot v. Mikkelson, [2004] M.J. No. 240, 2004 MBCA 107, at para. 36; Kallaba v. Bylykbashi, [2006] O.J. No. 545, 207 O.A.C. 60 (C.A.), at para. 146; Martel v. Martel, [2003] S.J. No. 341, 2003 SKCA 47, at para. 3.

[22] A court's reasons, which need not be perfect or lengthy (Lawson, at paras. 9-10; Bodnar, at p. 542 D.L.R.) nor necessarily eloquent (Petrowski v. Waskul, [2003] M.J. No. 151, 2003 MBCA 65, at para. 13) and which need not refer to all

aspects of the evidence or every point raised in the case (Canadian Broadcasting Corp. Pension Plan (Trustee of) v. BF Realty Holdings Ltd., [2002] O.J. No. 2125, 160 O.A.C. 72 (C.A.), at para. 64), should nevertheless be "sufficient to enable the general public" and a reviewing court "to know whether the applicable legal principles and evidence were properly considered": Canadian Broadcasting Corporation Pension Plan (Trustee of), at para. 64.

[23] Whether reasons permit meaningful review is a contextual one having regard to their purpose and taking into consideration a number of factors including the nature of the issues, the evidence and record of the proceeding, the positions and representations of the parties, implicit findings, and the extent to which the reason for the judge's conclusion is patent on the record: Diamond Auto Collision Inc. v. Economical Insurance Group, [2007] O.J. No. 2551, 2007 ONCA 487, at para. 12; Keephills Aggregate Co. Ltd. v. Parkland (County of) Subdivision and Appeal Board, [2003] A.J. No. 1017, 2003 ABCA 242 (Chambers)), at para. 22. In some instances, the facts speak for themselves and the basis of the decision is self-evident. On other occasions, with review of the totality of record, the basis for a decision becomes apparent despite the brevity or absence of reasons. [page220]

[24] Some analysis of the relevant facts and legal principles, however brief, is ordinarily necessary: Petrowski, at para. 13. "Standing alone, conclusory and generic reasons, in the sense that they could apply equally to any other case, do not permit appellate review": Diamond, at paras. 12, 43. Reference to the governing caselaw precedent and a statement of satisfaction that the test has or has not been met amounts to conclusory reasons risking a reviewing court not having "confidence that all relevant considerations have been addressed": Young, at p. 118 O.R.

[25] As a general rule, an appellate court maintains a deferential posture toward a judge's findings and especially so with findings of fact unless there exists some palpable and overriding error. Undoubtedly, a tension exists between the right to adequate reasons and the need for appellate deference,

but where an order or decision is made without adequate reasons, "unless the reasons are implicit or patent on the record, an appellate court has no access to the underlying reasons ... and cannot afford it deference": Lawson, at para. 13; Bodnar, at p. 541 D.L.R.

[26] The brief reasons in this case record the positions of the parties, the Wink test interpreting rule 56.01, and provide a conclusory statement that security for costs would entirely defeat the respondent's right to seek a remedy. There is no analysis of the evidence relating to the respondent's ability, or lack thereof, to access funding through its shareholder or any related company in order to post security for costs. The assessment of the evidence leading to the equitable relief extended the respondent from security for costs is not apparent. In these circumstances, the reasons impede meaningful review and eliminate the deference ordinarily owed the primary fact-finder. This is not intended as a criticism of the motion judge given the well-recognized pressing demands on motions judges (Bodnar, at p. 542 D.L.R.; Petrowski, at para. 13) and in particular having regard to his presiding in a jurisdiction notorious for choked civil motions lists and inadequate judicial resources.

Analysis

[27] Rule 56.01(1)(d) reads as follows:

> 56.01(1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> . . . . .
>
> (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or [page221] applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

[28] Determining whether it is "just" to make an order for security for costs is not an onerous threshold: Puma Canada Inc. v. Macaw Holdings Inc., [2003] O.J. No. 4660, [2003]

O.T.C. 1021 (S.C.J.), at para. 9. A balancing is essential with due regard to the purpose of affording defendants a reasonable measure of protection for their costs but also with regard to the potential impact on a plaintiff: 671122 Ontario Ltd. v. Canadian Tire Corp. (1993), 15 O.R. (3d) 65, [1993] O.J. No. 2173 (C.A.), at p. 67 O.R. The court has always exercised a broad discretion in deciding whether security for costs is just in the circumstances: Smallwood v. Sparling (1983), 42 O.R. (2d) 53, [1983] O.J. No. 3048 (H.C.J.), at pp. 56-57 O.R.; Warren Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd. (1986), 54 O.R. (2d) 213, [1986] O.J. No. 2364 (H.C.J.), at pp. 218, 220 O.R. While the standard of review on appeal ordinarily extends significant deference to the initial decision-maker (Warren Industrial, at p. 218 O.R.; Han Holdings Ltd. v. MCG Opportunities Fund Ltd., [2005] O.J. No. 1183, [2005] O.T.C. 219 (S.C.J.), at para. 11), the state of the reasons here and a consideration of the totality of the record do not warrant deference to the motion judge's conclusion.

[29] There was no dispute that on the record before the motions court there was good reason to believe the appellants established the respondent was a corporation with insufficient assets in Ontario to pay the costs of the appellants if Crudo was unsuccessful at trial. In these circumstances, the appellants had a prima facie right to security for costs.

[30] In response, the respondent made no attempt to demonstrate that it in fact had sufficient assets to meet potential costs obligations to the appellants should the action progress to its determination.

[31] As noted by Sutherland J. in Smith Bus Lines, at para. 43, "The term 'impecuniosity' does not appear in the rule; it is a term introduced as part of the judicial gloss upon the rule" relating to security for costs. On the evidence, the respondent corporation is impecunious only in the narrow and limited sense that it is inactive and without assets. However, "[e]vidence of financial difficulties does not necessarily equate with impecuniosity" to be able to post security for costs: Han Holdings Ltd., at para. 18.

[32] The key question here is whether the respondent has access to assets or funds: Di Paola (Re) (2006), 84 O.R. (3d) 554, [2006] O.J. No. 4381 (C.A. (Chambers)), at para. 23 (whether assets "available to it to fund the appeal. Presumably, its appeal is being funded by some source outside of the company"); [page222] Rhonmont Properties Ltd. v. Yeadon Manufacturing Ltd., [2003] O.J. No. 1883 (C.A.), at para. 5 (corporation "not impecunious in the extended sense that the shareholders and principals of the corporation are unable to fund security for costs"); Burgalia, at para. 5 quoting Superior Salmon Farms Ltd. v. Corey Feed Mills Ltd., [1991] N.B.J. No. 500, 115 N.B.R. (2d) 265 (Q.B.), at pp. 269-70 N.B.R. ("Obviously someone is prepared to finance the prosecution of the action. That person or persons should also be prepared to either provide security for the costs of the defendants in the event the claim fails or to establish that security cannot be raised."); Smith Bus Lines, at para. 43 (evidence that "amount of the security is not only not possessed by the plaintiff but is not available to it"); Han Holdings Ltd., at para. 18 ("There was evidence ... that certainly raised the possibility that Han had access to funds"); see also Kurzela v. 526442 Ontario Ltd. (1988), 66 O.R. (2d) 446, [1988] O.J. No. 1884 (Div. Ct.), at pp. 447-48 O.R.; ABI Biotechnology Inc. v. Apotex Inc., [2000] M.J. No. 14, [2000] 3 W.W.R. 217 (C.A.), at paras. 45-46; 1056470 Ontario Inc. v. Goh (1997), 34 O.R. (3d) 92, [1997] O.J. No. 2545 (Gen. Div.), at pp. 95-96 O.R.

[33] A corporate plaintiff carries a significant burden of establishing direct and indirect impoverishment: Design 19 Construction Ltd. v. Marks, [2002] O.J. No. 1091, [2002] O.T.C. 180 (S.C.J.), at para. 8. Rule 56.01(d) and its equivalents are clearly intended to place corporate plaintiffs in a more vulnerable position than plaintiffs who are individuals: 671122 Ont. Ltd., at p. 67 O.R.; ABI Biotechnology, at paras. 34, 36, 45, 47; Fat Mel's Restaurant v. Canadian Northern Shield Insurance Co., [1993] B.C.J. No. 507, 76 B.C.L.R. (2d) 231 (C.A.), at para. 27.

[34] On the record here, it has not been established by compelling evidence that the respondent does not have access

through its shareholder to the means to post security for costs. In this sense, the respondent is not impecunious in the extended sense. There is no evidence of unsuccessful attempts by the respondent to borrow or raise funds. The respondent is funding its action and Mr. Crudo, owner and employee of a similar corporate entity, is on the totality of the evidence, far from indigent.

[35] While not essential to determination of the appeal, given the finding as to impecuniosity, I am of the view that no injustice, in the broader sense of unfair defeat or hindrance of the respondent's claim, is made out on the existing record. There is no evidence that the rule 56.01 motion was used in any oppressive way to stifle or block the respondent's action. Further, as to the merits of the claim, while the appellants submitted that their evidence on the motion raised doubts as to the strength of the respondent's [page223] case and its likelihood of success, it could not realistically be said that Crudo's action is "plainly devoid of merit" (J.L. v. Montfils, [2004] O.J. No. 179, 181 O.A.C. 239 (C.A. (Chambers)), at para. 17; Puma Canada Inc., at para. 15) or frivolous or unfounded (1465778 Ont. Inc. v. 1122077 Ont. Ltd., [2005] O.J. No. 5185, 144 A.C.W.S. (3d) 35 (C.A.), at para. 3; Buraglia at paras. 6, 10). That said, the record does not cogently suggest anything approaching a certainty of success for the respondent.
Conclusion

[36] The court has a discretion, in furtherance of a balanced and just result, to order less than the requested amount of security. Considering the financial circumstances of the respondent and the nature of its claim against the appellants, I would not order posting of security in the full estimated amount.

[37] Security for costs is ordered by cash, bond or other security instrument satisfactory to the appellants, acting reasonably, in the following amounts and schedule. Twenty-five [thousand] ($25,000) within 60 days of this order and a further twenty-five thousand ($25,000) on or before March 3, 2008.

[38] The appellants are entitled to their costs of the leave application and this appeal. In the event counsel are unable to agree on the quantum of costs, the parties shall exchange and file brief written costs submissions within 30 days.

Appeal allowed.

NOVA SCOTIA COURT OF APPEAL
Citation: *Doncaster v. Field*, 2015 NSCA 83

Date: 20150903
Docket: CA 434858
Registry: Halifax

Between:

Ralph Ivan Doncaster

Appellant

v.

Jennifer Lynn Field

Respondent

Judge:	Farrar, J.A.
Motion Heard:	August 20, 2015, in Halifax, Nova Scotia in Chambers
Held:	Motion granted.
Counsel:	Appellant in person Janet M. Stevenson, for the respondent

Decision:

Overview

[1] The appellant and respondent's ongoing divorce proceeding has spawned a number of decisions and appeals. It has also resulted in several costs awards against Mr. Doncaster, in favour of Ms. Field, totalling in excess of $82,000.

[2] Mr. Doncaster also has costs awards against him in other proceedings approximating $2,700.

[3] Fifty thousand dollars of those costs awards are as a result of the decision subject to this appeal.

[4] Ms. Field has filed a motion for security for costs seeking an order staying Mr. Doncaster's appeal pending payment of the $50,000 costs awarded below and requiring him to post $15,000 as security for costs in this appeal.

[5] The matter was originally scheduled to be heard on August 6. Mr. Doncaster requested an adjournment to August 20 which I granted. I heard the parties on August 20 in Chambers and at the conclusion of argument reserved decision. For the reasons that follow, I allow the motion for security for costs in the amount of $15,000.

Background

[6] Mr. Doncaster's most recent appeal relates to the decision of Bourgeois, J. (as she was then) released on August 21, 2014 (2014 NSSC 312, unreported) with respect to the parties' divorce trial which was heard on February 20, 21, 24, April 2 and May 2, 2014.

[7] The corollary relief order was taken out on December 3, 2014. Mr. Doncaster filed his Notice of Appeal on December 29, 2014. Mr. Doncaster raises the following grounds of appeal:

1. Justice Bourgeois misapprehended the evidence;
2. Justice Bourgeois erred in the application of trust law;
3. Justice Bourgeois failed to take judicial notice of National Bank's purchase of Altamira Investment Services;

4. Justice Bourgeois' conclusion that 100% of the post-separation deposits to my CIBC account were matrimonial assets is unreasonable and contradicted by the evidence;
5. Justice Bourgeois made material accounting errors in the division of assets;
6. Justice Bourgeois erred in setting the valuation date of assets;
7. Justice Chipman had no jurisdiction to issue an order;
8. the Order omits Justice Bourgeois' finding that the CRA income tax assessment of approximately $400,000 is matrimonial debt;
9. such further and other grounds as may appear on the record.

[8] As an aside, it is clear from the trial judge's decision she found the CRA assessment was a matrimonial debt. (see ¶50). I indicated to Mr. Doncaster at the Chambers hearing in this matter, if he was concerned about the omission in the order that the CRA income tax assessment was a matrimonial debt (ground 8 above), his remedy would be to have the order corrected pursuant to Rule 78.08 which provides:

> **78.08** A judge may do any of the following, although a final order has been issued:
>
> (a) correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order;

[9] In support of her motion the respondent filed the affidavit of Roxanne Ayer, the office manager employed by the respondent counsel's law firm. In response to the motion, Mr. Doncaster filed his own affidavit. The affidavit addresses Mr. Doncaster's impecuniosity, it does not address the merits of his appeal.

[10] In addition, Mr. Doncaster, on August 13 filed a letter with the Court advising that he has made a consumer proposal under the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3 ("**BIA**") with Grant Thornton agreeing to act as the trustee. He suggests in his correspondence that this creates an automatic stay of the security for costs motion. I will address that issue in more detail later. On August 13, as well, he filed a copy of a consumer proposal and finally on August 19 he filed a Certificate of Filing of a Consumer Proposal from Industry Canada.

Issues

1. Does the filing of a consumer proposal act as an automatic stay of the respondent's motion for security for costs?
2. If it does not, is this the proper case for awarding security for costs pending appeal?

Issue #1 Does the filing of a consumer proposal act as an automatic stay of the respondents motion for security for costs?

[11] The short answer to this question is "no". The **BIA** provides a stay of proceedings applies under s. 69.2 (1) of the **BIA** to "any action, execution or other proceedings [against the debtor], for the recovery of a claim provable in bankruptcy." Claims provable in bankruptcy are "[a]ll debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt ...". (**BIA**, s. 121(1))

[12] The issue of whether costs are provable claims under the **BIA** was addressed by the Yukon Supreme Court in **Golden Hill Ventures Limited Partnership v. Ross Mining Limited**, 2012 YKSC 102.

[13] Veale J. reviewed the case law on the issue in detail, albeit in a different context and held:

> 25 In terms of whether court costs are provable claims, counsel provided me with a line of cases that derive from the UK bankruptcy case of *Glenister v. Rowe* (1999), [2000] Ch. 76, [1999] EWCA Civ 1221 (Eng. C.A.). In *Glenister*, it was common ground that if court costs are a "contingent liability" they are a "bankruptcy debt" and the discharge of the bankruptcy would release the bankrupt from the debt. The corollary is that court costs incurred after the date of bankruptcy are not a contingent liability at the date of the bankruptcy. In concluding that the costs in question were not a contingent liability on the date of the bankruptcy and therefore payable by the discharged bankrupt, the Court of Appeal gave the following reasons at p. 84:
>
> > 1. Costs of legal proceedings are in the discretion of the court. Until an order for payment of costs is made there is no obligation or liability to pay them and there is no right to recover them.
>
> 26 The Court went on to say that an "order for costs is a "contingency" which may or may not happen ...". It concluded that no liability can arise simply by

reason of a claim for costs made in a court proceeding. Simply put, the court concluded that, because of the discretionary nature of an award of court costs, there is no liability, contingent or otherwise, until an order is made.

[14] The Court went on to cite a number of Canadian cases and concluded:

> 33 I note that the cases just cited are consistent with the "Claims Provable" commentary in Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., looseleaf (Toronto: Carswell, 2009):
>
> > (b) Defendant's Costs
> >
> > If an unsuccessful action is brought by a debtor and he or she is ordered to pay costs or if a judgment is given against him or her before he or she becomes bankrupt, the costs are a provable claim. On the other hand, if no judgment is given against him or her and no order is made for payment of costs until after he or she becomes bankrupt, costs are not a provable debt. In such a case, there is no provable debt to which the costs are incident and there is no liability to pay by reason of any obligation incurred by the bankrupt before bankruptcy, nor are the costs a contingent liability to which the debtor can be said to be subject at the date of his or her bankruptcy: *Re British Gold Fields of West Africa Ltd.*,[[1899] 2 Ch 7]. (emphasis added)
>
> 34 The recent Supreme Court of Canada decision in *Newfoundland and Labrador v. Abitibi Bowater Inc.*, 2012 SCC 67 (S.C.C.), confirms this principle, albeit in a different context. In that case, a Companies' Creditors Arrangement Act Court judge concluded that the filing of a claim by the Environmental Protection Agency before the date of bankruptcy should be pursued as a provable claim. This conclusion was upheld by the Supreme Court of Canada. The general principles were set out in para. 26 of that judgment as follows:
>
> > These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. ...

[15] Veale J. went on to conclude that the court costs, which were discretionary and which were awarded after the filing date of the bankruptcy, were not an obligation or a liability until after the filing date of the proposal on November 25, 2009 and, therefore, were not a claim provable in bankruptcy.

[16] The essential questions are, therefore, whether the costs are: (1) a debt that the insolvent or bankrupt person was subject to at the time he filed for bankruptcy or made a proposal; or (2) a debt which the person incurred prior to the proposal or bankruptcy and may become subject to in the future.

[17] A security for costs award does not fit into either of these two categories. The nature of security for costs was such that it is not a claim provable in bankruptcy since it is not actually a debt or liability that would be owed by the payor. Indeed, it may never become a debt or a liability if Mr. Doncaster is successful on his appeal. Whether the security would be forfeited by Mr. Doncaster is contingent on future judgments in these civil proceedings and is subject to the complete discretion of the court.

[18] The award of security for costs does not create a debt from Mr. Doncaster to Ms. Field nor does it create a debt to the court and, therefore, is not a claim provable in bankruptcy. For this reason alone I do not accept Mr. Doncaster's argument on this point.

[19] I would also dismiss the argument on the basis that Ms. Field' s motion for security for costs is not commencing or continuing an "action, execution or other proceeding, for the recovery of a claim provable in bankruptcy" (**BIA**, s. 69.2(1)). The **BIA** in s. 69.2(1) provides that:

> "no creditor has any remedy ... or shall commence or continue any action, execution or other proceeding, for the recovery of a claim provable in bankruptcy"?
>
> (Emphasis added)

[20] While Ms. Field has filed this motion, it is in response to Mr. Doncaster's appeal. Here, the insolvent person has commenced and continued the proceeding, not Ms. Field.

[21] Finally, to give effect to Mr. Doncaster's argument would allow insolvent persons to exploit the automatic stay under s. 69.2(1) to be immune from costs in future proceedings they instigate. This is of particular concern in the present case where Mr. Doncaster has an extensive history of litigation and his failure to make any significant payment towards existing costs orders.

[22] In conclusion, I am not satisfied that Mr. Doncaster's filing of a consumer proposal operates as an automatic stay of the motion for security for costs.

[23] It may very well operate as a stay of the costs order of Campbell J. below. It is not necessary to decide that issue on the security for costs motion and I decline to do so without the parties, and in particular, Ms. Field having an opportunity to thoroughly brief and address the issue. However, because of my concerns I am not prepared to stay the appeal pending payment of the lower court's cost award.

Issue #2 If it does not, is this the proper case for awarding security for costs pending appeal?

[24] Rule 90.42 provides:

> **90.42** (1) A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.

[25] In **Geophysical Services Inc. v. Sable Mary Seismic Inc.**, 2011 NSCA 40, Beveridge J.A. thoroughly reviewed the law with respect to security for costs on an appeal. The applicant must establish "special circumstances" in order for her motion to be granted. Beveridge J.A. described "special circumstances" in **Geophysical**:

> [6] There are a variety of scenarios that may constitute "special circumstances". There is no need to list them. All bear on the issue of the degree of risk that if the appellant is unsuccessful the respondent will be unable to collect his costs on the appeal. In *Williams Lake Conservation Co. v. Kimberley-Lloyd Development Ltd.*, 2005 NSCA 44, Fichaud J.A. emphasized, merely a risk, without more, that an appellant may be unable to afford a costs award is insufficient to constitute "special circumstances". He wrote:
>
> > [11] Generally, a risk, without more, that the appellant may be unable to afford a costs award is insufficient to establish "special circumstances." It is usually necessary that there be evidence that, in the past, "the appellant has acted in an insolvent manner toward the respondent" which gives the respondent an objective basis to be concerned about his recovery of prospective appeal costs. The example which most often has appeared and supported an order for security is a past and continuing failure by the appellant to pay a costs award or to satisfy a money judgment: *Frost v. Herman*, at ¶ 9-10; *MacDonnell v. Campbell*, 2001 NSCA 123, at ¶ 4-5; *Leddicote*, at ¶ 15-16; *White* at ¶ 4-7; *Monette v. Jordan* (1997), 163 N.S.R. (2d) 75, at ¶ 7; *Smith v. Heron*, at ¶ 15-17; *Jessome v. Walsh* at ¶ 16-19.

> See also *Branch Tree Nursery & Landscaping Ltd. v. J & P Reid Developments Ltd.*, 2006 NSCA 131.
>
> [7] However, the demonstration of special circumstances does not equate to an automatic order of security for costs. It is a necessary condition that must be satisfied, but the court maintains a discretion not to make such an order, if the order would prevent a good faith appellant who is truly without resources from being able to prosecute an arguable appeal. This has sometimes been expressed as a need to be cautious before granting such an order lest a party be effectively denied their right to appeal merely as a result of impecuniosity (*2301072 Nova Scotia Ltd. v. Lienaux*, 2007 NSCA 28, at para. 6; *Smith v. Michelin North America (Canada) Inc.*, 2008 NSCA 52).

[26] In **Lienaux v. Norbridge Management Ltd.**, 2013 NSCA 3, Bryson, J.A. held that:

> [18] Norbridge submits that there is extensive evidence that Mr. Lienaux has behaved in an insolvent manner and, in particular, has failed to pay costs in related proceedings (2007 NSCA 28; 2001 NSCA 122; 2011 NSCA 94). In addition to other unpaid obligations, Mr. Lienaux has not paid four costs awards exceeding $40,000 in total. Chief Justice MacDonald's observation in 2007, remains apposite:
>
> > [12] In conclusion, there are in this appeal special circumstances justifying a security for costs order. In fact, given the appellants' horrendous record when it comes to honouring costs obligations, it is hard to imagine a more appropriate circumstance for such relief. In short, I am not prepared allow the appellants to again take the respondent through yet another appeal without providing security. [2007 NSCA 28]

[27] There is an abundance of evidence to establish that Mr. Doncaster has behaved in an insolvent manner and has failed to pay costs in related proceedings. I am satisfied that the respondent has established "special circumstances" which would justify an award of costs.

[28] However, as noted by Justice Beveridge in **Geophysical**, that does not automatically equate to an order for security for costs.

[29] Mr. Doncaster pleads impecuniosity which he says is evidenced by his creditor proposal and the information contained in his affidavit. He argues that to order him to provide security for costs would be to prevent him from proceeding with a meritorious appeal. Assuming that Mr. Doncaster is impecunious, impecuniosity does not offer immunity from security for costs in every case.

[30] As noted by Bryson J.A. in **Norbridge, supra**:

> [25] Norbridge also argues that even if impecuniosity prevents a hearing of the appeal, security can still be ordered. It says that this case is very much like two previous cases involving Mr. Lienaux. In 2011, Justice Saunders said:
>
> > [21] Had I reached the conclusion that the appellant was impecunious, or that compelling him to post security would likely terminate the appeal, I would nonetheless have ordered security for costs in favour of the respondents, so as to do justice between the parties in the face of this chronicle of discord which I would characterize as extraordinary and unparalleled. (2011 NSCA 94)
>
> And in 2001, Justice Bateman commented in *Campbell v. Turner-Lienaux*, (2001 NSCA 122):
>
> > [35] I am confident that, as they have in the past, the appellants will find the resources to advance the appeal in the face of a security for costs order, if they continue to believe in the merits of their cause. I add, however, that, in these circumstances, a consideration of the interests of not only the appellants but also the respondent leads me to conclude that an order for security is appropriate even should the result be termination of the litigation. In other words, even had I been satisfied that the appellants are impecunious I would have ordered security.

(See also **Doncaster v. Chignecto-Central Regional School Board**, 2013 NSCA 59, ¶38).

[31] Even if I was satisfied that Mr. Doncaster was impecunious; having regard to Mr. Doncaster's litigious history, his failure to honour costs awards in the past, and the number of costs awards against him, leads me to the conclusion that an order for security for costs is appropriate in these circumstances. As in **Norbridge, supra**, I am not prepared to allow Mr. Doncaster to proceed with another appeal without posting security.

[32] As a result, an order will issue requiring Mr. Doncaster to post security for costs in the amount of $15,000 on or before October 1, 2015.

[33] I have chosen the date of October 1 having regard to the appeal which is scheduled for December 10 and the respondent's factum which is due on October 30, 2015. If by October 1 security for costs is not posted, the respondent will have

an opportunity to make application to dismiss the appeal before having to prepare her factum.

Conclusion

[34] I order the appellant to post $15,000 as security for costs for this appeal no later than October 1, 2015, failing which the respondent will be at liberty to bring a motion to have the appeal dismissed. I fix costs on this motion at $2,000 inclusive of disbursements, payable in the cause.

Farrar, J.A.

Her Majesty The Queen in Right of the Province of Newfoundland and Labrador *Appellant*

v.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders) *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty The Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada *Interveners*

Indexed as: Newfoundland and Labrador *v.* AbitibiBowater Inc.

2012 SCC 67

File No.: 33797.

2011: November 16; 2012: December 7.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and Insolvency — Provable claims — Contingent claims — Corporation filing for insolvency protection — Province issuing environmental protection orders against corporation and seeking declaration that orders not "claims" under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), and not subject to claims procedure order — Whether environmental protection orders are monetary claims that

Sa Majesté la Reine du chef de la province de Terre-Neuve-et-Labrador *Appelante*

c.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., comité ad hoc des créanciers obligataires, comité ad hoc des porteurs de billets garantis de premier rang et U.S. Bank National Association (fiduciaire désigné par l'acte constitutif pour les porteurs de billets garantis de premier rang) *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Sa Majesté la Reine du chef de la Colombie-Britannique, Ernst & Young Inc., en sa qualité de contrôleur, et Les Ami(e)s de la Terre Canada *Intervenants*

Répertorié : Terre-Neuve-et-Labrador *c.* AbitibiBowater Inc.

2012 CSC 67

N° du greffe : 33797.

2011 : 16 novembre; 2012 : 7 décembre.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Réclamations prouvables — Réclamations éventuelles — Demande de protection contre l'insolvabilité par une société — Ordonnances environnementales émises par la province contre la société et demande, par la province, d'un jugement déclarant que les ordonnances ne constituent pas des « réclamations » aux termes de la Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985,

at the outset of the proceedings. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims or orders on the basis of form alone. If the order is not framed in monetary terms, the *CCAA* court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process in a case such as the one at bar. First, there must be a debt, a liability or an obligation to a creditor. In this case, the first criterion was met because the Province had identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred as of a specific time. This requirement was also met since the environmental damage had occurred before the time of the *CCAA* proceedings. Third, it must be possible to attach a monetary value to the debt, liability or obligation. The present case turns on this third requirement, and the question is whether orders that are not expressed in monetary terms can be translated into such terms.

A claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred. The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative. In the context of an environmental protection order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim. If there is sufficient certainty in this regard, the court will conclude that the order can be subject to the insolvency process.

certaines peuvent l'être en dépit du fait qu'elles ne sont pas quantifiées dès le début des procédures. En matière environnementale, le tribunal chargé de l'application de la *LACC* doit déterminer s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers l'organisme administratif qui a prononcé l'ordonnance. En pareil cas, la question pertinente ne se résume pas à déterminer si l'organisme a formellement exercé son pouvoir de réclamer une dette. Le tribunal qui évalue une réclamation ou une ordonnance ne se limite pas à un examen de sa forme. Si l'ordonnance n'est pas formulée en termes pécuniaires, le tribunal doit déterminer, en fonction des faits en cause et du cadre législatif applicable, si elle constitue une réclamation qui sera assujettie au processus de réclamation.

Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité dans une affaire telle celle en l'espèce, les ordonnances doivent satisfaire à trois conditions. Premièrement, il doit s'agir d'une dette, d'un engagement ou d'une obligation envers un créancier. En l'espèce, il a été satisfait à la première condition puisque la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance à un moment précis. Il a également été satisfait à cette condition puisque les dommages environnementaux sont survenus avant que les procédures en vertu de la *LACC* ne soient entamées. Troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. La présente affaire est centrée sur cette troisième condition, et la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes.

Il est possible de faire valoir une réclamation dans le cadre de procédures d'insolvabilité même si elle dépend d'un événement non encore survenu. Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural. Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité.

Per LeBel J. (dissenting): The test proposed by the Chief Justice according to which the evidence must show that there is a "likelihood approaching certainty" that the Province would remediate the contamination itself is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J. best reflects how both the common law and the civil law view and deal with contingent claims. Applying that test, the appeal should be allowed on the basis that there is no evidence that the Province intends to perform the remedial work itself.

Le juge LeBel (dissident) : Le critère que propose la Juge en chef, selon lequel la preuve doit démontrer une « probabilité proche de la certitude » que la province se chargerait de la décontamination, ne constitue pas le critère établi pour déterminer si, et de quelle façon, une réclamation éventuelle peut être liquidée en droit de la faillite et de l'insolvabilité. Le critère de ce qui est « suffisamment certain » qu'énonce la juge Deschamps reflète mieux la façon dont la common law et le droit civil envisagent et traitent les réclamations éventuelles. En appliquant ce critère, il y aurait lieu d'accueillir le pourvoi puisqu'aucune preuve ne confirme l'intention de la province d'exécuter elle-même les travaux de décontamination.

Cases Cited

By Deschamps J.

Distinguished: *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **referred to:** *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624.

By McLachlin C.J. (dissenting)

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Shirley (Re)* (1995), 129 D.L.R. (4th) 105; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

Statutes and Regulations Cited

Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, c. A-1.01.

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27, s. 9.

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, S.C. 1997, c. 12.

Jurisprudence

Citée par la juge Deschamps

Distinction d'avec l'arrêt : *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **arrêts mentionnés :** *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Canada c. McLarty*, 2008 CSC 26, [2008] 2 R.C.S. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624.

Citée par la juge en chef McLachlin (dissidente)

Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd. (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Shirley (Re)* (1995), 129 D.L.R. (4th) 105; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) c. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1; *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

Lois et règlements cités

Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, ch. A-1.01.

Code civil du Québec, L.Q. 1991, ch. 64, art. 1497, 1508, 1513.

Environmental Protection Act, S.N.L. 2002, ch. E-14.2, art. 99, 102(3).

Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des

ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

[36] The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

[37] The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met. For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude

le contexte d'une proposition concordataire présentée par une société ou d'une réorganisation. Dans ces cas, l'objectif que sous-tend une interprétation large est non seulement de garantir l'équité entre créanciers, mais aussi de permettre au débiteur de prendre un nouveau départ dans les meilleures conditions possibles à la suite de l'approbation d'une proposition ou d'un arrangement.

[36] Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural (*Confederation Treasury Service Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire afin d'obtenir le remboursement de ses débours. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité.

[37] Lorsqu'il détermine si une ordonnance constitue une réclamation prouvable, le tribunal chargé de l'application de la *LACC* doit, dans une certaine mesure, examiner les actes posés par l'organisme administratif. Cet examen se rapproche à certains égards de celui d'un contrôle judiciaire. La différence se situe, toutefois, au niveau de l'objet de l'évaluation que doit faire le tribunal. Son examen ne porte pas sur l'exercice du pouvoir discrétionnaire par l'organisme administratif. Il doit plutôt déterminer si le contexte factuel indique que les conditions requises pour que l'ordonnance soit incluse dans le processus de réclamations sont respectées. Par exemple, si le débiteur continue d'exercer les activités faisant l'objet de l'intervention de l'organisme administratif, il est fort possible que le tribunal conclue que l'ordonnance ne peut être incorporée au processus d'insolvabilité parce que ces activités et les dommages en découlant se poursuivront après la réorganisation et qu'elles excéderont donc le délai prescrit pour la production d'une

need for fairness against the debtor's need to make a fresh start.

[48] Whether the regulatory body has a contingent claim is a determination that must be grounded in the facts of each case. Generally, a regulatory body has discretion under environmental legislation to decide how best to ensure that regulatory obligations are met. Although the court should take care to avoid interfering with that discretion, the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings.

V. Application

[49] I now turn to the application of the principles discussed above to the case at bar. This case does not turn on whether the Province is the creditor of an obligation or whether damage had occurred as of the relevant date. Those requirements are easily satisfied, since the Province had identified itself as a creditor by resorting to *EPA* enforcement mechanisms and since the damage had occurred before the time of the *CCAA* proceedings. Rather, the issue centres on the third requirement: that the orders meet the criterion for admission as a pecuniary claim. The claim was contingent to the extent that the Province had not yet formally exercised its power to ask for the payment of money. The question is whether it was sufficiently certain that the orders would eventually result in a monetary claim. To the *CCAA* judge, there was no doubt that the answer was yes.

le pouvoir de décider qu'une ordonnance d'un organisme administratif peut constituer une réclamation; ces modifications ont de plus établi des critères applicables à la suspension de ces ordonnances (art. 65, modifiant la *LACC* par l'ajout de l'art. 11.1). Ces modifications visaient à établir un équilibre entre le besoin de traiter les créanciers de façon équitable et celui de permettre au débiteur de prendre un nouveau départ.

[48] La détermination qu'une ordonnance d'un organisme administratif constitue une réclamation éventuelle doit être fondée sur les faits de chaque affaire. La législation en matière d'environnement accorde généralement à un organisme administratif un pouvoir discrétionnaire de décider de la meilleure façon d'assurer le respect des obligations découlant de la réglementation. Quoique le tribunal doive se garder de s'ingérer dans l'exercice du pouvoir discrétionnaire de ces organismes, les mesures qu'ils prennent peuvent néanmoins faire l'objet d'un examen dans le cadre de procédures engagées sous le régime fédéral de l'insolvabilité.

V. Application

[49] J'aborde maintenant l'application des principes énoncés ci-dessus à l'affaire dont notre Cour est saisie. En l'espèce, le débat n'est pas centré sur la question de savoir si la province est créancière d'une obligation ou si des dommages étaient survenus à la date pertinente. Il est facile de répondre à ces questions étant donné que la province s'est elle-même présentée comme créancière en ayant recours aux mécanismes d'application de l'*EPA* et que les dommages sont survenus avant que les procédures en vertu de la *LACC* ne soient entamées. Le débat porte plutôt sur la troisième condition, celle qui consiste à savoir si les ordonnances satisfont au critère d'admissibilité à titre de réclamation pécuniaire. La réclamation était éventuelle dans la mesure où la province n'avait pas formellement exercé son pouvoir de demander paiement d'une somme d'argent. La question est de savoir s'il était suffisamment certain que l'ordonnance mènerait éventuellement à la production d'une réclamation pécuniaire. Pour le juge de première instance, une réponse affirmative ne faisait pas de doute.

[61] Thus, I prefer to take the approach generally taken for all contingent claims. In my view, the *CCAA* court is entitled to take all relevant facts into consideration in making the relevant determination. Under this approach, the contingency to be assessed in a case such as this is whether it is sufficiently certain that the regulatory body will perform remediation work and be in a position to assert a monetary claim.

[62] Finally, the Chief Justice would review the *CCAA* court's findings of fact. I would instead defer to them. On those findings, applying any legal standard, be it the one proposed by the Chief Justice or the one I propose, the Province's claim is monetary in nature and its motion for a declaration exempting the *EPA* Orders from the claims procedure order was properly dismissed.

[63] For these reasons, I would dismiss the appeal with costs.

The following are the reasons delivered by

THE CHIEF JUSTICE (dissenting) —

1. Overview

[64] The issue in this case is whether orders made under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"), by the Newfoundland and Labrador Minister of Environment and Conservation ("Minister") requiring a polluter to clean up sites (the "*EPA* Orders") are monetary claims that can be compromised in corporate restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). If they are not claims that can be compromised in restructuring, the Abitibi respondents ("Abitibi") will still have a legal obligation to clean up the sites following their emergence from restructuring. If they are such claims, Abitibi will have emerged from restructuring free of the obligation, able to recommence business without remediating the

[61] Par conséquent, je préfère retenir la méthode généralement suivie en matière de réclamations éventuelles. À mon avis, le tribunal chargé de l'application de la *LACC* peut prendre en compte l'ensemble des faits pertinents en vue de rendre la décision appropriée. Suivant cette approche, l'éventualité qu'il faut évaluer dans une affaire comme celle-ci est de savoir s'il est suffisamment certain que l'organisme administratif exécutera les travaux de décontamination et sera en mesure de faire valoir une réclamation pécuniaire.

[62] Enfin, la Juge en chef réviserait les conclusions de fait du juge de première instance. Pour ma part, je m'en remets à ces conclusions. Quelle que soit la norme juridique appliquée, soit celle proposée par la Juge en chef ou celle que je propose, au vu de ces conclusions, la réclamation de la province est de nature pécuniaire et sa requête demandant de déclarer que les ordonnances *EPA* n'étaient pas assujetties à l'ordonnance relative à la procédure de réclamations a été à juste titre rejetée.

[63] Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens

Version française des motifs rendus par

LA JUGE EN CHEF (dissidente) —

1. Aperçu

[64] Il s'agit en l'espèce de savoir si des ordonnances du ministre de l'Environnement et de la Conservation (le « ministre ») de Terre-Neuve-et-Labrador, émises en vertu de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2 (« *EPA* »), obligeant un pollueur à décontaminer des sites (les « ordonnances *EPA* ») constituent des réclamations pécuniaires qui peuvent faire l'objet d'une transaction dans le cadre d'une restructuration d'entreprise engagée sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Si elles ne constituent pas des réclamations pécuniaires pouvant faire l'objet d'une transaction, les intimées du groupe Abitibi (« Abitibi ») auront encore l'obligation légale de décontaminer les sites lorsque leur

obligation owed to the public into a financial or monetary obligation owed by the corporation to the government. Section 11.8(9), already discussed, makes it clear that this applies to damage after the *CCAA* proceedings commenced, which might otherwise not be claimable as a matter of timing.

parce que le gouvernement, en prenant des mesures pour décontaminer le site, a transformé l'exigence réglementaire non exécutée établie en faveur du public en une obligation financière ou pécuniaire à laquelle la société est tenue envers le gouvernement. Le paragraphe 11.8(9), examiné précédemment, prévoit clairement que cette situation s'applique aux dommages survenus après que les procédures ont été engagées au titre de la *LACC*; en l'absence d'une telle précision, ces dommages ne pourraient faire l'objet d'une réclamation compte tenu du moment choisi pour agir.

[83] A third situation may arise: the government has not yet performed the remediation at the time of restructuring, but there is "sufficient certainty" that it will do so. This situation is regulated by the provisions of the *CCAA* for contingent or future claims. Under the *CCAA*, a debt or liability that is contingent on a future event may be compromised.

[83] Une troisième situation peut se présenter : le gouvernement n'a pas encore exécuté des travaux de restauration au moment de la restructuration, mais il est « suffisamment certain » qu'il le fera. Cette situation est prévue par les dispositions de la *LACC* relatives aux réclamations éventuelles ou futures. Aux termes de la *LACC*, une dette ou un engagement qui dépend d'un événement futur peut faire l'objet d'une transaction.

[84] It is clear that a mere possibility that work will be done does not suffice to make a regulatory obligation a contingent claim under the *CCAA*. Rather, there must be "sufficient certainty" that the obligation will be converted into a financial or monetary claim to permit this. The impact of the obligation on the insolvency process is irrelevant to the analysis of contingency. The future liabilities must not be "so remote and speculative in nature that they could not properly be considered contingent claims": *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, at para. 4.

[84] Il est évident qu'une simple possibilité que les travaux soient exécutés ne suffit pas pour transformer une exigence réglementaire en une réclamation éventuelle au titre de la *LACC*. Pour en arriver à ce résultat, il faut plutôt qu'il soit « suffisamment certain » que l'exigence sera convertie en une réclamation financière ou pécuniaire. L'incidence de l'exigence sur le processus d'insolvabilité n'est pas pertinente pour l'analyse du caractère éventuel de la réclamation. Les engagements futurs ne doivent pas être [TRADUCTION] « si lointains et hypothétiques qu'ils ne puissent être considérés à bon droit comme des réclamations éventuelles » : *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, par. 4.

[85] Where environmental obligations are concerned, courts to date have relied on a high degree of probability verging on certainty that the government will in fact step in and remediate the property. In *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), Farley J. concluded that a contingent claim was established where the money had already been earmarked in the budget for the remediation project. He observed that

[85] Lorsque des exigences environnementales sont en cause, les tribunaux se sont jusqu'à ce jour fondés sur un haut degré de probabilité, proche de la certitude, que le gouvernement prendra réellement des mesures et exécutera les travaux de restauration. Dans *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (C.S.J. Ont.), le juge Farley a conclu que la preuve d'une réclamation éventuelle était établie parce que les fonds avaient

Date: 20040317
Docket: CI 02-01-27795
(Winnipeg Centre)
Indexed as: In Re Les Oblats de Marie Immaculee du Manitoba
Cited as: 2004 MBQB 71

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF:	)	COUNSEL
	)	
AN APPLICATION BY LES OBLATS DE MARIE IMMACULEE DU MANITOBA, PURSUANT TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	)	RhéaL Teffaine, Q.C. and James S. Ehmann, Q.C. for the Applicant
	)	John A. Faulhammer and Brian Empey, for The Attorney General of Canada
	)	Israel A. Ludwig, for certain claimants
	)	William G. Percy, for certain claimants
	)	Dennis M. Troniak, for certain claimants
	)	Richard W. Schwartz, for members of the Applicant
	)	Judgment delivered: March 17, 2004

SCHWARTZ J.

I Nature of Proceedings

[1] Her Majesty in Right of Canada (Crown) seeks to set aside the stay granted under the provisions of the *Companies' Creditors Arrangement Act* (*CCAA*) in favour of Les Oblats de Marie Immaculee Du Manitoba (LOMI) by one of my colleagues on an *ex parte* application in 2002.

[2] LOMI seeks to have its amended proposed Plan of Compromise and Arrangement (Plan) approved by the Court to enable its creditors and claimants to vote on its compromise proposal which would distribute approximately one-half of the value of its assets to all of its lawsuit claimants.

[3] LOMI by its most recent application heard on March 10, 2004 seeks to have this court postpone its judgment on its proposal until after the Supreme Court has dealt with the British Columbia Court of Appeal decision in ***W.R.B. v. Plint*** [2003] B.C.J. No. 2783 issued December 10, 2003.

[4] That decision reversed a trial decision which held the United Church 30% and the Crown 70% responsible for damages resulting from the abuse of a student at an Indian Residential School (IRS) in British Columbia. The appeal decision effectively exonerated the Church from civil responsibility for the acts of a school maintenance or janitorial employee who abused the student.

II Decision on Postponement Motion

[5] LOMI argues that if leave is refused or if granted to the Crown in the ***Plint*** case and ***Plint*** is upheld in the Supreme Court of Canada, it will likely result in the dismissal of all IRS claims against LOMI.

[6] If that were to occur the LOMI *CCAA* application currently under reserve would be abandoned and LOMI would be relieved of expenditure estimated in the amount of between $500,000 and $800,000 a year in legal defense costs.

[7] The Crown submits a contrary view; that there are different issues and facts involved in the LOMI IRS claims and that the ***Plint*** case will not resolve those issues.

[8] The Crown also argues that there is no provision in the rules of the Court, in the *CCAA*, or any other statute or in this court's general authority to postpone its decision to await a ruling from the Supreme Court.

[9] The Crown argues that any postponement is prejudicial to the Crown, will work a hardship on the Crown, and duplicate trial work as between it and LOMI on facts submitted while the actions against LOMI are stayed.

[10] This Court did not appreciate the number of IRS cases proceeding in courts across the nation against the Crown in which proceedings against LOMI are stayed.

[11] There is now before this court evidence of settlements between IRS claimants and the Crown on the basis that the Crown has accepted responsibility for 70% of the claims, leaving the claimants free to pursue their claims against LOMI for 30%, but as a condition of settlement preventing further action against the Crown.

[12] The Court is well satisfied that such a postponement is well within its inherent jurisdiction. However, having considered the Crown's argument, on a balance of convenience, considering the prejudice claimed, the Court ought to render its decision now rather than postpone it to await the ***Plint*** decision.

[13] The central reason is that real prejudice has been shown by the Crown, and by the IRS claimants and further prejudice will likely result from a continued delay in dealing with the substance of the *CCAA* application. Further, counsel advise additional settlement discussions and resolutions will be delayed due to these *CCAA* proceedings.

[14] It is no secret that this Court has attempted to have LOMI and the Crown resolve their dispute without further litigation. Counsel have finally convinced me that they are and are likely to remain unable to obtain instructions to settle their dispute at this time.

[15] All the parties and particularly the claimants recognize that while the cost of the multiple litigation contemplated is expensive and potentially wasteful, there appears to be no other arbitrated solution available at this time.

[16] Accordingly, for those reasons the LOMI application to postpone is dismissed.

III Crown's Request to Set Aside the Stay

[17] For the reasons which follow, the Court orders that the stay previously granted should be set aside or lifted.

IV Background and Positions

[18] The applicant seeks an order under the provisions of the *CCAA* approving the amended Plan to distribute approximately one-half of the value of its assets to the IRS claimants.

[19] LOMI was incorporated by an Act of the Legislature of Manitoba in 1873 and is also registered in Saskatchewan. Its members are missionary Catholic priests and brothers who, in April 2002, numbered 58 men, 39 of whom were older than 70. The retired members reside in a retirement home known as Casa Bonita, in Winnipeg, Manitoba.

[20] Since the early 1900's until sometime in the 1970's members of LOMI served in varying capacities at schools established by the Crown to educate Aboriginal children in Saskatchewan, Manitoba and Northern Ontario. The Crown was responsible for the education of Indians in Canada under federal legislation.

[21] Around 1997 a number of former students commenced proceedings against the Crown and LOMI for causes of action arising decades earlier.

[22] The list of claimants, as of 2002, totalling 2144 is attached to the draft Plan dated November 18, 2002, attached to the affidavit of Erin Janiskewich dated November 25, 2002 as Exhibit "E".

[23] In a number of the claims LOMI has been named as a co-defendant with the Crown and in the remaining claims where the Crown has been named as the sole defendant, the Crown either intends to add or has added LOMI, as a third party to the proceedings, claiming contribution from LOMI.

[24] This application was commenced in April 2002. A stay was granted on an *ex parte* basis and argument was subsequently commenced on a contested basis in April 2003. It was adjourned at the suggestion of the court to permit the parties to discuss alternative methods of resolving their disputes and reconvened

in June 2003. As well the Plan was amended to take into account the narrowing of the issues raised in the earlier argument.

[25] The members of LOMI have indicated their support for the Plan as have the represented claimants.

[26] The Crown opposes the Amended Plan claiming that LOMI is not entitled to succeed in its application because it does not qualify under the *CCAA* because it is neither insolvent, nor do the claims against it total more than 5 million dollars. The Crown also claims that the Amended Plan is unfair and contrary to the *CCAA* in other aspects, some of which will be addressed further.

[27] The Crown submits that LOMI's proposal to treat all IRS claims equally for distribution purposes, without recognizing the substantial differences among such claims, both as to liability and amount, is contrary to the objectives of the *CCAA* and contrary to the general law.

[28] Further the Crown submits that the Amended Plan proposes to include the Crown claims in the same class as the IRS claims which the Crown argues is also unfair and contrary to the *CCAA*. The Crown claim that if it is successful against LOMI its claims will exceed those of the IRS claimants in aggregate.

[29] It was conceded during argument that if the Crown is put in a separate category of claimants it will vote against the Amended Plan and it would fail. For that reason LOMI has submitted a plan which proposes to include the Crown with the individual IRS claimants in order to see the Crown's objection outvoted.

[30] The further history of these proceedings is set out in the list of the documents set out in the Moving Party's Brief as follows:

	Date of Document	Description	Date Filed
1.	April 16, 2002	Affidavit of Father James Fiori	April 29, 2002
2.	May 2, 2002	Order of McCawley, J.	May 2, 2002
3.	May 21, 2002	Interim Report of the Monitor	May 24, 2002
4.	May 27, 2002	Order of McKelvey, J.	May 27, 2002
5.	August 29, 2002	Order of McCawley, J.	September 20, 2002
6.	September 20, 2002	Affidavit of Father James Fiori	September 30, 2002
7.	October 2, 2002	Order of Jewers, J.	October 3, 2002
8.	November 18, 2002	Draft Claims and Voting Order (Exhibit "E" to the Affidavit of Service of Erin Janiskewich sworn November 25, 2002)	November 27, 2002
9.	November 18,2002	Plan of Compromise and Arrangement (Exhibit "F" to the Affidavit of Service of Erin Janiskewich sworn November 25, 2002)	November 27, 2002
10.	November 20, 2002	Interim Report of the Monitor (Exhibit "G" to the Affidavit of Service Service of Erin Janiskewich sworn November 25, 2002)	November 27, 2002
11.	November 21, 2002	Affidavit of Father James Fiori (Exhibit "C" to the Affidavit of Service of Erin Janiskewich sworn November 25, 2002)	November 27, 2002
12.	November 22, 2002	Notice of Motion returnable November 29, 2002 (Exhibit "D" to the Affidavit of Service of Erin Janiskewich sworn November 25, 2002)	November 27, 2002

13. November 29, 2002	Order of Clearwater, J.	December 2, 2002
14. January 29, 2003	Affidavit of Janet Maydan (filed by the Attorney General of Canada)	January 31, 2003
15. January 29, 2003	Affidavit of Dr. Giulio Silano (filed by the Attorney General of Canada)	January 29, 2003
16. February 12, 2003	Affidavit of Dr. Roland Jacques	February 14, 2003
17. February 13, 2003	Affidavit of James S. Ehmann	February 14, 2003

V The Practical Issue

[31] The apparently unchallenged position of LOMI and its members is stated in the affidavit of Father Fiori dated April 16, 2002; that members of LOMI, pursuant to their vows of poverty taken on joining the order, turned over all of their present and future income to LOMI. As a result LOMI, he states, is bound to care for the basic needs for each member until death. The earnings of LOMI consist of the salaries and pensions of its members and its investment income.

[32] He also states, again apparently uncontested, that the costs of defending the IRS claims will deplete the resources of LOMI to the point that it will be unable to meet its obligation to support existing members for life and to pay the employees needed to care for them (paragraphs 17 to 19 of his affidavit).

VI The Insolvency Issue

[33] In order to come within the jurisdiction of the *CCAA*, LOMI must establish on the evidence filed that it is a “debtor company” which is a defined term in section 2 of the *CCAA*. The only way it may do that is to establish that it is

"insolvent" as it is conceded, none of the other statutorily prescribed alternatives apply.

[34] The Crown submits and I accept that the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* (*BIA*) is not only a useful guide but is the only appropriate definition.

[35] As stated there is no evidence that LOMI falls within the definition of "insolvent person" in either subsection (a) or (b) of section 2 of the *BIA*. To be declared an insolvent person it must meet the definition in subsection (c).

> (c) the aggregate of whose property is not at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

The *BIA* also contains the method of determination whether a contingent or unliquidated claim is a provable claim and the method of its valuation is contained in section 135 of the *BIA*.

[36] The Crown submits that the IRS claims against LOMI are not due now. It also submits that those claims cannot be said to be "accruing due" as that term has been considered judicially.

[37] The remarks of Ground J. in ***Enterprise Capital Management Inc. v. Semi-Tech Corp.*** (1999) 10 C.B.R. (4th) 133 are on point.

[38] At pages 139 *et seq.* he stated:

> 15 It therefore becomes necessary to determine whether the principal amount of the Notes constitutes an obligation "due or accruing due" as of date of this application.
>
> 16 There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically in 1933, in *P.*

Lyall & Sons Construction Co. v. Baker, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the Dominion Winding Up Act had to determine whether the amount claimed as a set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J.A. at pages 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 2 O.A.R. 1 (Ont. C.A.) at page 8:

> A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: per Lindley, L.J. in *Webb v. Stenton* (1883) 11 Q.B.D. at p. 529.

17 Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re,* 220 B.R. 165 (U.S. N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

18 In addition, even if the reference in the CICA Handbook is applicable to the covenant defaults alleged by Enterprise, this simply means that it is recommended that, in applicable situations for purposes of preparing a financial statement, the accountants should show long term debt as a current liability. As stated above, I do not think reference should be made to financial statements for the purpose of determining whether a company is "insolvent" as that term is defined in the BIA and applicable to the CCAA. In the case at bar, where the Notes do not mature until 2003, there has been no Event of Default and no acceleration of the maturity of the Notes, the fact that accountants may,

> in certain circumstances of a covenant default, determine to show long term debt as a current liability in the financial statements, presumably with some explanatory note, is not in my view determinative of such debt being an obligation "accruing due" for purposes of the insolvency test.

[39] While LOMI relies on the order in ***Canadian Red Cross Society*** [2000] O.J. No. 3421 to support its application, the Crown submits that the factual underpinning of the ***Red Cross*** case distinguishes it from LOMI's application. Further, the Court notes that the final order in that case was arrived at by consensus with no continued objection.

[40] The factual distinction according to the Crown rests on the fact that the unsecured trade debts of the Red Cross of approximately $30,000,000.00 combined with its money losing operation while operating the national blood system which brought it to the verge of exhausting its cash flow permitted the motions judge to conclude it was insolvent.

VII Value of Claims

[41] The evidence as to the value of the claims in excess of $5,000,000.00 is contained in the valuation Father Fiori provided in his affidavit of April 16, 2002. As a possible method of valuation he estimates a total of 3,000 claims will be filed which he discounts by 50% for claims which he concludes are not valid (paragraph 27).

[42] He attributes a value of $50,000.00 to each claim for what he calls a conservative estimated exposure of $75,000,000.00. His evidence also describes the liability for the IRS claims as contingent because the claims are "unliquidated" and their valuation is "problematic and uncertain". (paragraph 27)

[43] He states that the liability of LOMI is unknown but that the costs of defending the claims and supporting its members who are 70 or over will "...see LOMI's assets fully consumed . . . within the next 4 years." (paragraph 29)

[44] This evidence as to the value of the IRS claims is based on possibilities rather than probabilities and is not sufficient to meet the *CCAA* value test of debts due or accruing due. The use of the term "possible" as distinguished from probable is not accidental.

[45] Likewise the cost of defence and the cost of supporting the retirees has not been sufficiently quantified to be considered as a debt due or accruing due.

[46] Further, the financial statements at December 31, 2000 (Exhibit "E" of Fiori's affidavit) and December 31, 2001 (Exhibit "F" of the same affidavit) do not estimate the IRS claims or show them as liabilities.

[47] Schedule "C" to the 2001 Balance Sheet (Exhibit "F") is an analysis of asset utilization purporting to show that at the end of 2006 estimated litigation costs will consume the estimated realizable value of the LOMI assets. However, as indicated, that schedule is not supported by evidence.

VIII The Timing

[48] In its initial brief, LOMI argued that the Crown has failed to oppose its application on a timely basis. It bases that argument on claimed inordinate delay to move against the initial *ex parte* order.

[49] However, it is claimed and unchallenged that the Crown attempted to obtain further and better disclosure from LOMI as to its assets and did so within

four months after the initial order. This resulted in various discussions and changes to the original draft plan following which a formal motion for approval was filed by LOMI which was then served on the Crown. It was then opposed on a timely basis.

[50] There is no substance to the timing argument as the Court is unable to find that the Crown acquiesced to the Plan as argued. LOMI was aware at all times of the Crown's position in opposition.

[51] Having concluded that the application has not met the required threshold of establishing the insolvency of LOMI, according to the *CCAA*, the remaining issues raised in argument need not be addressed save to state the following in the alternative.

IX The Status of LOMI Members

[52] It is also not necessary to determine whether the members of LOMI have a "legal" as distinguished from a "moral" claim enforceable against LOMI because their claims have been removed in the amended plan.

[53] Dr. Silvano's affidavit evidence supports the Crown's argument that there is no claim enforceable in the civil courts by a member against LOMI. There is a significant conflict in their affidavit evidence between Dr. Silvano and Dr. Roland Jacques (see affidavits of Dr. Silvano of January 27 and February 24, 2003 and of Dr. Jacques of February 12, 2003). Dr. Jacques does not agree with Dr. Silvano's opinion.

[54] The Court will not ordinarily determine issues such as the rights of members of a religious organization on the basis of conflicting affidavit evidence. If this was a matter which required determination, an order directing the trial of an issue would be the appropriate method of resolving the dispute.

X Equality of Claims

[55] The Plan proposed by LOMI places each IRS claim for damages at an equal value for voting purposes. The evidence does simply not support this.

[56] The Crown argues, and I agree that the *CCAA* requires that the value of each claim should be established prior to the holding of the vote. While that amount may not be the value fixed by a court of competent jurisdiction, for purposes of the Plan approval it ought to be done prior to the submission of a plan.

[57] Blair J. (as he then was) at page 10 of the decision in ***Menegon v. Philip Services Corp.*** [1999] O.J. No. 4080 at paragraph 42 states:

> The rights of creditors under the *CCAA* cannot be compromised unless,
>
> a) the creditor has been given a right to vote, in the appropriate class, on the proposed compromise;
>
> b) the creditor's vote is in accordance with a value ascribed to the claim by a Court approved procedure;
>
> c) the class in which the creditor has been appropriately placed has voted by a majority in number and two-thirds in value in favour of the compromise; and,
>
> d) the Court has sanctioned the compromise on the basis that it is fair and reasonable (with considerable deference being given by the Court in this regard to the votes of the creditors).

[58] The Court is also satisfied that the variety of claims which include claims for loss of cultural status and sexual abuse demand some sort of distinction and any vote based on equal comparison of complaints is on its face unfair.

[59] Making the IRS claims equal for distribution purposes may serve to assist in the financing of claims against the Crown by the utilization of LOMI resources, but that does not make the proposal fair or equitable as those terms are normally considered in the consideration of a *CCAA* Plan Arrangement.

[60] The concept of a distribution of LOMI assets to claimants without valid claims against either or both the Crown and LOMI is simply beyond the purpose and scope of the *CCAA*. While that issue might be addressed in having the distribution held in trust pending resolution of the claims and then divided in appropriate proportions, such an arrangement is not part of the current Plan.

XI Crown Claims

[61] The Crown submits that the proposal to include its claims within the IRS class of claims is "a blatant effort to compromise against LOMI's single largest creditor without allowing that creditor an appropriate say in the vote."

[62] With that argument the Court agrees.

[63] There is no real commonality of interest between the IRS claimants and the Crown and in fact they are in dispute, and as such the Crown ought not to be included in the same class. If that were to doom the plan to defeat, so be it. Further, even if the Crown claims and the IRS claims were included in the same category, it is likely that the Crown claims would exceed the IRS claims in value

as the Crown submission is that it claims against LOMI, the total amount it is required to pay out to IRS claimants.

[64] There are a variety of other arguments set out in the briefs. However, the Court does not intend to deal further with them except to say that the Plan as proposed cannot be approved in its present form.

XII Sympathy

[65] The Court concedes that this judge has felt sympathy for the innocent members of LOMI.

[66] They have dedicated their lives to the service of God and Man and have rejected temptations of materiality in the process. One might ask rhetorically: Is there anyone who would not admire and respect such a decision regardless of their particular religious faith or even if they did not have one?

[67] Nevertheless, I have been able to overcome my personal admiration for the efforts of LOMI members and am able to overcome what may have been a bias in their favour and determine this application according to law and on the evidence.

[68] This Court is then prepared to execute a formal order in the form of draft order #2 submitted by the applicant save and except for paragraphs 4 and 5.

[69] While LOMI is at liberty to reapply to this Court at any time should it so desire, it ought not to attempt to obtain a stay of proceedings without prior notice to the Crown.

[70] Further, the issue of costs set out in paragraph 5 of the draft order may be agreed to by the Crown, otherwise it may be spoken to on March 23, 2004 at 10:00 a.m.

[71] I am indebted to all counsel for their kind instruction, occasional forbearance, sage advice and patience not only with me but also their colleagues. Their authorities are listed at the end of these reasons.

XIII Postscript

[72] It is readily apparent from this application that *ex parte* proceedings are inherently inappropriate in applications under the *CCAA*. Of course, if there are special circumstances, which require a very speedy order, such orders should likely include a sunset provision so that interested parties may proceed thereafter on an equal footing.

[73] Except for the creation of a specialized Family Division, the Manitoba Queen's Bench has not accepted the principle of judicial specialization.

[74] The Senate of Canada by its Standing Senate Committee on Banking, Trade and Commerce in November 2003 released a report on its study of the provisions of the *BIA* and *CCAA*.

[75] In Chapter Six, Section D (page 178 *et seq.*) the Senate Committee recognized that certain areas of the law implicitly recognize the benefits of specialized knowledge. Further it heard witnesses who supported the development of a specialized judiciary to hear and resolve insolvency cases within Canada.

[76] I would strongly encourage my colleagues to review their position and encourage the recognition of the Senate's Committee's conclusions of the need for such a specialization. That specialization has developed in Ontario with the establishment of a commercial list in Toronto.

[77] The commercial list is administered and heard by a small group of judges who hear all the applications of this nature. They have become national experts through experience.

[78] The benefit is not for the judges nor to the Court but rather for the public which results in an improved service and presumably one of a higher quality. The development of a specialized bar more able to serve the public is also a consequence.

[79] The working example of the present Family Division in Manitoba exhibits the benefits of such specialization. Under the careful and steady leadership of Associate Chief Justice Mercier and longtime family law leaders such as Bowman J. and Carr J. the positive changes within the litigation umbrella of pre-trial case conferencing have resulted in a significant reductions in trials, trial days as well as earlier and less stressful resolutions of family disputes.

[80] The results of less antagonism and more cooperation between family disputants also results in lower expenses to families, all of which are benefits to society.

[81] Much litigation can be avoided in these days of pre-trial disclosure where judges can indicate likely results without the costs of expensive litigation. This is more easily accomplished by more experienced specialized judges.

_____J.

Authorities Filed by LOMI

1. ***F.S.M. v. Clarke***, [1999] B.C.J. No. 1973 (B.C.S.C.)

2. ***W.R.B. v. Plint***, [2003] B.C.J. No. 2783 (B.C.C.A.)

3. ***Mackin v. New Brunswick*** (1997), 187 N.B.R. (2d) 224, 1997 CarswellNB 143 (N.B.C.A.)

4. ***R. v. Newfoundland & Labrador (Provincial Court Judge)***, [2003] NLSCTD 50, 2003 CarswellNfld 88

5. ***R. v. S. (V.P.)*** (1999), 140 C.C.C. (3d) 204, 1999 CarswellBC 2192 (B.C.S.C.)

6. ***R. v. Baker*** (1994), 132 N.S.R. (2d) 349, 1994 CarswellNS 400 (N.S.C.A.)

7. ***Devereaux v. New Brunswick*** (1994), 155 N.B.R. (2d) 142, 1994 CarswellNB 386 (N.B.Q.B.)

8. ***E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia***, [2003] B.C.J. No. 1123 (B.C.C.A.) (QL)

9. ***Scurry-Rainbow Oil (Sask) Ltd v. Taylor***, [2001] S.J. No. 479 (Sask. C.A.)

This list is incomplete and the balance of the LOMI authorities may be obtained from counsel.

Authorities Filed by the Crown

1. The ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, Subsections 11(1) through 11(6)

2. Sections **N§5** and **A§7** of ***Bankruptcy and Insolvency Law of Canada***, Houlden & Morawetz, 3rd ed. (Carswell: Toronto, 1989)

3. Relevant portion of section 2(1), section 121 and section 135 of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3

4. ***Enterprise Capital Management Inc. v. Semi-Tech Corp.*** (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J.)

5. ***In the Matter of The Canadian Red Cross Society***, Endorsement of Justice Blair, July 20, 1998 (Ont. S.C.J.), (unreported)

6. ***Re: Canadian Red Cross Society***, [2000] O.J. No. 3421, (Ont. S.C.J.)

7. ***Reference re: Companies' Creditors Arrangement Act***, [1934] S.C.R. 659

8. ***Archer v. Society of the Sacred Heart of Jesus***, [1905] O.J. 141 (Ont. C.A.)

9. ***Menegon v. Philip Services Corp.***, [1999] O.J. No. 4080 (Ont. S.C.J.)

10. ***M.C.C. v. Canada (Attorney General)***, [2001] O.J. 4163 (Ont. S.C.J.)

11. ***Northland Properties Limited et al v. Bank of Montreal*** (1988), 32 B.C.L.R. (2d) 309 (B.C.C.A.)

12. ***Canada (Attorney General) v. Confederation Life Insurance Co.*** (1995), 8 E.T.R. (2d) 72 (Ont. C.J. (G.D.))

13. D.W.M. Waters, ***Law of Trusts in Canada***, Second Edition (Carswell: Toronto, 1984) pp. 122-128, 310-312

14. ***Les Oblats de Marie Immaculée du Manitoba Incorporation Act***, R.S.M. 1990, c.131

15. ***The Corporations Act***, C.C.S.M. c. C225, ss. 1(1), 265, 266 and 268

16. ***Income Tax Act,*** s. 149.1(1) and s. 168(1)

17. ***Re Christian Brothers of Ireland*** (2000), 47 O.R. (3d) 674 (C.A.)

18. Goff and Jones, ***The Law of Restitution***, Fifth Edition (Sweet & Maxwell: London, 1998) pp. 46 and 47

19. Fridman, ***Restitution***, Second Edition (Carswell: Toronto, 1992) pp. 30 and 31

20. ***Re Down*** (2000), 19 C.B.R. (4^{th}) 46 (B.C.S.C.)

21. ***Francis v. Brother MacDonald et al*****,** (January 6, 2004), (B.C.S.C.)

22. ***Re: Hunters Trailer & Marine Ltd.***, [2000] A.J. No. 1550, (Alta. Q.B.)

23. Court of Queen's Bench Rule 38

Authorities filed by the remaining parties may be obtained directly from counsel.

SUPERIOR COURT

COMMERCIAL DIVISION

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-047250-143

DATE: January 13, 2015

PRESIDING : THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.

IN THE MATTER OF THE BANKRUPTCY OF :

INDUSTRIES COVER INC.
Debtor/Respondent
and
PRICEWATERHOUSECOOPERS INC.
Trustee
and
GUARDIAN INDUSTRIES CANADA CORP., AN ONTARIO CORPORATION
and
GUARDIAN INDUSTRIES CORP., A DELAWARE CORPORATION
Respondents
and
GESTION J&N BOUDREAULT INC.
Petitioner
and
OFFICE OF THE SUPERINTENDENT OF BANKRUPTCY CANADA
Mis en cause
and
MICHAEL MORRISON
and
RICHARD ZOULEK
Directors/Petitioners
and
JELD-WEN DU CANADA LTÉE
Intervenor

JUDGMENT ON MOTION IN ANNULMENT OF BANKRUPTCY, ON MOTION OF THE DIRECTORS FOR REVIEW AND DIRECTIONS AND ON MOTION FOR A CONFIDENTIALITY ORDER

JP 1736

[1] The Court is seized with a Motion to Annul the Bankruptcy of Industries Cover Inc. ("**Cover**") presented by the Petitioner, Gestion J&N Boudreault Inc. ("**Gestion**"), a Motion for Review and Directions presented by two of the directors of Cover, Mr. Michael Morrison ("**Morrison**") and Mr. Richard Zoulek ("**Zoulek**") and a Motion of Gestion for the issuance of an order of confidentiality that is contested by Jeld-Wen du Canada Ltée ("**Jeld-Wen**"), who filed an intervention.

[2] On Monday August 25, 2014, pursuant to a resolution passed on Friday August 22, 2014 by a majority of its directors, Cover filed a voluntary assignment in bankruptcy with PricewaterhouseCoopers Inc. acting as trustee in bankruptcy (the "**Trustee**"). On the same day, the bankruptcy was immediately stayed temporarily until August 28, 2014 by order of Mr. Justice Jean Lemelin.

[3] The present Motion to Annul the Bankruptcy of Cover (the "**Motion to Annul**") was presented on August 28, 2014 by Gestion before Mr. Justice Brian Riordan, who granted Gestion's request for a Safeguard Order and ordered the stay of the bankruptcy proceedings until final judgment on the present Motion to Annul[1] (the "**Stay Order**").

[4] The Trustee had also filed a Motion for Directions in which it sought an order to take possession of the assets of Cover and be allowed to exercise conservatory measures during the present proceedings. In its Stay Order, Justice Riordan did not authorize the Trustee to take possession of Cover's assets, even on a conservatory basis. In fact, until now the Trustee was never vested in the property of Cover.

[5] Justice Riordan also ordered Cover, its directors and officers not to conduct any affairs outside the normal course of business.

[6] Other than conducting a somewhat distant monitoring of Cover's business with Raymond Chabot Inc., an observer appointed by Justice Riordan, the Trustee has not been further involved in its capacity of Trustee to the bankruptcy of Cover, who attempts to continue to conduct its affairs in the normal course of business despite the present circumstances.

[7] Morrison and Zoulek also filed a Motion seeking directions from the Court with respect to their function as directors of Cover during the present proceedings.

---

[1] "**PERMET** à Industries Cover inc. de continuer à exploiter son entreprise normalement, sous la surveillance du syndic-intimé et de l'observateur;
INTERDIT à Industries Cover inc. et à ses dirigeants de conclure toute opération hors du cours normal des affaires;"

THE PARTIES

[8] Cover is a Quebec corporation who specializes in the manufacturing of glass products, mainly (but not exclusively) insulated glass units ("**IGUs**") that it sells to manufacturers of windows (industrial, commercial and residential).

[9] Cover operates in different plants in Quebec and New Brunswick with some 300 employees.

[10] Cover has two shareholders:

- Guardian Industries Canada Corp., an Ontario corporation, ("**Guardian Canada**") holds 75% of Cover's shares;

- Gestion owns the remaining 25%.

[11] Guardian Canada is a wholly-owned subsidiary of Guardian Industries Corp., a Delaware corporation ("**Guardian**") with its head office in Auburn Hills, Michigan. Guardian is a worldwide glass manufacturer who supplies glass products to Cover, its principal raw material for its operations.

[12] Cover's board of directors (the "**Board**") is composed of three members, two designated by Guardian Canada and one by Gestion. On August 22, 2014, the three members of the Board were Morrison and Zoulek, both employees of Guardian and Mr. James Boudreault ("**Boudreault**"), the principal shareholder of Gestion, a Quebec corporation.

[13] Since its creation in 1990, the operations of Cover have always been conducted, *inter alia*, by Boudreault, its president and his son, Mr. Terence Boudreault ("**Terence**"), who acts presently as its vice-president finance.

[14] Guardian and Guardian Canada are not involved in the daily operations of Cover other than supplying the glass products required by Cover to manufacture, among other things, the IGUs.

[15] Jeld-Wen is a manufacturer of doors and windows who purchased IGUs from Cover and alleges that it was sold defective products. In July 2012, Jeld-Wen instituted a $4,621,900 lawsuit against Cover in product liability. The case is still pending and is actively contested by Cover. No trial date has yet been set.

[16] Cover was constituted in 1990 as a result of a merger of corporations in which Boudreault had a personal interest.

[17] The Court understands that over the years, Boudreault had developed a close relationship with the Late William Davidson ("**Davidson**"), president, chairman and CEO

of Guardian. That relationship was such that around 1990, Guardian, through Guardian Canada, accepted to become a 50% shareholder of Cover.

[18] Their excellent relationship lasted beyond Mr. Davidson's passing away in 2009 until Koch Industries became the majority shareholder of Guardian in or about December 2013.

[19] According to Gestion's lawyers, that is when the *"tide changed"* for Boudreault and for Cover, its employees and clients who all became the collateral victims of Guardian and Guardian Canada's abusive, if not illegal use of the provisions of the *Bankruptcy and insolvency Act* (the "**BIA**") in order to extricate Guardian of certain financial obligations contracted in favour of Gestion since 1995 through four successive shareholders' agreements.

- **The Assignment in Bankruptcy Resolution of August 22, 2014**

[20] In support of its Motion to Annul, Gestion essentially alleges that the resolution to have Cover file a voluntary assignment in bankruptcy was passed by Morrison and Zoulek, two of the three directors present at a special meeting of the board of directors (the "**Board**"), held on August 22, 2014 (the "**Assignment in Bankruptcy Resolution**"). It not only came as a total surprise and without any prior warning to Boudreault, the third director who voted against such a drastic and unwarranted resolution, but it was as well passed in flagrant violation of the provisions of the existing Shareholders' Agreement that prevented the Board to proceed to Cover's liquidation without the approval of Gestion, acting through Boudreault, its designated director.

[21] Moreover, at the special meeting of the Board, Boudreault realized that the main reason given to justify the bankruptcy of Cover was the recent "*catastrophic*" discovery by Guardian and Guardian Canada in July 2014 of an *"unusual and alarming"* rate of returned defective residential IGUs manufactured in 2011 (the "**2011 Production**").

[22] Directors Morrison and Zoulek based their decision to adopt the Assignment in Bankruptcy Resolution on a report from MNP LLP ("**MNP**") entitled "Cover Industries Inc. – Defect Liability – Financial Impact Assessment", dated August 21, 2014 (**R-6**), addressed to M^{tre} Michel La Roche ("**La Roche**"), one of the attorneys for Guardian and Guardian Canada, who had ordered the same on August 12, 2014 (the "**MNP Report**").

[23] MNP came to the conclusion that Cover was insolvent as its entire 2011 Production of 679 392 IGUs had to be replaced during the 15-year warranty granted by Cover to its customers, ending in 2026, at an estimated cost of some $42M. With such a contingent liability with a $37M value as at August 2014, Cover was clearly insolvent with only some $13.76M in assets. The fact that Cover was honouring its obligations and liabilities as they became due at the time without any pressure exercised by its creditors was irrelevant to MNP. If Cover had to replace its entire 2011 Production on a

single day, namely on August 22nd, 2014, it just did not have the financial resources to do it.

[24] Therefore, Cover was insolvent on that day. Under such circumstances, Cover had to file for a voluntary assignment in bankruptcy, hence the resolution voted by Morrison and Zoulek.

[25] One of the problems raised by Gestion with such a conclusion is that the people that were actually operating Cover on a daily basis, and more particularly Boudreault and Terence, had never seen nor read the MNP Report before the special meeting of the Board on August 22nd, 2014. They had no prior knowledge of the preparations (obtaining the MNP Report, retaining the services of a trustee in bankruptcy, etc.) made by Guardian and Guardian Canada to put Cover in bankruptcy. Boudreault and Terence were taken completely by surprise and disputed the findings and conclusions of the MNP Report, Boudreault sought an adjournment of the meeting to be able to understand better this unexpected turn of events and to have the opportunity to submit the MNP Report to Ernst & Young, the auditors of Cover for their review and comments. Boudreault's request was declined by his two colleagues who attended at the offices of the Trustee immediately after the meeting that ended abruptly.

[26] On that Friday afternoon, August 22, 2014, Morrison attended the offices of the Trustee with Zoulek or another colleague who was present at the special meeting of the Board, Mr. Thomas Pastore ("**Pastore**") also of Guardian in order to sign the documentation required for Cover's voluntary assignment in bankruptcy.

[27] On Monday August 25, 2014, the Trustee filed Cover's voluntary assignment in bankruptcy while Boudreault's lawyers successfully obtained the temporary stay of the bankruptcy proceedings. Gestion subsequently filed the present Motion to Annul Cover's bankruptcy on the grounds that Cover was not insolvent on August 22 and 25, 2014 and that Guardian and Guardian Canada had abused the process of bankruptcy in order to avoid an $18 million financial obligation of Guardian in favour of Gestion stemming from a Shareholders' Agreement binding the parties.

[28] As to the problems related to the 2011 Production, Boudreault and his son Terence stated that Cover was aware of the problem (as well as Guardian and Guardian Canada); that they took steps to correct the same as soon as possible in late 2011 and by 2012 the problem had been corrected. Most important of all, Cover is not only solvent but the company has always offered an after-sale service and honoured the warranty granted on its products. As far as they are concerned, Cover was and still is in a position to continue to do so as valid claims are made and honoured.

[29] Of course, if by a certain fiction, one expects Cover to replace in one day (August 22 or 25, 2014) the entire 2011 Production involving some 679 392 IGUs (that do not all need to be replaced) at an estimated cost of $42M, it would not be able to do so. In

Gestion's view, the 100% replacement scenario is an unrealistic and grossly exaggerated hypothesis.

[30] Guardian and Guardian Canada (collectively referred from time to time as the "**Guardian Group**") are vigorously contesting Gestion's Motion and maintain that Cover was indeed insolvent on August 25th, 2014 and that the bankruptcy proceedings are not only necessary but also in the interest of Cover's creditors and customers who have defective products. The bankruptcy proceedings will prevent Gestion from becoming an unsecured creditor of Cover for $18 million and thus prevent Gestion from *"competing"* with the other creditors regarding any dividend that may eventually be paid by the Trustee. Their use of the provisions of the BIA is totally legitimate and guided by their genuine concerns for the customers of Cover.

[31] The Court notes that the Guardian Group's reasons or justifications to provoke Cover's voluntary assignment in bankruptcy evolved between the August 22, 2014 special meeting of the Board and the hearing of the present Motion to Annul.

[32] In their written contestation, Guardian and Guardian Canada alleged that Cover's assignment in bankruptcy was justified by multiple factors including, without limitation, the difficult and increased competitive glass industry market, Cover's steady declining financial performance, the pending multi-million dollar product liability lawsuits instituted against Cover, the drastic increase of its returns and allowances caused by the defective production of its 2011 insulated glass units, which Boudreault concealed from Respondents, resulting in replacement costs in excess of $3,500,000 since 2012 and liability exposure conservatively estimated at approximately $36,000,000 as well as Gestion Boudreault's $18,000,000 redemption right coming to fruition under the Amended Restated Shareholders Agreement (**R-3**)[2].

[33] Not all these subjects were raised or discussed by Morrison and Zoulek at the August 22, 2014 special Board meeting to justify the adoption of the Assignment in Bankruptcy Resolution.

[34] Be that as it may, the Court also understands that besides the important expenses related to the defects stemming from the 2011 Production and anticipated to be incurred by Cover over the next 11-12 years based on a 15-year warranty period ending in 2026 and the potential liability stemming from two product liability lawsuits, Guardian also claimed that it had lost all confidence in Boudreault as a shareholder and as manager of Cover's operations, in that the latter failed to disclose in a timely manner the "true" problems relating to the 2011 Production and Cover's replacement program of the defective units. The Guardian Group alleges that it only became aware in July 2014 of the importance of the problems related to the 2011 Production. Boudreault contested such an assertion, adding that Guardian and Guardian Canada had constant and full disclosure of Cover's financial and production situation and were fully aware of the

[2] Paragraph 28 of the Amended Contestation of the Motion to cancel the bankruptcy of Cover.

higher than usual rate of returns linked to the 2011 Production, and well before August 2014. Cover had diligently corrected the situation and the subsequent productions did not have the same problems. Cover had to stand by its warranty with respect to its 2011 Production, but it certainly did not have to replace each and every unit, defective or not.

[35] During the hearing, the Guardian Group's position evolved even further. In addition to the problems related to the 2011 Production raised at the August 22nd Board meeting, the Guardian Group now contended that each and every IGU that Cover manufactured until now was not only defective at 100% but did not have the necessary certification and, as such, the entire production had to be replaced, including the 2012, 2013 and 2014 productions.

[36] Moreover, the directors designated by Guardian intervened expressing the view that it was their duty as directors of Cover to notify as quickly as possible the many users of Cover's products of the alleged generalised defects and lack of certification issues. A Canada wide advertising in newspapers was seriously being considered by them.

[37] Anyone intent on destroying a company and its goodwill could not think of a better solution.

[38] In the present context of the bankruptcy of Cover, the directors' true intent to notify all purchasers or users of Cover products that the entire 2011 production is defective and that their products are not duly certified by a competent authority is seriously questionable. Was it motivated by their desire to have Cover provide them all with replacement products even if it was not necessary? Casting a serious doubt in Cover's brand name and the quality of its products could only create an instantaneous and insurmountable liability that would undoubtedly provoke the immediate demise of the company. Again, under the present circumstances, what would have been the benefit of such an announcement for Cover's customers and users of its products? None whatsoever in a scenario where those highly concerned directors had absolutely no intention to see Cover make good on its warranty program. In all appearances, the whole idea was guided by the Guardian Group's goal to ensure that Cover will close permanently once and for all.

[39] The message conveyed by the Guardian Group, their designated directors and their lawyers was that Gestion's Motion to Annul the bankruptcy of Cover is an exercise in pure futility if such a pan-Canadian announcement is made, if and when Cover's bankruptcy is annulled.

THE QUESTIONS AT ISSUE

[40] The principal questions that the Court must answer are the following ones:

- Was Cover an *"insolvent person"* on August 25, 2014, within the meaning of the BIA, when it filed for a voluntary assignment in bankruptcy?

- Did Guardian and Guardian Canada abuse the process of bankruptcy for illegitimate motives to the extent that it warrants that the Court's exercises its discretion and annul Cover's bankruptcy?

[41] Depending on the answer to those two questions, the Court will also have to deal with the Motion for Review and Directions of the two directors, Morrison and Zoulek, in which they seek the following:

> "**CONFIRM** that, until a final decision is rendered in respect to the Motion to Annul the Bankruptcy of Cover, the Directors of Cover Industries Inc., including the Directors/Petitioners, are entitled to exercise all their functions and powers in accordance with the law;
>
> **ORDER** James Boudreault and Terence Boudreault to provide the Directors/Petitioners with all the information and documents requested in the letter that was sent to them by the Directors/Petitioners on October 9th, 2014;
>
> **ORDER** Cover, its officers, employees and representatives to fully collaborate with the Directors/Petitioners in the context of the exercise of their functions as directors of Cover Industries Inc., namely with regard to the issues raised by the Sale of non-certified IGU;"

[42] Given the fact that the Tribunal has already decided that the Stay Order, made by Justice Riordan on August 28, 2014, was to remain in full force and effect until judgment on the present Motion to Annul, the aforementioned conclusions are likely to become somewhat moot.

[43] However, during his pleadings, the lawyer for the directors Morrison and Zoulek indicated that if Cover's bankruptcy was annulled or not, his clients would want to know what powers they would be able to exercise in their capacity as directors of Cover. Their lawyer emphasized in particular their alleged duty as directors to notify the public as soon as possible, *inter alia*, of the non-certification and of the generalised defects of the 2011 Production and subsequent ones for their immediate and full replacement. The Court shall deal with that issue later on in this judgment.

[44] Finally, the Court will have to rule on Gestion's request that an order of confidentiality be made regarding certain testimonial evidence adduced in closed session (*huis-clos*) and certain exhibits that should remain sealed and unavailable to the public as they are presently. Jeld-Wen is contesting that Motion.

THE FACTS

[45] Boudreault acquired his first company manufacturing IGUs in the early 1980s. Over the next years, he teamed up with Mr. Pierre Tardif ("**Tardif**") on an equal basis and they acquired other IGUs businesses. In 1989, his companies formed the largest Canadian client base of Guardian, who supplied them with glass products, their main raw material. In 1989, Boudreault decided to approach Davidson, then president of Guardian. Boudreault wanted to negotiate with Guardian a more favourable supply arrangement and ideally, enter into a joint venture with Guardian in Canada.

[46] The two businessmen met in May 1989 and Davidson proposed to acquire 50% of the shares of the company that will become Cover in 1990, after the merger of Boudreault's companies. Soon after, Guardian would own 50% of the shares, Boudreault 25% and Boudreault's then partner, Tardif 25%.

[47] In 1995, Tardif wanted to withdraw and sell his shares in Cover. Davidson decided to acquire Tardif's shares. That gave Guardian a majority position in Cover with 75% of its issued shares. Boudreault was uneasy about it, as the equilibrium (50/50) would be broken. Davidson reassured him. Boudreault should not worry; he would continue to manage and operate Cover. The idea of entering into a Shareholders' Agreement was Davidson's idea, according to Boudreault. The latter explained that one of the main purposes for such an agreement was to protect Boudreault, who was to become a minority shareholder and induce him as well to continue operating Cover for their mutual benefit.

[48] Boudreault's protection came in the form of an option to have Cover redeem his (Gestion's) shares during a three-month window period in 2000, five years later from September 1st, 2000 to November 30, 2000 (the "**Option**"). Boudreault reiterated that the Option was not only designed to protect him, but as well was to be an inducement to remain and continue operating Cover for the following five years. The Option also gave Guardian the possibility to acquire Boudreault's shares in Cover (through Gestion) during the same three-month period window by having Cover redeem the same upon Guardian's instructions. Guardian could then achieve full ownership of Cover. The parties also agreed on a mechanism to establish the purchase price with a minimum and on Guardian providing the Guardian Guarantee, as mentioned and defined hereinafter.

[49] The Shareholder Agreement was entered into in 1995 and was amended and restated three more times in 2000, 2004 and 2010.

[50] Given the nature of the arguments made by Gestion in support of its Motion to Annul and given that according to Gestion, the Assignment in Bankruptcy Resolution of August 22nd, 2014 was prompted mainly, if not solely, by Guardian's determination to avoid any personal financial exposure stemming from the obligations it contracted with Cover and Guardian Canada in favour of Gestion via the Shareholders' Agreement, it is

necessary to examine the evolution of certain relevant provisions of the four Shareholders' Agreements signed over the years.

[51] As certain of the provisions and obligations contracted by Cover and Guardian as a principal debtor in favour of Gestion in these Shareholders' Agreements play a key and determining factor in the decision to put Cover in bankruptcy on August 22, 2014, according to Gestion, it is also necessary to identify these provisions and obligations and their evolution in time, as the case may be.

- **The Shareholders' Agreements**

[52] On September 1st, 1995, Guardian Canada became the majority shareholder of Cover (75%) and from the onset, Gestion, Guardian and Guardian Canada entered into a Shareholders' Agreement (**R-4.2**) (the "**1995 Shareholders' Agreement**") that was subsequently amended and restated on September 1st, 2000 (**R-4.1**) (the "**2000 Shareholders' Agreement**"), on February 29, 2004 (**R-4**) (the "**2004 Shareholders' Agreement**") and on March 16, 2010 (**R-3**) (the "**2010 Shareholders' Agreement**").

[53] All Shareholders' Agreements stipulate, *inter alia*, that the Board of directors will be composed of three directors. Boudreault is not only one of the three directors but was also given the responsibility to essentially continue to manage the daily operations of Cover with however, the obligation for the latter to purchase all its glass products, its principal raw material, from Guardian.

[54] Section 4 of the 1995 Shareholders' Agreement (**R-4.2**) entitled "*Options to Cause Redemption of Shares*" created options in favour of Guardian (not Guardian Canada) and Gestion for Cover to redeem all the shares held by Gestion subject to the following terms and conditions:

> "4.1 **Each of Guardian and Gestion Boudreault will have the option, exercisable by written notice to the other and the Company between September 1, 2000 and November 30, 2000, to cause the Company to redeem the GB Stock** [Gestion's shares in Cover]. **The purchase will be at the price computed in accordance with Section 6.1, with settlement to take place in accordance with Section 5**.
>
> 4.2 Option Upon Death. Disability or Dismissal. Gestion Boudreault will have the option to cause the Company to redeem the GB Stock upon: (i) the death of James Boudreault, (ii) the permanent disability (as defined below) of James Boudreault, or (iii) the termination of James Boudreault's employment with Cover by Cover for any reason, with or without cause, exercisable by written notice to Guardian and the Company within ninety (90) days. In this Agreement, disability means Mr. Boudreault's inability to perform substantially all of his responsibilities as an employee for a period of 120 days due to illness or injury. The purchase

will be at the price computed in accordance with Section 6.2 with settlement to take place in accordance with Section 5.

[…]

5.4 Redemptions Under Section 4. When GB Stock is being redeemed under Section 4, the settlement will take place by February 15, 2001, if Section 4.1 applies and within 60 days after receiving a written notice in the case of Section 4.2, and the Company will pay for the GB Stock by certified or cashier's check, or by wire transfer, at the settlement date."

[Emphasis added]

[55] In Section 6, entitled "*Price*", the parties stipulated as follows the formula to be used and the price to be paid to Gestion for its shares in case of the exercise of the Option by either Gestion or Guardian:

"6. Price.

6.1 Price Under Section 4. 1. The price for the GB Stock upon exercise of the option described in Section 4.1 will be the greater of:

(a) an amount equal to (i)(x) six times the average of the Company's consolidated earnings before interest and taxes (computed in accordance with Canadian generally accepted accounting principles) for the years 1999 and 2000, minus (y) the total consolidated borrowings of the Company as of December 31, 2000 multiplied by (ii)(x) the number of shares of GB Stock, divided by (y) the number of outstanding shares of common stock of the Company; or

(b) **an amount equal to:**

(i) $5,250,000.00, plus

(ii) the excess, if any, of $1,575,000.00 over the aggregate amount of dividends paid by the Company to Gestion Boudreault with respect to the period beginning January 1, 1996, and ending December 31, 2000.

6.2 Price for Purchases Under Section 3 and Redemptions Under Section 4.2. The purchase price of GB Stock under Section 3 and the redemption price of GB Stock upon exercise of the option described in Section 4.2 will be an amount equal to:

(i) $5,250,000, plus

(ii) the excess, if any, of:

(x) $1,575, 000 multiplied by an amount equal to (I) the number of months that have elapsed between January 1, 1996, and the date of settlement of the purchase, divided by (II) 60, over

> (y) the aggregate amount of dividends paid by the Company to Gestion Boudreault with respect to the period beginning on January 1, 1996, and ending on the earlier of the settlement date or December 31, 2000."
>
> [Emphasis added]

[56] For the purposes hereof, the Option that is of interest here is the one created in section 4.1.

[57] The 1995 Shareholders' Agreement also provided for its termination upon the dissolution or the bankruptcy of Cover :

> "10. Termination.
>
> **This Agreement will terminate upon the earliest to occur of**: (a) dissolution or **bankruptcy of the Company** or (b) the date on which one person or entity owns all of the Company's common shares."
>
> [Emphasis added]

[58] Finally, at the end of the 1995 Shareholders' Agreement, Guardian agreed to be bound as a principal debtor, specifying *"not merely as surety"* and guaranteed the performance by Guardian Canada of all its obligations under that Agreement as follows:

> "12. Guarantee by Guardian. Guardian, hereby waiving the benefit of division and discussion, agreeing to be bound as principal debtor and not merely as surety, guarantees the performance by Guardian Canada of all of Guardian Canada's obligations under this Agreement."
>
> [the "**Guardian Guarantee**"]

[59] Although it is not specifically stated in the said Agreement, the Guardian Guarantee was necessarily for the benefit of Gestion.

[60] In the 2000 Shareholders' Agreement, the clauses that are of particular interest in this matter remained essentially the same, except that the Option could then be exercised by either Guardian or Gestion between September 1, 2005 and November 30, 2005 at a minimum price for Gestion's shares increased from $5,250,000 to $8,000,000 (Section 6.1 (b)(i)).

[61] Moreover, in the 2000 Shareholders' Agreement, Guardian Guarantee is broadened to include as well Cover's obligations under it:

> "12. Guarantee by Guardian. Guardian, hereby waiving the benefit of division and discussion, agreeing to be bound as principal debtor and not merely as surety, guarantees the performance by Guardian Canada **and the Company** of all of Guardian Canada's **and the Company's** obligations under this Agreement."

[Emphasis added]

[62] In the 2004 Shareholders' Agreement, the parties agreed that henceforth Gestion would, to all intents and purposes, also enjoy a right of veto should the Board wish to *"liquidate"* Cover:

> "1.1 […] The Company will not, without the approval of Gestion Boudreault: (i) amend its articles or bylaws (other than ministerial or technical changes that do not affect any substantial rights of any shareholder); or (ii) sell assets which are responsible, in the aggregate, for 40 percent of the sales of the Company; or (iii) sell the shares of a subsidiary or a subsubsidiary; or (iv) amalgamate or merge with another company; or (v) **liquidate the Company**."
>
> [Emphasis added]

[63] Incidentally, Gestion raised in the present proceedings that the Assignment in Bankruptcy Resolution was illegally adopted in violation of that specific clause as Boudreault's objection and negative vote was disregarded by Morrison and Zoulek.

[64] Guardian's lawyers responded that bankruptcy did not fall within the ambit of the expression *"liquidate"* contemplated in the said Section 1.1.

[65] The right of veto conferred upon Gestion in case of the Board deciding on the liquidation of Cover, pursuant to Section 1.1 of the 2004 Shareholders' Agreement, did not exist in the two previous Shareholders' Agreements.

[66] Furthermore, in 2004, the three-month window Option to redeem Gestion's shares in Cover was moved to September 1, 2010 and the minimum purchase price was increased again to $9,000,000 from $8,000,000 in the previous Agreement (Section 6.1 (a)(2)(i)).

[67] In 2010, the last Shareholders' Agreement which is the current one, was entered into and the parties agreed to amend it in order to reflect another change in the three-month window to exercise the Option, starting on September 1, 2014 and the minimum price was once again increased substantially from $9,000,000 to $18,000,000 (Section 6.1 (a)(2)).

[68] The Guardian Guarantee and all other relevant clauses remained unchanged in the 2010 Shareholders' Agreement.

[69] As September 2000 was getting closer, Davidson approached Boudreault and asked him not to exercise his Option. He wanted Boudreault to remain with and continue operating Cover for another five years until 2005; hence, the 2000 Shareholders' Agreement was signed. The minimum purchase price was increased as previously indicated.

[70] The same situation occurred in February 2004 and caused the 2004 Shareholders' Agreement to be executed. The new three-month window period was set to start on September 1st, 2010. Boudreault continued to operate Cover.

[71] Unfortunately, Davidson passed away in 2009.

[72] In 2010, the then management of Guardian, represented by Morrison, asked Boudreault once again not to exercise the Option and proposed that the 2010 Shareholders' Agreement be signed with a minimum purchase price of $18M, also negotiated by Morrison. The latest Option could be exercised by either Guardian or Boudreault between September 1st, 2014 and November 30th, 2014.

[73] In the spring of 2013, Morrison came to Montreal to meet with Boudreault. Morrison was accompanied by Mr. Scott Thompson, also of Guardian. Boudreault testified that Morrison asked him not to exercise the Option in September 2014 and stay with Cover for an additional two-year period until the end of 2016.

[74] Morrison also proposed that Guardian, through Guardian Canada, would buy 14% of Gestion's 25% shareholding in Cover for some $10M based on the $18M minimum purchase price agreed upon in the 2010 Shareholders' Agreement. The Option would be amended to be exercised in 2016 at a minimum purchase price of some $8M, again based on the existing minimum purchase price of $18M.

[75] Boudreault agreed and Guardian prepared the necessary documentation with the intention to make the $10M purchase transaction before the end of the year 2013.

[76] Guardian's following internal memo, dated October 31, 2013 (**R-20**), communicated to Boudreault the outline of the agreed transaction:

> "A. Overview
>
> Guardian Industries Corp. Confidential
>
> October 31, 2013
>
> Guardian Industries Canada Corp ("GICC") is a wholly-owned subsidiary of Guardian Industries Corp. ("Guardian"), a Delaware corporation. GICC owns 100% of the Class A Shares (750,000 shares, all issued and outstanding) of Industries Cover ("Cover"), a Quebec corporation. Gestion J&N Boudreault Inc. ("Boudreault Inc.") a Quebec corporation owns 100% of the Class B Shares (250,000 shares, all issued and outstanding)
>
> B. Proposed Transaction
>
> Guardian would purchase 14% of additional equity in Cover to prepare for a potential amalgamation of GICC and Cover in the future which would result in a new entity ("Amalco"). By amalgamating GICC and Cover, Amalco could utilize

> the existing Net Operating Loss (NOL) asset held by GICC today against Cover profits. The potential amalgamation will not occur in fiscal year 2013, and will be under review again in 2014.
>
> **As Guardian is obligated to purchase the remaining equity held by Boudreault Inc at the end of James Boudreault's employment contract, Guardian has decided to break up that purchase and to purchase 14% prior to the amalgamation**.
>
> C. Transaction Summary
>
> • GICC to acquire an additional 14% (140,000 shares) equity in Industries Cover
>
> • Purchase price of shares calculated at $10,080,000 CAD
>
> • **Share purchase to take place on or prior to December 31, 2013**
>
> Note: Employment contract to follow"
>
> [Emphasis added]

[77] By email dated December 9, 2013 (**R-20**), Mr. A.J. Berres ("**Berres**") of Guardian's Corporate Development, sent to Boudreault and Terence drafts of an Amendment to the 2010 Shareholders' Agreement (the "**Amendment**") and a Share Purchase Agreement.

> "Hi Guys -
>
> ajberres@guardian.com
> 9 décembre 2013 11:38
> Terence Boudreault; James Boudreault
> mmorrison@guardian.com
>
> Contracts & Share Purchase
> Cover - Amendment to Shareholders Agreement - December 5.docx; Cover – Stock Purchase Agreement - December 5 2013 Draft.doc; Third Amendment - Boudreault.docx
> Attached are the contract drafts. Please review and let us know when you would like to discuss this week.
> These items that are required to close are still outstanding:
> *These items are **needed by Dec 20th** at the latest so please let me know if you have issue obtaining any of them
> 1. Original minute book
> 2. original share certificates
> 3. wire instructions
> 4. J&N Boudreault Resolution (we have asked our counsel in Canada to prepare this on your behalf to save you time)

> Assuming everything is agreed upon and in place by December 20th, we will be ready to fund. Please let me know if there is any condition or situation that would require funding prior to December 31st.
>
> Thank you,"

[78] The draft Amendment attached to Berres' email confirmed that the Option could be exercised during a three-month window commencing on September 1st, 2016. If Gestion exercises the Option, its shares will be purchased by either Cover or Guardian Canada, at the latter's discretion.

[79] The Court notes that Section 4.2(a) of the 2010 Shareholders' Agreement was to be modified in order to provide that Guardian Canada would purchase Gestion's shares should there be a negative impact to Cover purchasing the said shares and that the applicable financial tests could not be met as a result thereof:

> "The first clause of Section 4.2(a) of the Shareholders' Agreement is hereby deleted in its entirety, and replaced with the following:
>
> 4.2(a) Gestion Boudreault will have the option to cause the Company or Guardian Canada (at Guardian Canada's option, it being understood that upon the death of James Boudreault, if there is no negative impact to the Company to purchase the GB Stock and that the financial tests set forth under the applicable laws are met, the Company will purchase the GB Stock rather than Guardian Canada) to purchase the GB Stock upon:…"

[80] The amended Option would carry a minimum purchase price of $7,920,000. As Guardian Canada was to acquire an additional equity of 14% in Cover from Gestion and pay $10,080,000, the *"amended Option"* carrying a minimum purchase price of $7,920,000 reflected the current minimum purchase price of $18M.

[81] The documents attached to the email (**R-20**) also reveal that Guardian was seriously contemplating merging Cover with Guardian Canada for tax considerations and that Boudreault was called upon to give his consent thereto.

[82] Boudreault forwarded the email to his lawyers, who provided their comments back to Berres. Everything seemed to work just fine.

[83] The December 9th, 2013 email (**R-20**) will be the last written communication between the parties concerning this proposed transaction. In fact, it will never materialise.

[84] On a different note but related however to the issue of dividends, in early December 2013, at the very same time that the parties were exchanging draft contracts regarding Gestion's $10M share purchase, Boudreault received another letter whose contents surprised him. Cover was showing a $500,000 profit for the year 2013, but Guardian wanted Cover to declare a $5M dividend before the end of December.

Boudreault objected to it as it was unrealistic to declare such a large dividend under such circumstances. He added that Morrison contacted him and urged him to give his consent. Morrison explained to him that Guardian was, to all intents and purposes, doing Gestion a favour. If the $5M dividend is declared and paid before the $10M transaction is completed, Gestion was certain to be entitled to a dividend based on its current 25% shareholding as opposed to only 11%, Gestion's expected remaining shareholding in Cover after the $10M purchase transaction. As Gestion's stake in Cover was to be significantly reduced with only 11% and 89% for Guardian Canada, Morrison finally managed to convince Boudreault to go along with a major dividend but Morrison accepted Boudreault's condition to reduce the declared dividend from $5M to $4M.

[85] In retrospect, Guardian is now blaming Boudreault for having given his consent. Yet, if Boudreault did not have the interest of Cover at heart, he would not have objected to the disproportioned dividend and ultimately insisted on reducing it by $1M. In doing so, he was renouncing to an additional $250,000 dividend as opposed to $110,000 after the proposed transaction.

[86] On December 17, 2013, Boudreault, as director of Cover, signed a resolution prepared by Guardian's legal department declaring the $4M dividend (**R-15**). The resolution was also signed by Zoulek, the only other director designated by Guardian Canada at the time. In fact, Cover only had a two-member Board of directors for some time. It changed on August 6th, 2014, when Morrison was added as the third director. Boudreault did not realize at that time that Morrison's appointment was to give Guardian a majority of votes for the first and last special meeting of the Board that was about to be called a few days later.

[87] At that time, Boudreault never anticipated either that the $10M share purchase with Guardian or Guardian Canada would not take place.

[88] Terence testified that in March 2014, he spoke to Berres about the $10M transaction. Berres apologised. "*We have egg on our face.*" There was apparently a new procedure that had been put in place and Guardian's board wanted to perform a due diligence process. It came to a surprise to Terence. Why would Guardian want to perform a due diligence process of a company that it owns at 75% for more than 20 years and that generated $81,496,000 in dividends during that period?

- **Guardian's Due Diligence of Cover**

[89] As previously indicated, December 31st, 2013 went by without the $10M transaction being completed with regard to the purchase by Guardian Canada of a portion of Gestion's shares in Cover.

[90] Boudreault was not given any explanation other than the one offered by Berres to Terrence. In April 2014, Morrison called Boudreault to say that due to the new ownership of Guardian, they had to proceed with what he called a due diligence process

of Cover, an astonishing news knowing that Guardian already owned 75% of Cover and had already agreed to acquire 89% of it by the end of 2013.

[91] Be that as it may, Boudreault agreed to go along with the exercise. There were meetings and interviews with lawyers and numerous documentation and information was supplied as requested. Guardian even requested to get the entire backup of all emails in Cover's servers. Boudreault obliged.

[92] On August 13, 2014, Mr. Thomas Pastore ("**Pastore**") of Guardian sent to various persons, including Boudreault, an email (**D-13**) with due diligence reports on accounting, tax and environmental subjects. These attachments are not the actual reports but rather some sort of executive reports.

[93] Among the attachments, is a document entitled "*Cover IG Product Warranty Reserve Analysis – December 2013*". The document dealt with the reserve needed on December 31, 2013 to take into consideration the cost of returns or replacement of IGUs under warranty. The 2011 Production was showing an abnormally high rate of returns already. A reserve of between $2M and $5M should have been allocated for it by Cover with the real exposure being closer to the $5M mark.

[94] The Court notes that this report mentions a reserve with a range between $2M and $5M for the 2011 Production.

[95] We are now on August 13th, 2014, a few days before the special meeting of the Board when the Assignment in Bankruptcy Resolution will be passed with a $42M estimated liability for the same production based on a 100% replacement rate.

[96] Why then give such a document to Boudreault on August 13th, 2013 that suggests that Cover should have only allocated a reserve of $2M to $5M for the replacement of the defective IGUs of the 2011 Production when Guardian itself had already decided that a 100% replacement rate was applicable? One has to bear in mind that on the previous day, August 12th, 2014, the lawyers for Guardian and Guardian Canada had given a mandate to MNP LLP to establish the damages stemming from the 2011 Production with a 100% failure rate. This mandate will turn out to be the second attempt since the beginning of August 2014 by the lawyers to get an accounting firm to quantify the damages stemming from the 2011 Production.

[97] At the time, Guardian never informed Boudreault of the mandate given to MNP and did not identify the subject of the bankruptcy of Cover in the agenda of the August 22nd, 2014 special meeting of the Board.

[98] On the accounting side, the executive report identified, *inter alia*, the declining financial performance of Cover who generated less sales since Cardinal, Guardian's competitor, had entered the Canadian market, an unrecorded IGUs warranty liability of between $2M to $5M (estimated to be closer to the higher number), Jeld-Wen lawsuit

(that was known since July 2012) and Cover's dealings with parties related to Boudreault and members of his family, including the use of an helicopter.

[99] On that latter issue, the evidence will show that Boudreault's dealings with related parties and the use of the helicopter were duly authorized in the past with proper resolutions signed as well by the two directors designated by Guardian, who was clearly aware of the situation and approved it at the time.

[100] In July 2014, it suddenly became an issue.

[101] On the tax front, no risks were identified or issues found and no significant issues were found on the environmental side.

[102] As part of the due diligence process dealt with the 2011 Production, it is necessary to examine the relevant facts relating thereto.

- **The 2011 Production of IGUs**

[103] The evidence reveals that in late 2009, Cover was contemplating automating its manufacturing process of the IGUs. Cover wanted to acquire and use machines that would automatically apply a sealant between the glass windows and the Inex spacer placed in between. Until then, the fabrication of the IGUs was essentially done manually.

[104] The use of Erdman machines to automatize the sealant application process was deemed to improve the durability of Cover's products. However, the new process required a different type of sealant to be used. At the request of Cover, tests were conducted by HB Fuller at the end of 2009 and in the first half of 2010, in order to determine the suitable sealant to be used with the Erdman machine and the Inex spacer that is made of plastic material. In fact, with the Erdman machine, Cover could no longer use the polyurethane sealant that was currently applied manually. The machine required a hot melt sealant.

[105] Cover had HB Fuller test various IGU samples in a P1 Chamber where they remained for more than 20 weeks. The Court understands that the P1 Chamber serves to test IGUs durability and suitability as well as to certify products. A one week period in a P1 Chamber is equivalent to a one year period in a normal environment. In other words, an IGU successfully passing a 20 week test in the P1 Chamber indicates that under normal condition, the IGU would perform as expected during 20-year life.

[106] By the end of June 2010, Cover had HB Fuller tested five IGUs with a HL5130 sealant, six IGUs with the Bostik 5192 Sealant and seven IGUs with HL 5160C sealant. All IGUs were assembled on December 16, 2009 with an Erdman machine using the three different sealants.

[107] In an email sent on June 23, 2010 (**R-17**), Mr. Thomas Kopacz ("**Kopacz**") of HB Fuller, reported to Mr. François Ouellette ("**Ouellette**"), an engineer employed by Cover that, among other things, four of the six IGUs assembled with the Bostik 5192 sealant successfully passed the 22 week test:

> "François,
>
> Attached is the June 23rd update on the Cover Inex spacer units in P1.
>
> This is the 20th week point for 5160-C-149 and the 22nd week for 5130 and the 5192.
>
> The last frost point measurements shows that an additional unit manufactured with Bostik 5192 has a frost point above
>
> -80F and the last unit with HL-5130 also failed.
>
> Summary:
>
> -**4 of 6 Bostik 5192 units remain at -80F.**
>
> -5 of 7 HL-5160 units remain at -80 NF, One unit is at -70F - 0 of 5 HL-5130 units remain at -80 N
>
> Luc Beliveau will be contacting you to schedule a conference call to discuss what further analysis should be done to evaluate these or any additional units.
>
> Thomas Kopacz
>
> HB Fuller
>
> Window Technical Services Manager"
>
> [Emphasis added]

[108] On August 3, 2010, the email in question to which were attached the actual detailed results of all the tests performed by HB Fuller (**R-17**) was sent to Morrison and to Mr. Jeremy Wong ("**Wong**"), a senior analyst who worked at Guardian with Morrison.

[109] Cover could not acquire the Erdman machines for its plants without the prior approval of Guardian. In order to obtain Guardian's approval, Morrison's department had to recommend internally the proposed acquisition with a Capex report (Capital expenditure). This email was part of a series of information and data provided by Cover to Guardian (Morrison's department) for the preparation of the Capex report. Obviously, if Morrison did not approve the Capex, Cover would have never gone ahead with its proposed acquisition of the Erdman machines at a cost in excess of $1.8M.

[110] The Capex report prepared by Wong of Morrison's department mentioned:

> "As a strategic response, **Cover initiated its own P-1 testing in collaboration with two hot melt butyl suppliers: HB Fuller and Bostick**. The tests were started in Dec 2009 and are still in progress after 23 weeks as at Jul 3, 2010, with **most units passing the 20-week mark** with hot melt butyl from both

> manufacturers. **Based on the success of the P-1 tests**, Cover is moving ahead with the decision to switch from the polyurethane sealant to hot melt butyl for all its IG units. It is believed that the improved durability of the hot melt butyl, combined with the energy efficiency characteristics of the INEX spacer, will provide Cover with a very potent competitive edge in the market place with retaining existing customers, attracting new customers, as well as taking back the lost business from Jeld-Wen. **The strong test results (over 20 weeks in P-1 chamber is equivalent to approximately 20 years in the field)** could also provide Cover compelling arguments to neutralize competitive threats from Cardinal, and the 20-year warranty that Cardinal offers."
>
> [Emphasis added]

[111] Following Morrison's Capex Report, Guardian approved the acquisition of the Erdman machines and the production of IGUs with the use of Erdman machines started in 2011. After the above mentioned tests that were described by Wong in his Capex recommendation as *"successful P-1 tests",* it was decided to use the Bostik 5192 Sealant with the Inex spacer.

[112] It must be noted that none of the three sealants used in the tests came out with 100% successful test results. However, the Bostik 9152 sealant had 4 of 6 IGUs successfully passed the 22-week mark (66.6%) and a fifth one had successfully passed the 15-week test that is the equivalent of 15 years of normal use and of the 15-year warranty given by Cover. In other words, those P-1 Chamber tests communicated to Guardian and directly to Morrison on August 3rd, 2010, showed an 83% success rate for 5 of the six IGUs assembled with Bostik 9152 for a minimum 15-week period (the equivalent of Cover's 15-year warranty).

[113] Morrison will testify at the hearing that he only discovered the existence of the HB Fuller tests in July 2014 and insisted that a single failure in the P-1 Chamber tests meant a 100% failure rate.

[114] Unfortunately, the 2011 Production of residential IGUs was determined to be problematic in that the Bostik 5192 sealant did not always bond well to the Inex spacer, causing potential leakage and a shorter life period. A greater than normal rate of return of IGUs of the 2011 Production started showing in 2012 and accentuated in 2013. Even Guardian noted the unusual increase in June 2013 (**D-5**) and sent one of their own specialists to Quebec for one week during that month, according to Morrison's affidavit of September 18, 2014 (par. 159, 160 and 161).

[115] Cover had already identified the problem towards the end of 2011 and replaced the Bostik 9152 sealant with a more appropriate one. Cover completed in 2012 the phasing out of the manufacturing using Bostik 9152 sealant that it had started at the end of 2011.

[116] The replacement sealant used since then by Cover does not cause the problem.

[117] Yet, the Guardian Group has adopted in the present proceedings the surprising position that it only discovered in July 2014 the existence of the problems related to the 2011 Production and that Boudreault concealed this crucial information ever since December 2009 when he allegedly received the HB Fuller Technical Report (**D-11**).

[118] The Guardian Group, through Morrison's very lengthy and detailed affidavit made in support of their contestation of the present Motion, claims that they only discovered in July 2014 the existence of a report of tests conducted by HB Fuller dated December 16, 2009 (**D-11**). In his affidavit, Morrison blamed Boudreault for proceeding with the 2011 Production with the Bostik 9152 sealant despite a "*negative Fuller report*" (**D-11**) that indicated a failure rate of 66.6% of the sampled units manufactured with the Inex spacer and the secondary Bostik 5192 sealant.

[119] The preponderant evidence shows that these allegations made by Morrison are false.

[120] Firstly, the HB Fuller Technical report ("**Technical report**") dated December 16, 2009 (**D-11**) mentioned by Morrison, appears to be a synopsis of the same tests conducted at the time between December 17, 2009 and June 23, 2010 that were emailed to Morrison in August 2010 in order to get his authorization (and Guardian's) to acquire the Erdman machines.

[121] Secondly, the Technical report could not possibly exist on December 16, 2009 and Boudreault could not know of the problem with the Bostik 5192 sealant on that date, as the tests had not even started. In fact, the actual detailed results annexed to the Technical report show that the various IGUs used by HB Fuller were assembled with an Erdman machine on December 16, 2009. The tests in the P1 Chamber started on the following day December 17th and lasted until June 23, 2010. The detailed results also reveal that four of the six IGUs made with the Bostik 9152 sealant **successfully** passed the 22 week test (and a fifth one passing the 15-week mark). In reality, it was a 66.6% success rate and not a 66.6% failure rate for 4 of the 6 tests (and an 83.3% for 5 of the 6 tests after 15 weeks). [Emphasis added]

[122] It is true that the synopsis in the Technical report itself indicated that four of the six IGUs with the Bostik 5192 sealant had failed. But, it turned out to be an error made by the person who wrote the synopsis in the interpretation of the actual results attached to it.

[123] But there is more.

[124] Guardian and Guardian Canada are claiming through Morrison's affidavit that they were unaware of the results of these tests conducted in 2010 by HB Fuller.

[125] Yet, the evidence shows that Morrison himself had received the detailed results from Cover on August 3rd, 2010, as previously mentioned and with the correct interpretation of the actual test results.

[126] On that day, Ouellette, an engineer at Cover, had forwarded to Morrison and to his assistant Wong an email that Cover had received on June 23, 2010 (**R-17**) from Kopacz of HB Fuller in which the latter reported the good tests results and that, among other things, four of the six IGUs with Bostik 5192 had successfully passed a 22 week test. The detailed test results attached to that email confirmed the validity of Kopacz's affirmation.

[127] Boudreault did not purposely decide to use the Bostik 9152 sealant *"knowing that 66.6% of the test IGUs had failed"*, contrary to Morrison's affirmation. It was the opposite and Morrison knew it as early as on August 3rd, 2010. In fact, Morrison's own department recommended that Cover acquire the Erdman machines "*Based on the success of the P-1 tests*[3]". The Capex report specifically referred to also the Bostik 9152 sealant mentioned in the very same HB Fuller tests.

[128] In 2010, with Wong's Capex report, Morrison recommended to Guardian to acquire Erdman machine and use them to manufacture IGUs. Guardian gave its consent to the recommendation contained in the Capex report that also referred to successful P-1 tests involving the Bostik 9152 sealant, the same tests that they allegedly only discovered in July 2014. During his cross-examination, Morrison was very evasive on this question, not remembering even having received that email at first and then confirming having received it.

[129] During his testimony, Morrison was asked about the contradiction in the Technical report synopsis (**D-11**) when compared with the actual test results annexed to it. Morrison simply dismissed it by responding that he was not *"a technical person"*. In doing so, Morrison tried to let the Court believe that he did not have the abilities or knowledge to interpret such technical test results. With all due respect, the Court cannot believe for a moment that Morrison, an experienced executive employed by Guardian since the 1980s and having occupied important executive functions even abroad in a world leading glass manufacturing company, cannot read test results involving glass products like the ones submitted by HB Fuller in 2010 (**R-17**). The Court cannot believe that Guardian would leave the control of the expenditure of substantial funds to acquire equipment in the glass manufacturing business to such an unexperienced person unfamiliar or incapable of understanding detailed P-1 Chamber test results that are far from being uncommon in the glass window industry.

[130] The Court has serious doubts about the credibility of the witness. Other components of his testimony will contribute to undermine his credibility in the eyes of the Court.

[131] Be that as it may, the alleged *"sudden and alarming"* discovery during the summer of 2014 by the Guardian Group of the 2011 Production failure was the keystone of the latters' strategy to provoke to bankruptcy of Cover.

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[3] Jeremy Wong Capex Report, page 1 (**R-18**).

[132] This alleged "*sudden and alarming*" discovery in July 2014 has led the Guardian Group to the immediate conclusion that the entire 2011 Production of some than 679,392 residential IGUs was defective and that each unit had to be replaced. This conclusion was reached by Guardian and Guardian Canada without ever discussing the same in any detail with anyone at Cover.

[133] As previously mentioned, Boudreault and his son Terence agreed that there was a bonding issue between the Inex spacer and the sealant Bostik 9152 used in the 2011 Production of residential IGUs. However, Cover had dealt with the problem and had actively replaced defective IGUs since 2012. The in-house financial statements communicated monthly to Guardian revealed the increase in the rate of return.

[134] By July 2014, three years later, the return rate had reached 7.33%, clearly a higher than usual rate compared to past and subsequent productions, but not as catastrophic as Guardian pretends. At the hearing, the return rate had reached 7.9%. In their minds, the returns were expected to continue for a while and peak. They insisted that not all IGUs will fail. If the defects were such that Guardian now claims, the return-rate would have already been far greater, which is not the case.

[135] But first and foremost, Cover was always in a position to honour its warranty and was doing so to satisfy its client base and the latter's clients. Obviously and unfortunately, Cover's profits would undoubtedly suffer for a while but the company has been good to its shareholders with more than $81M paid in dividends. Cover could continue to honour its obligations and, if necessary could count on the support of its shareholders.

- **The special meeting of the board of directors of Cover – August 2014**

[136] On August 6, 2014, Morrison was appointed to Cover's Board of directors to join Zoulek and Boudreault. Incidentally, Boudreault pointed out that in 23 years, Cover's Board of directors never met in person, not even once. The Board's resolutions were always passed without any physical meetings. No physical meetings, no votes, no need to have three directors until August 6, 2014. Boudreault did not know at the time the reasons underlying Morrison's return to Cover. He did not know that a special meeting of the Board would be called soon, that a vote would take place and that Guardian needed to ensure a majority of that vote.

[137] On or about August 11, 2014, Boudreault received a Notice of a special meeting of the Board of the directors of Cover. The Notice indicated that the meeting would be held on August 18, 2014 at Guardian's head office in Auburn Hills, Michigan and that the following items would be discussed:

- Product failure rates;

- Current business environment and strategic action to be taken; and

- Business due diligence review.

[138] By letter dated August 12, 2014 (**R-5.1**), Boudreault advised Morrison and Zoulek that he could not attend the meeting on August 18th as he had an important medical appointment. Moreover, he was expected to be deposed in the Jeld-Wen lawsuit on August 19th.

[139] By Notice dated August 13th (**R-5**), the special meeting was postponed to August 22nd, 2014 in Dorval at 10:00 a.m. The agenda remained identical and no documents were attached to the Notice. It will be Boudreault's first and last meeting of the Board in the presence of the other two directors. He had no idea that his two colleagues would propose that Cover file a voluntary assignment in bankruptcy.

[140] On August 22nd, Boudreault left his home in Baie-St-Paul at 6:00 a.m. to attend the meeting in Dorval at 10:00 a.m. without checking his emails. Boudreault did not know of the existence of the MNP Report dated August 21, 2014 (**R-6**). He did not know that Morrison had emailed a report concluding to Cover's insolvency to him at 8:53 p.m. on that evening. At that time, Boudreault was asleep in bed and at the hearing Morrison admitted that he knew that Boudreault was in bed at the time that he sent the email. Thus, Boudreault never had a chance to carefully read it before the fateful meeting.

[141] At the meeting, Morrison and Zoulek are accompanied by Pastore, who had been involved in Guardian's due diligence process. Pastore had emailed the due diligence executive summaries to Boudreault on August 13th. Terrence accompanied his father.

[142] Morrison changed the order of the agenda and decided to start with the third item *"Business Due Diligence Review".* Boudreault wanted to get more information on this point as he only got the email (**D-13**) with a few attachments and details on August 13, 2014. The exchange was relatively short as Pastore responded that the results of the process constituted privileged information that could not be divulged to him. Pastore reassured Boudreault that they did not find anything about him or on him. Pastore's reassurances are surprising for someone coming as a Guardian official who is attending a special meeting, knowing full well that his two colleagues are going to put Cover in bankruptcy in a few minutes. Pastore's refusal to provide more information to Boudreault on their findings regarding the 2011 Production is even more troubling as it is that precise subject that is at the heart of the MNP Report that will serve to justify the adoption of the Assignment in Bankruptcy Resolution to be tabled a few minutes later. In other words, the subject is on the agenda but the findings of the due diligence process are privileged and confidential and cannot be communicated to Boudreault.

[143] On the second item *"The current business environment"* Boudreault acknowledges that the sales have been declining, due to fierce competition from the new comer on the Canadian market which sometimes sells to competitors below Cover's cost; Terence pointed out that Cover was nevertheless regaining market share.

[144] Morrison then passed to the first item on the agenda *"Product failure rates"*, Morrison referred to the MNP Report that Boudreault has not seen before entering the meeting and had not read. Pastore got copies printed for all in attendance.

[145] Morrison reviewed the three scenarios contemplated by MNP in its report and expressed his agreement with MNP's conclusion that Cover was insolvent due to the 2011 Production failure. Morrison moved that Cover file a voluntary assignment in bankruptcy, given its state of insolvency. Zoulek seconded the motion. Boudreault and his son Terence, in addition to being shocked by the unexpected turn of events, expressed their total disagreement. Cover was not insolvent: it had very few debts, unencumbered assets with significant value, a line of credit that was used to less than half its limit and all suppliers, including Guardian, were always paid in sufficient time for Cover to benefit from discounts. Moreover, Cover had always been able to deal with the defective products and to honour its warranty. Cover could continue to do so. There was no justification to close the company so abruptly and dismiss some 300 employees after 23 years of successful and profitable operations. The profitability may be temporarily reduced to deal with the 2011 Production, if and when claims are made, but profitability was nevertheless still there.

[146] Terrence requested that the resolution and the meeting be adjourned to give them time to carefully read the MNP Report and to obtain the reaction and comments from Cover's auditors, Ernst & Young, but to no avail as Morrison and Zoulek refused their request, which was quite reasonable under such circumstances. According to Terence, Morrison even invited Boudreault to join them at the offices of PricewaterhouseCoopers to meet with the Trustee, Mr. Christian Bourque ("**Bourque**") and sign the appropriate documentation for the assignment in bankruptcy.

[147] Boudreault refused and the meeting was adjourned abruptly.

[148] At no time during the August 22nd meeting was the question of Gestion's $18M Option ever raised or mentioned.

[149] Then, what was the urgency of passing the Assignment in Bankruptcy Resolution on August 22nd, 2014?

[150] Absolutely no pressure was being exercised at the time by Cover's creditors and suppliers on its finances.

[151] Based on the preponderant evidence, there is only one possible answer to that question, the Option that could be exercised by Gestion and Boudreault in ten days. Yet, Boudreault was offered and had agreed to stay with Cover until the end of 2016 and to postpone by as much the three-month window to exercise the Option. Boudreault had agreed to sell to Guardian Canada for some $10M 14% of his stake in Cover. Who could possibly think of bankruptcy under such circumstances?

[152] The Court is convinced that when he walked into the special meeting of the Board on that fateful August 22nd, 2014, the bankruptcy of Cover was not on "his radar".

[153] Yet, in cross-examination, the first questions put to Boudreault by Guardian's lawyer dealt with his apparent sole objective for contesting the bankruptcy of Cover, namely salvaging the Option. Boudreault disagreed firmly. His priority was always to maintain in operation the company that he founded for the benefit of its shareholders, of course, but as well its workforce and its clients, who benefit from an after-sale service and long-term warranties.

[154] In any event, as previously mentioned, on the Monday following the August 22, 2014 special meeting of the Board, PricewaterhouseCoopers filed Cover's assignment in bankruptcy while Boudreault was obtaining a first temporary stay order that led to the August 28, 2014 Stay Order that is presently in force until judgment is rendered on the present Motion to Annul Cover's bankruptcy.

ANALYSIS

[155] The Tribunal is called upon:

- to determine whether Cover was an *"insolvent person"* within the provisions of the BIA when it filed an assignment in bankruptcy on August 25, 2014; and

- whether Guardian and Guardian Canada unlawfully misused or abused the provisions and the spirit of the BIA in order to terminate abusively the 2010 Shareholders' Agreement (**R-3**) and thus avoid certain financial obligations towards Gestion stemming from the same.

[156] The Court believes that it should first answer the second question as the convincing and compelling preponderant evidence leads the Court to conclude that the Respondents have seriously, if not grossly, abused the bankruptcy process in order to achieve their real and only goal to extricate Guardian from its personal and direct liability of $18M to Gestion under the 2010 Shareholders' Agreement. That financial obligation would automatically disappear with the termination of the 2101 Shareholders' Agreement occurring upon the bankruptcy of Cover as the Option and the Guardian Guarantee would immediately become void and unenforceable.

[157] Temporarily setting aside the issue of the $18M Option, the preponderant evidence also leads the Court to conclude that on August 22 and 25, 2014, Cover was solvent and able to honour its financial obligations as they became due.

[158] The only way to *"conveniently"* render Cover insolvent for the purpose of putting it in bankruptcy was to create a sudden and *"catastrophic situation",* in virtue of which each and every of the 679 392 IGUs manufactured in 2011 was deemed by Guardian to be defective without exception, placing Cover in a situation that if it had to replace them all

on August 25th, 2014, the financial obligation stemming from it was rendering Cover insolvent.

[159] In the elaboration of their scheme, Guardian and Guardian Canada obtained self-serving expert evidence in their attempt to establish that on August 25, 2014, Cover was an *"insolvent person"* based on the 100% replacement catastrophic scenario.

[160] It is important to always bear in mind the principles underlying the BIA "*to assist honest but unfortunate debtors and to allow realization and equitable distribution of the assets of the bankrupt for the benefit of the creditors*"[4].

[161] The scheme concocted by Guardian and Guardian Canada with their catastrophic scenario does not justify that Cover be maintained in a state of bankruptcy as the goals sought by the Respondents clearly do not adhere to these principles.

[162] Given the main questions at issue to be determined, the Court will first examine the conduct of Guardian and Guardian Canada as they were preparing to avail themselves of the remedies offered by the BIA to provoke the bankruptcy of Cover.

- **Guardian's preparatory works to the special meeting of the directors of August 22, 2014**

[163] On August 22, 2014, upon entering the room where the Assignment in Bankruptcy Resolution would be voted by Morrison and Zoulek, Boudreault and Terence were unaware of various facts which came to light during the hearing.

[164] Bourque, of PricewaterhouseCoopers, testified that he was first approached by La Roche, one of the lawyers of the Guardian Group, at the beginning of August 2014. The proposed mandate was to assess and quantify the damages linked to Cover's 2011 Production. Bourque declined the mandate as PricewaterhouseCoopers were the auditors of Guardian.

[165] On or about Monday August 18, 2014, La Roche approached Bourque once again and asked if he would accept to act as trustee to the bankruptcy of Cover. This time, Bourque did not see any conflict of interest as *"a shareholders' conflict"* involving Guardian and Gestion was of no concern to PricewaterhouseCoopers acting as eventual trustee to the bankruptcy of Cover. Also, the fact that PricewaterhouseCoopers were the auditors of Guardian did not constitute an impediment. Bourque testified that on the contrary, their relationship with Guardian helped to make the decision to act as Trustee.

[166] To proceed with the bankruptcy filing, Bourque needed a resolution passed by the Board of Cover. Bourque knew that the resolution would be available at some point during the day on Friday August 22, 2014, as a special meeting of the Board of Cover

[4] *Moss (Re)*, 1999 CanLII 14182 (MB QB), par. 31.

had already been called for that morning. Bourque scheduled a 3:00 p.m. appointment with Morrison after the Board meeting. Bourque was also asked to prepare the necessary documentation for the filing. All required information was to be provided to him by Guardian and its lawyers. Bourque said that he understood that he could not contact anyone at Cover to get the information that he needed to prepare the Statement of affairs, like a detailed list of Cover's assets, liabilities and creditors as it is normally done. Guardian supplied a list of Cover's customers but without their addresses. Bourque had his employees find their addresses on the Internet for some three hours. Obviously, Cover had such information. Surprisingly, Bourque testified later that he was not aware that this exercise was all being done by Guardian in secret and outside the knowledge of Cover and of Boudreault.

[167] As to the MNP Report, contrary to Boudreault who only got it at 8:53 p.m., Guardian provided a copy of the report to Bourque early in the afternoon of August 21st through their lawyer La Roche.

[168] At 3:00 p.m. on August 22nd, Morrison and Zoulek or Pastore attended Bourque's offices with the resolution. Morrison signed the Statement of affairs (**R-10**). The resolution appeared to Bourque to be in order, although it did not reflect that one of the three directors had voted against it. Bourque must have been aware of Boudreault's dissidence as he asked La Roche if there was a Shareholders' Agreement and in the affirmative, if any of its provisions prevented the filing of a voluntary assignment. La Roche told him that there were no such restrictions; in the Court's opinion, that is a statement that is inaccurate. Bourque never saw the 2010 Shareholders' Agreement.

[169] When Morrison left the offices of PricewaterhouseCoopers with his colleague, it was too late for Bourque to file the assignment documents on that day. He was asked by Morrison to hold the documents in escrow until the following Monday at which time he would receive instructions from Guardian to file the assignment.

[170] At 7:09 a.m. on Monday August 25th, 2014, Bourque replied to an email (**R-49**) received at 6:57 a.m. from Mr. Kyle Krywko ("**Krywko**"), Guardian's in-house lawyer, in all likelihood instructing him to file the assignment immediately. Bourque responded as follows:

> "8:30, but add at least an hour (9:30) to get the certificate of bankruptcy from the official receiver (Industry Canada).
>
> Also we have to consider that taking possession during production hours will be very disruptive. I would prefer to wait and file in the afternoon in order to take possession by the end of the day shift, say around 6pm."

[171] Bourque's response was unacceptable to Guardian as at 8:19 a.m., Pastore sent an email asking him:

> "Christian,

> This will confirm that we want to file asap this morning. Kyle just left you a message on your office line but that is the reason for the call. We have advised Phil.
>
> Thanks
>
> Tom"

[172] Morrison and Pastore are in copy on these emails. Bourque got the legal documentation filed around 10:00 a.m., as instructed to do.

[173] Over the years, Morrison had been involved extensively with Cover and knew Boudreault. In fact, the witness stated that he considered James Boudreault as a friend. Morrison claimed that he was very familiar with Cover's operations and needs as he had received and reviewed Cover's in-house financial statements submitted to Guardian on a monthly basis from 1995 to 2011, at which time he was assigned to another position.

[174] Boudreault ran the business and Morrison provided the tools needed to make Cover a successful business. They were *"two good friends".*

[175] Morrison was asked by his superiors to get involved again with Cover in 2013 as "*Guardian was not getting all the information it needed*". Guardian was concerned with the spikes in returned IGUs. His testimony was corroborated by Terence's, who mentioned that Guardian was aware of the abnormal rate of returns of the 2011 Production since at the very least in June 2013, as evidenced by an email in which Guardian was asking for additional details on this specific question (**D-5**).

[176] The evidence also revealed that the unusual situation was preoccupying Cover's management since 2011, but they had already identified the problem and found a replacement sealant that was performing much better for the productions commencing in 2012. They had totally phased out the Bostik 5192 sealant production in 2012 and Cover was actively replacing the IGUs of the 2011 Production that failed prematurely. Based on the testimony of Gestion's witnesses, the Court understands that they never tried to conceal the problem from Guardian.

[177] There is not a shred of evidence that the financial information given to Guardian on a monthly basis was ever false, incomplete or misleading in any manner whatsoever. The evidence shows that Cover was proceeding to replacements of the 2011 Production at a higher than usual rate since 2012. Such information was converted into the in-house financials that Guardian received monthly throughout the years.

[178] Boudreault and his colleagues were genuinely convinced that not all the IGUs from the 2011 Production would fail. In their view, such an occurrence was impossible; not all IGUs were assembled into windows in the same manner. For example, window glazing involves the application by the window manufacturer of another sealant while integrating Cover's IGU into its window frame. Under such circumstances, the risks of a

leak occurring were minimal. Not all windows are exposed to the same type of weather elements. Also, the orientation of the window (East, West, North or South) will have an impact on its longevity.

[179] *"We will have massive failures and are looking at a $42 million exposure for the 2011 Production",* testified Morrison. Terence disagreed entirely with such a catastrophic and unrealistic approach.

[180] Cover's management believed that the 2011 IGUs that are actually defective would fail rather quickly, hence a higher rate of return in the first years but that the ones that did not fail would very likely last much longer. That is why Terence and his colleagues told their colleagues at Guardian that they anticipated the *"spike"* of returns to peak and tapper in the near future. Were they acting in bad faith and intentionally misinforming Guardian? The Court does not believe so.

[181] In retrospect, one can conclude that Cover's managers made a mistake when they chose the Inex and the Bostik 9152 sealant combination. But, contrary to Guardian's unfounded allegations, their decision was not reckless and unreasonable given the HB Fuller tests results of 2010. If they made a mistake, the preponderant evidence does not reveal any sign of bad faith and ill will on their part.

[182] But the Court sees in the present situation, that Cover's management made an honest mistake in the selection of the Bostik 9152 sealant that unfortunately caused the 2011 Production to fail to a greater degree compared to the others. In business, there are good years and sometimes bad ones.

[183] Again, that business decision had been made on four of the six IGU samples fabricated with the Bostik 9152 sealant successfully passing HB Fuller's 22-week P1 Chamber test in 2010 and on a fifth IGU managing to successfully last during 15 weeks before failing.

[184] In fact, no one knows to this day how many IGUs of the 2011 Production will really cease to perform what they have been designed to do.

[185] Morrison stated during his testimony that if a single sample of IGU failed a P1 Chamber test, it meant that all IGUs made with the same combination would fail. The Court does not believe that the preponderant evidence supports Morrison's view that all IGUs of the 2011 Production will fail.

[186] Moreover, Morrison's statement is contradicted by his own decisions made in 2010.

[187] The Court believes that such a statement (one test failure means 100% failure rate) was meant to "neutralize" certain undeniable facts that were coming to haunt the witness.

[188] The same HB Fuller tests, made in 2010 with the Bostik 9152 sealant that are presently used by Guardian to justify its "*catastrophic discovery*" position, were described as successful tests and were used by Morrison and his senior analyst Wong in 2010 to approve the acquisition and the use of the Erdman machines by Cover. The HB Fuller P1 Chamber tests were deemed to be successful by Morrison in 2010, despite the fact that some IGU samples, a minority, had failed in those tests.

[189] Insofar as to the 2011 Production is concerned, it is impossible to say or predict with any certainty the exact amount of failure and the time when the failure will occur, if it occurs. The failure rate will definitely be higher than usual because of the incompatible combination of the Inex spacer with the Bostik 9152 sealant.

[190] But, in the Court's opinion based on the preponderant evidence, it is preposterous to even suggest at this time that the entire 2011 Production has to be replaced, given that the HB Fuller tests that were made in 2010 yielded negative results. The results were in fact mostly positive and reported by Morrison and his senior analyst to Guardian as being successful in August 2010 (**R-18**) in order to justify the expenditure of $1.8M in Erdman machines and allow Cover to begin manufacturing with them. Not a single of the tests submitted by Cover to Morrison in August 2010 was entirely successful (100%). If as the witness now claims that one failure of a sample in a P1 Chamber test means that 100% of that production will certainly fail, why did Morrison recommend to Guardian the acquisition of expensive manufacturing equipment based on the same test results that he qualified at the time as successful tests?

[191] The Court does not believe Morrison's version of the facts.

[192] Morrison's testimony also revealed that Guardian was deeply concerned and was firmly against Cover contributing financially in any manner to the labour costs incurred by their customers to replace the defective 2011 IGUs. Boudreault saw it as a gesture of goodwill on the part of Cover; Guardian saw it as an unnecessary waste of their profits.

[193] Couldn't Guardian try to discuss openly its financial concerns with their long-term partner Boudreault before deciding unilaterally to close permanently this otherwise successful business?

[194] Morrison confirmed that he was asked in early August 2014, to join Cover's Board of directors because he had the longest history with Cover and his friend Boudreault. Morrison claimed that at the time, Guardian was convinced that Boudreault was concealing information about the 2011 Production, an unproven fact bearing in mind that before the bankruptcy the lack of certification of the 2011 Production was not an issue. In any event, an IGU assembled with the Bostik 9152 sealant that becomes defective will not become more defective or less defective if it was certified. One must remember that four out of the six IGUs assembled with the same "bad mix" were tested favourably by HB Fuller in 2010 for at least 22 weeks. These samples were not certified.

Moreover, Cover has built on years other that in 2011, IGUs that also failed from time to time (yet at a lesser rate) even though these IGUs had been certified.

[195] The certification issue is simply a "red herring".

[196] Morrison added that prior to the special meeting of the Board, he communicated to Boudreault Guardian's concerns about the failure rates and that there was no slowdown in the returns. "*We needed to address these issues at the upcoming meeting*". Morrison admitted that he never raised the subject of bankruptcy with Boudreault "*as the plan was to continue gathering data to explain the return rates*."

[197] According to Morrison, all preparations relating to the bankruptcy were handled and coordinated by Krywko, Guardian's in-house counsel, who told him that Cover was in trouble. Morrison had several discussions with Krywko in July and August 2014. He told Morrison that Cover had no problems with its own creditors but there was an issue with Cover's customers and their customers' customers. The fact that Cover had to replace a higher than normal number of IGUs with respect to the 2011 Production and even contributed to the labour costs was unacceptable. "*We have never paid for the labour in the past*". They (Guardian and Guardian Canada) were "*facing a financial penalty*". "*We have a large financial exposure stemming from the 2011 Production.*" [Emphasis added]

[198] About the MNP Report, Morrison testified that he only received it around 8:00 p.m. on the evening of August 21st and that he forwarded it to Boudreault at 8:53 p.m.

[199] Morrison acknowledged that Boudreault had not read the MNP Report before the meeting. The latter did not even have a copy of the report when he arrived at the special meeting. After Pastore got copies for all, Morrison went through the three scenarios (100%, 75% and 50% replacement scenarios) and declared himself in agreement with MNP's conclusion that Cover was insolvent. He proposed the Assignment in Bankruptcy Resolution with Zoulek's approval.

[200] Boudreault and Terrence, in shock, wanted a postponement of the meeting and get a second opinion from Ernst & Young before adopting such a fatal and drastic resolution. Morrison replied: "*I have this report [MNP]. There is no need for an additional report.*"

[201] Morrison could not wait a few more days as requested by Boudreault because they were looking at $42M of *"bad units".*

[202] The Court noted that Morrison mentioned on several occasions that there was a major concern within Guardian that they were not getting all the relevant data concerning the 2011 Production.

[203] If that was the case, why automatically conclude to the worst possible scenario with a 100% replacement? At that time, after three years since the 2011 Production,

only 7.33% of the latter had been returned. Although a higher rate than normal, it could not justify a 100% failure rate as easily as it did.

[204] According to Morrison, Guardian had lost confidence in Cover's management and they were not getting any information from Boudreault to dissuade them from resorting to the bankruptcy process.

[205] If that was the case, why did Guardian act so precipitously if it did not have all the relevant information? Why not give Boudreault a chance to dissuade Guardian from resorting to the bankruptcy of Cover?

[206] It is somewhat difficult for someone to dissuade another when that person ignores what the object of the dissuasion is. Shouldn't Boudreault have been informed earlier that the bankruptcy was envisaged by his co-shareholder in order allow him to dissuade the latter from going forward?

[207] Under such circumstances and in the absence of all relevant information, how could Guardian consider the MNP Report and its conclusions as reliable?

[208] In any event, Morrison insisted that the 100% failure rate of the 2011 Production was a reasonable conclusion for Guardian. Again, one IGU sample failing a P1 Chamber test means that all IGUs would fail.

[209] What did Guardian had to lose in having an open, forthright and honest discussion with their long term partner who had managed a company (Cover) that generated some $81M in dividends to its shareholders ($61M for the Guardian Group)?

[210] Morrison gave the answer: "*The financial erosion of the company was continuing*" and "*after September 1st, James Boudreault could initiate the Put Option*".

[211] During his cross-examination, Morrison tried unconvincingly to minimise his personal involvement in the process leading to the bankruptcy of Cover.

[212] In that vein, he only became aware of Krywko's involvement sometime in August, at an unknown date. Yet, he previously testified of having spoken to Krywko in July as well about Cover.

[213] Morrison did not know when the *"outside"* lawyers were hired by Krywko.

[214] Moreover, when Morrison agreed to postpone the special meeting of the directors to August 22nd at Boudreault's request, he claimed the he still had no knowledge of the involvement of the outside counsels in Montreal and of the mandate given to MNP on August 12, 2014. He was only made aware of the mandate given to MNP *"within a week"* before the August 22nd meeting and he did not even know when their report would be available.

[215] It would explain why he only received it at 8:00 p.m. in the evening of August 21st. The Court does not believe that the witness did not even know if the MNP Report would be available for the August 22nd, 2014 special meeting of the Board.

[216] Morrison also claimed that he was relying on Krywko, Guardian's in-house counsel that he described as "*a good attorney who is preparing the bankruptcy even if no decision was made*". On that specific subject, Morrison mentioned repeatedly that the decision to proceed with the bankruptcy had not been taken.

[217] When was the decision taken then?

[218] Morrison seemed to imply that upon receiving the *"unexpected"* MNP Report around 8:00 p.m., Guardian's decision to put Cover in bankruptcy had still not been taken and that they were still trying to get more information from Boudreault at the special meeting to be held on the following day.

[219] The witness' story just does not make sense. His version of the facts is simply not credible, given the facts introduced into evidence.

[220] Morrison had to be aware of the decision to put Cover in bankruptcy much before August 21st. It is highly unlikely that Morrison did not know earlier in the week that he had an appointment at the Trustee's offices at 3:00 p.m. after the special meeting of the directors. Obviously, such an appointment only made sense if the Assignment in Bankruptcy Resolution was passed earlier in the day, at that the special meeting of the Board.

[221] The Court believes that Morrison was one of the key Guardian employees who orchestrated the bankruptcy of Cover and implemented Guardian's decision.

[222] Morrison added that "*I did not call James Boudreault about the impending bankruptcy. I know that James goes to bed early. James Boudreault did not know about the bankruptcy.*"

[223] Upon reading the so-called *"unexpected"* MNP Report around 8:00 p.m., how could Morrison not realize that the bankruptcy was imminent if it really had not been decided until then? The special meeting of the Board was schedule to begin in some 12 to14 hours. Wouldn't someone, being apprised of such *"unexpected"* and important if not crucial information about the future of Cover, not try to wake up a *"good friend"* in order to advise him to read the MNP Report as it would be tabled and discussed at the special meeting? Morrison knew that Boudreault was asleep in bed when he chose to send the MNP Report to him by email. In all likelihood, Morrison forwarded the email at a time at which he knew that his *"good friend"* would not probably see it before the special meeting of the Board. In all appearances, Morrison was implementing Guardian's strategy, keep Boudreault and his son Terence "in the dark" as much as possible.

[224] Morrison's testimony also contradicted his own statement in the affidavit that he signed in support of Guardian's contestation of the present Motion, where he affirmed under oath:

> "174. As will be demonstrated hereinafter, in view of this alarming discovery, Guardian Canada requested that its counsel retain the services of MNP to prepare a report (R-6) in order to determine the impact of the future returns and allowances of the 2011 IGUs on Cover's financial situation;"

[225] How could Morrison make such a statement under oath if he was only made aware of the hiring of outside counsels in Montreal and of the mandate having been given to MNP within a week before the August 22nd meeting? He was not aware of such facts as they occurred.

[226] Morrison also specified that the bankruptcy decision was not taken because "*of the $18 million Put* [Option]". But, he concluded his cross-examination by saying that they wanted to put the company in bankruptcy as soon as possible to "*protect the employees and the creditors…and to avoid the additional $18 million debt for James Boudreault*".

[227] In any event, resorting to the bankruptcy of Cover not only ensured Guardian to be relieved from its financial obligations under the Guardian Guarantee but it also ensured that no one in the future would ever know whether the fictitious *"catastrophic"* $42M scenario was realistic. More importantly, not a single customer of Cover could ever rely and benefit from Cover's warranty in the future.

[228] For Guardian, *"the financial erosion"* would be contained with Cover's bankruptcy. The Court understands that we are talking here of the *"financial erosion'* of Guardian caused not by Cover, but because of Cover and the Option.

[229] With all due respect, Morrison's testimony was filled with many hesitations, contradictions and inconstancies that seriously affected his credibility in the eyes of the Court.

[230] Moreover, based on the preponderant evidence adduced at trial, the Court has serious reservations about several of the affirmations made by Morrison in his 210 paragraphs affidavit signed on September 18, 2014 in support of Guardian's contestation.

[231] Morrison's story in the affidavit reads well but several of his statements were not supported by the evidence and sometimes by his own testimony.

[232] The Court does not believe Morrison's minimal involvement in the bankruptcy of Cover nor that he was only made aware of the mandate given to MNP a few days before the August 22nd meeting and that he only received the MNP Report at 8:00 p.m. on the evening of August 21st which means that, in all probability, his aforementioned

statement in the affidavit was true. Then why did he offer a different version during his testimony?

[233] The Court does not believe that when Morrison as an experienced executive accepted to serve as director of Cover on August 6th, 2014, he was not aware of Guardian's plan to put Cover in bankruptcy. At that time, Guardian already had *"Montreal lawyers"* and PricewaterhouseCoopers had already been approached at the beginning of August 2014 to produce a report that would justify putting Cover in bankruptcy.

[234] Morrison, as an experienced executive who had already served as director on boards, must have been aware of a director's fiduciary duty towards the company on which board he agrees to sit.

[235] The Court does not believe for an instant that Morrison, an experienced executive and director, accepted to preside a special meeting of the Board and propose the Assignment in Bankruptcy Resolution not knowing as late as on the eve of the meeting that the MNP Report would be available and that Guardian had not yet decided on the bankruptcy of Cover.

[236] Under such unusual circumstances, how could Morrison, as director of Cover, mentioning repeatedly that Guardian did not have all the relevant data on the 2011 Production, flatly refuse Boudreault's understandable and legitimate request for additional time to take cognizance of the MNP Report that he had not yet read and get a second opinion from Cover's auditors, Ernst & Young, given the gravity of the conclusions of the MNP Report?

[237] When Morrison accepted to serve as director of Cover, he had the duty to protect the interest of Cover if it came in conflict with the interest of the majority shareholder. The Court does not believe that as director of Cover, Morrison acted in good faith in the performance of his duties.

[238] Finally, when cross-examined on his involvement regarding the $10M transaction in December 2013, Morrison was hesitant and unconvincing on the reasons why the transaction did not proceed as planned.

[239] Morrison was directly involved in the discussions surrounding that transaction that he personally initiated in the spring 2013.

[240] At all relevant times, Guardian was receiving Cover's in-house financial statements on a monthly basis since 1995. They necessarily included financial information about the IGUs replacement program. Yet, Guardian would have only noted a *"spike"* in the IGUs return-rate in June 2013. Be that as it may, this information caused concern internally at Guardian and Morrison was asked to increase his involvement with Cover in that respect in mid-2013.

[241] Considering that in 2013 Guardian was preoccupied with the 2011 Production failure rates and entertained serious doubts about being fully apprised of the situation by Cover and Boudreault, it is quite surprising that on October 31st, 2013, Guardian prepared an internal outline of its proposed transaction with Boudreault (**R-20**) and that it was still seriously contemplating going ahead with an additional two-year extension of the Option and acquiring an additional 14% equity in Cover by buying some of Gestion's shares for more than $10M. In December 2013, despite that the same concerns were still growing, Guardian nevertheless submitted contracts to Boudreault for the closing aimed to take place before the end of that year. Guardian also sought Boudreault's approval for the eventual merger between Cover and Guardian Canada.

[242] Then, in 2014 everything changed suddenly with the due diligence process initiated in the spring of 2014 at the request of the Board of directors of Guardian.

[243] In August 2014, the financial situation was not significantly different than in December 2013 when the $4M dividend was declared at Guardian's insistence except that the return rate on the 2011 Production had reached 7.33% after some three years. According to the due diligence report sent on August 13th, 2014 by Pastore to Boudreault (**D-13**), Cover should have allocated a reserve of some $5M for the 2011 Production. In less than 10 days later, Boudreault will be told that Cover has a $42M problem…

[244] Guardian's complete turnabout in 2014 is totally inconsistent with its behaviour in 2013. Guardian already had on hand the relevant information and as a world leading corporation in glass production, it already knew of the financial consequences of producing a *"bad batch".* The company and its shareholders will sustain a *"financial penalty".*

[245] The only logical and highly probable explanation for such an abrupt change is the transfer of the ownership of Guardian that occurred at the end of 2013 or at the beginning of 2014. The *"good years"* when Cover was able to generate generous dividends were over. The competition was stronger. In all probabilities, the new owners were now looking at incurring *"financial penalties"* with Cover's 2011 Production in addition to having to pay $18M to Gestion in order to acquire full ownership. The past performances no longer counted for the new owners. Guardian wanted out and the bankruptcy of Cover was the answer to terminate the 2010 Shareholders' Agreement and save Guardian from paying the $18M to Gestion.

[246] In light of the preponderant evidence, the Court is of the opinion that under the circumstances prevailing in August 2014, Guardian would have had no interest in provoking the voluntary assignment of Cover in the absence of the Guardian Guarantee in the 2010 Shareholders' Agreement. The offer that Morrison wanted to present to Boudreault on the weekend of August 23, 2014 is quite revealing and eloquent.

[247] Morrison testified that after the August 22nd, 2014 special meeting of the Board and attending at the Trustee's office, he tried unsuccessfully to call Boudreault over the weekend. The conversation never took place, but Morrison stated that he had the mandate to present an offer to Boudreault on behalf of Guardian.

[248] According to Morrison, Guardian (and Guardian Canada) was ready to sell its entire interest in Cover for $1, provided that Guardian and Guardian Canada would get a full and final release from Cover and from Gestion and Boudreault as well from any and all obligations and liabilities, including the Option. Boudreault and Cover would have had to assume all liabilities of Cover to the complete exoneration of Guardian and Guardian Canada.

[249] In other words, under such a proposal, if Gestion and Boudreault renounced to exercising the Option and claiming the $18M purchase price from Guardian under the Guardian guarantee, Cover would be theirs exclusively and would remain "alive" (out of the bankruptcy). Cover could then pursue its operations to the complete exoneration of Guardian and Guardian Canada who would no longer be involved. The Court understands that under such a proposal, the Assignment in Bankruptcy Resolution would have never been used.

[250] Morrison was apparently not able to reach Boudreault and make the offer before the Trustee was instructed on Monday morning to file the bankruptcy documentation. The concept behind the offer nevertheless confirms where Guardian's priorities and motivations were at the time.

[251] If Guardian had been more forthright with Boudreault and had acted honestly and in good faith, as all are expected to do so under the *Civil Code of Quebec*[5], instead of acting hastily and in a scheming manner with the trumped-up conviction that it did not have all the relevant data from Cover and instead had openly communicated its true intentions to Boudreault about its *"bankruptcy solution",* Cover, in all likelihood, would not have found itself in such dire and unnecessary predicament.

[252] With the benefit of the evidence and having heard the parties' testimony, the Court is convinced of Boudreault's good faith in this unfortunate affair and that he would not have jeopardized the future of Cover, the company that he had founded some 23 years before and which had been extremely profitable for its shareholders during those years under his direction. The Court does not believe that Boudreault would have blindly plunged Cover into dire financial straits for the Option. His involvement in the interim financing episode and his testimony at the hearing at the time speak volume.

[253] Regardless of Cover's financial situation at the time of the exercise of the Option, Guardian was directly and personally liable as principal debtor for the payment of the agreed upon purchase price in the 2010 Shareholders' Agreement.

[5] 1375. The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.

[254] The existence of the Guardian Guarantee can be easily explained as the exercise of the Option be it by Gestion or Guardian itself had one undeniable purpose. Guardian through its wholly-owned subsidiary, Guardian Canada, would become the sole owner of Cover.

[255] Guardian knew that fact and the reality surrounding its own financial responsibilities very well. The in-house October 31, 2013 internal outline (**R-20**)[6] leaves no doubt about it. Guardian knew since 2010 about Cover's commitment to redeem Gestion's shares for the $18M minimum purchase price. Yet, it kept on withdrawing important dividends year after year that, in all certainty, prevented Cover from ever being able to honour its commitment under the Option. Just between 2010 and 2013, Guardian received $15M in dividends through Guardian Canada. Guardian knew that it had guaranteed to Gestion the obligations of Cover under the 2010 Shareholders' Agreement as principal debtor and not merely a surety. Guardian knew that all times that, in any event it was the only party who could and would have to pay the $18M purchase price to Gestion. The Guardian Group caused Cover to never be in a position to honour the Option. Only Guardian could pay and its new ownership was undoubtedly aware of it.

[256] The Court can only conclude that, based on the preponderant evidence and in all likelihood, Guardian (and its new ownership) *"wanted out"* while they were still *"financially ahead"* as:

- on one hand, they did not want to incur any further *"financial penalties"* that unfortunately came with the 2011 Production failure and Cover's obligation to correct the situation; Guardian considered that Cover was not as profitable as before and Boudreault increased the *"financial erosion"* of Cover by being unnecessarily generous in his attempts to correct the situation and allowing Cover to absorb the labour costs related to the replacement of the 2011 Production defective IGUs; and

- on the other hand, acquiring complete ownership of Cover at a cost of $18M was no longer a financially attractive proposition under the present circumstances; Guardian no longer intended to exercise the Option after January 2014, but it certainly did not want Gestion to do so either.

[6] Guardian would purchase 14% of additional equity in Cover to prepare for a potential amalgamation of GICC and Cover in the future which would result in a new entity ("Amalco"). By amalgamating GICC and Cover, Amalco could utilize the existing Net Operating Loss (NOL) asset held by GICC today against Cover profits. The potential amalgamation will not occur in fiscal year 2013, and will be under review again in 2014.
As Guardian is obligated to purchase the remaining equity held by Boudreault Inc at the end of James Boudreault's employment contract, Guardian has decided to break up that purchase and to purchase 14% prior to the amalgamation.

[257] Guardian did not want to acquire or to be forced to acquire the full ownership of Cover and pay for it $18M to Gestion. The idea of postponing the exercise of the Option by two more years (as previously agreed with Boudreault) would have helped relieve the "pressure from the Option" but it came at an unattractive price. Guardian no longer wanted to pay $10M to Boudreault for an additional 14% stake in Cover.

[258] In order to achieve Guardian's goal, Cover had to be plunged into bankruptcy before Boudreault (Gestion) could exercise the Option in order to terminate the 2010 Shareholders' Agreement and void the Option and the Guardian Guarantee regardless of the collateral damages, regardless of the obvious dire consequences for Cover and its 300 employee workforce and more particularly for the thousands of customers who had purchased Cover products over the last 23 years and who still depend on Cover's after-sale service and warranty program.

[259] As shareholder in a corporation, Guardian Canada's liability was limited to the value of its shares in Cover. In principle, the correction of the *"catastrophic"* 100% replacement of the 2011 Production and the lawsuits, if successful, would have cost nothing more to Guardian and Guardian Canada. Moreover, Guardian and Guardian Canada had already received from Cover some $61M in dividends over the previous years, including $3M in December 2013.

[260] The idea to offer to sell Guardian Canada's shares to Gestion for $1 revealed eloquently that the Guardian Group had no further financial interest in Cover on August 25, 2014 or since it decided to resort to the remedies of the BIA earlier in 2014. Boudreault could have pursued Cover's operations and continued to handle the claims without further liability to the Guardian Group, if it wasn't for the Option.

[261] The Court finds that the bankruptcy of Cover was provoked by the Guardian Group for only one purpose: automatically trigger the termination of the 2010 Shareholders' Agreement and immediately void the Option and most importantly, the Guardian Guarantee.

[262] The provisions of the BIA and its spirit are not designed to resolve such shareholders' disputes.

- **Was Cover insolvent on August 25, 2014, within the meaning of the BIA?**

[263] It is also the Court's finding that on or before August 25, 2014, Cover was not an *"insolvent person"* within the meaning of Section 2 BIA for the following reasons.

[264] The expression *"insolvent person"* is defined at Section 2 BIA as follows:

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

> (a) who is for any reason unable to meet his obligations as they generally become due, [“**Test A**”]
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, [“**Test B**”] or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; [“**Test C**”] ”

[265] At the hearing, each side produced a report from an expert witness aiming at establishing on one hand that Cover did not meet any of the three tests and on the other, that it met each and every insolvency test.

[266] Must all tests be met in order to declare someone insolvent? Or is just one, either of them, sufficient?

[267] The answer to the foregoing question has been settled by the jurisprudence[7]. These tests are not cumulative.

[268] However, the tests must be applied in light of the facts specific to each case, always bearing in mind the aforementioned principles underlying the BIA.

[269] Before examining those three tests, the Court will deal with the argument of Guardian’s lawyers that Cover’s own admission of insolvency evidenced by the Assignment in Bankruptcy Resolution passed by a majority of its Board of directors settles any doubt about Cover’s actual insolvency as at August 22, 2014. They believe that Cover’s own acknowledgement of insolvency made through the said resolution of its Board of directors cannot be ignored and must take precedence.

[270] With all due respect, the Court disagrees with that assertion and the Court cannot ignore either that Boudreault, the third member of the Board of directors, voiced his objection and voted against such a resolution proposed by his two co-directors, Morrison and Zoulek.

[271] The resolution passed on August 22, 2014 with a majority of directors, reads as follows:

> "INSOLVENCY AND BANKRUPTCY:
>
> After the review of the Company's financial position, the Board of Directors acknowledges that the Company is insolvent and that it is unable to meet its obligations as they become due.
>
> UPON MOTION DULY MADE AND SECONDED, IT IS RESOLVED THAT:

[7] *Tousignant* v. *Banque de Nouvelle-Écosse*, 2001 CanLII 7118 (QCCA).

> The Company file an assignment and that PricewaterhouseCoopers LLP, Trustee in the City and District of Montreal, act as Trustee to the bankruptcy of the Company, and that Michael Morrison is authorized and directed, by and on behalf of the Company, to sign all documents and to do such further acts and things as Michael Morrison, in his sole discretion, may consider necessary or desirable to give effect to this resolution."
>
> [the "**Assignment in Bankruptcy Resolution**"]

[272] The Court believes that even in the absence of any mention of Boudreault's negative vote in the resolution itself by adopting the Assignment in Bankruptcy Resolution under the particular circumstances then prevailing, Morrison and Zoulek, the two members of the Board designated by Guardian Canada, who voted in its favour despite the objections of Boudreault, the director designated by Gestion, violated the provisions of Section 1.1 of the 2010 Shareholders' Agreement as Gestion's approval was necessary if not essential to proceed to the liquidation of Cover:

> "1.1 A correct and complete copy of the articles and bylaws of the Company and Cover are attached as Exhibit 1.1. The Company will not, without the approval of Gestion Boudreault: (i) amend its articles or bylaws (other than ministerial or technical changes that do not affect any substantial rights of any shareholder); or (ii) sell assets which are responsible, in the aggregate, for 40 percent of the sales of the Company; or (iii) sell the shares of a subsidiary or a sub-subsidiary; or (iv) amalgamate or merge with another company; or (v) liquidate the Company."

[273] It is necessary to point out that the present matter is a rather unusual, if not a unique one in that it is, to all intents and purposes, a form of an unfortunate "duel" between the two shareholders of Cover. One that owns 75% of its shares who wants its company to be declared bankrupt at all cost and the minority shareholder who want to *"keep it alive"* and operating.

[274] We are not facing a company that on August 22 and 25, 2014, was avoiding its creditors as it could not honour its financial obligations towards them as they were becoming due. The actual situation prevailing at the time was entirely the opposite. This does not mean that Cover was not called upon to face certain financial challenges in the months or years to come, but its very survival was not an issue for anyone, except for Guardian and its wholly owned subsidiary, Guardian Canada who in all likelihood, had a very different agenda for Cover.

[275] In fact, the preponderant evidence reveals that on August 22nd, 2014, Cover was in sound financial situation. It was profitable despite a reduced market share but it was improving, as Terence Boudreault testified. Cover met its liabilities has they were becoming due without any difficulty; Cover enjoyed significant available short-term credit from its banker, the Scotia Bank, with an important unused portion; all of Cover's plants assessed at some $12M were free of any charge, mortgage, hypothec or

encumbrances and Cover was providing after-sale service and honouring the warranty given to its clients by replacing defective products during the applicable warranty period.

[276] In December 2013, Guardian Canada demanded that a $5M dividend be declared and distributed. This is not a sign in itself of pending insolvency, unless Guardian Canada was already planning to position Cover for insolvency if one considers the amount of such a dividend in light of the $500,000 profits made by Cover in 2013. But the Court does not believe so because of the $10M transaction that was "still in the air" then.

[277] One must remember that the $5M dividend was reduced to $4M at the insistence of Boudreault who thought that it was seriously out of proportion with the $500,000 profits for 2013.

[278] Can Boudreault be blamed for bowing on that question? The answer is no.

[279] Gestion was about to see its stake in Cover reduced to 11% in a few days. Gestion was about to get $10M from Guardian Canada for part of its shares. This is not the sign of a majority shareholder who does not believe in Cover and who will provoke its bankruptcy soon after. The problems related to the 2011 Production were well known by all and Cover was actively honouring its warranty program. The idea that Guardian would renege on its agreements with Gestion and provoke the bankruptcy of Cover eight months later was not in Boudreault's mind for certain; had Boudreault known Guardian's real plans, the Court is convinced that he would have never allowed Guardian to remove so much equity from Cover to the detriment of the company, its workforce and its creditors and customers. The Court is certain that at the time, Boudreault never entertained the idea that Guardian was not acting in good faith.

[280] Moreover, no one can pretend that with a reduced stake in Cover at 11%, Boudreault did not care anymore. The latter had accepted to push the exercise of his Option to the end of 2016 and to remain at the helm of Cover for two more years. We must bear in mind that this whole idea came from Guardian and Morrison in the spring of 2013, not from Boudreault.

[281] If indeed, Boudreault was aware of crucial and catastrophic information about the 2011 Production and purposely kept it secret from Guardian, wouldn't it have made far more sense for Boudreault *"to get out of Cover as soon as possible"* and refuse to postpone by two more years the exercise of his Option, hoping that Guardian would only discover the so-called "truth" after his exercising the Option in September 2014?

[282] Cover is also involved in two lawsuits for product liability, namely the Bocenor and the Jeld-Wen lawsuits that it contested in good faith in the case of Bocenor and is still contesting in the same manner with respect to Jeld-Wen, in light of the evidence offered by its outside counsel in a *"huis-clos"* hearing. If and when the plaintiffs eventually succeed and are awarded an indemnity against Cover, it is not anticipated

that, under normal circumstances, the financial obligations of Cover would threaten the very survival of the company.

[283] Finally, on August 25, 2014, there was not a single creditor that was applying any form of pressure on Cover to cause its bankruptcy due to its failure or its default to honour its obligations has they became due.

[284] With such a factual backdrop, the lawyers for Guardian and Guardian Canada argued that the expression *"liquidate",* found in Section 1.1 of the 2010 Shareholders' Agreement, did not mean or include the notion of filing of a voluntary assignment in bankruptcy under the BIA.

[285] With all due respect, the Court disagrees.

[286] The right of veto granted to Gestion regarding an eventual liquidation of Cover was first introduced in the 2004 Shareholders' Agreement. The Court does not know the reasons for such an addition. However, the expression used in the Agreement does not specify the method of *"liquidation"* contemplated by the parties. Obviously, the parties had to contemplate a liquidation to be decided by the Board of directors of Cover; otherwise Gestion's right to object was pointless, if not meaningless. In order to determine whether the expression *"liquidate"* applies herein, one has to also take into consideration the circumstances surrounding the adoption of the Assignment in Bankruptcy Resolution.

[287] As previously mentioned, on August 22, 2014, there were no *"outside forces"* exerting any pressure on Cover due to its alleged state of insolvency. The decision to file an assignment in bankruptcy came exclusively from within the company or more, precisely from the majority shareholder, who had designated two of three directors sitting on Cover's Board and who caused them to propose and adopt the Assignment in Bankruptcy Resolution for financial reasons that only mattered to that shareholder.

[288] There is no doubt in the Court's mind that the Cover's assignment in bankruptcy constitutes a voluntary assignment decided by a majority of its directors with the strong objection of Boudreault, designated by Gestion. The very purpose of an assignment in bankruptcy of a corporation is to ensure its orderly *"liquidation"* and the orderly *"liquidation"* of its assets in compliance with the rules set out in the BIA. [Emphasis added]

[289] The vehicle adopted and used by the majority of Cover's directors was a voluntary liquidation of the company under the BIA. It therefore constituted a voluntary liquidation of Cover, within the meaning of Section 1.1 of the 2010 Shareholders' Agreement and by disregarding Boudreault's objection to proceed to the liquidation of Cover under the BIA, the other two directors (as well as Guardian Canada) violated the terms and conditions of the said Agreement. [Emphasis added]

[290] Based on the rights granted to Gestion under Section 1.1 of the 2010 Shareholders' Agreement, the Board of directors could not validly adopt the Assignment in Bankruptcy Resolution without Gestion's approval that had to be expressed through Boudreault.

[291] Notwithstanding the foregoing, the Tribunal does not believe that on August 22 and 25, 2014, Cover met any of the three insolvency tests as they should be applied.

[292] The MNP Report concluded otherwise. With its three scenarios, Cover met all three insolvency tests. But, all due respect, The Court strongly disagrees with MNP's conclusions that result from unproven and unrealistic scenarios dictated by Guardian.

- **The MNP Report dated August 21, 2014 (R-6)**

[293] The decision to adopt the Assignment in Bankruptcy Resolution made by Guardian via its two designated directors, Morrison and Zoulek, on August 22, 2014, was based on the findings and conclusions of the MNP Report dated August 21, 2014 (**R-6**) that had been ordered on August 12th, 2014 by La Roche, one of the Guardian Group's lawyers in Montreal. The mandate was given for the following purpose:

> "Guardian Industries Canada Corp. ("Guardian" or the "Client") has requested that we assess the impact of potential defect liabilities on the financial situation of Cover Industries Inc. ("Cover"), a subsidiary of Guardian, following defects. You have also asked us to prepare calculations ("Calculations") to determine whether Cover has the financial capacity to meet its obligations as they become due, taking into consideration those potential liabilities.
>
> MNP is hereby providing a report of our findings, based on the available financial information received as of the date of this report. **It is our understanding that this report will be provided to Cover's Directors to assist them in assessing the financial situation of Cover during their Board Meeting scheduled on Friday August 22, 2014**."
>
> [Emphasis added]

[294] The Court finds that MNP's *"catastrophic"* 100% scenario was inspired if not dictated by Guardian that informed MNP of its concerns that the IGUs manufactured by Cover in the year 2011 exhibited a higher than normal rate of return for manufacturing defects and are likely to be replaced:

> "However, since 2011, Cover started experiencing higher rates of returns for defective products. After investigating the issue and having a third-party expert review the defective units, it appears that the sealant used by Cover is incompatible with the PVC of the spacer.
>
> The Units produced by Cover in 2011 appear to be experiencing the most failures. In 2011, Cover changed its product-mix to use a new sealant. In total

> 679,392 were produced in 2011. As of August 19, 2014, Cover has already replaced 49,803 Units which represents 7.33% of the total number of Units produced in 2011. Cover's warranty for this type of defect is up to 15 years.
>
> **Guardian is concerned that the entirety of the Units produced in 2011, combining the specific sealant and spacer, may be defective and will require a Unit replacement**. Cover's product warranty covers this type of defects and therefore customers will be entitled to replacement Units. Hence, Guardian expects that the levels of product returns will increase exponentially in the short term." (MNP Report page 2)
>
> [Emphasis added]

[295] The Court notes that the 100% replacement scenario was not only a finding or a conclusion reached by the author of the MNP Report, Mr. Denis Hamel ("**Hamel**") of MNP, but the latter did not determine if such a conclusion was reasonable under the circumstances.

[296] The Court concludes that the 100% replacement scenario came from Guardian and MNP simply calculated the damages stemming from it and adding the 75% and 50% scenarios to give more credence to his conclusions, namely Cover was insolvent in August 2014 under all scenarios:

> "We have calculated the potential liability using average variable costs based on net sales for the years 2011 to 2013 based on Cover's financial results and from internally prepared document. The potential liability calculated is then present-valued over the remaining warranty period.
>
> The present value calculated represents the amount that Cover would need to invest right away to be able to assume the potential liability as it becomes payable (as per our claim scenarios in section 7.2.1).
>
> This scenario is, in our view, likely to represent the reality that Cover will face if clients' claims start to increase exponentially. We used a discount rate of 2.5 % to convert future claims to a present value. The rate used is based on the Bank of Canada marketable bonds over 10 years on the date of this report." (MNP Report page 5)

[297] MNP made calculations based on three assumptions namely that the rate of defective 2011 IGUs to be replaced would be 50%, 75% and 100% in all cases based on a 15 year warranty period, although some IGUs came with 5 year or 10 year warranties.

[298] Hamel added:

> "We have calculated that the cost of replacing the remaining Units represents an amount between $21.27 and 42.55 million (Schedule 3) with a present value of between $19.33 million and $35.74 million as of July 31, 2014.

> When we include the potential defect liability to the total liabilities, as per July 31, 2014 financial results, Cover found itself in a position where its total assets ($13.76 million) are not sufficient to cover its liabilities. This situation meets one of the criteria [based on the definition of "insolvent person" in the BIA] for Cover to be insolvent. (MNP Report page 9)
>
> […]
>
> In all three scenarios, the Calculations show that, as of 2014, Cover will start incurring negative cash flow considering the defect liability.
>
> Both the 100% and 75% scenarios (A and B above) have cumulative negative cash flows until 2026. Based on a 100% scenario, cumulative negative cash flow is $(11,414,052) in 2026 (Schedule 5). Based on a 75% scenario, Cover would not achieve a positive cash flow until 2024 at which point the cumulative negative cash flow is $(7,494,418) (Schedule 6). Based on a 50% scenario (C above), Cover would not achieve a positive cash flow until 2021 at which point the cumulative negative cash flow is $(4,260,991) (Schedule 7)." (MNP Report page 11)

[299] Hamel concluded his report as follows;

> "8, CONCLUSION
>
> **Based on the information obtained, the assumptions enumerated in this report** and the work performed, we are of the view that:
>
> a) Cover faces a **potential** defect liability of $42.55 million with a present value of between $19.33 million (50% of Units replaced) and $35.74 million (100% of Units replaced) as of July 31, 2014.
>
> b) When we include the $42.55 million of potential defect liability to the total liabilities, as per July 31, 2014 financial results, Cover's will find itself in a position where its total assets ($13.76 million) are not sufficient to cover its liabilities. **This situation meets one of the criteria for Cover to be insolvent**.
>
> c) Cover will start incurring negative cash flow after defective Units' defect liability costs as of 2014. Cover does not have the financial capacity to assume this potential defect liability, and as the claims for defective Units will arise, it will not be able to meet its obligations as they become due. This situation meets one of the other criteria for the company to be insolvent.
>
> d) **Cover will become insolvent if the shareholders do not inject new capital or obtain additional financing to cover the negative cash flow to be incurred**.
>
> e) The calculations performed do not take into account some facts that are not quantifiable at the time of this report. For example: the judgement against Cover for which the quantum of damages is unknown; the Motion to institute

> proceedings against Cover for which the amount claimed is approximately $4.6 million; and other potential lawsuits, such as a class action, since the defect is pervasive in the window Unit." (MNP Report page 12)
>
> [Emphasis added]

[300] Hamel's report is based essentially on the information provided by Guardian and its lawyers and Guardian's expectation or concerns that the entire 2011 Production had to be replaced. Such an unsubstantiated expectation or such concerns do not automatically turn into reality. Hamel had to test the soundness of Guardian's apprehensions made with one goal in mind, find a way to put Cover into bankruptcy.

[301] Hamel never had any discussions with anyone at Cover nor did he ever visit one of its facilities in order to verify if Guardian's concerns were justified and realistic. He simply built his report on it.

[302] The exercise was, in all appearances, to use Guardian's concerns convert them into the assumption that Cover was inevitably going to experience a 100% replacement scenario of its 2011 Production and quantify Cover's damages as a result thereof to conclude that Cover was insolvent now, within the meaning of the BIA at the time.

[303] Hamel wrote his report knowing full well in all likelihood that the Board was to meet on August 22nd, 2014 and that his report released on the day before would serve to adopt the Assignment in Bankruptcy Resolution.

[304] In support of its Motion to Annul the Bankruptcy of Cover, Gestion retained the services of Mr. François Filion ("**Filion**") of Accuracy Canada Inc. ("**Accuracy**") to analyse and comment the MNP Report (**R-6**) and to express his opinion as an expert on the "insolvency" of Cover on August 22 and 25, 2014 (the "**Accuracy Report**").

- **Accuracy Canada Inc. – Report dated August 27, 2014 prepared at the request of Gestion's lawyers**

[305] After having analysed, *inter alia*, Cover's historic financial statements, Filion concluded that the company had been profitable, despite the loss of a portion of its market share between 2010 and 2013 and, despite the claims related to the 2011 Production, it had nevertheless been able to generate so far a profit, albeit more modest.

[306] Comparing Cover's 2014 results to the same period in 2013 revealed, setting aside the present bankruptcy context provoked by Guardian, that it was going to realize similar profits.

[307] Filion noted that as at July 31, 2014, Cover had no difficulty in collecting its accounts receivable and paying its accounts payable when they became due.

Moreover, at the time, Cover was only using $1.76M of a $4.7M line of credit with the Scotia Bank.

[308] Cover had unencumbered immovable assets assessed at more than $12M.

[309] Filion concluded that in his opinion, Cover was not insolvent at the time and showed all the signs of being in healthy financial condition.

[310] In his opinion, MNP Report's conclusions were purely theoretical and were based on the worst possible scenarios with the replacement of 100%, 75% or 50% of the 2011 Production.

[311] At a 100% replacement rate of the 2011 Production, IGUs that would have to be replaced as far as in 2026 (based on a 15-year warranty) would generate a replacement value of some $42M with an actual value of almost $36 million in 2014, hence Cover's actual state of insolvency with assets of less than $14 million in August 2014.

[312] Hamel was proving that Cover was meeting Test C.

[313] Moreover, when using MNP's original cash flows in the report that was used by the two directors designated by Guardian and Guardian Canada on August 22, 2014, Hamel showed that under the three scenarios, Cover's cash flow from 2014 to 2026 would always negative throughout whether one would consider the worst scenario possible (100% replacement rate) or the other two at 75% and 50%.

[314] Hamel's cash-flows were consistently negative from 2014 and thereafter. It showed that Cover was losing money from 2014 due to his 2011 Production replacement's scenarios. With such figures, MNP concluded that Cover could not honour its obligations as they became due even in 2014.

[315] Therefore, Cover met the other two insolvency tests (A and B) of the BIA in August 2014.

[316] However, Filion noted the presence of significant errors in the three cash flows used by MNP in its report of August 21, 2014. The main error was that Hamel used "after tax" revenues to which he applied the "before tax" cost of replacement of the 2011 Production IGUs. As a matter of example, Filion identified that the replacement cost used by MNP in the MNP Report for the year 2014 was $869,146, omitting to deduct from such cost, tax savings of $233,800 yielding a net replacement cost of $635,346. Mr. Hamel of MNP acknowledged his omission that had an important impact on his entire cash flows covering 2014 to 2026 because of the 15-year warranty coming with the 2011 Production.

[317] With Filion's correction, Cover's three cash flows (keeping the same projected annual revenues used by Hamel in the MNP Report) revealed a totally different picture. The cash-flows went from all negative year after year beginning in 2014 to all positive

from 2014 to 2020 in six years, under the worst case scenario (100%). But, with the 75% and the 50% replacement rate scenarios, Cover's cash flow would remain positive from 2014 throughout until 2026.

[318] In other words, with the projected annual revenues used by MNP in its August 21, 2014 report, Cover could still manage to replace the 2011 Production at the unproven rates of 50% and even 75% and would only need the assistance from its shareholders commencing in 2020 with the 100% scenario, assuming that its revenues have not increased at all in 2020.

[319] Filion concluded his report by mentioning that in order to be considered insolvent at the time, the Court would have to consider that Cover:

- would not dispose of cash flow generated by its future operations;

- be confronted to claims from secured creditors, which is not the case here;

- had a negative cash flow (N.B. Filion agrees with annual revenues of $2.6M used by MNP in its August 21, 2014 report that would be sufficient, except for some years commencing on 2020 in a 100% replacement scenario);

- had no access to short term credit (Cover used at the time $1.76M out of a $4.7M line of credit which is still extended by Scotia Bank, despite its difficulties with Guardian);

- had no possibility to obtain long-term financing (at the time that Cover was assigned in bankruptcy, all of its immovable assets, with an estimated value of $12M, were free of any encumbrances and charges); and

- could not count on the financial support of its shareholders.

[320] On that latter subject, Filion noted that between 1997 and 2013, Cover declared and distributed some $83M in dividends with Guardian Canada's share being in excess of $61M (over $43M since 2005).

[321] The Court noted that the Guardian Group received from Cover some $15M in dividends since 2010, when they had already agreed to an Option bearing an $18M minimum purchase price for Gestion's shares. In 2010, the Guardian Group was aware of the Bocenor lawsuit that was instituted in 2005. By the end of 2012, when the Guardian Group received another $3M in dividends, they were aware of the Jeld-Wen lawsuit and they already knew of the 2011 Production problem.

[322] The Court does not believe Morrison's testimony and affidavit that the 2011 Production problem came as a total surprise to the Guardian Group in July 2014. At the end of 2011, Cover had already identified the problem with the Bostik 9152 sealant, had

found a suitable alternative and had already not only started phasing out the Bostik 9152 sealant from its production plants but also started replacing failed IGUs in 2012.

[323] How did the Guardian Group ever expect Cover to honour its obligations as they would become due and withdraw so much money in dividends?

[324] They could answer that Boudreault should have objected at the time and that he did not because Gestion was also collecting handsome amounts.

[325] It is true that with a 25% share, Gestion's dividends were also significant but it is not the one who is intent on closing Cover and on ceasing its operations, closing its various plants and dismissing a 300 employee workforce without mentioning the numerous customers who count on its after-sale service and on its warranty support that will be left stranded.

[326] Filion also mentioned that declaring a $4M dividend in December 2013 with profits before income tax of $500,000 had to be taken as an indication that Cover shareholders were not anticipating any cash flow problems in the short term.

[327] Guardian responded that it was unaware of the 2011 Production failure and its *"catastrophic"* extent. Again, no one knows the true extent number of the IGUs of the 2011 Production that will truly fail in the future. But, Guardian conveniently adopted an unsubstantiated *"catastrophic"* 100% failure rate, a fact that is not supported by the preponderant evidence, to create a state of insolvency for Cover.

[328] Filion's credibility and even his competence were attacked by the lawyer for the Guardian Group, based mainly on the comments made by a judge in a previous case. The Court appreciates the credibility of the witnesses who appear before it, based on the witness' testimony and the evidence offered during the hearing. With all due respect, the Court is not bound by the comments or findings of other judges based testimonies delivered and the evidence offered in other trials.

[329] On the contrary, the Court found Filion's testimony as an expert witness in his field of expertise as solid, credible and convincing; his report was very useful for the purposes hereof and was not tainted by any partiality.

[330] The Motion to Annul and the Accuracy Report seem to have induced Guardian and Guardian Canada to seek a new opinion from MNP and another one from Mr. Stephen Howes ("**Howes**"), an expert in IGUs.

- **MNP's report dated October 6, 2014 entitled "*Cover Industries Inc. – Defect Liability – Financial Impact Assessment*" (D-25)**

[331] It must be pointed out that the present Motion to Annul prompted Guardian to *"dig deeper"* in order to justify the decision of its two designated directors to adopt the Assignment in Bankruptcy Resolution of August 22, 2014.

[332] MNP was asked by Guardian Canada to submit a second report. That second report came with conclusions far more alarming, if not depicting a greater catastrophic if not totally hopeless situation for Cover.

[333] Moreover, Guardian is now blaming Cover for having sold IGUs (the 2011 Production) that did not pass the certification process by the IGMAC, a competent certification authority; a fact that the two directors, Morrison and Zoulek, must now disclose without any delay to the Canadian population, hence the true purpose of their Motion for Review and Direction.

[334] In the context of contesting the present Motion to Annul, the Guardian Group retained the services of Howes, an expert in IGUs, who testified that in his own opinion, upon his examination of a samples of the IGUs manufactured by Cover in 2011 and other more recent samples, all IGUs manufactured by Cover until now will fail and will all have to be replaced.

[335] The second report filed by MNP accepts and uses Howes' findings and conclusions to now adopt the assumption that every single IGU manufactured by Cover from 2011 until now is defective and must be replaced.

[336] If the findings and conclusions reached in those two additional expert reports are true, the message that the Guardian Group seems to convey to the Court is that it should only conclude that Cover's operations have been a *"total disaster"* since 2011 and that it cannot manufacture a single IGU correctly. Regardless of the question of its insolvency on August 25, 2014, the company should be quickly *"put out of its misery"* for the greater benefit of its customers. Cover must stop its operations with any further delay and proceed with its liquidation under the BIA.

[337] *Qui veut noyer son chien, l'accuse de la rage*.

[338] MNP's second report, dated October 6, 2014 (**D-25**) ("**MNP's second Report**"), was ordered by Guardian Canada and aimed at confirming Hamel's initial conclusions of the MNP Report that served to adopt the Assignment in Bankruptcy Resolution.

[339] However, Hamel used different hypotheses even more unlikely and improbable than the ones he used initially in his first report.

[340] In his first report, Hamel used the scenario representing Guardian's concerns at the time, namely that 100% of the 2011 Production was defective and had to be replaced. In his second report, Hamel expressed the opinion that not only each and every IGU manufactured by Cover in 2011 was defective but that all subsequent productions until now were as well defective and must be entirely be replaced. In other words, since 2011 Cover never produced a single IGU that was not defective. Hamel based his new position on the report dated October 4, 2014, filed by the expert Howes (**D-26**) that will be examined subsequently.

[341] With all due respect, the Court has already expressed its serious reservations about Hamel's first report and especially, his hypothesis of a 100% replacement rate of the 2011 Production. Nothing in the evidence gives any credence to such an eventuality that originated from Guardian's concerns for the purpose of preparing the first MNP Report and putting Cover in bankruptcy.

[342] Hamel embraced Howes' conclusions that the 2012, 2013 and 2014 productions would fail entirely as well. Hamel also maintained his 100% replacement scenario for the 2011 Production, despite Howes' opinion that 80% to 90% of the 2011 Production will fail.

[343] Yet, the preponderant evidence established that Cover's subsequent productions were manufactured with a different sealant that not only performed well, but the IGUs from these productions were duly certified.

[344] In his second report, Hamel surprisingly considered additional elements that were known at the time of preparing his first report.

[345] More importantly, Hamel acknowledged and corrected his error, identified by Filion, with respect to his use of the before tax replacement costs with after tax revenues. However, his three negative cash-flows that justified, under his three scenarios, his conclusion that Cover was insolvent under Test C on August 21, 2014, were no longer negative after applying the necessary adjustments identified by Filion.

[346] Hamel chose to change Cover's anticipated revenues between 2014 and 2026 in the cash-flows used for his three scenarios (100%, 75% and 50% replacements).

[347] In his first report that served Morrison and Zoulek to vote the Assignment in Bankruptcy Resolution, Hamel used annual cash-flow projections of approximately $2.3M from 2014 to 2026; a projection that Filion considered acceptable, although somewhat conservative given Cover's historical financial results.

[348] In his second report, Hamel replaced the annual projections of $2.3M with annual revenues of $119,010 from 2014 to 2026. To achieve that result, Hamel used the six-week cash flow that Cover produced with the Trustee following the Stay Order. This six-week cash-flow does not reflect in any way the normal operations of Cover but rather its anticipated income and expenditures on a short term basis after having been plunged into bankruptcy by the Guardian Group. It even includes the cash in advance in excess of $1M per month that it must pay to Guardian in order to continue being supplied by the latter with glass material and legal fees for M^{tre} Jacques Larochelle who is actively representing Cover in the Jeld-Wen lawsuit. There is nothing realistic about this short-term cash-flow that can be used to establish Cover's insolvency on or before August 25, 2014.

[349] The Court is not concerned here with Cover's financial situation under the existing bankruptcy process.

[350] The MNP second Report is of no use to assist the Court make such a determination. The measures adopted by Guardian and Guardian Canada since the filing of the Motion to Annul the Bankruptcy of Cover have been anything but helpful to allow Cover to continue its normal operations, as was contemplated by the Stay Order (the change of the credit terms by Guardian regarding the supply of glass to *"Cash in advance"*, Guardian's objections to Scotia Bank extending funds under the existing short-term facility that Scotia Bank was ready to maintain available despite the bankruptcy, Guardian's contestation of Gestion Motion for Interim Financing in virtue of which Gestion offered to advance $2M to Cover to maintain its operations are prime examples).

[351] Of course, if you prevent Cover from operating normally and significantly restrict its use of funds for its operations and its ability to generate revenues as it was before, in addition to having withdrawn some $4M in dividends a few months earlier, will guarantee that Cover is no longer and will no longer be able to honour its 15-year warranty and continue to replace defective IGUs as it was doing until then.

[352] However, this is not the test that the Court must make to determine if Cover was insolvent when the Assignment in Bankruptcy Resolution was adopted.

[353] The Court must determine whether Cover was indeed insolvent on August 22nd and on August 25th, 2014. In deciding whether an assignment ought not to have been filed, events must be considered as they existed when the assignment was filed: post-assignment events cannot be used to support the present application.[8]

[354] The new scenarios developed by Hamel in his second report are so exaggerated and preposterous that they appear to have been tailor-made once again to reinforce Guardian's wishes. Cover has to fail and disappear, no matter what the cost.

[355] This is not the type of conduct that the Court expects from an expert witness who is supposed to give an impartial opinion to assist the Court to make a decision. How can the Court give any credibility to an *"amended"* expert's opinion that Cover's adjusted annual revenues (that obviously should have been used in MNP's first report), should not have been the conservative $2.3M (as labelled by Filion) but rather $119,010 based on six-week cash-flow readjusted by Hamel to span 12 years from 2014 to 2026?

[356] The role adopted by Hamel is even more dubious in the Court's eyes, when the expert witness considers in his second report the $18 million Option and the Bocenor and Jeld-Wen lawsuits at face value.

[357] In his first report, Hamel did not consider in his calculations the Bocenor and the Jeld-Wen lawsuits as, according to him, they could not be quantified in the context of his attempt to determine the insolvency of Cover at the time:

[8] Houlden, Morawetz & Sarra, The 2014-2015 Annotated Bankruptcy and Insolvency Act, D§68, Page 197; *Re Regional Steel Works (Ottawa – 1987) Inc.* (1994), 25 C.B.R. (3d) 135 (Ont. Gen. Div.).

> "The calculations performed do not take into account some facts that are not quantifiable at the time of this report. For example: the judgement against Cover for which the quantum of damages is unknown [Bocenor]; the Motion to institute proceedings against Cover for which the amount claimed is approximately $4.6 million; […]"[9]
>
> [Emphasis added]

[358] A few weeks later, the expert witness adopts a different approach in his second report. He adds $6,386,093 to Cover's liabilities related to those two lawsuits[10]. This total amount represents the full face value of the two lawsuits.

[359] This abrupt change in such a short period of time on Hamel's part is difficult to understand. What made change Hamel's mind?

[360] The Court understands that during that period of time, Hamel was provided with the *Bocenor* judgment rendered on February 22, 2013 in virtue of which Cover was found liable with two co-defendants. In the Bocenor case, the extent of Cover's liability for this 2005 lawsuit has yet to be determined by the judge who has taken the case under advisement. Nobody knows the amount of Cover's condemnation considering also the presence of two co-defendants.

[361] Hamel was also provided with the Jeld-Wen's Motion to Institute Legal Proceedings against Cover filed in July 2012.

[362] During his testimony, Hamel acknowledged that he made no further attempts to determine the validity of those two claims taken at their face value of $6,386,093. Hamel did not try to obtain Cover's defences filed in both cases, nor the expert reports, nor did he try to contact Cover's lawyer, M^tre^ Jacques Larochelle, who incidentally testified under "*huis clos*" about those two cases.

[363] With all due respect, M^tre^ Larochelle's testimony left serious doubts in the Court's mind about the validity of the assumptions made by Hamel regarding Cover's potential exposure in these lawsuits. Hamel's sudden reliance on two documents with these two lawsuits that were available before his first report is clearly not sufficient, in the Court's opinion, to give credibility to the decision of the expert witness to add more than $6M to Cover's liabilities when a few weeks earlier, he could not quantify these contingent liabilities.

[364] To all intents and purposes, Hamel's position in his second report seems to reflect the same approach taken by Guardian for the purpose of these legal proceedings. Guardian is ready to admit liabilities, any possible liabilities using the worst and most catastrophic scenarios that will generate the highest amount of debts and

[9] MNP Report (**R-6**) page 12.

[10] "It was assumed that the amount (sic) claimed in the lawsuit/judgments were representative of the amounts that would have to be paid by Cover", MNP second Report (**D-25**) page 11.

liabilities possible (100% replacement rate scenario, otherwise contested lawsuits at face value, etc.).

[365] Finally, Hamel decided to add the $18 million Option as a liability of Cover to justify its insolvency as at August 21st, 2014, another fact know to him when he submitted his first report.

[366] As an expert specialised in insolvency, Hamel knew very well or should have known, that this amount could not be considered on August 21, 2014 to determine the insolvency of Cover.

[367] Firstly, the Option had not been exercised and was not due at the time. That is undoubtedly why he did not consider it in his first report. Secondly, had Hamel read the 2010 Shareholders' Agreement, the latter would have realised that triggering the bankruptcy of Cover terminated automatically the Agreement and more importantly, voided the Option and the Guardian Guarantee. Moreover, if it was exercised by Gestion and that Cover could not pay the minimum purchase price, as it was always contemplated given the amount of dividends declared over the years, only Guardian was capable and liable to pay the same amount as a principal debtor and not merely as a surety.

[368] The Court gives no credence to MNP second Report, a document that contains unrealistic, unsupported and grossly exaggerated hypotheses and assumptions to depict, if not artificially create, a false state of insolvency.

- **Mr. Stephen Howes report dated October 4, 2014 entitled "*Insulating Glass Failures of Industries Cover, Inc.*" (D-26)**

[369] Howes is an expert in IGUs who testified in support of his report entitled "*Insulated Glass Failures of Industries Cover, Inc.*" (**D-26**) (the "**Howes Report**"). Howes' services were retained by the lawyers for the Guardian Group after the institution of the present proceedings. His report did not exist when the Assignment in Bankruptcy Resolution was adopted by Morrison and Zoulek.

[370] Howes concluded in his report that some 80% to 90% of the 2011 Production was defective[11]. Howes based his conclusion on his inspection at Guardian's offices of some ten IGUs from the 2011 Production that were defective. In the Court's view, such an opinion is astonishing given that Howes was able to come to such a firm conclusion affecting 679,392 IGUs produced in 2011 after having examined only ten of those units

[11] "I would expect almost all of the Cover IG units to fail during the warranty period because the labor methods and workmanship are consistently very poor. I would expect 80 to 90% of all of the Cover insulating glass units to fail that have been manufactured in this manner." (Howes Report (**D-26**) page 5).

that were known to be defective and parts of some dismantled units, also defective and apparently coming from the same production.

[371] Let us not forget that under the 2010 HB Fuller test, four of six IGUs assembled with Bostik 9152 sealant passed a 22-week P1 Chamber test and a fifth one passed the 15-week level before failing.

[372] During his testimony, Howes acknowledged that he did not take into consideration various factors that influence the longevity of IGUs (the glazing of the IGU, the orientation of the IGU once installed, the weather conditions, etc.).

[373] There is no convincing and credible evidence that 80%, 90% and even 100% of the 2011 Production will fail with certainty. The only certainty is that by August 2014, 7.33% of the 2011 Production had been replaced in a three-year period and that the number of replaced IGUs rose to 7.9% at the time of the hearing in mid-October 2014. With all due respect, the Court does not see any convincing evidence that the above mentioned rates are realistic and sufficiently probable to be utilised.

[374] These conclusions remain opinions that, in all appearances, seem to have been dictated or expected by Guardian's need to establish the insolvency of Cover as at August 22nd, 2014 and justify the decision of its two directors, Morrison and Zoulek, to adopt the Assignment in Bankruptcy Resolution.

[375] Without a very high return rate or failure rate to occur under a 15-year warranty program ending in 2026, the insolvency of Cover in August 2014 is very difficult, if not impossible to establish.

[376] Howes also examined some 29 IGUs apparently manufactured by Cover in 2014 and found that the workmanship at Cover that was, in his view, deficient in the 2011 Production (based on his examination a 10 IGUs and of some dismantled parts) was deficient as well even to this date, leading him and Hamel to conclude that not only the 2011 Production will fail but all subsequent productions until now, all these findings without Howes ever visiting a single plant of Cover or meeting with a single of its employees involved in the manufacturing process before expressing such opinions.

[377] It must be pointed out that in his report, Howes referred to the 2010 HB Fuller tests as follows:

> "**The results of the HB Fuller testing, dated Dec. 16, 2009, were in my opinion at best inconclusive**, with the combination of the materials, method and workmanship (not done by Cover) **as more units failed the testing than passed**.
>
> If Erdman cannot get all of the HP Fuller Test Units to last in a PI chamber test, as these results showed, then you can conclude there is a problem with the equipment/method of the application and further testing should be carried out to

> establish the problem. Certainly before going ahead into production of IG units with these same methods, materials and equipment.
>
> Although the tests showed the chosen sealant, Bostik 5192, combined with Inex Spacer, glass, PIB, desiccant, can reach 24 weeks in a PI chamber @ -80F frost-point, **it is my opinion that because of the high percentage of failures of the units in the PI test Chamber, further testing and investigation should have been taken before changing to these product combinations and methods in August 2010**."
>
> [Emphasis added]

[378] During his cross-examination, Howes had to admit that his abovementioned opinion was based on his reading of the Technical report dated December 16, 2009, a synopsis that reported erroneous test results. The expert witness acknowledged that he did not read the actual test results of the 2010 HB Fuller, that were attached to the Technical Report, and that showed indeed a 66.6% success rate for the IGUs assembled with Bostik 5192 sealant that were tested in the P1 Chamber during a 22-week period (4 out 6 IGUs) and a fifth one failing after a 15-week period, contrary to what is indicated in his own report.

[379] Howes also mentioned in his report that the spacers found in the 2011 Production IGUs that he had examined were stamped with the IGMAC logo which constituted, in his opinion, a misrepresentation as this type of IGU (Inex spacer with Bostik 5192 sealant) never passed the IGMAC certification process.

[380] Although in his report the expert witness led the reader to believe that Cover was selling all its subsequent production IGUs bearing the IGMAC logo without the proper certification, Howes had to recognize that other than the problematic 2011 Production, Cover had the proper certification for the following productions.

[381] The certification issue raised by Howes became a new major issue for Guardian justifying the immediate bankruptcy of Cover and the urgency to notify the population that products manufactured and sold by Cover were not only defective but were falsely represented as having been certified by IGMAC.

[382] As previously mentioned, for the purpose of determining the insolvency of Cover, the issue of the lack of certification in itself is not proof nor a guarantee that all IGUs that have not been certified will automatically fail.

- **The three insolvency tests under the BIA**

[383] For the purpose of examining the insolvency of Cover, in the Court's opinion, the three tests must be made as of August 22, 2014, the date at which the Assignment in Bankruptcy Resolution was adopted by Morrison and Zoulek. In that resolution, the two

directors acknowledge that Cover was insolvent and was unable to meet its obligations as they became due.

[384] One must bear in mind that their decision to adopt the aforesaid resolution was based on the findings and conclusions of the MNP Report dated August 21, 2014 (**R-6**).

[385] It must be pointed out that the Court already found the scenarios adopted by MNP to be grossly exaggerated, based on the preponderant evidence. The Court will however use those three scenarios to verify whether Cover was insolvent at that date.

[386] The expert witness Filion convinced the Court that the errors made by Hamel in his three original cash-flows attached to the MNP Report were so significant regarding the before tax replacement cost of the 2011 Production that it will rely on the same three cash-flows corrected this time by Filion, who used the same projected annual revenues of Cover that Hamel found acceptable when he drafted his first report.

[387] The Court has already explained why it will not consider Hamel's incredible annual revenue projections of $119,010 used in his second report.

[388] At the outset, the second test (Test B[12]) can be easily ruled out. There is ample compelling evidence that on August 22, 2014, Cover had not ceased paying its current obligations in the ordinary course of business, as they were generally becoming due.

[389] As to the first test (Test A[13]), was Cover unable to meet its obligations for any reason as they generally became due on August 22, 2014?

[390] The inability of a debtor to meet its obligations *"for any reason"*, as they generally become due contemplated in Test A, implies that it must be considered on the short term basis or in the immediate future[14].

[391] Again, the preponderant evidence convinces the Court that Cover did not meet this specific test on August 22, 2014 or on the following Monday, August 25, 2014.

[392] On a short-term basis, Cover was clearly able to meet its obligations as they generally became due. In fact, based on Hamel's first cash-flows corrected by Filion, the present conclusion is obvious.

[393] The third test (Test C[15]) is the most challenging one. In fact, it is the one used and relied upon by the directors designated by Guardian Canada to justify their decision

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[12] (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due.

[13] (a) who is for any reason unable to meet his obligations as they generally become due.

[14] *Re King Petroleum Ltd.* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.), par. 9.

[15] (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

to file for a voluntary assignment in bankruptcy with the assistance of the MNP Report dated August 21, 2014 (**R-6**). A significant portion of the MNP Report is consecrated to Test C to enable the conclusion that Cover met that third test in light of its eventual obligations and contingent claims stemming from the 2011 Production.

[394] As the three tests are not cumulative, Guardian Canada and Guardian argued, with the active support of the Trustee and the assistance of MNP, that MNP's conclusions clearly showed that Cover met that specific test in August 2014 and must therefore be considered to be an *"insolvent person"* within the meaning of the BIA at that time.

[395] The residential IGUs manufactured by Cover during the year 2011 were the main reason why, in Guardian and Guardian Canada's view, Cover was deemed to be insolvent under Test C on August 22, 2014. The Respondents found, after the fact, additional reasons to justify their decision to put (or maintain) Cover in bankruptcy. But, the Court must make its determination based on the facts and circumstances as they existed on August 22, 2014. For instance, it will not consider the preposterous notion that each and every IGU manufactured to this day by Cover is defective and will have to be replaced. Despite Guardian's expert report submitted by Howes, there is no convincing evidence that the 2012, 2013 or the 2014 productions were affected with the same problem or showed a higher than normal rate of return. There is no compelling evidence either that the new sealant, used subsequently in replacement of the Bostik 5192, gave any sign of incompatibility.

[396] The 2011 Production of IGUs has been determined to be problematic in that the poor compatibility of the Bostik 5192 sealant with the Inex spacer was causing potential leakage and a shorter life period. A greater than normal rate of returned 2011 IGUs started showing in 2012 and accentuated in 2013. For the purposes hereof, Guardian has adopted the position that the entire 2011 production of 679,392 residential IGUs is defective and that each unit will have to be replaced.

[397] Boudreault and his son Terence discovered the seriousness of the compatibility issue between the Inex spacer and the sealant Bostik 9152 used in the 2011 Production and corrected the situation.

[398] The evidence reveals that by mid-August 2014, the 2011 Production return rate had reached 7.33% (7.9% during the trial), clearly a higher than usual rate compared to past and subsequent productions and Cover's management expected the trend to continue to increase and eventually peak.

[399] In that context, the evidence shows that until August 22, 2014, Cover was successfully honouring its warranty program and believed that it should continue to do so despite Guardian's objection that labour costs be assumed as well by Cover.

[400] There is no doubt that the 2011 Production issue will affect the overall profitability of Cover on a short and medium term basis, but Boudreault and Terence strongly dispute the idea that 100% or 75% of the 2011 Production will have to be replaced. Not all IGUs will prove to be defective and with the passage of time, Cover should be able to replace, under its warranty program, the defective ones. Of course, if they all (100%) had to be replaced on August 22, 2014, Cover would have faced a major problem. But, such a proposition dictated by Guardian to MNP is not only highly hypothetical but unrealistic and unproven as well.

[401] The Court agrees with Boudreault and Terence on that question.

[402] When favouring the existence of contingent claims totalling some $42M stemming from the 100% failure of the 2011 Production and the necessity of replacing all 679,392 IGUs, we are far from the concept of contingent claims that are "*sufficiently certain*" within the meaning considered by the Supreme Court of Canada in the *AbitibiBowater*[16] case.

[403] Based on the evidence, what is *"sufficiently certain"* is that there will be a higher than normal rate of replacement of the 2011 Production but there is no compelling evidence, in the Court's view, that all IGUs or even 75% of the 2011 Production IGUs will need to be replaced.

[404] Under its three scenarios, MNP gave an actualised value to the aggregate replacement costs to be incurred by Cover until 2026. The results yielded an estimated liability of $42M (based on the 100% replacement scenario with an actual value as of July 31, 2014 at $36M) to $21M (based on the 50% replacement scenario with an actual value as of July 31, 2014 at $19M). With assets valued at some $14M as of July 31st, 2014, Cover was clearly insolvent within the provisions of the third test. Cover was financially incapable to proceed to the said replacement in August 2014; hence its state of insolvency under Test C. Cover can only meet Test C with the addition of contingent claims. Otherwise, it cannot be deemed insolvent.

[405] The Statement of affairs (**R-10**) signed by Morrison and filed with the Trustee on August 22, 2014 (**R-10**), reveals a deficiency of $34,901,467 with:

- Assets of $12,334,003; and
- Liabilities of $47,235,470 composed of:
    - Unsecured claims of: $2,355,007;
    - Secured claims of: $2,330,001;
    - Contingent claims of $42,550,462.

[16] [2012] 3 S.C.R. 443.

[406] The contingent claims are identified by enumerating each and every client of Cover with an amount of liability or claim of $1 each. Morrison even added the commercial customers that never purchased the 2011 Production IGUs.

[407] Incidentally, Jeld-Wen is also identified as a contingent claim with a $1 value. Yet, Hamel retains in his second report the $4.6M face value. There is no mention of the Bocenor claim.

[408] The Court understands that upon signing such a Statement of affairs (**R-10**) on behalf of Cover, Morrison acknowledged that, in is opinion based on the Assignment in Bankruptcy Resolution, the latter was insolvent and had to resort to an orderly liquidation of its assets, essentially because the entire 2011 IGUs production had to be replaced and that each and every client of Cover had a contingent claim on August 25, 2014 totalling $42,550,462.

[409] Without these *"contingent claims"*, Cover was clearly not insolvent. Moreover, Morrison does not seem to have taken into consideration the fact that at the time Cover had already replaced or was in the process of replacing some 7% of the 2011 Production.

[410] In any event, these $42M contingent claims were crucial to successfully pass Test C.

[411] Can these contingent claims be considered as obligations of Cover that were due and accruing due as at August 22, 2014, within the meaning of paragraph c) of the definition of an *"insolvent person"* in the BIA?

[412] How does the jurisprudence approach that specific test that carries a significant different approach compared to the other two tests?

[413] That question must be approached and answered bearing in mind the principles underlying the BIA previously mentioned.

[414] The Court is of the view that for the purpose of Test C, only the existing financial obligations at that moment and their modalities of payment, if any, must be taken into consideration.

[415] Based on the preponderant evidence, the Court finds that there is no *"sufficient certainty"* that these contingent claims of $42M existed or that they would even come to exist in the future.

[416] Moreover, there is compelling evidence based on MNP's cash-flow adjusted with Filion's corrections under the third scenario with an unlikely 50% return rate over next 11 years until 2026, that Cover will have the necessary positive cash-flow to honour its warranty on the IGUs of the 2011 Production that will become defective, as the case maybe.

[417] The Court cannot accept Guardian's simplistic argument that Test C should be applied, to all intents and purposes, blindly or in a void by virtually ignoring Cover's present financial condition, its capacity to generate revenues under normal circumstances, its capacity and willingness to continue to honour valid claims made under its warranty program, as and when they are filed with Cover.

[418] The Court cannot ignore either the reality of the present case.

[419] The Court cannot ignore that the majority shareholder instructed its designated directors to cause Cover to admit its insolvency, based on a trumped-up and self-serving 100% replacement rate scenario assessed at $42M with the kind and complacent assistance of MNP who determined that despite the fact that the $42M artificial and highly conjectural liability would be generated over a 12-year period from 2014 to 2026, MNP determined that this contingent liability had an actual value of $35.74M, hence automatically placing Cover in a state of *"legal"* insolvency pursuant to Test C of the BIA.

[420] The Court refuses to believe that such a simplistic approach meets or respects the spirit of the BIA.

[421] Otherwise, how many law firms and accounting firms would easily be deemed insolvent under Test C, as proposed by Guardian's lawyers?

[422] The Tribunal is in total agreement with the following comments of Justice Ground in the case of *Enterprise Capital Management Inc. v. Semi-Tech Corp.*[17]:

> "[17] Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding up legislation, it is apparent to me that it should not be applied to definitions of insolvency. **To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for purposes of the BIA and therefore the CCAA**. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re,* 220 B.R. 165 (U.S. N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". **In my view the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied** as, for example, a sinking fund payment due within the current year. **Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period but which is not yet paid**

[17] 1999 CanLII 15003 (ON SC).

> **or payable".** The principal amount of the Notes is neither due nor accruing due in this sense."
>
> [Emphasis added]

[423] In *Les Oblats de Marie Immaculée du Manitoba (Re)*[18], Justice Schwartz quite appropriately made a distinction between the possibility of a debt becoming due or accruing due as opposed to a probability:

> "[37] The remarks of Ground J. in Enterprise Capital Management Inc. v. Semi-Tech Corp. (1999) 10 C.B.R. (4 th) 133 are on point.
>
> […]
>
> [44] **This evidence as to the value of the IRS claims is based on possibilities rather than probabilities and is not sufficient to meet the CCAA value test of debts due or accruing due. The use of the term "possible" as distinguished from probable is not accidental**.
>
> [45] Likewise the cost of defence and the cost of supporting the retirees has not been sufficiently quantified to be considered as a debt due or accruing due.
>
> [46] Further, the financial statements at December 31, 2000 (Exhibit "E" of Fiori's affidavit) and December 31, 2001 (Exhibit "F" of the same affidavit) do not estimate the IRS claims or show them as liabilities."
>
> [Emphasis added]

[424] The Court believes that within the meaning of the BIA, no one should consider being insolvent on the sole basis that its liabilities exceed its assets at a given time. One must as well appreciate the person's solvency by examining its capacity to honour its financial obligations as they become due and in compliance with the requirements of its creditors[19].

[425] *In re Bonneau*[20], Justice Fournier stressed the importance of not adopting a restrictive interpretation of the expression *"accruing due"* in paragraph c) as follows :

> "36 **S'il fallait que toutes les personnes qui ont des paiements mensuels future (sic) à faire décident par une fiction de l'esprit de rendre tous ces paiements mensuels futurs exigibles sur le champ pour estimer leur "solvabilité", une bonne partie de la population pourrait ou devrait faire faillite, ce qui est un non-sens**.

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[18] 2004 MBQB 71.
[19] *Garceau (Syndic de)*, 2006 QCCS 859, par. 48.
[20] J.E. 97-1915 (C.S.); see to the same effect *Villeneuve v. Villeneuve*, 2007 QCCS 4468 at par. 31 and 32.

> 37 Les mots “obligations à échoir” du paragraphe c) de la définition de “personne insolvable” pris dans un sens isolé pourraient, par une interprétation stricte, procurer **ce non-sens**.
>
> 38 Ce n’est certainement pas le but du législateur de créer un tel non-sens.
>
> 39 **Le Tribunal est d’avis que la nature et les termes futurs de toutes obligations “à échoir” doivent être pris en considération lorsqu’est analysé le sens de ce paragraphe c) de la définition de “personne insolvable”**."
>
> [Emphasis added]

[426] The Tribunal also endorses Madam Justice Bédard’s following analysis on this subject that reflects very well the approach that must be favoured under such circumstances:

> “2° **Lors de la cession de biens, l’intimé était-il insolvable?**
>
> [14] Il importe de rappeler que la faillite ne peut être accordée qu’à une personne insolvable. Suivant l’article 2 L.f.i., la définition de personne insolvable se lit comme suit :
>
> > « 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. »*
>
> [15] Ainsi, selon cette disposition, une personne n’est pas insolvable par le seul fait que son passif excède son actif. Afin d’apprécier la solvabilité du débiteur, il est nécessaire d’évaluer sa capacité de faire honneur à ses engagements *« selon les exigences normales de ses créanciers »*[21]. De plus, l’insolvabilité d’une personne est constatée lorsque la valeur de ses biens est inférieure à celle

[21] *Grobstein* c. *Royal Bank of Canada,* [1958] B.R. 562.

de ses dettes, et que ses revenus ne laissent pas prévoir la possibilité d'une amélioration dans le futur[22].

[16] Toutefois, une personne ne sera pas insolvable lorsque ses revenus lui permettent de rembourser les dettes au fur et à mesure de leur échéance[23]. À titre d'exemple, dans l'affaire *In re Tousignant*, la Cour d'appel du Québec expose la situation qui suit :

> *« N'est pas une personne insolvable au sens de la loi, le débiteur dont la seule dette résulte d'un emprunt de 25 000 $ auprès d'une banque, mais qui a un emploi stable depuis 19 ans, un revenu annuel de 45 000$ et des dépenses mensuelles variant entre 1 200$ et 1 700$. Malgré un actif limité à 3 300$, il est en mesure de faire face à ses obligations, à plus forte raison si son créancier est prêt à faire des arrangements pour lui octroyer des délais ».*[24]

[17] Lorsqu'une personne solvable fait appel au mécanisme de la faillite, l'annulation de cette faillite peut être demandée. L'article 181 L.f.i. accorde au tribunal le pouvoir d'annuler la faillite. C'est la base de la présente requête.

[18] Rappelons qu'en matière d'annulation de faillite, chaque cas est un cas d'espèce[25]. Le pouvoir du tribunal d'annuler une faillite est discrétionnaire. L'annulation de la faillite peut être accordée lorsque le débiteur est en mesure de faire face à ses obligations à leur échéance, à plus forte raison si le créancier offre de lui consentir des accommodements et délais pour le remboursement[26]."

[Emphasis added]

[427] In the present instance, the inclusion of some $42M of contingent claims conveniently acknowledged by Guardian and Guardian Canada, was absolutely necessary in Guardian's attempt to establish the alleged insolvency of Cover in August 2014. While these claims could potentially constitute provable claims in bankruptcy, pursuant to Section 121 and following BIA, they are nevertheless eventual and unliquidated, if not completely hypothetical and conjectural claims that cannot and should not be utilised to establish or justify the insolvency of Cover.

[428] Again, there is nothing *"sufficiently certain"* about these eventual claims to the extent (100% or 75%) that Guardian wants acknowledged by Cover. Nobody knows with *"sufficient certainty"* the actual amount of these eventual and contingent claims. But, in the Court's view, the *"sufficiently certain"* number is nowhere near what has been anticipated by Guardian who, in any event has showed through its witness Morrison and its lawyers, that it is ready to admit to any indebtedness in the name of Cover to achieve

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[22] *In re Robenhymer*, J.E. 97-1914 (C.S.).
[23] *In re Bonneau*, J.E. 97-1915 (C.S.).
[24] *In re Tousignant*, J.E. 2001-488 (C.A.).
[25] Ibid.
[26] Ibid.

its dubious goal. The Bocenor and the Jeld-Wen lawsuits are prime examples. On one hand, Cover is contesting actively and in good faith the Jeld-Wen lawsuit and on the other hand, Guardian is adamant to admit Cover's liability on the face value of Jeld-Wen's lawsuit.

[429] Jeld-Wen should not interpret Guardian's self-serving manoeuvres as a form of confession of judgment by Cover.

[430] On August 22, 2014, approximately 7.33% of the 2011 Production had already been replaced or was in the process of being replaced under Cover's warranty program. Boudreault and his son Terence have always taken the position that Cover could continue and would continue to honour the warranty that came with the IGUs.

[431] Other than a self-serving grossly exaggerated admission by Guardian and Guardian Canada that the entire 2011 Production was defective and each and every IGU had to be replaced immediately to establish Cover's insolvency, the Court is of the opinion that such contingent claims, based on Cover's warranty, do not begin to exist before the IGU under warranty gives signs that it is indeed affected by a defect that prevents it from serving the purpose or the function for which it was purchased in the first place.

CONCLUSIONS ON THE MOTION TO ANNUL COVER'S BANKRUPTCY

[432] On August 22nd, 2014, Boudreault had not exercised Gestion's Option pursuant to the 2010 Shareholders' Agreement. In fact, he had agreed to postpone its exercise until the end of 2016 at the specific request of Guardian via Morrison. Boudreault had agreed to remain at the helm of Cover's operations for two more years and he had accepted Guardian's proposal to sell some of his shares to Guardian Canada for $10M in order to facilitate the merger of Guardian Canada with Cover.

[433] Why then provoke Cover's bankruptcy without any prior warning to Boudreault and with the MNP Report that was ordered a few days before calling the special meeting of the Board of directors and released within less than 24 hours before passing the Assignment in Bankruptcy Resolution?

[434] The only logical and most probable explanation offered by Gestion's lawyers is amply supported by the preponderant evidence.

[435] In the spring of 2013, Guardian had proposed to amend the 2010 Shareholders' Agreement delay by two years the exercise of the Option, have Guardian Canada acquire 14% of Gestion's stake in Cover for $10M and pave the way for the merger of Cover with Guardian Canada. Guardian's intentions were reaffirmed in an internal memo dated October 31, 2013 (**R-20**) and with the delivery to Gestion of draft closing documents in December 2013 (**R-20**). At that time, Guardian was aware of the particular

problems related to the 2011 Production for months and still proposed to proceed with the $10M transaction.

[436] The new ownership acquired the control of Guardian at the end of December 2013 or at the beginning of January 2014 and in all likelihood, decided that Guardian should not go ahead with the $10M transaction. They did not want to acquire a portion of Gestion's shares for $10M with an $8M balance being paid after September 1st, 2016, when Gestion would be able to exercise the Option once amended.

[437] In all probabilities, even if Guardian did not proceed with the $10M transaction, it realized that the Guardian Guarantee bearing a price tag of $18M granted in the 2010 Shareholders' Agreement made it personally liable as *"principal debtor"* to Gestion under the said agreement should it exercise its Option to redeem its shares in Cover commencing on September 1st, 2014.

[438] Guardian wanted out and found a solution that entailed sacrificing Cover. Putting its own subsidiary in bankruptcy would terminate the 2010 Shareholders' Agreement and void the Option and the Guardian Guarantee. However, the bankruptcy had to occur before Gestion could exercise its Option, thus before September 1st, 2014.

[439] That was the only true reason to act in such haste.

[440] During the hearing, Guardian lawyers made great strides to establish that Guardian, to all intents and purposes, had lost all confidence in Boudreault, his son Terence and their management team at Cover for their lack of transparency regarding the 2011 production failure and the lack of certification of the IGUs produced in 2011.

[441] It is necessary to point out that the Court is not sitting here in a liability hearing between shareholders or in an oppression remedy.

[442] Lack of trust of a shareholder towards another and alleged mismanagement are not a basis to have a corporation file an assignment in bankruptcy.

[443] In theory, whether Guardian knew or not of the 2011 Production problems and of the non-certification issue or whether it should have known about these issues with the information conveyed monthly by Cover at the time cannot form the basis upon which is determined Cover's state of alleged insolvency on August 22, 2014.

[444] The circumstances and the preponderant evidence lead the Court to the following findings and conclusions.

[445] The decision to put Cover in bankruptcy was made by Guardian well before August 22, 2014 but in any event after December 2013, at which time the $10M transaction with Gestion almost took place. Guardian's decision was final. Nothing that Boudreault could have said, nothing that he could have done would have stopped

Guardian from implementing its plan, at least, until Gestion's Motion to Annul the Bankruptcy of Cover.

[446] But Guardian could not resort to the provisions of the BIA with Cover's then real financial situation. Krywko, Guardian's in-house counsel, told Morrison that Cover did not have any problems with its creditors. The problem was with its customers and its customers' customers referring to the 2011 Production.

[447] The Statement of affairs (**R-10**) signed by Morrison is quite eloquent on that point.

[448] The problems related to the 2011 Production of residential IGUs were known by all parties much before July 2014 and they were being dealt with properly by Cover (but in a too generous and unnecessary manner in Guardian's view). However, the creation of a false *"catastrophic discovery"* of the 2011 Production in July 2014 became Guardian's keystone in its plan to provoke the *"liquidation"* of Cover, with the assistance of the BIA.

[449] With all due respect, the Court finds that MNP Report (**R-6**) has all the indications of a complacency report prepared to justify Guardian's already made decision and to permit the use of the provisions and the remedies offered by the BIA to reach Guardian's goal.

[450] The Court also finds that Guardian's sole objective in this unfortunate and tragic affair was to provoke the bankruptcy of Cover to terminate the 2010 Shareholders' Agreement, void the Option, prevent Gestion from exercising it commencing on September 1st, 2014 and most important of all, void as a result thereof the Guardian Guarantee in virtue of which Guardian was the principal debtor of a $18M undertaking to purchase Gestion's shares in Cover. Guardian was the principal party and principal debtor in the redemption of Gestion's shares as it conveyed full ownership of Cover to Guardian through its wholly-owned subsidiary Guardian Canada.

[451] The preponderant evidence reveals that in all probabilities Guardian (with its new ownership) lost all interest in Cover, due to its shrinking market share and reduced profits. Add to that fact the problems related to the 2011 Production and the $18 million Option, Guardian had no further interest in acquiring the full ownership of Cover via the Option. The $10M transaction of December 2013 was abandoned. Guardian no longer wanted to merge Guardian Canada with Cover. Consequently, it was out of question that Guardian would exercise itself the Option and the latter definitely did not want that Gestion exercises the Option on or after September 1, 2014. Guardian's chosen solution was to provoke the bankruptcy of Cover. Guardian did not care that Cover was able to honour its after-sale service and warranty program, as established by the expert witness Filion. As Morrison stated, Guardian was to take a *"financial penalty"*.

[452] Why take a *"financial penalty"* if Guardian could avoid it and save $18M at the same time?

[453] Cover, its 300 workforce and its numerous customers who trusted Cover's products and counted on its after-sale service and warranty program which was and could still be honoured by Cover's management, became the collateral victims of Guardian's devious machinations to extricate itself of financial obligations that it no longer wanted to honour.

[454] That is the backdrop of these bankruptcy proceedings.

[455] Sections 181 and 182 BIA, establish the discretion the Court enjoys under such circumstances:

> "181. (1) If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.
>
> (2) If an order is made under subsection (1) all sales, dispositions of property, payments duly made and acts done before the making of the order by the trustee or other person acting under the trustee's authority, or by the court, are valid, but the property of the bankrupt shall vest in any person that the court may appoint, or, in default of any appointment, revert to the bankrupt for all the estate, or interest or right of the trustee in the estate, on any terms and subject to any conditions, if any, that the court may order.
>
> (3) If an order is made under subsection (1), the trustee shall, without delay, prepare the final statements of receipts and disbursements referred to in section 151.
>
> 182. (1) An order of discharge or annulment shall be dated on the day on which it is made, but it shall not be issued or delivered until the expiration of the time allowed for an appeal, and, if an appeal is entered, not until the appeal has been finally disposed of."

[456] In the matter of *Moss (Re)*[27], Justice Steel expressed the view that an examination of the full background surrounding the assignment had to be made in order to properly determine whether an annulment should be granted:

> "[34] There are a number of grounds upon which courts have annulled an assignment including mistake, fraud, a clear sufficiency of assets to pay all creditors' claims and abuse of process. (See *Re 609940 Ont. Inc.*, etc. [Ont.] (1985), 57 C.B.R. 137 (Ont. S.C.).) If an abuse of process exists, the court may exercise its discretion to annul even where the bankrupt meets the criteria of an insolvent person.
>
> [35] The term "abuse of process" is not easily susceptible to precise definition. In *Shaw v. Trudel* (1988), 53 Man.R. (2d) 10 (Man. Q.B.), Kennedy J. defines it in the following terms:

[27] 1999 CanLII 14182 (MB QB).

> a term used to describe an improper use of the judicial proceedings and may arise if jurisdiction were exceeded. **It arises when a legal process with some legitimacy is used for some ulterior motive, other than that for which it was intended.** It is invoked to protect against harassment, or the perversion of the process to accomplish an improper result. (p. 12)

[36] The conduct of the bankrupt must be tainted by bad motives in order to justify a finding of abuse of process. (See *Blaxland v. Fuller* (1990), 2 C.B.R. (3d) 125 (B.C.S.C.) at p. 127.)

[37] For example, in the case of *Henfrey Samson Belair Ltd. v. Manolescu* (1985), 58 C.B.R. (N.S.) 181 (B.C.C.A.), the abuse of process consisted of the bankrupt making an assignment in bankruptcy in contravention of a court order that one of the creditors be given seven days notice before any of the debtor's assets were dealt with in any way. On the facts, the court felt that bad motive could clearly be inferred. In *Good, Re* (1991), 4 C.B.R. 12 (3d) (Ont. Bktcy.), the assignment in bankruptcy was annulled in a situation where a husband, after 33 years of marriage, was:

> determined to destroy himself and all of his assets rather than allow his wife the benefit of any of those assets. (p. 14)

[38] **In *Wale, Re* (1996), 45 C.B.R. (3d) 15 (Ont. Bktcy.), the husband's assignment in bankruptcy was date-stamped by the official receiver an hour and a half before the commencement of his family law trial**.

[…]

[42] In exercising my discretion, I adopt the analysis followed in the case of Wale, Re. In that case, the court indicated that the debtor's motive is the primary consideration in determining whether an abuse of process or fraud exists. Some of the questions the court might pose to ascertain the debtor's motive are:

1. **Is the debtor's financial situation genuinely overwhelming or could it have been managed?**

2. **Was the timing of the assignment related to another agenda or was bankruptcy inevitable in the near or relatively near future?**

3. Was the debtor forthcoming in revealing his situation to his creditors or did he hide assets or prefer some creditors over others?

4. **Did the debtor convert money or assets to himself which would otherwise have been assets in the bankruptcy?**

5. **What had been the debtor's relationship with his creditors, particularly his major ones? Was it such that they might have assisted him if he had**

> **approached them by granting time or terms of repayment or had any goodwill been destroyed by past unfulfilled promises?**
>
> 6. **Are there other relationships - business partnerships, shareholder arrangements, spousal, competitors for an asset or simply personal associations which could cast light on a possible bad faith motive for making an assignment?**
>
> [43] In short, an examination of the full background surrounding the assignment must be made in order to properly determine whether an annulment should be granted (Blaxland v. Fuller, supra, at p. 128)."
>
> [Emphasis added]

[457] Our Court of Appeal has made the following quite appropriate comments in *Tousignant* v. *Banque de Nouvelle-Écosse*[28]:

> "[25] **La LFI a pour but de protéger le débiteur, le créancier ainsi que l'intérêt public, afin de s'assurer que la loi ne deviendra pas un moyen de se débarrasser de ses obligations.**
>
> [26] **Il y a donc des distinctions à faire afin d'éviter de pénaliser un débiteur qui agirait dans le but de se refaire une santé financière et celui qui, même insolvable, n'agit que pour désavantager ses créanciers. Le professeur Albert Bohémier s'exprime ainsi à ce sujet** :
>
> > On doit distinguer entre le débiteur qui agi dans le but de trouver un remède à son état d'insolvabilité et celui qui, bien qu'insolvable, ait agi principalement dans le but de frustrer ses créanciers. On perçoit la distinction, mais elle est d'application délicate. Le tribunal doit prendre en considération les circonstances entourant la cession : le nombre de créanciers, la nature et la date des jugements rendus contre le débiteur, le caractère plus ou moins opportun de l'empressement manifesté par le débiteur dans l'exécution de sa cession.
>
> […]
>
> [29] En l'espèce, je suis d'avis que l'appelant n'a pas fait une telle démonstration. Il a un emploi stable depuis 21 ans auprès d'Hydro-Québec, qui lui procure un revenu annuel d'environ 45 000$. Il verse actuellement 150 $ par mois au syndic et il a racheté son seul bien, soit la camionnette. Il soutient qu'il a des dépenses fixes et diverses autres pour un montant de 1772 $, dont entre autres des dépenses pour l'essence de son camion de 350 $, duquel seulement 40 $ pour son travail. Il admet ne pas avoir tenté de négocier avec la Banque autrement que pour demander une extension d'un versement, qui lui a été refusée. Il n'a pas tenté de rencontrer la Banque pour discuter de solution possible au

[28] 2001 CanLII 7118 (QC CA).

remboursement de sa dette. Il n'y a jamais eu de pressions sur l'appelant, pas même de mise en demeure. Au contraire, il semble qu'il y avait une certaine ouverture pour l'accommoder. **Il n'a donc fait aucun effort réel pour solutionner le paiement de sa dette. Dans ces circonstances, il y a eu utilisation impropre de la procédure accordée par la LFI au détriment de la créancière et de l'intérêt du public. Je suis d'avis qu'il s'agit d'un cas exceptionnel où l'annulation d'une cession est justifiée**."

[Emphasis added]

[458] In *De la Durantaye (Syndic de)*[29], the Court of Appeal reiterated:

"[9] Le juge saisi d'une demande en vertu de l'article 181 *LFI* jouit d'un vaste pouvoir discrétionnaire. Cette discrétion doit cependant être exercée avec prudence et seulement lorsque le débiteur n'est pas insolvable ou lorsqu'il abuse de ses droits. […] [Soulignement original]

[10] Les motifs retenus par le juge reposent tout d'abord sur la requête de la faillie en vertu de l'article 178.1 *LFI* présentée au registraire peu de temps avant sa seconde cession, laquelle requête démontre, de toute évidence selon le juge, que la libération de sa dette d'études apparaît être le seul motif de sa faillite. **Or, sa conclusion est en tout point conforme à la jurisprudence qui enseigne qu'un débiteur ne saurait être admis à se débarrasser de ses dettes dans le but de frustrer ses créanciers.** Voici ce que rappelle le juge Nuss dans l'arrêt *Tousignant* précité :

> [25] La LFI a pour but de protéger le débiteur, le créancier ainsi que l'intérêt public, afin de s'assurer que la loi ne deviendra pas un moyen de se débarrasser de ses obligations.
>
> [26] Il y a donc des distinctions à faire afin d'éviter de pénaliser un débiteur qui agirait dans le but de se refaire une santé financière et celui qui, même insolvable, n'agit que pour désavantager ses créanciers. Le professeur Albert Bohémier s'exprime ainsi à ce sujet :
>
> On doit distinguer entre le débiteur qui a agi dans le but de trouver un remède à son état d'insolvabilité et celui qui, bien qu'insolvable, ait agi principalement dans le but de frustrer ses créanciers. On perçoit la distinction, mais elle est d'application délicate. Le tribunal doit prendre en considération les circonstances entourant la cession : le nombre de créanciers, la nature et la date des jugements rendus contre le débiteur, le caractère plus ou moins opportun de l'empressement manifesté par le débiteur dans l'exécution de sa cession.

[14] **Comme le juge de première instance, la Cour conclut que la faillie a fait cession de ses biens dans le seul et unique but de frustrer l'intimé de sa créance, et ce, sans avoir fait au cours des ans les efforts**

[29] 2011 QCCA 1093.

> **nécessaires pour la rembourser, ce qui constitue une utilisation impropre de la procédure prévue à la *LFI* au détriment de l'intimé et de l'intérêt public.**
>
> [15] **Étant donné qu'un des deux critères exigés par la jurisprudence pour annuler la faillite d'un débiteur est satisfait, la Cour ne croit pas utile de poursuivre l'analyse et de déterminer si la faillie était une personne insolvable au sens de la *LFI* au moment de la deuxième session.** "
>
> [Emphasis added]

[459] Even if Cover had been found to be insolvent on August 22 and 25, 2014, the Court has nevertheless the discretion to annul the bankruptcy under circumstances such as the present ones[30]. But, this is not the case here.

[460] Cover was artificially placed in a state of insolvency on those dates as a result of the scheme concocted by Guardian with the kind assistance of MNP and of its own auditors PricewaterhouseCoopers, who actively supported Guardian throughout the present proceedings and even took part in the pleadings to argue in favour of Cover's bankruptcy.

[461] The circumstances surrounding the bankruptcy of Cover could not evidence a more blatant abuse of the provisions of the BIA to serve the goals of the majority shareholder (Guardian and Guardian Canada) intent on extricating itself from financial obligations contracted legitimately with the minority shareholder (Gestion) who operates the business. The majority shareholder took a serious production problem that it was previously aware of in order to concoct a virtual catastrophic scenario to justify the bankruptcy of its subsidiary (Cover).

[462] The Guardian Group lawyer argued that Guardian was motivated with the *"protection"* of Cover's customers and their customers' customers. With all due respect, such a proposition is not supported by the preponderant evidence. Guardian's true goals and objectives were far different.

[463] In any event, if the arguments of Guardian's lawyer are accurate and that Guardian genuinely has the interest of Cover's customers at heart, Guardian has done so far everything in its power to make absolutely sure that Cover will never be in a position to honour its warranty in the future.

[464] How many automobile manufacturers facing significant production defects would still exist if they adopted the "altruistic" business philosophy of Guardian?

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[30] *Villeneuve* c. *Villeneuve*, 2007 QCCS 4468.

[465] The interest of justice demands that the Court exercise the discretion conferred upon it by Section 181 BIA.

[466] Therefore, the Court will annul the bankruptcy of Cover, who should have never found itself in such an unnecessary predicament.

[467] Guardian's lawyer pointed out to the Court that in any event, as Boudreault's employment contract was ending on December 31, 2014 and that his son Terence would not be kept on Cover's payroll beyond that date, the bankruptcy was the only logical remedy available.

[468] With all due respect, the Court strongly disagrees with such a "proposal" to ultimately justify maintaining a bankruptcy that should have never taken place.

[469] Only time will tell the true extent of the damages sustained by Cover as a direct result of Guardian's and Guardian Canada's abusive use of the bankruptcy process since August 22, 2014.

[470] Under the present particular and most disgraceful circumstances, the bankruptcy of Cover must be annulled and Guardian as well as its subsidiary Guardian Canada shall have to assume their responsibilities and answer to Gestion, Cover's employees, creditors and customers for their abusive behaviour and their inappropriate use of the BIA.

[471] On August 22nd and 25th, 2014, Cover was not insolvent; its operations were profitable as it had been since its creation in 1990 and Cover was honouring its financial obligations as they became due and was in a position to continue to do so.

[472] The problems generated by 2011 Production were real but nowhere near the catastrophic scenario embraced by Guardian and Guardian Canada to justify the bankruptcy of Cover. Unfortunately, the unusual problems related to the 2011 production were going to impose on Cover and its shareholders a *"financial penalty"* on a temporary basis in the form of reduced profits. Cover's shareholders never had to face such a *"financial penalty"* in the past, having shared among themselves more than $81M in dividends since 1997. Doing business entails taking risks especially in the manufacturing world. Although not a single businessperson ever expects to face a problem that will cost money, such a possibility is not always as remote as it may seem.

[473] MNP's first cash-flow, once corrected by the expert witness Filion, revealed that Cover could, in all likelihood, face and honour its obligations stemming from the 2011 Production until 2026, with obviously a reduced profitability. If for some reason additional financial is required on a punctual basis, Cover could always count on its banker Scotia Bank, which remarkably stood by its client despite the present tumultuous and uncertain period. Under such circumstances, shouldn't Cover reasonably expect the support of its shareholders who reaped some $81M in dividends during its more profitable years?

[474] The remedies of the BIA are not designed to be used to enable a shareholder to dodge its financial obligations toward another shareholder to the detriment of the employees, creditors and customers of the bankrupt debtor, who all become collateral victims as a result thereof.

[475] Gestion has requested in its Motion to Annul that the Court orders the provisional execution of the present judgment notwithstanding appeal.

[476] The conduct of Guardian and of Guardian Canada following the institution of the present Motion to Annul leaves the Court with no doubt that it is in the interest of justice that such an order be made in the present case.

- **The conduct of Guardian and of Guardian Canada following the Stay Order pronounced by Justice Riordan.**

[477] As previously mentioned, on August 28, 2014, Justice Riordan ordered the stay of the bankruptcy process, pending the present proceedings to annul the bankruptcy of Cover.

[478] One of the main objectives of the Stay Order, if not the most important one, was to allow Cover to conduct its operations in the normal course of business. Cover and its directors were also ordered not to do anything that would be outside the company's normal course of business.

[479] Guardian, faced with the Stay Order and as the principal supplier of raw material to its own company, namely Cover, chose to change its terms of payment from 30 days from the date of the invoice to cash in advance ("**CIA**") (not COD (cash on delivery)). In other words, commencing on August 28, 2014, the date of the Stay Order, Guardian indicated that it would not even contemplate beginning to manufacture products required by Cover to pursue its operations unless the latter pay in advance the entire cost of any such order for glass material. Guardian lawyers argued that Cover agreed to these new and unusual terms, especially when one considers that Guardian (Guardian Canada) is to all intents and purposes the majority shareholder of Cover. Did Cover have any choice to refuse Guardian's new requirement under the circumstances?

[480] This abrupt change in Guardian's credit policy forced Cover to pay some $1,325,000 in advance to Guardian to obtain its raw material and pursue its operations. In addition to that, Guardian immediately demanded through its lawyers that Cover pay when due the last invoice of $815,000 for deliveries made before the bankruptcy (this amount was part of the Statement of affairs signed by Morrison on August 22nd (**R-10**)). These requirements from Cover's principal owner created a sudden significant pressure on its cash flow.

[481] In order to honour its various financial obligations as they were becoming due, Guardian's new requirements forced Cover to use its line of credit with Scotia Bank but Guardian's lawyers also advised the bank that their client objected to Scotia Bank

extending any further credit to Cover. Such instructions coming from Cover's principal shareholder prompted Scotia Bank to freeze the unused portion of Cover's line of credit.

[482] Despite the Stay Order that aimed to allow Cover to continue its operations in the normal course of business until the judgment on the present Motion to Annul, Guardian's actions can only be characterized as blatant attempts to prevent the continuation of its own company's normal operations and force their termination and thus the permanent closing of Cover before judgment could be rendered on the present Motion.

[483] This situation prompted Gestion, the minority shareholder, to file a Motion for Interim Financing that would allow it to advance to Cover $2M (the majority of these new funds being destined to Guardian in order to comply with its new CIA credit terms).

[484] By judgment rendered on September 23, 2014, the Motion for Interim Order was granted and the Court ordered the provisional execution of the order notwithstanding appeal (the "**Interim Financing Order**").

[485] It must be noted that Scotia Bank also agreed to reinstate the full use of its line of credit upon Gestion's Motion for interim financing being granted.

[486] Scotia Bank's position and its sign of confidence towards Cover are in direct contradiction with the majority position adopted by the Guardian members of Cover's Board of directors that the company was insolvent and should be bankrupted. Nobody was forcing Scotia Bank to advance further funds and take additional risks. Despite disposing of security, financial institutions do not normally like to remain financially involved in uncertain and litigious circumstances such as Cover has been experiencing since August 25, 2014.

[487] Guardian and Guardian Canada appealed the judgment rendered on September 23, 2014, which was their absolute right to do.

[488] Guardian and Guardian Canada also unsuccessfully attempted to have the Court of Appeal order the stay of execution of the Interim Financing Order pending their appeal. Again, it was their absolute right to seek such an order from the Court of Appeal.

[489] However, the Court cannot ignore that particular fact for the purposes hereof.

[490] In the present case, if Guardian and Guardian Canada had successfully obtained the stay of execution of the Interim Financing Order, Gestion would have been prevented from advancing $2M to Cover and Scotia Bank would not have extended any further credit to its client.

[491] Cover, who wanted to continue its normal operations under the Stay Order, would have been literally *"strangled financially"* by Guardian's new CIA requirement, in particular.

[492] The Court can only conclude that under such circumstances Cover would have failed soon after and the present Motion to Annul would have become moot.

[493] Moreover, the Court understands that because of the fresh funds injected by Gestion into the company as a result of the Interim financing Order, on or about October 2, 2014, an amount of in excess of $2M was indeed paid by Cover to Guardian in compliance with the latter's new credit requirements. Three weeks later, Guardian changed its mind and returned the entire amount to its lawyers to be held in trust pending its appeal on the Interim Financing Order.

[494] All actions taken by Guardian and its two designated directors, Morrison and Zoulek, show that are all intent on having Cover commit a "commercial suicide".

[495] In their scenario, the interest of Cover's creditors and customers was not first and foremost in their preoccupations.

[496] The Court cannot help noticing that in the MNP Report, Hamel assumed that Guardian would sell to Cover the glass necessary to replace the defective 2011 Production at arm's length prices. This approach ensured that Cover's replacement cost would be greater as Guardian was to make a profit out of this unfortunate and unique situation. Guardian never dispelled this assumption during the trial. Guardian never showed any signs that it wanted to assist Cover in correcting the defective 2011 Production, despite the fact that Guardian was saying that the entire production had to be replaced :

> "It was assumed that both Guardian Industries Corp. and Cover have the available capacity to assume the additional production required to replace the defective Units, without having to forego another customer's current production.
>
> It was confirmed that replaced Units will be disposed of and not recycled. Therefore, all Units have to be rebuilt entirely.
>
> It was assumed that Guardian would continue to charge intercompany profit (at arm's length amounts) to Cover for the glass for the replacement Units. We were not provided with sufficiently detailed information in order to identify the percentage of intercompany profit that might be included in the material cost used to calculate the potential liability."[31]

[497] With all due respect, the Court seriously doubts of the good faith of Guardian, Guardian Canada and their two designated directors, Morrison and Zoulek in this matter. They have definitely not been acting to protect the rights and recourses of

[31] MNP Report (**R-6**), page 7.

Cover's creditors and customers and to ensure that Cover makes good its 15-year warranty on the IGUs.

[498] The Court will order the provisional execution notwithstanding appeal, knowing full well that upon the present order annulling the bankruptcy of Cover becoming final, the company's management and directors will be at liberty to do whatever they deem fit or right, without further intervention of this Court.

[499] The Court must nevertheless point out that upon its bankruptcy being annulled, Cover shall be deemed to have never been bankrupted as the annulment remits Cover in its original situation before the filing of the voluntary assignment in bankruptcy on August 25, 2014. The present annulment also renders null and void the Assignment in Bankruptcy Resolution that was, in any event, adopted on August 22, 2014 in direct violation of the provisions of the 2010 Shareholders' Agreement.

[500] The present situation is quite different than those contemplated by Section 181 (2) BIA, as pursuant to the Stay Order Cover's property was never vested with the Trustee since the filing of the voluntary assignment. Other than the distant and limited monitoring authorized by the Stay Order, the Trustee has never taken possession of Cover's assets nor did it continue its operations. Since August 25, 21014, Cover continued its operations in the normal course of business as it was intended in the Stay Order.

[501] In closing, the Court found the testimony of Mr. François Filion of Accuracy Canada Inc. very useful as well as his reports. Given the circumstances leading to the bankruptcy of Cover and the involvement of Guardian and Guardian Canada, the Court is of the opinion that Accuracy Canada Inc.'s fees and disbursements, totalling $101,386.72 (**R-55.1**) relating to Mr. Filion's expert testimony, should be paid by Guardian and Guardian Canada solidarily as part a Gestion's taxable costs and disbursements.

- **The Motion of the Directors for Review and Directions**

[502] In their Motion for Review and Directions, the directors Morrison and Zoulek are seeking the following conclusions:

> "**CONFIRM** that, until a final decision is rendered in respect to the Motion to Annul the Bankruptcy of Cover, the Directors of Cover Industries Inc., including the Directors/Petitioners, are entitled to exercise all their functions and powers in accordance with the law;
>
> **ORDER** James Boudreault and Terence Boudreault to provide the Directors/Petitioners with all the information and documents requested in the letter that was sent to them by the Directors/Petitioners on October 9th, 2014;

> **ORDER** Cover, its officers, employees and representatives to fully collaborate with the Directors/Petitioners in the context of the exercise of their functions as directors of Cover Industries Inc., namely with regard to the issues raised by the Sale of non-certified IGU;
>
> **ORDER** the execution of the present motion notwithstanding appeal;"

[503] During the trial, the Court ruled that the directors were already bound by the Stay Order until the present judgment being rendered.

[504] The decision on the Motion for Review and Directions was taken under advisement at the same time as the Motion to Annul.

[505] During the oral submissions of the lawyer for the two directors, it became obvious that the conclusions sought would become somewhat moot upon judgment being rendered on the Motion to Annul in either case. If the Court dismissed Gestion's Motion to Annul and maintained the bankruptcy, the Trustee would take over. If the Motion was granted and the bankruptcy annulled, the directors would necessarily resume their role in Cover without the Court's intervention.

[506] In closing on that particular question, the Court cannot help noticing that the somewhat lengthy directors' Motion seemed to have two underlying goals: namely endorse as much as possible the catastrophic scenario developed by Guardian and Guardian Canada and constitute a sort of blueprint to enable, if not somewhat invite the institution of legal proceedings or even class actions against Cover.

[507] That feeling was reinforced when the Court was told on more than one occasion by the lawyers for the two directors as well as the lawyer for the Guardian Group, of the necessity to disclose publicly and quickly the existence of defective IGUs combined with the lack of appropriate certification; especially when Morrison suggested that he was considering placing advertisements in various newspapers across Canada in order to discharge his duty as director of Cover.

[508] Be that as it may, given the conclusions reached by the Court that the bankruptcy of Cover be annulled, the Court is of the opinion that it has no further jurisdiction to give directions to directors of a corporation that with the present judgment, will automatically be deemed to have never been in bankruptcy since August 25, 2014.

[509] Therefore, the intervention and the involvement of this Court on the issues raised by the two directors of Cover are no longer necessary or warranted. The Motion is dismissed without costs.

- **The Motion of Gestion for a Confidentiality Order**

[510] Gestion presented a first Motion of that nature and Justice Riordan rendered the following order on September 9, 2014:

"**CONSIDÉRANT** la Requête pour l'émission d'une ordonnance de mise sous scellé amendée;

CONSIDÉRANT que la situation décrite pourrait rencontrer les critères pour l'émission d'une telle ordonnance;

LE TRIBUNAL:

ACCUEILLE la Requête pour l'émission d'une ordonnance de mise sous scellé amendée de la requérante Gestion J&N Boudreault inc.;

ORDONNE la mise sous scellé des pièces R-6, R-7, R-10 (formulaire 78 uniquement) et du rapport d'expertise préparé par monsieur François Filion, jusqu'au jugement final sur la demande d'annulation ;

ORDONNE au Bureau du Surintendant des faillites de conserver confidentiel le bilan déposé par Industries Cover inc. le 25 août 2014, jusqu'au jugement final sur la demande d'annulation;"

[511] On October 24, 2014, upon the hearing being adjourned until November 10th, 2014 and in the presence in the courtroom on that afternoon for the first time of a person who identified himself as a lawyer but who preferred not to disclose the identity of his client, the Court granted Gestion's uncontested verbal Motion to issue a General Order of Non-Disclosure and temporarily placed under seal all proceedings and exhibits until the present case is taken under advisement given the very special circumstances surrounding these proceedings, many of the allegations in the said proceedings, the nature of the dispute between two shareholders, the commercially sensitive and confidential nature of the several subjects raised in Court, including but not limited to Cover's legal strategy in connection with the Bocenor and the Jeld-Wen lawsuits.

[512] Until then the trial had only been attended by representatives of the parties, their lawyers and expert witnesses. The presence of the person in question was noted by Gestion's lawyers who asked if the gentlemen could identify himself as the exclusion of the witnesses had been ordered earlier. Upon discovering that the person was not a witness called by a party but was a lawyer who did not want to disclose the identity of his client, Gestion's lawyers made the verbal Motion for a temporary Confidentiality Order that was granted.

[513] On November 10, 2014, upon resuming the hearing, the lawyer who had attended the October 24th hearing in the afternoon on behalf of an unidentified client, filed a Motion in Intervention on behalf of Jeld-Wen, who is actively involved in a product liability lawsuit against Cover.

[514] On November 11, 2014, when the present case was taken under advisement, the Court renewed, at the request of Gestion's lawyer, its Confidentiality Order of October 24th, 2014 until the judgment is rendered on the present Motion to Annul.

[515] At the time, it was also understood that Gestion's lawyer would provide the Court with a list of all exhibits and proceedings that in her opinion, should be kept under seal after the judgment is rendered on the Motion to Annul. The Court also agreed to hear the representations of the parties and more particularly, those of Jeld-Wen's lawyers on the confidentiality issue before the present judgment is rendered.

[516] The hearing on Gestion's Amended Motion for a permanent Order of Confidentiality took place on December 12, 2014.

[517] At the outset, the lawyer for Gestion mentioned that her client did not expect that any of the proceedings and the plans of arguments submitted by the lawyers during their pleadings should remain under seal any longer.

[518] The Motion had to objectives:

- the testimony of Mtre Jacques Larochelle, the lawyer representing Cover in the Bocenor and Jeld-Wen lawsuits and a portion of Mr. Michael Morrison's testimony, both delivered in closed session (*huis clos*) as the subjects discussed were subject to the solicitor-client privilege of confidentiality; and

- certain exhibits consisting of :

    - financial statements of Cover: **R-7**, **R-25**, **R-26**, **R-27**, **R-28**, **R-29**, **R-30**;

    - Cover's internal financial production reports and cash flows: **R-34** (also filed as **RD-25**), **R-46**, **D-27** to **D-34**, **D-45**;

    - Cover's lists of clients with addresses and quantities purchased: **R-10** (Form 78 only), **R-10A** (original of **R-10** – Form 78 only), **R-47;**

    - experts' reports: **RD-20** (also filed as **R-6**) MNP Report 2014-08-21; **R-54** (Accuracy 2014-08-27) and **R-55** (Annex 1 to R-54); **R-58** (PowerPoint presentation of Accuracy's expert report (R-54)); **D-25** (MNP Report 2014-10-06) (also filed as **RD-3**) and annexes **D-25.2**, **D-25.3** and **D-25.4**; **D-26** (Mr. Stephen Howes Report) (also filed as **RD-2**);

    - emails and attachments (reports) concerning the IGUs' productions: **D-5** (also filed as **RD-7**), **D-7**(also filed as **RD-8**), **D-10**(also filed as **RD-10**), **D-12**, **D-20** (also filed as **RD-15**), **D-39** (also filed as **RD-22**), **D-42**(also filed as **RD-9**), **D-47**, **RD-4**, **RD-5**, **RD-6;**

- emails exchanged with M^tre^ Jacques Larochelle concerning the Bocenor and the Jeld-Wen lawsuits (**R-41**);

- due diligence reports on the 2011 Production, as well as tax accounting and environmental issues: **D-13** (also filed as **RD-13**);

- third-party evaluations of IGUs: **D-35** and **D-36**, **RD-1** (also filed as **D-19**);

- personal notes taken by Mr. Terence Boudreault at the August 22nd, 2014 special meeting of the Board (**R-35**).

[519] Save and except for exhibit **R-35** consisting of personal notes taken by Mr. Terence Boudreault at the special meeting of the Board on August 22, 2014, which should not be considered to be kept confidential and placed under seal, all other documents that Gestion is asking to place permanently under seal after the present judgment is rendered relate directly, in one form or another, to Cover's financial information and internal information about its production of IGUs (the latter point being mostly related to the 2011 Production).

[520] The testimony of M^tre^ Jacques Larochelle and a portion of Mr. Michael Morrison's testimony were heard in closed session (*huis-clos*) on a confidential basis.

[521] M^tre^ Larochelle, the lawyer representing Cover in the Bocenor and the Jeld-Wen lawsuits, was called by Gestion to testify about his written and oral communications with Cover and Guardian concerning his two mandates and the legal opinions that he gave to his client in connection with those two lawsuits.

[522] The Court understands that at all relevant times, M^tre^ Larochelle's services were retained by Cover to represent the latter in the two lawsuits in question but that Guardian's in-house law department was monitoring the lawsuits and M^tre^ Larochelle was reporting to them and was receiving his instructions from them.

[523] The Court also understands that M^tre^ Larochelle's testimony was deemed by Gestion to be necessary, if not essential in light of the allegations made by Guardian and Guardian Canada, as well as their expert MNP who took the position in its second report that Cover was liable for the full amount of both lawsuits in question.

[524] Given the privileged and confidential nature of M^tre^ Larochelle's testimony, Gestion requested that such testimony be given in a closed session (*huis-clos*) and be treated as confidential as Cover's lawyer, M^tre^ Larochelle, was still bound by his professional secrecy duty towards his client who never relieved him from the same.

[525] The Court granted Gestion's verbal motion and M^tre^ Larochelle testified in a closed session (*huis clos*) and his testimony has since then been treated on a confidential basis and was placed under seal until now.

[526] The Court finds that the content of M^tre^ Larochelle's testimony falls under the professional duty of secrecy that binds the lawyer to his client Cover, who did not waive its privilege.

[527] The same process was followed for Mr. Michael Morrison who testified in closed session (*huis clos*) for a short while on discussions the witness had about those lawsuits. It turned out that during his very short testimony on the subject, Mr. Morrison's conversation about the lawsuits did not involve M^tre^ Jacques Larochelle but rather Guardian's in-house counsel, Mr. Kyle Krywko.

[528] With all due respect, the Court does not believe that the latter testimony was protected by duty of confidentiality that binds the exchanges between Cover and its lawyer. We have here discussions between two fellow employees that did not even relate to any information exchanged with or any opinion given by M^tre^ Jacques Larochelle in connection with those lawsuits.

[529] The Confidentiality Order made with respect to Mr. Michael Morrison's testimony given in closed session (*huis clos*) is lifted.

[530] M^tre^ Mark Bantey, who represents the interests of Jeld-Wen, objected to Gestion's position as in his view Cover implicitly waived its privilege by allowing M^tre^ Larochelle to testify.

[531] With all due respect, the Court disagrees. The testimony of M^tre^ Larochelle must be considered in the very particular, if not very special context of the present proceedings.

[532] Cover was not an active participant in these proceedings.

[533] The Court has already concluded that Cover should have never been put in bankruptcy and that the latter should be annulled.

[534] Cover's bankruptcy was provoked by a majority shareholder in the context of its conflict with a minority shareholder. Setting aside the vote of the two directors designated by Guardian and Guardian Canada, who were instructed by the latters to adopt the Assignment in Bankruptcy Resolution despite the objections of the third director who had a right of veto, Cover never intended to file for a voluntary assignment in bankruptcy and did not seek to find itself in the middle of the present litigation where its very survival is at stake.

[535] The minority shareholder Gestion was obliged to take the present proceedings and to present in particular confidential internal financial and legal evidence to counter the Guardian Group's reasons invoked to justify their decision to have Cover file for bankruptcy. The Bocenor and Jeld-Wen lawsuits became part of the majority shareholder's justifications and had to be addressed by Gestion in order to counter the evidence offered by the Guardian Group and its expert MNP.

[536] The particular context of the present affair leads the Court to conclude that Cover never waived its privilege and never consented to M^tre^ Larochelle's testimony and his written communications in connection with the two lawsuits (**R-41**) be rendered public, especially since Cover is actively contesting the Jeld-Wen lawsuit with M^tre^ Larochelle.

[537] It was argued that as the lawyer for the Guardian Group did not object to M^tre^ Larochelle's testimony and did not insist on his testimony being delivered in closed session (*huis clos*), it necessarily implied a form of consent coming from the majority and controlling shareholder of Cover.

[538] The Court disagrees with such a proposition. The evidence shows with great eloquence that the Guardian Group's main objective is that Cover remains in bankruptcy at all costs. This goal lead to the Guardian Group and their lawyers to conveniently make surprising admissions regarding Cover's contingent liabilities that normally shareholders, having the interest of the corporation at heart, would never make. The Guardian Group's position with respect to the Jeld-Wen lawsuit was contradicted by Cover's own actions and its lawyer, M^tre^ Larochelle.

[539] Whatever strategic decisions may have been made by the Guardian Group in the present case, the Court does not conclude that they evidenced Cover's waiver of its solicitor-client privilege with its lawyer, M^tre^ Larochelle.

[540] The Court cannot ignore neither the reality that Jeld-Wen has a very special interest in the present matter. Jeld-Wen is not simply a member of the general public who should have access to that information indiscriminately.

[541] Jeld-Wen has instituted a $4,621,900 lawsuit against Cover in product liability and that lawsuit is still on-going. A lawsuit that it is being defended actively by Cover. Jeld-Wen's particular interest in the testimony of M^tre^ Larochelle, who was conducted in closed session (*huis clos*) and in the written exchanges between M^tre^ Larochelle and his client in the specific context these lawsuits (**R-41**), is obvious given the nature of the subjects that were discussed.

[542] Without disclosing anything more than is absolutely necessary for the purposes hereof, the testimony and written communications of M^tre^ Larochelle satisfy the Court that, *prima facie*, Cover is defending its rights in good faith.

[543] Cover was involuntarily propelled into the present litigation mainly as a collateral victim of a conflict between shareholders.

[544] In order for Gestion to seek the annulment of Cover's *"involuntary"* bankruptcy, the very nature of the evidence dictated by the Guardian Group's position left Gestion with little choices: either give up and leave Cover bankrupted or contest the bankruptcy process triggered by Guardian Canada and Guardian. The latter choice involved the necessary disclosure of Cover's internal financial, operational and production information to establish that it was solvent at all relevant times, as well as information

related to the two lawsuits invoked by the Guardian Group that are still contingent claims.

[545] The issuance of an Order of Confidentiality with respect to evidence and exhibits would have been entirely moot had the Court decided that Cover's bankruptcy should not be annulled. Maintaining the bankruptcy would have rendered this information and these documents of very little use, if any.

[546] The present debate takes its full dimension upon Cover's bankruptcy being annulled.

[547] Cover is still *"alive"* and the Jeld-Wen lawsuit is still going on.

[548] As Cover is now deemed to have never been in bankruptcy pursuant to the present judgment, Cover has an obvious commercial interest to remain in business.

[549] Jeld-Wen could obtain a strategic advantage if it could have access to all the internal confidential information and data produced at the hearing on the Motion to Annul. Getting access to the transcript of M^{tre} Larochelle's testimony could turn out to be a "bonus" as well for Jeld-Wen. Knowing what opinion the opponent's lawyer gave to its client and what strategy he discussed in connection with Jeld-Wen's lawsuit could confer an advantage to Jeld-Wen.

[550] Jeld-Wen is an important manufacturer of doors and windows who is plaintiff in a $4.7M lawsuit instituted against Cover based on issues that may be similar to the ones that were considered in the course of this trial. Over and above the lawsuit in question, Jeld-Wen could also draw a commercial benefit from its providential access to Cover's internal and confidential business information.

[551] Jeld-Wen is understandably extremely interested to gain free access to Cover's financial information, any information related to its manufacturing process as well as the information shared by Cover's lawyer with the Court about the Bocenor and the Jeld-Wen's lawsuits.

[552] Jeld-Wen is attempting to take advantage of Cover's predicament to gain an unfair advantage at Cover's commercial prejudice, whether in a lawsuit involving the very same parties or otherwise. Let us just think of, among other things, Cover's entire client list with not only the coordinates of each client but the type of products purchased and the applicable quantities as well.

[553] The general rule is that court proceedings are public. Curtailing the right of the public to have access to all aspects of a court record (proceedings, exhibits and testimonies) constitutes an exception.

[554] In the present case, given the very special circumstances in virtue of which Cover found itself in the middle of a public and bitter conflict between its only two

shareholders, there is no doubt in the Court's mind that exposing to the public the information contained in M^tre^ Larochelle's testimony and in the various exhibits specifically identified by Gestion in the present Motion would pose a threat to Cover's commercial interest; a real, serious and substantial threat.

[555] The risks that Cover's commercial interest would face should the present Motion not be granted are real, very real, in the Court's opinion.

[556] It would be absolutely ironic, if not ludicrous, if Gestion's legitimate and successful attempt to bring Cover out of its bankruptcy via legal proceedings would afterwards become the cause for its commercial demise because the numerous commercially sensitive and confidential documentation and information that were necessarily disclosed in Court in order to have reasonable chances of convincing a judge that the bankruptcy should be annulled, become public.

[557] In the Court's opinion, the salutary effects of the Confidentiality Order to be rendered in the present matter far outweigh its deleterious effects. The conditions precedent that give the Court judicial discretion to make such an order are present in this case[32].

[558] The intervention of the Court in this matter is warranted to ensure that Cover's commercial interest is reasonably preserved.

[559] **FOR THOSE REASONS, THE COURT:**

[560] **GRANTS** the Motion of Petitioner, Gestion J&N Boudreault Inc., to annul the bankruptcy to Industries Cover Inc.;

[561] **ANNULS** the bankruptcy of Industries Cover Inc. resulting from the filing of a voluntary assignment in bankruptcy on August 25th, 2014;

[562] **DECLARES** that in light of the Stay Order rendered by Mr. Justice Brian Riordan on August 28, 2014, the Trustee, PricewaterhouseCoopers Inc., was never vested in the property of Industries Cover Inc.;

[563] **DECLARES** that Industries Cover Inc. was not an insolvent person on August 22, 2014 and on August 25, 2014 within the meaning of Section 2 of the *Bankruptcy and Insolvency Act*;

[564] **DECLARES** that the Assignment in Bankruptcy Resolution adopted on August 22, 2014 (**R-10**) by a majority of the Directors of Industries Cover Inc. is null and void as it was voted in a context where Industries Cover Inc. was not insolvent and in violation of the provisions of the Shareholders' Agreement dated March 16, 2010 (**R-3**) with the third director, Mr. James Boudreault, voting against it;

[32] *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC.

[565] **DECLARES** that as a result of the present judgment, Industries Cover Inc. is deemed to have never been in bankruptcy since August 25, 2014;

[566] **ORDERS** the provisional execution of the present judgment notwithstanding appeal;

[567] Given the annulment of the bankruptcy of Industries Cover Inc., **DISMISSES** without costs the amended Motion of the Directors, Mr. Michael Morrison and Mr. Richard Zoulek, for review and directions;

[568] **GRANTS** in part the Motion of Gestion J&N Boudreault Inc. for the issuance of an order of confidentiality;

[569] **ORDERS** that the testimony of M^{tre} Jacques Larochelle made in a closed session of the Court (*huis clos*) on October 21st, 2014 from 10:01 to 10:45, together with Exhibit **R-41** filed by the witness, are and shall remain confidential and be placed and kept under seal in the records of the Superior Court of Quebec and that the testimony and Exhibit **R-41** not be obtained, disclosed, copied, duplicated, published or disseminated, in whole or in part, directly or indirectly, without the prior authorization of this Court, subject however to the right of the parties to retrieve Exhibit **R-41** pursuant to article 331.9 C.P.C.;

[570] **ORDERS** that the following additional Exhibits are and shall remain confidential and be placed and kept under seal in the records of the Superior Court of Quebec and that they may not be obtained, disclosed, copied, duplicated, published or disseminated, in whole or in part, directly or indirectly, without the prior authorization of this Court, subject however to the right of the parties to retrieve the following Exhibits pursuant to article 331.9 C.P.C.:

- Exhibits filed by Gestion J&N Boudreault Inc. (**R**) and the Directors, Mr. Michael Morrison and Mr. Richard Zoulek (**RD**):

  R-6 (also filed as **RD-20**), **R-7**, **R-10** (Form 78 only), **R-10A** (original of **R-10** - Form 78 only), **R-25**, **R-26**, **R-27**, **R-28**, **R-29**, **R-30**, **R-34** (also filed as **RD-25**), **R-46**, **R-47**, **R-54**, **R-55** and **R-58**; and

- Exhibits filed by Guardian Industries Canada Corp. and Guardian Industries Corp. (**D**) and the Directors, Mr. Michael Morrison and Mr. Richard Zoulek (**RD**):

  D-5 (also filed as **RD-7**), **D-7** (also filed as **RD-8**), **D-10** (also filed as **RD-10**), **D-12**, **D-19** (also filed as **RD-1**), **D-13** (also filed as **RD-13**), **D-20** (also filed as **RD-15**), **D-25** (also filed as **RD-3**) with annexes **D-25.2**, **D-25.3** and **D-25.4**, **D-26** (also filed as **RD-2**), **D-27**, **D-28**, **D-29**, **D-30**, **D-31**, **D-32**, **D-33**, **D-34**, **D-35**, **D-36**, **D-39** (also filed as **RD-22**), **D-42** (also filed as **RD-9**), **D-45** and **D-47**;

- Exhibits filed by the Directors, Mr. Michael Morrison and Mr. Richard Zoulek (**RD**):

  RD-4, **RD-5** and **RD-6**;

[571] **ORDERS** the Office of the Superior Court of Quebec to deny access to the testimony of M^tre^ Jacques Larochelle and to all aforementioned Exhibits to the public;

[572] **ORDERS** the Office of the Superintendent of Bankruptcy Canada to keep confidential and under seal the Statement of affairs of Cover dated August 22, 2014 and signed by Mr. Michael Morrison (**R-10A**);

[573] **THE WHOLE** with costs payable solidarily by Guardian Industries Canada Corp. and Guardian Industries Corp. to Gestion J&N Boudreault Inc. including Accuracy Canada Inc.'s fees and disbursements totalling $101,386.72 (**R-55.1**) relating to Mr. Filion's expert testimony.

_____

MICHEL A. PINSONNAULT, J.S.C.

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Dates of hearing: October 21, 22, 23, 24, November 10, 11 and December 12, 2014

CITATION: Royal Bank of Canada v. Oxford Medical Imaging Inc., 2019 ONSC 1020
COURT FILE NO.: CV-18-602205-00CL
DATE: 20190314

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ROYAL BANK OF CANADA	)	*Rachel Moses*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
OXFORD MEDICAL IMAGING INC., JAE K. KIM aka JAE KOUL KIM aka DR. JAE KIM and JAE K. KIM MEDICINE PROFESSIONAL CORPORATION	)	*Robert A. Klotz*, lawyer for Dr. Jae Kim and Oxford Medical Imaging Inc.
	)	
Defendants	)	
	)	
	)	*Bevan Brooksbank*, lawyer for Deloitte Restructuring Inc. in its capacity as Court-Appointed Sales Officer
	)	
	)	*Edward L. D'Agostino*, lawyer for The INCC Corp.
	)	
	)	**HEARD:** January 29, 2019

REASONS FOR DECISION

MCEWEN J.

[1] This matter involves a dispute in which the landlord The INCC Corp. ("INCC") primarily seeks a declaration terminating the lease (the "Lease") with its tenant Oxford Medical Imaging Inc. ("OMI"). OMI seeks a declaration to restrain such termination as well as a further declaration allowing it to assign its Lease to 2617949 Ontario Limited ("261 Ont") pursuant to an asset purchase agreement (the "APA") entered into between OMI and 261 Ont on December 5, 2018.

[2] The dispute arises out of the following facts.

BACKGROUND FACTS

[3] OMI is owned and operated by Dr. Jae Kim ("Dr. Kim"). OMI operates five medical imaging clinics in and around the Regional Municipality of Waterloo.

[4] Specifically, OMI leases premises from INCC at a commercial building located at 430 The Boardwalk in Waterloo (the "Leased Premises"). The building is four stories in size and contains dozens of tenants who are involved in the health care industry.

[5] OMI borrowed funds from the Royal Bank of Canada ("RBC").

[6] RBC became concerned about its loans with OMI, given litigation involving other related companies in which Dr. Kim was involved as a shareholder. Fellow shareholders had commenced litigation against him. When RBC became aware of the dispute it advised Dr. Kim that it no longer wanted OMI's business and it called the OMI loans. Dr. Kim attempted to sell OMI but was unable to do so within the timeline provided by RBC.

[7] OMI, Dr. Kim and the RBC agreed to a consent judgment concerning the outstanding loans in the amount of approximately $2.6 million.

[8] Thereafter, again on consent, RBC brought a motion to have Deloitte Restructuring Inc. ("Deloitte") appointed as a Sales Officer to sell OMI's assets. Conway J. by way of order dated August 31, 2018 appointed Deloitte as the Sales Officer. This Appointment Order provided a sales process involving all five of OMI's businesses including the clinic occupying the Leased Premises.

[9] Deloitte retained Mr. John Gilmour of THiiNC Health Inc., a recognized specialist in the area, to assist with the sale. Mr. Paul Casey and Mr. Stephano Damiani handled on the matter on behalf of Deloitte.

[10] Mr. Gilmour had previous business dealing with Ms. Cynthia Voisin, who is the manager of the building owned by INCC, which includes the Leased Premises.

[11] On October 13, 2018, Mr. Gilmour emailed Ms. Voisin to advise that he was working with Deloitte, which had been appointed to sell the assets of OMI. Shortly thereafter he provided her with a copy of the Appointment Order. He advised Ms. Voisin that his task was to make sure that all the stakeholders were kept "in the loop" about the process so that there would be no "late surprises".

[12] Between late October and mid-November 2018, Mr. Gilmour conducted site visits at the Leased Premises with potential purchasers. Ms. Voisin made herself available for these tours.

Mr. Gilmour and Ms. Voisin continued to speak about whether the potential purchasers might be acceptable to INCC.

[13] On November 13, 2018, Mr. Gilmour toured the principals of 261 Ont through the Leased Premises. There is some dispute as to whether Ms. Voisin was available or not. She did not, however, attend on this occasion.

[14] Shortly thereafter on November 16, 2018, Mr. Gilmour advised Ms. Voisin, via text message, that they were reviewing potential bids for the sale of OMI. There was no communication between them after that until December 12, 2018. It was during this time, and thereafter, that INCC takes great issue with the fashion in which Mr. Gilmour and Deloitte carried on with the sales process. INCC feels it was essentially kept in the dark about what was transpiring with the sales process which, necessarily, would involve a situation where OMI would be seeking the permission of INCC to assign its lease of the Leased Premises.

[15] Ultimately, Deloitte determined the offer from 261 Ont was the most desirable bid. The APA was entered into between OMI (by way of Deloitte) and 261 Ont on December 5, 2018. The closing of the APA was conditional, amongst other things, on securing the consent of the relevant landlords to the assignment of OMI's leases to 261 Ont.

[16] On December 12, 2018, Ms. Voisin sent an email to Mr. Gilmour seeking an update. On December 13, 2018, Deloitte prepared a motion record returnable on December 21, 2018 seeking court approval of its activities, which included approving the APA. As noted, the Lease provided that INCC's approval was required if OMI wished to assign the Lease. INCC however was not served with the motion record and had no notice of the motion.

[17] In the interim, Mr. Gilmour and Ms. Voisin continued to speak. Mr. Gilmour advised that Deloitte had selected a group to purchase OMI's assets and Mr. Gilmour introduced Ms. Voisin to Mr. Casey and Mr. Damiani of Deloitte. During this timeframe, Ms. Voisin also learned from an unnamed employee that 261 Ont had met with OMI's current employees and this employee had some concerns. Mr. Casey and Mr. Damiani also followed up with Ms. Voisin to set up a meeting to discuss the proposed assignment of the Lease, but INCC was still not told about the pending motion.

[18] In what appears to be a coincidence, INCC served OMI with a Notice to Tenant on December 21, 2018 (the same day as the return of the motion for court approval) seeking to terminate the Lease, alleging a number of events of default. Deloitte obtained the Approval and Vesting Order on December 21, 2018. According to counsel for OMI, Hainey J., who heard the motion, was advised that there were difficulties with INCC, but it was hoped that they could be worked out. Nonetheless, INCC was unaware that the motion was being heard.

[19] Matters further deteriorated after December 21, 2018. Mr. Casey expressed great surprise that Ms. Voisin had served the Notice to Tenant given his earlier dealings with her. Ms. Voisin was displeased about not receiving notice of the motion.

[20] Thereafter, discussions continued. On January 17, 2019, INCC met with the principals of 261 Ont. As a result of that meeting INCC advised Deloitte that 261 Ont was not a suitable tenant and refused to provide its consent to assign the Lease to 261 Ont.

ISSUES

[21] As noted, both INCC and OMI bring motions before the court.

[22] INCC seeks declarations that there have been one or more events that constitute an Event of Default under the Lease; a declaration that INCC is entitled to and has properly terminated the Lease with OMI; and an order that OMI vacate the Leased Premises.

[23] OMI seeks declarations restraining INCC from terminating the Lease pending the determination as to whether INCC has unreasonably withheld its consent; that the Lease is in good standing and not in default; and an order dispensing with the consent of INCC to assignment pursuant to s. 23(2) of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7.

[24] The disputes between the parties, and the declarations and order sought, raise the following three issues:

1. Is OMI insolvent?

2. Were steps taken or proceedings commenced for the dissolution, winding-up, or termination of OMI's existence or the liquidation of OMI's assets?

3. Has INCC unreasonably withheld its consent to assign the Lease?

[25] The parties agree that if INCC succeeds on either question one or two the issue of whether the consent was unreasonably withheld becomes moot.

[26] The parties further agree that INCC bears the burden of proof with respect to questions one and two while OMI bears the burden of proof with respect to question three.

[27] I will now deal with each question in turn and, as will be seen, I have determined all of the issues in OMI's favour.

OMI IS NOT INSOLVENT

[28] Section 12.01 of the Lease generally stipulates that if OMI becomes insolvent, or steps are taken or a proceeding is commenced for the liquidation of OMI's assets, an event of default would occur and INCC would have the right to re-enter into the premises.

[29] The relevant provisions of s. 12.01 are as follows:

> ARTICLE 12 – DEFAULT
>
> 12.01 Default and Right to Re-Enter
>
> …
>
> (c) the Tenant or any Indemnifier becomes bankrupt or insolvent or takes the benefit of any statue for bankrupt or insolvent debtors or makes any proposal, an assignment or arrangement with its creditors, or any steps are taken or proceedings commenced by any Person for the dissolution, winding-up or other termination of the Tenant's existence or the liquidation of its assets;
>
> (d) a trustee, receiver, receiver/manager, or a Person acting in a similar capacity is appointed with respect to the business or assets of the Tenant or any Indemnifier;
>
> (e) the Tenant or any Indemnifier makes a sale in bulk of all or a substantial portion of its assets other than conjunction with an assignment or sublease approved by the Landlord.

[30] INCC relies heavily upon the steps taken in RBC's Application against OMI and Dr. Kim as well as OMI's financial situation.

[31] In this regard, INCC relies on the fact that RBC served a Notice of Intention to Enforce Security pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") on OMI in March 2018 alleging OMI was insolvent. INCC also relies upon the fact that OMI defaulted under a Forbearance Agreement with RBC and that thereafter RBC agreed to extend the Forbearance Agreement to July 2018, which included a condition where it required OMI to execute a consent to appoint a Sales Officer to sell its assets. This resulted in the consent judgment and sales process.

[32] INCC also points to the fact that OMI was incurring substantial yearly losses for the fiscal years of 2016, 2017, and 2018 in which it was losing between $500,000 and $700,000 per year. It points to the fact that Dr. Kim injected money into the company to keep it afloat and OMI's liabilities of approximately $7.2 million far exceed its assets of approximately $3.5 million.

[33] Relying primarily upon the aforementioned facts INCC submits that OMI was clearly insolvent which led to the Appointment Order being granted that provided for the sales process.

[34] I do not agree with this submission.

[35] I prefer the submissions of OMI, Deloitte, and RBC that OMI was not insolvent. They submit the following:

- OMI did not commit any act of bankruptcy or take any statutory benefit in this regard.
- There was no judicial order that declared OMI to be insolvent, including the Appointment Order.
- Dr. Kim has deposed that OMI has always remained solvent notwithstanding the fact that it encountered financial difficulties. He further deposes that he has always supported OMI financially and that it remains current with its financial obligations. He has continued to cover all operating losses and, as OMI's largest creditor, has a shareholder loan of approximately $3.6 million. He has every intention of continuing to support the business. RBC supports this submission. RBC submits that its Notice of Intention to Enforce Security is not proof of insolvency. RBC also submits that INCC, in any event, cannot reasonably rely upon a stale demand of the bank as proof of insolvency, since Notices of Intention greater than six months old cannot be relied upon by a creditor such as RBC. Further, RBC points to the fact that INCC never referred to RBC's Notice of Intention when it served its default notice to OMI in December 2018.
- RBC further submits that particular attention was paid to OMI's financial status when the Appointment Order was taken out since if OMI became insolvent it would lose its licences with the Ontario Ministry of Health and Long-Term Care. As a result, the Appointment Order specifically states in paragraph 2 that Deloitte is not and shall not be deemed to be a receiver as defined in the *BIA*.
- RBC's debt will be fully satisfied if the sale with 261 Ont is approved.
- RBC did not call the loan with OMI due to insolvency but rather to the lawsuits that were swirling between Dr. Kim and his partners with respect to the related companies.
- The simple fact that a company has greater liabilities than assets does not, by definition, render it insolvent.

[36] I agree with the aforementioned submissions. OMI did not commit an act of bankruptcy or take any statutory benefit in this regard, nor are there any judicial orders declaring OMI to be insolvent.

[37] Dr. Kim's evidence that OMI has always remained solvent was not meaningfully challenged by INCC. INCC filed no contrary evidence nor did it cross-examine Dr. Kim.

[38] While OMI has clearly experienced financial difficulties, it is current with all of its suppliers and leases. Notwithstanding the RBC judgment, OMI had worked out an arrangement with RBC in which it could repay the monies owed upon the sale of the business.

[39] The case law also generally supports OMI's position. For the purposes of determining whether a company is insolvent, it is inappropriate to include every debt payable at some future date for the purposes of determining insolvency. This would render numerous corporations insolvent. Rather, debt obligations ought to be measured against the fair valuation of the company's property and limited to obligations currently payable or properly chargeable: *Enterprise Capital Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.), at paras. 17-19; *Les Oblats de Marie Immaculee du Manitoba, Re*, 2004 MBQB 71, 182 Man. R. (2d) 201, at paras. 37-38; *Industries Cover Inc. (Syndic des)*, 2015 QCCS 136, 21 C.B.R. (6th) 1, at paras. 412-426.

[40] For the aforementioned reasons I find that OMI is not, and has not, been insolvent.

NO STEPS OR PROCEEDINGS HAVE BEEN COMMENCED FOR THE DISSOLUTION, WINDING UP, TERMINATION OF OMI, OR THE LIQUIDATION OF OMI'S ASSETS

[41] INCC submits that a proceeding has been commenced to liquidate OMI's assets; therefore, as per s. 12.01(c) of the Lease (as set out in paragraph 29 above) this constitutes a default. In this regard INCC points to the Appointment Order which appointed Deloitte to carry out the sales process.

[42] Specifically, INCC relies upon the following paragraphs of the Appointment Order:

> SALES OFFICER'S POWERS
>
> 3. THIS COURT ORDERS that the Sales Officer is hereby empowered and authorized, but not obligated, to act at once in respect of the sale of the Property and, without in any way limiting the generality of the foregoing, the Sales Officer is hereby expressly empowered and authorized to do any of the following where the Sales Officer considers it necessary or desirable:
>
> a) to review and monitor the cash receipts and disbursements of OMI;
>
> **b) to market any or all of the Property including soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Sales Officer in its sole discretion may deem appropriate;**
>
> **c) to enter into one or more sales agreements on behalf of OMI for all or any part of the Property, subject to Court approval;**
>
> d) to engage consultants, appraisers, agents, brokers, experts, auditors, accountants, managers, counsel, tax advisors, and such other persons from time to time and one whatever basis, including on a temporary basis… [Emphasis added.]

[43] INCC argues that the powers provided to Deloitte are "receiver-like" and that Deloitte has free rein to sell any or all of OMI's property in its sole discretion. This, INCC submits, is a liquidation.

[44] I do not agree.

[45] Paragraph 2 of the Appointment Order makes it clear that Deloitte was appointed solely as a sales officer and not a receiver. Paragraph 2, in totality, reads as follows:

> **APPOINTMENT OF SALES OFFICER**
>
> …
>
> 2. THIS COURT ORDERS that the Sales Officer **is not and shall not be deemed to be a receiver as defined in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA")** and shall not be required to provide notice of its appointment or any statement or reports in accordance with sections 245 and 246 of the BIA. [Emphasis added.]

[46] The Appointment Order also clearly sets out that the first step, and the primary goal, of the Appointment Order is to market and thereafter sell the entirety of OMI's business. This is envisioned in Schedule "A" to the Appointment Order. I agree with the submissions of OMI that what is contemplated in the order is a sales process for the entire business failing which the company could be sold piece-meal. That, however, was a secondary option that did not take place since the sale of the business as a going concern was achieved. Further, Deloitte never managed, directed, or controlled the operations of OMI.

[47] OMI's position, in my view, is supported by the case law that supports the contention that the sale of a business as a going concern does not amount to a liquidation of assets, or for that matter a dissolution, winding-up, or termination of OMI's existence. The case law has drawn a clear distinction between the sale of a business and a liquidation by stating that the sale of a business, in fact, avoids a liquidation: see *GMAC Commercial Credit Corporation – Canada v. T.C.T Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123, at paras. 93-94; *Clothing for Modern Times Ltd., (Re)*, 2011 ONSC 7522, 88 C.B.R. (5th) 329, at paras. 4 and 11; *Proposition de 2964-3277 Quebec Inc.*, 2019 QCCS 115, at para. 17.

[48] Additionally, it bears noting that INCC never took the position that OMI was insolvent or was engaged in the proceedings seeking to liquidate its assets when it first became aware of the Appointment Order in September 2018. INCC first took the position that OMI was insolvent or engaged in liquidation proceedings after its relationship with Deloitte deteriorated. I accept OMI's submission that INCC did not take the position that OMI had breached the Lease until it became unhappy with the way it was being treated. Certainly, the record supports this submission and I find that INCC used the alleged insolvency and liquidation proceedings as a tactic to control which tenant will replace OMI and to keep 261 Ont out of the leased premises. INCC is a sophisticated landlord. It would have known immediately of its rights to terminate

under the Lease when it first became aware of the Appointment Order. It chose to do nothing at that time but instead raised the issues concerning OMI's alleged insolvency once its relationship with Deloitte and Mr. Gilmour began to break down.

INCC HAS UNREASONABLY WITHHELD ITS CONSENT

[49] The leading case on the principles applicable to a landlord withholding consent to assignment is *1455202 Ontario Inc. v. Welbow Holdings Ltd.* (2003), 33 B.L.R. (3d) 163 (Ont. S.C.), in which Cullity J. set out the following guidelines at para. 9:

> In determining whether the Landlord has unreasonably withheld consent, I believe the following propositions are supported by the authorities cited by counsel and are of assistance:
>
> 1. The burden is on the Tenant to satisfy the court that the refusal to consent was unreasonable. In deciding whether the burden has been discharged, the question is not whether the court would have reached the same conclusion as the Landlord or even whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent.
>
> 2. In determining the reasonableness of a refusal to consent, it is the information available to – and the reasons given by - the Landlord at the time of the refusal - and not any additional, or different, facts or reasons provided subsequently to the court - that is material. Further, it is not necessary for the Landlord to prove that the conclusions which led it to refuse consent were justified, if they were conclusions that might have been reached by a reasonable person in the circumstances.
>
> 3. The question must be considered in the light of the existing provisions of the lease that define and delimit the subject matter of the assignment as well as the right of the Tenant to assign and that of the Landlord to withhold consent. The Landlord is not entitled to require amendments to the terms of lease that will provide it with more advantageous terms - but, as a general rule, it may reasonably withhold consent if the assignment will diminish the value of its rights under it, or of its reversion. A refusal will, however, be unreasonable if it was designed to achieve a collateral purpose, or benefit to the Landlord, that was wholly unconnected with the bargain between the Landlord and the Tenant reflected in the terms of the lease.
>
> 4. A probability that the proposed assignee will default in its obligations under the lease may, depending upon the circumstances, be a reasonable ground for withholding consent. A refusal to consent will not necessarily be

> unreasonable simply because the Landlord will have the same legal rights in the event of default by the assignee as it has against the assignor.
>
> 5. The financial position of the assignee may be a relevant consideration. This was encompassed by the references to the "personality" of an assignee in the older cases.
>
> 6. The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case, including the commercial realities of the market place and the economic impact of an assignment on the Landlord. Decisions in other cases that consent was reasonably, or unreasonably, withheld are not precedents that will dictate the result in the case before the court.

[50] Additionally, there is an obligation on a landlord to consider requests for a proposed assignment particularly where the landlord has no particular reason to believe that the proposed assignee is undesirable: *St. Jane Plaza Ltd. v. Sunoco Inc.* (1992), 24 R.P.R. (2d) 161 (Ont. C.J. (Gen. Div.)), at para. 11.

[51] I appreciate INCC's frustration at the slow pace at which it was receiving information in the latter part of November and early December 2018. I am also of the view that INCC ought to have been served with a copy of the motion record returnable December 21, 2018 to approve the APA. Even though the APA is conditional upon INCC's approval of 261 Ont, INCC was affected by the Approval and Vesting Order and should have been served. Further, it would have made good business sense for Deloitte to ensure that INCC was kept abreast of developments so that it could react in an informed fashion.

[52] That being said, I am also of the view that INCC has reacted emotively to these failures. Further, the failures were immaterial since the Lease provided that INCC's permission to sublet had to be obtained (not to be unreasonably withheld). Also, the court was advised of the fact that INCC's consent was required and that it was an on-going issue.

[53] The question to be answered, therefore, is whether INCC's consent was unreasonably withheld.

[54] In this regard INCC emphasizes that it has decided "to give back to the region by establishing a reputable location in the region of Waterloo where excellent medical care would be available for residence". It submits that INCC offers outstanding, one-stop and accessible services to residents and has to ensure consistent and excellent medical services are provided.

[55] Ms. Voisin and the founder Dr. John Sehl personally interview potential tenants to determine suitability. Ms. Voisin deposes that they consider, amongst other things, the potential tenant's ties to the region, familiarity with the region, commitment to enhancing health care for residents in the region, relationships with existing tenants, proper licensing, the nature of the

business plan being presented, and their general impression of the potential tenant. INCC claims that it does not even look at the financial suitability of the potential tenant until it determines that it is the type of tenant that meets the overall suitability with respect to ties with the region and medical excellence.

[56] INCC submits that 261 Ont failed to meet its criteria.

[57] The three primary objections raised by INCC are:

i. 261 Ont is not an imaging clinic owned by a radiologist but rather by an investor.

ii. 261 Ont only has one licensed radiologist.

iii. 261 Ont has no connection to the community.

[58] INCC also raises lesser concerns which include the following:

iv. INCC did a Google Street View of 261 Ont's other clinics and did not find them attractive.

v. The directors of 261 Ont have no relationships with the Waterloo medical community.

vi. During the interview with the 261 Ont principals, Dr. Sharma, indicated that he owned two clinics when in fact INCC later allegedly discovered he owns one clinic.

vii. 261 Ont provided an insufficiently developed business plan.

viii. 261 Ont did not have any "brand equity", and had yet to decide on an operating name.

[59] In my view, OMI has established that INCC's refusal to provide consent was unreasonable. I have come to this conclusion for the following reasons (which are listed in the same numerical order as the aforementioned complaints of INCC):

i. The argument of INCC that 261 Ont is owned by an investor as opposed to a radiologist has little if any merit. I have difficulty finding any real relevance to this objection. Notwithstanding INCC's stated, laudable goals to create an excellent health care environment, it too is a for-profit corporation. There is nothing inherently wrong with an investor owning a medical laboratory. INCC adduced no independent or credible evidence to suggest that this should be of any concern.

ii. INCC's submission that 261 Ont only has one radiologist is of very limited or no significance. INCC argues that OMI had used 18 radiologists and therefore only having one radiologist would present a significant, negative operational issue. While superficially this argument may have some attraction, it does not withstand scrutiny. First, OMI did employ 18 radiologists but that was for all five of its clinics, not just the

Leased Premises. Further, 261 Ont has other operations and access to radiologists. Also, OMI has been brought as a going concern and 261 Ont plans to invite personnel, including radiologists, to remain on-staff. Last, no cross-examinations were conducted by INCC to support its contention that there would be a problem with the staffing of radiologists at the Leased Premises. In these circumstances I find this purported concern to be entirely speculative,[1] particularly in a situation where the principals of 261 Ont are successfully operating other clinics.

iii. Similarly, the fact that 261 Ont has no connection to the community, nor do its directors, should not form the basis for withholding permission to assign the Lease in this case. Dr. Kim, the principal of OMI, never resided in the Waterloo region. Additionally, INCC previously approved another tenant to take over the Leased Premises (which later fell through). The principal of that business also had no connection to Waterloo. Of further note is that the principal also had a history of disciplinary proceedings with the Ontario College of Pharmacists, which resulted in a suspension. Last, INCC preferred another bidder – True North. Its principal also has no connection to Waterloo.

iv. The argument concerning the Google Street View results fails on the basis that INCC did not produce any of these documents to the court in support of this contention.

v. The complaint that the directors of 261 Ont have no relationships within the Waterloo medical community is similar to complaint (iii) - that they have no connection to the community at large. Once again, I do not see the merit in this submission. 261 Ont would be operating a professional medical facility. Whether or not there are existing relationships with the current medical community, I see as being of little significance. Professional relationships will obviously be developed. There is nothing to suggest that 261 Ont lacks the professional capabilities to create those relationships or that the medical needs of the community will not assist in forging those relationships.

vi. The objection concerning Dr. Sharma's statement that he owned two clinics when in fact he may own one is of little or no concern. He was not asked about the alleged contradiction by INCC and allowed an opportunity to explain. There is no real evidence to support INCC's contention of any sort of falsehood or exaggeration and there is nothing to suggest anything other than a simple misunderstanding or mistake. Ms. Voisin never asked for an explanation.

vii. Insofar as the complaint of the underdeveloped business plan is concerned, I have difficulty accepting the legitimacy of this complaint. Deloitte provided INCC information of 261 Ont's and its principals' financial and operational capabilities on December 21, 2018 without response. INCC admittedly refused to review 261 Ont's financials on the

[1] Or alternatively, tactical, based on my comments below in paragraph 60.

basis that it already determined that 261 Ont was an unsuitable tenant. Deloitte also forwarded a detailed business plan to INCC.

viii. Once again, I cannot see how "brand equity" can be of any real significance. This, after all, is a medical facility that will offer needed services to the community. Undoubtedly, as 261 Ont has submitted at the motion, an operating name will be decided upon in the usual way.

[60] In addition to the above, which directly deal with INCC's objections noted above the remaining factors are also germane to my determination:

- After the relationship between INCC and Deloitte began to deteriorate, Ms. Voisin refused to engage with Deloitte in order to discuss 261 Ont's suitability. Ms. Voisin testified at her discovery that she felt she had no duty to consult. Of significance is the fact that Mr. Brad Stoneburgh, of Para-Med Realty, the property manager for INCC, emailed Deloitte on December 18, 2018 (before INCC even knew the identity of 261 Ont) stating "to be clear if any request is made to assign the Lease it will be rigorously denied". Ms. Voisin, at her examination, denied delegating this authority to Mr. Stoneburgh. While she may not have delegated the authority one would be naive to believe that Mr. Stoneburgh was acting in his own capacity without having reviewed the issue with Ms. Voisin. I accept that he was expressing INCC's views. In fact, earlier Mr. Stoneburgh had confirmed that he was corresponding on behalf of INCC. This refusal, as per the decision in *St. Jane Plaza*, was unreasonable. The identity of 261 Ont was unknown and therefore INCC had no particular reason to believe 261 Ont was unsuitable, or for that matter, any other proposed tenant was unsuitable. INCC closed its mind to any proposals made by Deloitte on behalf of OMI.

- Further, as noted in the materials filed by Deloitte concerning the 261 Ont management team, Dr. Sharma is a foreign-trained radiologist and practised radiology for 15 years prior to immigrating to Canada. For the past 16 years, he has been the owner and operator for imaging and radiology clinics in the Greater Toronto Area (GTA). Another member of the team, Dr. Datta, is a Canadian-trained doctor who is a qualified radiologist.[2] Another principal, Mr. Houja, owns and operates an imaging and radiology clinic in the GTA. Another principal, Mr. Gosian, is a senior financial accounting professional with experience in medical clinics. They were specifically approved for Deloitte by its consultant Mr. Gilmour, who is the only industry expert involved in the transaction. Through Deloitte, the principals of 261 Ont provided a suitable schedule of personal wealth. A deposit has been paid for the purchase of OMI. All this information has been

[2] INCC also submitted that Dr. Datta "may have" restrictions as a radiologist, but introduced no evidence in this regard. OMI disputes this contention.

provided to INCC. As noted, INCC did not review the financial information of 261 Ont, having confirmed that they were not suitable prior to even reviewing financial information. In my view, this further evidences the cursory nature of the review undertaken by INCC, which occurred after they had already indicated that no tenant proposed by Deloitte would be suitable. There is no reasoned basis to suggest that 261 Ont is not qualified to operate the proposed facility.

- As noted, INCC preferred the assignment of the Lease to another prospective purchaser during the sales process – True North. This occurred in October 2018. At that time, INCC did not raise any complaints of default against OMI. It was only later when True North was not selected by Deloitte that INCC delivered its Notice to Terminate.

- None of the four other landlords in the other locations have denied consent to the assignment.

- The rigorous sales process conducted by Deloitte with the assistance of the industry expert, Mr. Gilmour, has been approved by this court.

- None of INCC's subjective criteria regarding residency and ownership are contained in its Lease with OMI.

- If INCC is successful in opposing the termination, OMI will cease operations and largely face the destruction of its business since the Leased Premises are its largest location. There will be resulting unemployment of staff and lack of services to patients. All of these factors must be considered. INCC has produced no evidence to suggest that the consequences will not be significant.

- There is no credible evidence to suggest that 261 Ont cannot live up to the financial obligations imposed by the Lease or that an assignment would have a negative financial impact on INCC.

- The meeting between INCC, Deloitte, and 261 Ont was finally held on January 17, 2019. Further financial details of the personal and business assets of 261 Ont and its principals were produced to INCC. Several other topics were reviewed, including the experience of 261 Ont's principals and its outreach plans. INCC was also offered further financial details of the principals' personal and business assets if they would execute a non-disclosure agreement ("NDA"). It was at this meeting that it also confirmed that 261 Ont's deposit and documentation evidencing that the balance of funds required to close that transaction was available. INCC did not execute the NDA. Shortly thereafter, INCC refused permission without explanation. INCC's position was only meaningfully set out for the first time in this motion materials.

[61] I agree with the reasoning in *Welbow Holdings* that a court should be slow to substitute its judgment for the business judgment of a landlord. I also accept that the test is whether a reasonable person could have withheld consent in the circumstances of this case.

[62] Based on the foregoing, however, it is my view that it is appropriate to substitute my judgment for that of INCC on the basis that its decision could not have been reached by a reasonable person.

[63] First, it purported to refuse any assignment without even knowing the identity of 261 Ont. Thereafter, the reasons provided by INCC, in my view, were not commercially reasonable and seemed to expand based on emotive reasons, stemming from the fact that INCC (in particular, Ms. Voisin) was not kept abreast of developments for a period of time and was not served with a copy of the motion record.

[64] In this circumstances of this particular case, INCC has acted unreasonably. While Deloitte and Mr. Gilmour could have done a better job of keeping INCC abreast of developments, they did work meaningfully with INCC early in the process. Later, when they learned of INCC's unhappiness they attempted to mend the relationship and provide cogent, useful information concerning 261 Ont to INCC. I accept the submissions of RBC, OMI, and Deloitte that once INCC became unhappy with the process it formed a view that it would not accept a tenant proposed by Deloitte and this is evidenced by Mr. Stoneburgh's email. Even if I am in error and INCC had not predetermined the issue, it acted unreasonably in refusing to consent to an assignment of the Lease to 261 Ont, who is a suitable tenant for all the reasons noted above.

DISPOSITION

[65] INCC's motion is dismissed.

[66] OMI and Dr. Kim are entitled to a declaration that the Lease is in good standing and not in default, and a further declaration that INCC's refusal to consent to an assignment to 261 Ont has been unreasonably withheld. It is therefore further entitled to an order that the assignment may be made, notwithstanding INCC's refusal to consent, as per s. 23(2) of the *Commercial Tenancies Act*.

[67] With respect to the issue of costs, RBC is not seeking costs. Having been successful, OMI/Dr. Kim and Deloitte are entitled to costs payable by INCC.

[68] I have reviewed the bill of costs. Costs are to be paid on a partial indemnity basis. The bills of costs of the parties were fairly similar. It is fair and reasonable to award OMI/Dr. Kim the partial indemnity costs sought in the amount of $32,050.79, inclusive, and Deloitte in the amount of $36,751.05, inclusive.

McEwen J.

Released: March 14, 2019

CITATION: Royal Bank of Canada v. Oxford Medical Imaging Inc., 2019 ONSC 1020
COURT FILE NO.: CV-18-602205-00CL
DATE: 20190314

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ROYAL BANK OF CANADA

Plaintiff

– and –

OXFORD MEDICAL IMAGING INC., JAE K. KIM aka JAE KOUL KIM aka DR. JAE KIM and JAE K. KIM MEDICINE PROFESSIONAL CORPORATION

Defendants

REASONS FOR JUDGMENT

McEwen J.

Released: March 14, 2019

In the bankruptcy of Pacific Mobile Corporation

Gérald Robitaille, Trustee *Appellant*;

and

American Biltrite (Canada) Ltd. *Respondent.*

File No.: 17286.

1985: March 27, 28; 1985: April 4.

Present: Dickson C.J. and Beetz, McIntyre, Lamer, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

Bankruptcy — Fraudulent preferences — Late payment — Validity of payment dependent on whether made in "ordinary course of business" — "Ordinary course of business" to be considered in circumstances of each case, taking into account business relationship between debtor and creditor and industry standard — Late payment normal between companies involved and standard for their industry — Bankruptcy Act, R.S.C. 1970, c. B-3, s. 73.

Cases Cited

Hudson v. Benallack, [1976] 2 S.C.R. 168, distinguished.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C. 1970, c. B-3, s. 73.

APPEAL from a judgment of the Quebec Court of Appeal, [1982] C.A. 501, 44 C.B.R. (N.S.) 190, allowing an appeal from a judgment of Jacques J. (1979), 34 C.B.R. (N.S.) 8, maintaining the application of the trustee in bankruptcy to annul a payment. Appeal dismissed.

Louis Dorion and *Claude Fontaine*, for the appellant.

David B. Campbell and *Gaétan Dumas*, for the respondent.

The following is the judgment delivered by

THE COURT—This appeal raises two narrow questions in the area of bankruptcy law. First, what is meant by the term "ordinary course of business" in the context of s. 73 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. Second, was the overdue

Dans l'affaire de la faillite de Pacific Mobile Corporation

Gérald Robitaille, syndic *Appelant*;

et

American Biltrite (Canada) Ltée *Intimée.*

N° du greffe: 17286.

1985: 27, 28 mars; 1985: 4 avril.

Présents: Le juge en chef Dickson et les juges Beetz, McIntyre, Lamer, Wilson, Le Dain et La Forest.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite — Paiement préférentiel — Paiement tardif — Paiement valide s'il est fait dans «le cours ordinaire des affaires» — «Le cours ordinaire des affaires» doit être analysé selon les circonstances de chaque cas, compte tenu des relations d'affaire entre le débiteur et le créancier et des normes de l'industrie — Paiement tardif normal entre les sociétés en cause et habituel dans leur industrie — Loi sur la faillite, S.R.C. 1970, chap. B-3, art. 73.

Jurisprudence

Distinction faite avec l'arrêt: *Hudson c. Benallack*, [1976] 2 R.C.S. 168.

Lois et règlements cités

Loi sur la faillite, S.R.C. 1970, chap. B-3, art. 73.

POURVOI contre un arrêt de la Cour d'appel du Québec, [1982] C.A. 501, 44 C.B.R. (N.S.) 190, qui a accueilli un appel à l'encontre du jugement du juge Jacques (1979), 34 C.B.R. (N.S.) 8, qui avait accueilli la requête du syndic de la faillite visant l'annulation du paiement. Pourvoi rejeté.

Louis Dorion et *Claude Fontaine*, pour l'appelant.

David B. Campbell et *Gaétan Dumas*, pour l'intimée.

Version française du jugement rendu par

LA COUR—Le pourvoi soulève deux questions limitées relevant du domaine du droit de la faillite. Premièrement, que signifie l'expression dans «le cours ordinaire des affaires» dans le contexte de l'art. 73 de la *Loi sur la faillite*, S.R.C. 1970,

payment in this case made in the "ordinary course of business".

We are all of the view, for the reasons set out by Monet J.A. of the Quebec Court of Appeal (reported at (1983), 44 C.B.R. (N.S.) 190), that this appeal must fail.

It is not wise to attempt to give a comprehensive definition of the term "ordinary course of business" for all transactions. Rather, it is best to consider the circumstances of each case and to take into account the type of business carried on between the debtor and creditor.

We approve of the following passage from Monet J.A.'s reasons discussing the phrase "ordinary course of business" at p. 205:

> It is apparent from these authorities, it seems to me, that the concept we are concerned with is an abstract one and that it is the function of the courts to consider the circumstances of each case in order to determine how to *characterize* a given transaction. This in effect reflects the constant interplay between law and fact. With all due respect, however, I do not think that it can be said that a payment that is not made when due cannot be regarded as having been made in the ordinary course of business.

In this case, it is clear, based on the evidence adduced, that the payment was made in the ordinary course of business. The late payment by Pacific Mobile to American Biltrite was not only normal in the context of their business relationship, but was also standard for their particular industry.

In his factum, as well as in oral argument, the appellant relied upon this Court's decision in *Hudson v. Benallack*, [1976] 2 S.C.R. 168, to interpret the term "ordinary course of business". He placed particular emphasis on the following passage at pp. 175-76:

> The object of the bankruptcy law is to ensure the division of the property of the debtor rateably among all his creditors in the event of his bankruptcy. Section 112 of the Act provides that, subject to the Act, all claims proved in the bankruptcy shall be paid *pari passu*. The Act is intended to put all creditors upon an equal footing. Generally, until a debtor is insolvent or has an act of bankruptcy in contemplation, he is quite free to

chap. B-3? Deuxièmement, le paiement en souffrance en l'espèce a-t-il été fait dans «le cours ordinaire des affaires»?

Nous sommes tous d'avis que pour les motifs énoncés par le juge Monet de la Cour d'appel du Québec (publiés à (1983), 44 C.B.R. (N.S.) 190), ce pourvoi doit être rejeté.

Il n'est pas sage de tenter de donner une définition exhaustive de l'expression dans «le cours ordinaire des affaires» applicable à tous les cas. Il est préférable de considérer les circonstances de chaque cas et de tenir compte du genre d'affaires que font le débiteur et le créancier.

Nous approuvons le passage suivant tiré des motifs du juge Monet où il discute de l'expression dans «le cours ordinaire des affaires» à la p. 205:

> Il ressort de ces autorités, me semble-t-il, que, d'une part, la notion qui nous concerne est une notion abstraite et que, d'autre part, les tribunaux ont pour mission d'apprécier les circonstances propres à chaque espèce afin de déterminer la *qualification* d'une transaction donnée. C'est, en somme, le va-et-vient perpétuel entre le droit et le fait. Mais, avec égards, je crois qu'on ne peut pas affirmer qu'un paiement qui n'est pas fait à échéance ne peut être considéré comme ayant été fait dans le cours ordinaire des affaires.

En l'espèce, il est clair, vu les éléments de preuve produite, que le paiement a été fait dans le cours ordinaire des affaires. Le paiement tardif de Pacific Mobile à American Biltrite était non seulement normal dans le contexte de leurs relations d'affaire, mais c'était aussi habituel dans leur industrie particulière.

Dans son mémoire, de même que dans sa plaidoirie, l'appelant s'est appuyé sur l'arrêt de cette Cour, *Hudson c. Benallack*, [1976] 2 R.C.S. 168, pour interpréter l'expression dans «le cours ordinaire des affaires». Il a particulièrement insisté sur le passage suivant, aux pp. 175 et 176:

> La législation sur la faillite a pour objet de garantir le partage des biens du débiteur failli proportionnellement entre tous ses créanciers. L'article 112 de la Loi prévoit que, sous réserve des dispositions de la Loi, toutes les réclamations établies dans la faillite doivent être acquittées *pari passu*. La Loi vise à mettre tous les créanciers sur un pied d'égalité. En général, jusqu'à ce qu'il soit insolvable ou projette de faire un acte de faillite, le

deal with his property as he wills and he may prefer one creditor over another but, upon becoming insolvent, he can no longer do any act out of the ordinary course of business which has the effect of preferring a particular creditor over other creditors. If one creditor receives a preference over other creditors as a result of the debtor acting intentionally and in fraud of the law, this defeats the equality of the bankruptcy laws.

In our view, the appellant has incorrectly interpreted the above passage. *Hudson, supra*, dealt with one point only: whether the words "with a view to giving such creditor a preference", contained in s. 73(1) of the *Bankruptcy Act*, require an intention on the part of the insolvent debtor alone to prefer or a concurrent intent on the part of both the debtor and creditor. The Court held that only the intention of the debtor was relevant. That case did not, in any way, consider or determine the meaning of the term "ordinary course of business" and is, therefore, not helpful in the resolution of the issues at hand.

Conclusion

For the reasons set out by Monet J.A. of the Quebec Court of Appeal, the payment made by Pacific Mobile to American Biltrite was a payment made in the "ordinary course of business". Therefore, the payment is not void as against the appellant under s. 73 of the *Bankruptcy Act*. The appeal is accordingly dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: Louis Dorion, Québec.

Solicitors for the respondent: Hackett, Campbell, Bouchard, Sherbrooke.

débiteur est tout à fait libre d'administrer ses biens à sa guise et il peut préférer l'un ou l'autre de ses créanciers. Toutefois, dès qu'il devient insolvable, il ne peut plus rien faire qui sorte du cours ordinaire des affaires et ait pour effet de procurer une préférence à un créancier sur les autres. Si un créancier reçoit une préférence sur les autres par suite d'un acte délibéré et frauduleux du débiteur, le principe de l'égalité à la base de la législation sur la faillite est mis en échec.

À notre avis, l'appelant a mal interprété le passage ci-dessus. L'affaire *Hudson*, précitée, traitait d'un seul point: savoir si l'expression «en vue de procurer à ce créancier une préférence» contenue dans le par. 73(1) de la *Loi sur la faillite* ne vise que l'intention du débiteur insolvable d'accorder une préférence ou si elle exige l'intention commune du débiteur et du créancier. La Cour a conclu que seule l'intention du débiteur importait. Cette affaire-là n'a en aucune façon examiné ou déterminé le sens de l'expression dans «le cours ordinaire des affaires» et n'est par conséquent d'aucun secours pour résoudre les questions en litige.

Conclusion

Pour les motifs exposés par le juge Monet de la Cour d'appel du Québec, le paiement versé par Pacific Mobile à American Biltrite était un paiement effectué dans «le cours ordinaire des affaires». Le paiement n'est donc pas nul à l'égard de l'appelant en vertu de l'art. 73 de la *Loi sur la faillite*. Le pourvoi est donc rejeté avec dépens.

Pourvoi rejeté avec dépens.

Procureur de l'appelant: Louis Dorion, Québec.

Procureurs de l'intimée: Hackett, Campbell, Bouchard, Sherbrooke.

CITATION: Stelco Inc. (Re) , 2007 ONCA 483
DATE: 20070628
DOCKET: C46248, C46258, C46266 & C46916

COURT OF APPEAL FOR ONTARIO

O'CONNOR A.C.J.O., GOUDGE and BLAIR JJ.A.

BETWEEN:

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A" APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Jeffrey Leon, Robert Staley and Derek Bell for the Debenture Holders

Dan Macdonald and Erin Cowling for Sunrise Partners Limited Partnership, Appaloosa Management L.P., TD Securities, A Division of The Toronto Dominion Bank and Irving Wortsman

Joseph M. Steiner and Nancy Roberts for 2074600 Ontario Inc.

Kyla Mahar for Ernst & Young, in its capacity as Monitor

Sean Dunphy and Ellen Snow for Aurelius Capital Management, LP [representing the Cash-Elect Debentureholders]

Charles F. Scott, M. Paul Michell and Michael J. Sims for Catalyst Capital Group Inc. and David Kempner Capital Management LLC [representing the Share-Elect Debentureholders]

Brendan Y.B. Wong for CIBC Mellon Trust Co.

Heard: March 27, 2007 and May 2, 2007

On appeal from the orders of Justice Herman J.W. Siegel of the Superior Court of Justice, dated October 31, 2006 and March 6, 2007, with reasons reported at [2006] O.J. No. 3219, [2006] O.J. No. 5430, and [2007] O.J. No. 808.

BY THE COURT:

I. OVERVIEW

[1] These reasons concern four appeals arising from proceedings involving Stelco Inc. under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[2] In January 2004, Stelco filed for protection under the *CCAA*. At the time, it owed almost $550 million to various creditors. (With post-filing interest, the amount increases to approximately $640 million.) In January 2006, after two years of efforts to raise capital, sell assets, and negotiate a compromise, a plan of arrangement and reorganization was sanctioned by Farley J. as fair and reasonable, thereby putting in motion the process by which Stelco would emerge from restructuring with its debt reorganized. In simple terms, the creditors agreed to release and discharge all claims against Stelco in exchange for a distribution of cash and new securities. These appeals concern how those assets are to be distributed amongst classes of the creditors, and include disputes over the ranking of priorities, the characterization of debt, and the value to be attributed to the new securities.

[3] In these reasons, we summarize the facts most relevant to the appeals. The motion judge reviewed the facts in greater detail in his reasons for judgment released on August 9, 2006, and on March 6, 2007, which are reported at 20 B.L.R. (4th) 286 and [2007] O.J. No. 808, respectively.

II. THE NOTEHOLDERS' APPEAL (C46248)

(a) Facts

[4] When Stelco filed for protection under the *CCAA* on January 29, 2004 (the "Filing Date"), it had two principal debt obligations:

(1) Debentures: There were two classes of senior debentures: 10.4% Debentures issued in 1989 in the principal amount of $125,000,000 and 8% Debentures issues in 1999 in the principal amount of $150,000,000.

(2) Notes: There was one class of unsecured subordinated debentures issued in 2002 in the principal amount of $90,000,000 and bearing an interest rate of 9.5% per annum.

In these reasons the parties representing the holders of the Debentures will be referred to as the "Debentureholders" and the parties representing the holders of the Notes will be referred to as the "Noteholders".

[5] In the Note Indenture, the Noteholders agreed to subordinate their entitlement to repayment in full of the "Senior Debt" (the "Turnover Provisions"). It is agreed that the Debentures constitute Senior Debt as defined in the Note Indenture.

[6] Article 6.2 of the Note Indenture specifically addresses the operation of the Turnover Provisions in the event of insolvency proceedings. Article 6.2(2) requires any payment or distribution of assets to the Noteholders in such circumstances be paid to the holders of Senior Debt to the extent necessary to result in payment in full of the principal and interest owing to them after giving effect to any concurrent payment or distribution to the holders of Senior Debt. Article 6.2(3) provides that if any payment or distribution is paid to the Noteholders it shall be held in trust for the Senior Debt Holders until the principal of and interest on the Senior Debt shall be paid in full.

[7] On January 20, 2006, Farley J. approved a plan of arrangement or compromise (the "Plan") to reorganize Stelco's debt obligations. The Plan became effective on March 31, 2006 (the "Effective Date") at 11:59 p.m. (the "Effective Time").

[8] In accordance with the Plan, the Debentureholders filed proofs of claim totalling $342,655,664. On the Effective Date, they received an initial *pro rata* share of the Plan distribution in the form of cash, New Common Shares, New Warrants, and New Floating Rate Notes (the "New FRNs") (collectively, the "Distributed Assets"). The Distributed Assets were comprised of $52,243,533 in cash, US$121,486,000 in New FRNs, 4,004,829 New Common Shares, and 733,311 New Warrants. Pursuant to the terms of the Plan, the New Common Shares were issued at a price of $5.50 per share. Based on that price per share, the New Warrants would be worth $1.44 per warrant using the Black-Scholes Model.

[9] The Plan also provided for a distribution of $20,075.359 in cash, US$40,522,000 in New FRNS, 849,325 New Common Shares and 244,528 New Warrants to the Noteholders (the "Turnover Proceeds"). The Plan required that the Turnover Proceeds be held in trust by the Monitor pending the determination of entitlement to the Turnover Proceeds pursuant to the Turnover Provisions.

[10] The difference between what the Debentureholders claim to have received from the Distributed Assets and the resulting balance remaining from their claims, if any (the "Deficiency"), is payable to them out of the Turnover Proceeds.

[11] On March 7, 2006, Farley J. issued an order as to how the litigation over the Turnover Proceeds was to be conducted. Pursuant to that order, the Debentureholders filed a claim stating that they were entitled to the Turnover Proceeds. 2074600 filed a claim stating that the debt owed to it was Senior Debt and had priority over the amount owing to the Noteholders. (This claim is the subject of a separate appeal and is discussed below.) The Noteholders responded with a counterclaim denying the existence of any

Deficiency and insisting that they were entitled to the entire Turnover Proceeds. The hearing took place before the motion judge on July 17 through 21, 2006.

[12] In a ruling released on August 9, 2006, and formally entered on October 31, 2006, the motion judge made the following findings that are relevant to the Noteholders' appeal:[1]

> (1) The Senior Debt Holders are entitled to enforce the Turnover Provisions as third-party beneficiaries of the provision. They are also entitled to enforce the Provisions as the beneficiaries of the trust in which the Turnover Proceeds are currently held;
>
> (2) The implementation of the Plan did not cancel the Turnover Provisions in the Note Indenture;
>
> (3) It was not necessary for Senior Debt Holders to prove individually the actual amount of their deficiencies after receiving the Distributed Assets under the Plan; and
>
> (4) The Senior Debt Holders were entitled to be paid post-CCAA-filing interest on their outstanding amounts.

[13] The Noteholders appeal each of these findings.

(b) Enforcement of the Turnover Provisions

[14] The Noteholders appeal the finding of the motion judge that the Debentureholders as holders of Senior Debt[2] are entitled to enforce the Turnover Provisions contained in the Note Indenture despite the fact that they are not parties to that Indenture.

[15] The motion judge found that the Senior Debt Holders are entitled to do so both as third party beneficiaries and as the beneficiaries of the trust established in their favour by the Indenture.

[16] For the reasons that follow, we agree with the motion judge that while they are not parties to the Note Indenture between Stelco and the Noteholders, the Senior Debt Holders can rely on trust principles to provide an exception to the privity of contract

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[1] He made other findings that are addressed below in our reasons relating to the appeals by 2074600 Ontario Inc. and the Debentureholders.

[2] The "Senior Debt Holders" include the Debentureholders and, given that we conclude below that the EDS claim constitutes Senior Debt, 2074600 Ontario Inc.

doctrine, entitling them to enforce the Turnover Provisions in the Note Indenture that constitutes the Noteholders trustees of the Turnover Proceeds for the Senior Debt Holders once the Noteholders receive those Proceeds. It is therefore unnecessary for us to decide whether the trial judge erred in allowing the Senior Debt Holders to enforce the Indenture as third party beneficiaries by extending to this case the principled exception to privity of contract found in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108.

[17] Needless to say, our approach to this issue is premised on our conclusion, explained below, that the Turnover Provisions of the Note Indenture survive the implementation of the Plan and are not extinguished by it.

[18] It is helpful to begin by reproducing the Turnover Provisions in the Note Indenture, noting that they refer to the Indenture as the "Debenture" and the Noteholders as the "Debenture Holders". These are Article 6.1 and Article 6.2(1), (2) and (3), of which the last is the most important for the trust issue. They read as follows:

> **ARTICLE 6 – SUBORDINATION OF DEBENTURES**
>
> **6.1 Agreement to Subordinate.**
>
> The Corporation covenants and agrees, and each Debentureholder, by his acceptance thereof, likewise agrees, that the payment of the principal of and of any interest on the Debentures is hereby expressly subordinated, to the extent and in the manner hereinafter set forth, in right of payment to the prior payment in full of all Senior Debt whether outstanding on the date of this First Supplemental Indenture or thereafter incurred.
>
> **6.2 Distribution on Insolvency or Winding-up.**
>
> In the event of any insolvency or bankruptcy proceedings, or any receivership, liquidation, reorganization or other similar proceedings relative to the Corporation, or to its property or assets, or in the event of any proceedings for voluntary liquidation, dissolution or other winding-up of the Corporation:
>
> (1) *the holders of all Senior Debt will first be entitled to receive payment in full of the principal* thereof, premium (or any other amount payable under such Senior Debt), if any, *and interest due thereon, before the Debentureholders will be entitled to receive any payment* or distribution of any kind or character, whether in cash, property or securities, which may be payable or deliverable in any such event in respect of any of the Debentures;
>
> (2) *any payment by, or distribution of assets of the Corporation* of any kind or character, whether in cash, property or securities (other than securities of the Corporation or any other company provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in this Article 6 with respect to the Debentures, to the payment of all Senior Debt, provided that (i) the Senior Debt is assumed by the new company, if any, resulting from such reorganization or readjustment, and (ii) without prejudice to the rights of such holders with respect to any such plan (including without limitation as to whether or not to approve same and on what conditions to do so), the rights of the holders of Senior Debt are not

altered adversely by such reorganization or readjustment) *to which the Debentureholders or the Trustee would be entitled, except for the provisions of this Article 6, will be paid or delivered by the Person making such payment or distribution*, whether a trustee in bankruptcy, a receiver, a receiver-manager, a liquidator or otherwise, *directly to the holders of Senior Debt* or their representative or representatives or to the trustee or trustees under any indenture under which any instruments evidencing any of such Senior Debt may have been issued, rateably according to the aggregate amounts remaining unpaid on account of the Senior Debt held or represented by each, *to the extent necessary to make payment in full of all Senior Debt remaining unpaid* after giving effect to any concurrent payment or distribution (or provision therefore) to the holders of such Senior Debt; and

(3) subject to Section 6.6, *if, notwithstanding the foregoing, any payment by*, or distribution of assets of, *the Corporation* of any kind or character whether in cash, property or securities (other than securities of the Corporation as reorganized or readjusted or securities of the Corporation or any other company provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in this Article 6 with respect to the Debentures, to the payment of all Senior Debt, provided that (i) the Senior Debt is assumed by the new company, if any, resulting from such reorganization or readjustment and (ii) without prejudice to the rights of such holders with respect to any such plan (including without limitation as to whether or not to approve same and on what conditions to do so), the rights of the holders of Senior Debt are not altered adversely by such reorganization or readjustment), *is received by the Trustee or the Debentureholders before all Senior Debt is paid in full, such payment or distribution will be held in trust for the benefit of, and will be paid over the holders of such Senior Debt or their representative* or representatives or to the Trustee or trustees under any indenture under which any instruments evidencing any of such Senior Debt may have been issued, rateably as aforesaid, for application to the payment of all Senior Debt remaining unpaid *until such Senior Debt has been paid in full*, after giving effect to any concurrent payment or distribution (or provision therefore) to the holders of such Senior Debt. [Emphasis added.]

[19] It is also helpful to review a number of the provisions of the Plan approved by the court on January 20, 2006, effective March 31, 2006.

[20] Article 2.03 provides that once the Plan is effective, each Affected Creditor (including both the Senior Debt Holders and the Noteholders) will receive in full satisfaction of its claim against Stelco its *pro rata* share of the pool of assets provided by Stelco, consisting of cash, New FRNs, New Common Shares and New Warrants.

[21] As noted above, Article 6.01(2) provides that the Turnover Proceeds will be delivered to the Monitor, who will hold the proceeds in trust pending the outcome of this litigation over the Proceeds. The Monitor was to seek directions of the court about the process to be used to determine that entitlement, so that this trust can be fully implemented.

[22] The Senior Debt Holders claim that they are entitled to rely on the Turnover Provisions in Article 6.2(3) of the Note Indenture because of the trust exception to the privity of contract doctrine and that they are ultimately entitled to the Turnover Proceeds.

[23] In response, the Noteholders assert that the Senior Debt Holders have no right to enforce those Provisions, and that therefore the Monitor holds the Turnover Proceeds in trust for the Noteholders and not for the Senior Debt Holders.

[24] At first instance the Noteholders did not contest the trust exception to the privity of contract doctrine. Nor do they do so in this court. They accept the well-known proposition that parties to a contract can constitute one party a trustee for a third party of a right under the contract and thereby confer on the third party a right enforceable by it in equity. See *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228 at 239.

[25] Rather, their principal argument below was that the Senior Debt Holders could not rely on Article 6.2(3) of the Note Indenture because the Turnover Proceeds have been paid to the Monitor under the Plan and have not therefore been "received" by the Noteholders for the purposes of the Article. Thus no trust has arisen and the Senior Debt Holders have no beneficial interest to enforce. The motion judge dismissed this argument as follows:

> This is an argument of form over substance. The Monitor has no interest in the Distributions. For the purpose of this proceeding, payment to the Monitor satisfies the requirement of delivery of the corpus of the trust to the Noteholders. The only other possibility – that the Distributions were paid to the Senior Debt Holders – is, of course, denied by the Noteholders and would render consideration of this issue unnecessary.

[26] The Noteholders raise the same argument in this court. We would give the same response, with the following elaboration.

[27] The Plan, approved by court order, creates a trust in which the Monitor holds the Turnover Proceeds in trust pending determination by the court of whether the Senior Debt Holders or the Noteholders are ultimately entitled to them.

[28] Subject to any right of subordination available to the Senior Debt Holders, the Noteholders are ultimately entitled to the Turnover Proceeds, pursuant to the terms of the Plan. In other words, the Noteholders hold the beneficial interest in the Turnover Proceeds but that interest is not unfettered. It is subject to the rights of the Senior Debt Holders if the court should so order. As a consequence, the Noteholders cannot be said to have the entire equitable interest in the Turnover Proceeds. The Senior Debt Holders' interest gives them the right to engage the assistance of the court to effect the full implementation of the trust created by the Plan.

[29] In relying on Article 6.2(3) of the Note Indenture to accomplish this full implementation, the Senior Debt Holders effectively ask the court:

> (a) to order that the Turnover Proceeds be paid to the Noteholders who, on receipt, are obliged by Article 6.2(3) to hold the proceeds in trust for the Senior Debt Holders and to pay those proceeds over to them until they are paid in full, and
>
> (b) to enforce their right as beneficiaries of the arrangement set up by Article 6.2(3) to this payment.

[30] We agree that the court below was correct to so order. The payment to the Noteholders is ordered simply as a step in the full implementation of the arrangement, and once these steps are taken, the Noteholders are to be held to the terms of the trust that results. The Senior Debt Holders are entitled to have the court ensure that the proper beneficial interests in both trusts are respected.

[31] On appeal, the Noteholders raise two additional arguments.

[32] First, they rely on *Greenwood Shopping Plaza*, *supra*, to argue that unless the Senior Debt Holders can establish that Stelco was contracting as trustee for them in entering into the Note Indenture, they cannot rely on the trust exception to privity of contract so as to enforce Article 6.2(3).

[33] We do not agree. As we read *Greenwood Shopping Plaza*, the fundamental question is whether Article 6.2(3) can be shown to create a trust in favour of the Senior Debt Holders once property flows. While evidence that Stelco contracted with that intention would point to that conclusion, here the language of the Article itself is so explicit that it is more than enough to show the establishment of the trust contended for by the Senior Debt Holders.

[34] Second, the Noteholders argue that the Indenture could have been amended without notice to or consent from the Senior Debt Holders and that this is inconsistent with Article 6.2(3) providing for the trust contended for by the Senior Debt Holders.

[35] Again, we disagree. Not only has there been no such amendment, but Article 6.8 of the Note Indenture provides that Stelco cannot act to impair any subrogation rights of the Senior Debt Holders. Moreover, *Greenwood Shopping Plaza* makes clear that whether the parties can change the contractual terms creating the trust is but one test (although a common one) to determine whether a trust has been created. As we have said, in this case, the language of Article 6.2(3) is enough to make it crystal clear that that has happened.

[36] In summary, on this issue we agree with the motion judge. The Senior Debt Holders are entitled to the benefit of the trust established in their favour pursuant to Article 6.2(3) of the Note Indenture.

(c) Cancellation of the Turnover Provisions

[37] The Noteholders argue that the motion judge erred in failing to conclude that because the Plan cancelled the Note Indenture on implementation, it necessarily cancelled the Turnover Provisions which were included in the Note Indenture. Thus, the Senior Debt Holders are no longer entitled to enforce their subordination rights that are embodied in the Turnover Provisions.

[38] Article 4.01 of the Plan provides for the cancellation on implementation of Stelco debentures which include the Note Indenture. The relevant part of that Article reads:

> [A]ll debentures … subject to Section 6.01(2) will be cancelled and null and void, and all debentures … will not entitle any holder thereof … to any compensation or participation other than as expressly provided for in this Plan[.]

[39] The motion judge rejected the Noteholders' argument. He held that section 6.01(2) of the Plan was the complete answer. That section provides as follows:

> [N]othing in the wording of Section 6.01(1) or any other language in this Plan will bar or prejudice or be deemed to bar or prejudice the ability of any holder of Senior Debt (as defined in the Subordinated 2007 Bond Indenture) … to maintain or pursue claims or other remedies, including any third party beneficiary claims or remedies they may have, against holders of the [Notes].

[40] The Noteholders argue that s. 6.01(2) does not preserve the substantive rights of Senior Debt Holders contained in the Turnover Provisions. Rather, they say that the section provides only that the Plan would not preclude the Senior Debt Holders from advancing other claims not based on the Note Indenture or the Noteholders from raising defences to such claims.

[41] We do not agree that s. 6.01(2) should be read in this manner. We agree with the motion judge that the most reasonable interpretation of s. 6.01(2) is that implementation of the Plan would not affect the substantive rights and obligations of the Senior Debt Holders and the Noteholders in respect of the Turnover Provisions. While the language of s. 6.01(2) does not explicitly refer to the Turnover Provisions, it does preserve "the ability of [Senior Debt Holders] to maintain or pursue claims or remedies, including any third party beneficiary claims or remedies, they may have against the [Noteholders]". The plain meaning of this language would protect all of the then-existing rights of the

Senior Debt Holders against the Noteholders which unquestionably include the rights embodied in the Turnover Provisions.

[42] Moreover, there is nothing in the language of s. 6.01(2) or elsewhere in the Plan to suggest that the Senior Debt Holders intended to forego their rights of subordination found in the Turnover Provisions. Indeed, there does not appear to be any commercial basis that would have led the Senior Debt Holders to vote in favour of a Plan that had the effect of removing the priority accorded to them by those provisions.

[43] We read s. 6.01(2) as providing a method by which the parties could proceed with implementing the Plan without having to await the resolution of possible disputes between the Senior Debt Holders and the Noteholders with respect to the Turnover Provisions. The potential delay in awaiting such a resolution could be lengthy, as the present litigation has shown, and possibly fatal to the implementation of the Plan. From a commercial and practical standpoint, the approach adopted in s. 6.01(2) made a good deal of sense.

[44] We note that this approach of delaying the resolution of inter-creditor disputes is not inconsistent with the scheme of the *CCAA*. In a ruling made on November 10, 2005, in the proceedings relating to Stelco reported at 15 C.B.R. (5th) 297, Farley J. expressed this point (at para. 7) as follows:

> The *CCAA* is styled as "An Act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors *vis-à-vis* the creditors themselves and not directly involving the company.

[45] Thus, we agree with the motion judge's interpretation of s. 6.01(2). The result of this interpretation is that the Plan extinguished the provisions of the Note Indenture respecting the rights and obligations as between Stelco and the Noteholders on the Effective Date. However, the Turnover Provisions, which relate only to the rights and obligations between the Senior Debt Holders and the Noteholders, were intended to continue to operate.

(d) Proof of Deficiencies

[46] The Noteholders submit that the motion judge erred in failing to require each of the Senior Debt Holders to prove by evidence the amount of its actual Deficiency after receiving the distribution under the Plan.

[47] The Note Indenture creates the Senior Debt Holders' subrogated rights against the Noteholders. Article 6.2, which is reproduced above, provides that in the event of insolvency or bankruptcy proceedings, the holders of all Senior Debt are entitled to be paid in full before the Noteholders are entitled to receive any payment or distribution. It further provides that any payment or distribution made to the Noteholders will be paid to or held in trust for the Senior Debt Holders to the extent necessary to make payment of all Senior Debt remaining after giving effect to any concurrent payment or distribution to the Senior Debt Holders. The Noteholders argue, therefore, that the motion judge should have required the Senior Debt Holders to prove the amount outstanding on their debts after receiving and disposing, if that is what occurred, of the Distributed Assets.

[48] The thrust of the Noteholders' argument is that some Senior Debt Holders sold their securities in the new Stelco during the days or weeks immediately following the Effective Date at prices well in excess of the subscription price paid for those securities under the Plan. Others who did not sell at the higher prices could have done so. Thus the Noteholders argue the motion judge should have required each Senior Debt Holder to call evidence to prove its individual deficiency. In effect, the Noteholders ask for an accounting by each Senior Debt Holder at some point after receipt of their securities in the new Stelco.

[49] The Noteholders argue that failure to call this type of evidence resulted in a failure to prove the individual claims of the Senior Debt Holders and for that reason the deficiency claims based on the subrogation right should have been dismissed.

[50] The motion judge rejected this argument and proceeded by calculating the amount of the Deficiency on a collective rather than an individual basis. The amount owing to the Senior Debt Holders before implementation of the Plan was not in dispute. From this amount, the motion judge deducted the total amount of cash paid to the Senior Debt Holders together with the value he placed on the securities received by them as of the Effective Time. Below, we deal with the issue of whether or not the motion judge erred in the way that he valued the Distributed Assets. For present purposes, we need only concern ourselves with the general approach adopted by the motion judge, not the actual amounts resulting from that process.

[51] In our view, the motion judge adopted the correct approach in calculating the Senior Debt Holders' Deficiency. It was not necessary for him to assess each claim on a collective, rather than an individual, basis. Both the Note Indenture and the Debenture Indentures contemplate claims being made on a collective basis.

[52] The evidence about the amount owing to the Senior Debt Holders collectively was not in dispute, nor was the evidence about the distributions made to the Senior Debt Holders under the Plan. The only question was what value should be attributed to the securities being received by the Senior Debt Holders on implementation. The question

was not: What did the Senior Debt Holders do with the securities after implementation or what could they have done?

[53] Article 6.2(2) of the Note Indenture is clear that in the event of bankruptcy or insolvency proceedings, the Noteholders are required to make payment in full of the Senior Debt remaining unpaid after giving effect to any concurrent payment or distribution to the Senior Debt Holders. The exercise required under this provision is to look at the payment or distribution to the Senior Debt Holders in order to ascertain what remains unpaid. To complete this exercise it was not necessary for the Senior Debt Holders to call evidence to establish what they did with the securities they received after implementation.

[54] The Senior Debt Holders assumed the market risks, benefits and burdens, after they received the securities. The Noteholders are not entitled to benefit in market increases realized by the Senior Debt Holders after the implementation of the Plan.

[55] Thus, we agree that the motion judge correctly proceeded with the Senior Debt Holders deficiency claim on a collective rather than individual basis. We also agree that he did not err in not requiring the Senior Debt Holders to prove their individual claims by calling evidence about what securities were sold or at what prices securities could have been sold after implementation.

(e) Post-Filing Interest

[56] The Noteholders submit that the trial judge erred in concluding that the Senior Debt Holders were entitled to post-CCAA-filing interest on their outstanding amounts. The Noteholders make two arguments.

[57] First, the Noteholders say that under the Plan, interest is only payable to creditors up to and including the filing date. They base this argument on the definition of a claim in the Plan which is as follows:

> [A]ny right of any Person against one or more of the Applicants in connection with any indebtedness, liability or obligation of any kind of any one or more of the Applicants in existence on the Filing Date and any interest thereon and costs payable in respect thereof to and include the Filing Date[.]

[58] The Noteholders submit that any claim the Senior Debt Holders have for interest must be based on a “claim” they have against Stelco for such interest. If the Senior Debt does not include post-filing interest, there can be no claim against the Noteholders for such amounts.

[59] We do not accept the Noteholders' argument. We note that the Debentures were not cancelled until the implementation of the Plan on March 31, 2006. Section 6.01(2) of the Plan specifically contemplates that the Senior Debt Holders will be able to claim interest against the Noteholders up to the point at which they are paid in full. For convenience, we repeat the relevant language of s. 6.01(2) here:

> [T]he fact that the Plan provides that the calculation of the quantum of Claims and Affected Claim[s] is limited to principal, plus interest accrued to the Filing Date …. is not intended to bar or prejudice any entitlement of holders of Senior Debt (as defined in the Subordinated 2007 Bond Indenture) to make a claim for the full benefit for subordination against the holders of the Subordinated 2007 Bonds and their trustee in respect of *all* amounts owing to them or that would have been owing to them had the CCAA Proceedings and the Plan never been implement, even amounts in excess of their Claims or Affected Claims for purposes of the Plan[.] [Emphasis in original.]

[60] In our view, a fair reading of the Plan as a whole indicates that the definition of "claim" in the Plan was not intended to limit the Senior Debt Holders' claims for interest on outstanding debt after the filing date. The definition of a claim relied upon by the Noteholders was intended only to form the basis upon which the amounts of claims against the company can be fixed for voting purposes in order to allow the company's affairs to be administered in the *CCAA* proceedings.

[61] The question then becomes whether the Debentures provide that interest would accrue after the institution of the *CCAA* proceedings. We are satisfied that they do. The Debentures specify that Stelco would pay principal and interest accrued thereon, including in the case of default, interest on the amount of the default, so long as any Debentures remain outstanding. The Debentures remained outstanding after the filing in the *CCAA* proceedings until the Plan was implemented on March 31, 2006. Clearly, the Debentures contemplated that interest would continue to accrue post-filing.

[62] Moreover, nothing in the Note Indenture limits the Senior Debt Holders' entitlement to interest as of filing under a *CCAA* Plan. Parties to the Note Indenture expressly addressed the possibility of the insolvency of Stelco and established the Turnover Proceeds process. In doing so, the Note Indenture did not limit the Senior Debt Holders to pre-filing interest claims. On the contrary, the Noteholders agreed that they would not receive any payment from Stelco until after all Senior Debt had been paid in full. Senior Debt was defined as "the principal of the premium (if any) and interest …".

[63] Thus, we do not accept the Noteholders' argument that the Plan limited the Senior Debt Holders' claim to pre-filing interest.

[64] The Noteholders' second argument is that the Senior Debt Holders are not entitled to post-filing interest because of an "Interest Stops Rule". According to this argument, interest would only be paid up to the filing date in all bankruptcy, winding up and related proceedings, including restructurings under the *CCAA*. The policy reasons for the rule are that one creditor's *pro rata* share of the debtor's filings should not increase faster than another's and also that claims in a *CCAA* proceeding should be fixed and not subject to continual recalculation for interest.

[65] The Noteholders point out that the *CCAA* defines a claim as "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." Post-filing interest cannot be claimed under the *BIA*.

[66] The trial judge rejected these arguments, correctly in our view.

[67] To start, there is no persuasive authority that supports an Interest Stops Rule in a *CCAA* proceeding. Indeed, the suggested rule is inconsistent with the comment of Justice Binnie in *Re Canada 3000 Inc.*, [2006] 1 S.C.R. 865 at para. 96, where he said:

> While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the *Bankruptcy and Insolvency Act*.

[68] Justice Binnie's comment highlights the point that not all companies emerge from *CCAA* proceedings. Some are converted into *BIA* proceedings. When that happens, claims under the *BIA* include interest up to the date of the bankruptcy and, therefore, could include claims after a *CCAA* filing.

[69] In our view, the definition of claim in the *CCAA* is not intended to limit payments to creditors. Indeed, the Noteholders accept that Plans can and sometimes do provide for payments in excess of claims filed in the *CCAA* proceeding. That fact argues against an interpretation of the definition of a claim in the *CCAA* that would limit payments to the creditors.

[70] In our view, the definition of claim in the *CCAA* is intended to set a date in order to crystallize a point in time at which claims against the company can be fixed for voting purposes in order that the estate may be administered. It has nothing to do with the amount of payments to the creditors. As we set out above, s. 6.01(2) of the Stelco Plan contemplated the continuation of accrual of interest to the Senior Debt Holders after the

CCAA filing date. We do not accept that there is a "Interest Stops Rule" that precludes such a result.

(f) Disposition

[71] Accordingly, for the reasons set out above, the Noteholders' appeal is dismissed.

III. THE 2074600 ONTARIO INC. APPEAL (C46258)

[72] 2074600 Ontario Inc. is the assignee of a claim against Stelco by EDS Canada Inc. ("EDS"). The EDS Claim arises out of a Master Information Technologies Services Agreement entered into between Stelco and EDS in February 2002 (the "MITSA"). Under that Agreement, Stelco outsourced and transferred to EDS all of its information technology ("IT") services and needs. Stelco's anticipated costs for operational and project fees over the ten-year period contemplated by the MITSA were approximately $320 million. At the time of the CCAA filing Stelco's indebtedness to EDS was fixed at $48,994,917.

[73] The issue before us is whether Stelco's indebtedness to EDS places 2074600, as assignee, amongst the class of Senior Debt Holders and therefore entitles 2074600 to its *pro rata* share of the Turnover Proceeds. The answer to this question depends upon whether the EDS indebtedness falls within the definition of "Senior Debt" in the Note Indenture.

[74] "Senior Debt" is defined in the Indenture as follows:

> "Senior Debt" means the principal of, the premium (if any) and interest on: (i) indebtedness, other than indebtedness represented by the [Noteholders], for money borrowed by [Stelco] or for money borrowed by others for the payment of which [Stelco] is liable; (ii) indebtedness incurred, assumed or guaranteed by [Stelco] in connection with the acquisition by it or by others of any business, property, services or other assets *excluding indebtedness incurred in relation to any such acquisitions made in the ordinary course of business*; and (iii) renewals, extensions and refundings of any such indebtedness, unless, in any of the cases specified above, it is provided by the terms of the instrument creating or evidencing such indebtedness that such indebtedness is not to be superior in right of payment to the [Noteholders.] [Emphasis added.]

[75] In short – as all counsel agreed the motion judge properly asked himself – the issue is whether the acquisition transaction contemplated by the MITSA was out of the ordinary course of business for Stelco. 2074600 says it was. The Debentureholders and the Noteholders (aligned in interest on this issue) say it was not. The motion judge agreed with the Debentureholders and the Noteholders. He held that the EDS Claim did not constitute "Senior Debt".

[76] Respectfully, we disagree.

[77] The motion judge began his consideration of the EDS Claim by observing that the Supreme Court of Canada has held that there is no comprehensive definition of the term "ordinary course of business" and that the Court must consider "the circumstances of each case in order to determine how to characterize any particular transaction": see *Pacific Mobile Corp. (Trustee of) v. American Biltrite (Canada) Ltd.*, [1985] 1 S.C.R. 290 at 291. He therefore correctly determined that he must interpret the term in the context of the definition of "Senior Debt" and the circumstances of this case.

[78] Having reviewed the three-part definition of "Senior Debt", the motion judge set out the substance of his decision as to the approach to be taken:

> I am of the opinion that, for this purpose, the concept of an ordinary course acquisition should be interpreted broadly and, accordingly, a non-ordinary course acquisition should be given a narrow scope. The concept of an acquisition in the ordinary course of business goes beyond transactions with trade creditors. The reference to " *business*, *property*, services *or other assets*" (emphasis added) suggests that the principal focus of the clause is the acquisition of businesses or assets. The reference to the acquisition of services, while included in the list, is secondary and suggests that it was included to reflect the possibility that an acquisition could include a service component, rather than the possibility of a 'services only' transaction. This reading of the definition of an ordinary course transaction suggests that the intention was to narrow transactions that qualified as non-ordinary course transactions to those that are material to Stelco in terms of both the amount of the indebtedness incurred or assumed and in terms of their impact on Stelco's business and operations. Accordingly, I think the clause implicitly requires demonstration that the acquisition will have the effect of significantly changing the nature of the business conducted, being the goods and services produced and sold, the scale of operations, the manner of manufacturing or distributing the

> products sold by Stelco, or the anticipated financial results of Stelco.
>
> While I do not think that the clause contemplates transactions in which services are the principal subject matter, I accept, however, that such acquisitions could qualify as Senior Debt if it can be demonstrated that the transaction will have an effect on Stelco that is described by the test set out above. In particular, if a service contract, for which the most obvious candidate would be an outsourcing contract such as the MITSA, materially changes the manner in which Stelco manufactures or distributes its products, or its financial prospects, the contract can be said to envisage a transaction that is analogous to a non-ordinary course acquisition of a business, property or assets.

[79] The motion judge then went on to find that the MITSA did not satisfy his test for essentially three reasons. First, he concluded that the transaction contemplated by the MITSA "will not significantly change the nature of Stelco's business or the scale of its operations. Nor will its change either the products manufactured and sold by Stelco over this period or Stelco's manufacturing or distribution activities". Secondly, he found it necessary to separate the components of the MITSA into its "ordinary course elements" and its "non-ordinary elements", and he decided that the former outweighed the latter. Finally, while the total fees anticipated over the ten-year term of the MITSA were "undoubtedly significant", the motion judge found that the annual expenditures involved were not materially greater than those under other outsourcing arrangements Stelco had entered into and that there was "no evidence that the transaction contemplated by the MITSA was material to the projected annual financial performance of Stelco".

[80] The Debentureholders and Noteholders stress that this court has emphasized on a number of occasions that Commercial List judges, particularly those supervising a *CCAA* proceeding, are entitled to considerable deference: see *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.) at para. 63; *Stelco Inc. (Re)* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) at 160; and *BNY Capital Corp. v. Katotakis*, [2005] O.J. No. 623 (C.A.) at para. 8. They also submit that a determination of whether a transaction falls within "the ordinary course of business" of an enterprise is an issue of fact: see *McDonic v. Hetherington (Litigations Guardian of)* (1997), 31 O.R. (3d) 577 (C.A.) at 583; and *Public Trustee v. Mortimer* (1985), 49 O.R. (2d) 741 (H.C.J.) at 750. Accordingly, they argue that we should not interfere with the findings of the motion judge – an experienced Commercial List judge interpreting a commercial contract – as he made no palpable and overriding error and is entitled to deference.

[81] Determining whether a transaction occurs in the ordinary course of business entails more than simply the finding of facts and the drawing of inferences from those facts, although the fact finding exercise is clearly a central part of the process. "Ordinary course of business" is a legal notion and the decision as to whether a certain set of facts falls within that category, or does not, has generally been arrived at by courts through an examination of various factors associated with the notion – about which we will have more to say later. In this sense, we prefer the approach taken by the Alberta Court of Appeal in *Gainers Inc. v. Pocklington Holdings Inc*. (2000), 271 A.R. 280 (C.A.), namely that such a determination is a question of mixed fact and law. As Fruman J.A. noted at para. 23:

> While a reviewing court will defer to a trial judge's fact findings, a determination that a transaction was in the ordinary course of a company's business is a mixed question of fact and law. A failure to consider the appropriate factors constitutes reviewable error.

[82] We do not read Justice Doherty's comments in *McDonic Estate, supra*, to mandate any different conclusion. There, the court was dealing with whether a law firm was vicariously liable for the actions of a partner who had invested funds deposited in the firm's trust account on behalf of the plaintiffs. The answer depended on whether the partner's actions fell within the scope of his implied authority, which they did if they fell within the ordinary course of business of the law firm. The meaning of the legal norm was not in issue. Doherty J.A. observed that the question was a factual one – without focusing on whether it was a question of fact alone or of mixed fact and law – and noted that the trial judge's finding that the partner's activities did not fall within the scope of the firm's ordinary course of business "must stand unless tainted by an error of law, a serious misapprehension of the evidence, or a failure to consider relevant evidence". This conclusion is not inconsistent with the approach taken by the Alberta Court of Appeal in *Gainers.*

[83] The Supreme Court of Canada recognized the importance of "the constant interplay between law and fact" in *Pacific Mobile, supra*, at 291, adopting the comments of Monet J.A. in the Quebec Court of Appeal in that case: (1983), 44 C.B.R. (N.S.) 190 at 205. And in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paras. 32-36, the Supreme Court of Canada also recognized that, although the findings of a judge of first instance on issues of mixed fact and law will generally be entitled to deference on the "palpable and overriding error" standard, where the judge has erred in applying a "readily extricable" legal principle in making those findings the review will be conducted in accordance with a less stringent standard. A failure to consider appropriate factors or an error in determining the factors to be applied will fall into this latter category.

[84] In our view, the motion judge fell into such error here. We say this for a number of reasons.

[85] First, his approach to the resolution of the ordinary course of business issue was grounded in his view that the concept of an "ordinary course" acquisition in the definition of Senior Debt in the Note Indenture should be interpreted broadly and that of a "non-ordinary course" acquisition, narrowly. This approach was driven by his view of the terms of the Note Indenture, particularly the definition of "Senior Debt" and his perception that the reference to the acquisition of "services" in the definition was secondary – included "to reflect the possibility that an acquisition could include a service component, rather than the possibility of a 'services only' transaction." We do not understand why, as the motion judge said (reasons, para. 157), "the reference to '*business*, *property*, services *or other assets*' [emphasis added by the motion judge] suggests that the principal focus of the clause is the acquisition of businesses [the first item mentioned] or assets [the last mentioned]" rather than on "services" (the third item mentioned). We can see no basis for singling out "services" from the list and assigning it a lower level of significance. These are not matters of fact; they are matters of contractual interpretation.

[86] Secondly, while the motion judge acknowledged, and found, that the MITSA transaction "was a *unique* outsourcing transaction" and that it "was both *comprehensive* in terms of the scope of Stelco's IT requirements" and also "*significant* to Stelco, because a failure by EDS to perform adequately would be costly" [emphasis added], he gave these important factors little, if any, consideration in making his ordinary course of business determination.

[87] Thirdly, in establishing the criteria that he did for resolving the issue, he set the bar so high that a non-ordinary course of business acquisition in relation to services is practically impossible. This stems, at least in part, from his conclusion that an acquisition in relation to "services" does not rank at the same level as other types of acquisitions. On our reading of the Note Indenture, this interpretation is inconsistent with the intention of the parties to it.

[88] Finally, the motion judge erred, in our view, by entirely discarding the factors taken into account in the existing jurisprudence concerning what may constitute a transaction out of the ordinary course of business. He did so on the basis that the cases relied upon by 2074600 "dealt with the disposition of assets, rather than acquisitions, in circumstances in which the applicable covenant or legislation is directed toward fair treatment of, or protection of, creditors", and that "[t]hey do not deal with the concept of non-ordinary course transactions involving the purchase of assets or services by a solvent company". The cases referred to are *Pacific Mobile, supra* (a fraudulent preference case); *Roynat Inc. v. Ron Clark Motors Ltd*. (1991), 1 P.P.S.A.C. (2d) 191 (Ont.Ct. J. (Gen.Div.)) (covenant in a floating charge); and *Rowbotham v. Nave* (1991), 1 P.P.S.A.C.

(2d) 206 (Ont. Ct. J. (Gen. Div.)) (bulk sales legislation). But see also, *Fairlane Boats Ltd. v. Leger* (1980), 1 P.P.S.A.C. 218 (Ont. H.C.) (whether sale of a boat by a dealer was in the ordinary course of business); *Gainers Inc. v. Pocklington Holdings Inc., supra* (sale of shares of a subsidiary company); *Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd*. (2002), 214 D.L.R. (4th) 121 (Ont. C.A.) (sale of all or substantially all of assets outside of the ordinary course of business in a dissenting shareholder rights context); and *Aubrett Holdings Ltd. v. Canada*, [1998] G.S.T.C. 17 (T.C.C.).

[89] Respectfully, we do not understand the significance of the distinction drawn by the motion judge between circumstances involving the disposition of assets and those involving acquisitions for these purposes. When the Supreme Court of Canada observed that it is unwise "to give a comprehensive definition of the term 'ordinary course of business' for all transactions" (*Pacific Mobile*, *supra* at 291), the court did not mean that there were no recognizable indicia or factors to be considered; it simply meant that no single criterion or set of criteria was suitable for all cases. While there may be different considerations in situations involving fraudulent preferences, bulk sales transactions, tax cases or dissenting shareholders' rights cases, the factors taken into account by the courts in such circumstances may nonetheless be of assistance here because they help shed light on what courts have looked to in various contexts in order to decide whether a transaction is one that is in the ordinary course of business.

[90] In our view, the foregoing errors by the motion judge moderate the deference to which his decision on a question of mixed fact and law would otherwise be entitled and permit us to reconsider the ordinary course of business analysis afresh.

[91] In that regard, we start with the observation that the intention of the Note Indenture is clear: the Noteholders' claims are to be subordinated to *all* Senior Debt, as defined in the Indenture. Article 2.9 (Rank and Subordination) provides that "payment of the principal of and interest on the Debentures is expressly subordinated to the prior payment in full of Senior Debt, as provided in Article 6." Article 6 (Subordination of Debentures) opens with the declaration in 6.1 that:

> [Stelco] covenants and agrees, and each [Noteholder], by his acceptance thereof, likewise agrees, that the payment of the principal of and of any interest on the Debentures is hereby *expressly subordinated*, to the extent and in the manner hereinafter set forth, in right of payment *to the prior payment in full of all Senior Debt whether outstanding on the date of this First Supplemental Indenture or thereafter incurred*. [Emphasis added.]

[92] The definition of "Senior Debt" is cited above. In substance, it encompasses all borrowings of a general nature and all borrowings for purposes of acquisitions (except

acquisitions in the ordinary course of business), together with the refinancing of such borrowings. In our opinion, this concept of Senior Debt is quite broad and is intended to be so.

[93] Accordingly, we see no reason why ordinary course acquisitions should be viewed broadly and non-ordinary course acquisitions addressed narrowly. Having regard to the purpose of Article 6.1 of the Note Indenture and the definition of Senior Debt, we think the contrary is the case. The purpose and intent of the Indenture was to ensure that creditors providing financing to Stelco, other than ordinary course of business creditors, would have priority over the Noteholders, who accepted that they were taking subject to such "Senior Debt".

[94] It does not advance the case to argue – as the Debentureholders do – that because of the impact on other creditors' rights (namely, those of the Noteholders) the concept of non-ordinary course transactions should be interpreted narrowly and ordinary course transactions broadly. The only issue here is what "creditors' rights" are to be affected? We can see no basis for interpreting the Note Indenture in favour of one group of creditors over another simply because of what group they fall into. A reading of the definition of Senior Debt supports the view that debtholders who were creditors for "moneys borrowed" by Stelco – whether it be free-standing borrowing or indebtedness incurred in connection with the acquisition of business, property, *services* or assets – were to have priority over the Noteholders. The only exceptions were ordinary course of business acquisitions. Given this scheme, it is the exception that ought to be construed narrowly, not the principal provision.

[95] The motion judge's opinion that the factors considered by other courts to be pertinent to the determination of what constitutes a transaction in the ordinary course of business, together with his view that non-ordinary course transactions should be narrowly construed in the circumstances of this case, led him to postulate his own test. In doing so, he set the bar very high. To qualify as a transaction out of the ordinary course of business, he concluded that an acquisition must have the effect of *significantly changing* either (a) the nature of the business conducted by Stelco (the goods and services it produced or sold, the scale of its operations, the manner of manufacturing or distributing the products it sold) and/or (b) the financial results of Stelco.

[96] The motion judge cited no authority for such a prohibitive test, and we are aware of none. Undoubtedly, an acquisition that met those criteria would be a non-ordinary course of business transaction, but we do not read anything in the Note Indenture or in the jurisprudence that requires a transaction that is out of the ordinary course of business to be of such a corporate landscape-changing nature.

[97] In *Gainers, supra*, Fruman J.A. noted (at para. 21) that:

> The analysis is to be achieved through an objective examination of the usual type of activity in which the business is engaged, followed by a comparison of that general activity to the specific activity in question. *The transaction "must fall into place as part of the undistinguished common flow of business carried on, calling for no remark and arising out of no special or peculiar situation"*: Aubrett Holdings Ltd. v. Canada, [1998] G.S.T.C. 17 (T.C.C.). [Emphasis added.]

[98] In *Roynat Inc. v. Ron Clark Motors Ltd., supra*, at 197, Herold J. cited *Re Bradford Roofing Industries Property Ltd.*, [1966] 1 N.S.W.R. 674 – a decision of the New South Wales Supreme Court – to the same effect:

> The transaction must be one of the ordinary day to day business activities, having no unusual features, and being such as a manager of a business might reasonably be expected to be permitted to carry out on his own initiative without making prior reference back or subsequent report to his superior authorities such as, for example, to his board of directors.

[99] These observations are consistent with dictionary explanations. *The Shorter Oxford English Dictionary*, 3rd ed., defines "ordinary" as being "of common occurrence, frequent, customary, usual" and "of the usual kind, not singular or exceptional". It defines "course" as meaning "habitual or ordinary manner of procedure; way, custom, or practice". *Black's Law Dictionary*, 6th ed., describes "ordinary course of business" in the following fashion:

> The transaction of business according to the common usages and customs of the commercial world generally or of the particular community or (in some cases) of the particular individual whose acts are under consideration. … *In general, any matter which transpires as a matter of normal and incidental daily customs and practices in business.* [Emphasis added.]

[100] Given these parameters, it is hard to appreciate why a transaction that is not in the ordinary course of business should be required to meet such a high threshold as that ascribed to it by the motion judge in the circumstances of this case – particularly keeping in mind the purposes and intent of the Turnover Provisions in the Note Indenture.

[101] A number of helpful benchmarks may be gleaned from a review of the authorities and the citations referred to above for purposes of determining whether the MITSA transaction constitutes an acquisition of services in the ordinary course of Stelco's business. They include a consideration of whether the transaction:

a) is distinguishable from the normal course of the company's operations because of its particular complexity or its far-reaching or otherwise unusual nature;

b) arose out of some special or peculiar situation;

c) required approval from the company's shareholders or board of directors;

d) was given special notice by the company;

e) was an unusual or isolated undertaking as opposed to a routine one; or,

f) is reflective of standard practice in the relevant industry.

[102] The motion judge was not unmindful of all of these factors. As we have indicated, however, he weighed those that he did consider against what we take to be an unsuitably high standard.

[103] In our view, the transaction envisaged in the MITSA was not a transaction in the ordinary course of Stelco's business. We say that having regard particularly to a number of factors and characteristics.

[104] First, as the motion judge found, the MITSA was a uniquely comprehensive and significant transaction for Stelco. The evidence was that no outsourcing transaction in Stelco's history was comparable to it. It contemplated a total amount payable by Stelco over its ten-year term of more than $320 million.

[105] The MITSA involved the total transition of Stelco's IT assets and virtually all business applications and IT employees from Stelco to EDS and the complete transfer from Stelco to EDS of all responsibility for Stelco's IT needs. As well as providing for the transfer of IT assets from Stelco to EDS and from EDS to Stelco, and for the provision of all services in relation to Stelco's IT needs, the MITSA provided for the integration, through a series of enterprise resource planning systems ("ERPs"), of all aspects of Stelco's business from procurement or materials to shipping of finished products. The ERPs consisted of three projects: (i) a synchronous manufacturing system, (ii) an asset management system, and (iii) human resources and financial management

systems. The effect was to overhaul and change completely Stelco's manufacturing, asset management, human resource and financial management systems.

[106] As Mr. Steiner put it in his factum and in oral argument on behalf of 2074600: "If this extraordinary contract for services … is not out of the ordinary course of business for Stelco, what possible contract for services could be?"[3]

[107] Second, the MITSA was a one-time transaction – isolated, unusual, and far from routine in the course of Stelco's business.

[108] Third, the MITSA was the subject of a special public announcement by Stelco. The Debentureholders and the Noteholders argue that it is the content – or, rather, what is missing in the content – of the press release that is significant, not the public announcement itself. They say this because the press release made no specific mention of the fact that the MITSA indebtedness would constitute Senior Debt and therefore the market could not be expected to react on the basis that it did. In our view, however, the significant point is that Stelco felt the transaction was sufficiently important and unusual that public disclosure was necessary, a step the company rarely took when entering into a procurement contract. Stelco's indebtedness with regard to the MITSA was treated as long-term indebtedness, and was specifically mentioned on its financial statements. In short, the transaction – to adopt the language of *Aubrett Holdings, supra* – was not treated as one "calling for no remark". It received special notice.

[109] Fourth, the MITSA entailed complex provisions relating to financing that were unusual to Stelco and to EDS. Because the material and evidence filed on this issue contains confidential information and has been ordered sealed, no more need be said about it.

[110] Finally, the transaction was not one that could be carried out on management's own initiative. It required, and received, approval from Stelco's board of directors.

[111] The fact that others in the steel industry may be outsourcing their IT needs as well, and the fact that Stelco engaged in other outsourcing transactions itself, are indicative of the increasing popularity of this particular practice, but they are not dispositive of whether the transaction envisaged in the MITSA is an ordinary course of business transaction for Stelco. In the end, the transaction provided for in the MITSA involved a fundamental change to the way in which Stelco carried on its integral IT operations – and through that, its manufacturing operations – at a cost and in a fashion that was considered sufficiently significant to call for public disclosure, and which required and received board of director approval. It was characterized by unusual and complex financial arrangements. Even if the motion judge were correct in his conclusion that the MITSA

[3] Factum of 2074600 Ontario Inc., para 72.

did not effect a significant change in the nature of the business Stelco conducted – it continued to manufacture and distribute steel products – the transaction was not "one of the ordinary day to day business activities, having no unusual features" (*Re Bradford Roofing*), or "part of the undistinguished flow of business carried on, calling for no remark" (*Aubrett Holdings*, as adopted in *Gainers*). It did not transpire "as a matter of normal and incidental daily customs and practices in business" (*Black's Law Dictionary*).

[112] The property, services and assets provided for in the MITSA were not acquisitions made in the ordinary course of Stelco's business. Accordingly, the indebtedness incurred by Stelco to EDS (and therefore to 2074600, as assignee of EDS) constitutes "Senior Debt" within the meaning of the Note Indenture.

[113] 2074600 Ontario Inc. is a Senior Debt Holder and is entitled to its *pro rata* share of the Turnover Proceeds in that capacity. Its appeal in this regard is allowed.

IV. The Debentureholders' Appeal (C46266)

(a) Overview

[114] The Debentureholders and the Noteholders disagree on the value of the Distributed Assets. This has an effect on the value of the Deficiency (if any), which in turn determines how the Turnover Proceeds will be distributed amongst the parties. The Debentureholders assign a lower value to the Distributed Assets ($217,215,846) compared to the Noteholders' valuation ($294,497,863). This means that by the Debentureholders' calculation, the Deficiency is $125,439,818 whereas the Noteholders calculate the Deficiency to be much lower ($48,157,801).

(b) The Source of the Disagreement

[115] The Debentureholders adduced evidence from different sources that supported a finding that the value of the New Common Shares on the Effective Date was $5.50 per share. They also argued that the New FRNs should be valued at par (face value) and that the New Warrants should be valued at $1.44 per warrant.

[116] The Noteholders did not adduce conflicting evidence regarding the value of the shares on the Effective Date; instead, they adduced evidence by way of a report prepared by a derivatives expert who assigned a value to the Distributed Assets based on the volume weighted average price ("VWAP") of the securities during the first week of trading, beginning on April 3, 2006.

(c) The Motion Judge's Reasons

[117] The motion judge used a third set of figures and his own methodology to arrive at a different set of valuations. He did not agree with either party's position on valuation.

He held that "value" means "the price for the securities that the Senior Debt Holders could have received if they had sold their securities in an open market at the Effective Time on March 31, 2006." The motion judge also held that the definitions of "fair market value", "fair value", and "intrinsic value" were not helpful to determine the definition of "value" to the extent that those terms mean "something other than the price of the securities in an open market", because the issue was not whether the Debentureholders had received "fair" value, but rather what value should be ascribed to the assets.

[118] The motion judge rejected the parties' positions on the grounds that neither method of valuation was an appropriate reflection of the value of the securities on the Effective Date. He then determined that the best evidence of the value of the Distributed Assets was the VWAP from the first trading day after the Effective Date. In the case of the New Common Shares and the New Warrants, the first day of trading was April 3, 2006; for the new FRNS, the first trading day was April 5, 2006. The motion judge did not take into account block discounts or a lack of liquidity in the marketplace to alter those values. He valued the Distributed Assets at a total of $276,487,090, leaving a Deficiency of $66,168,574.

[119] Both the Debentureholders and 2074600 appeal the motion judge's reasons with respect to his valuation methodology.

(d) Analysis

[120] A central issue on this appeal relates to the price to be attributed to the securities distributed by Stelco – in particular, the price of its New Common Shares – as part of the compromise of its debt. The issue arises because of the Subordinated Noteholders' obligation under the Note Indenture to make the Senior Debt Holders whole out of any proceeds they (the Notheholders) receive in an insolvency or reorganization. Only after the Senior Debt Holders have been paid in full are the Noteholders entitled to recover on their own account.

[121] Articles 2.9, 6.1 and 6.2 of the Note Indenture, which are cited in full elsewhere in these reasons, set out these obligations on the part of the Noteholders. For present purposes, the provisions that are most relevant are those set out in section 6.2(3)[4] which states that in the event of the insolvency or reorganization of Stelco, any payments received from Stelco by the Noteholders or the Trustee, whether in cash, property or securities, before the Senior Debt is paid in full, are to be held in trust,

[4] Article 6.2(2) contains the identical operative language.

> and will be paid over to the holders of such Senior Debt … for application to the payment of all Senior Debt remaining *until such Senior Debt has been paid in full, after giving effect to any concurrent payment or distribution (or provision therefore) to the holders of such Senior Debt.* [Emphasis added.]

[122] There is no dispute about the amount of the Senior Debt remaining unpaid as at the Effective Date ($342,655,664 plus the EDS Claim of $48,994,917). Thus, the central issue for determination is how to "[give] effect to any concurrent payment or distribution … to the holders of [the] Senior Debt" in order to determine whether the Senior Debt Holders had been "paid in full" and, if not, the extent of the Deficiency to be made up through the Turnover Proceeds ("the Deficiency Claim").

[123] That is not the question the motion judge posed for himself, however. Both the Debentureholders and 2074600 argued that the New Common Shares and the New Warrants should be valued using the $5.50 subscription price for the New Common Shares under the Plan. The motion judge rejected this approach. Instead, he focused on the public markets and sought to determine what the "market value" was of Stelco's New Common Shares received in the distribution, as closely as that value could be determined to the Effective Time under the Plan.

[124] At paras. 105 and 106 of his Reasons he said:

> The issue before the Court can therefore be put simply: did the Senior Debt Holders receive Distributions on the Plan Implementation Date having a value that constituted "payment in full" of their claims and, if not, what is the extent of their deficiency? For this purpose, *the Court must determine the value of the payments received* by the Senior Debt Holders. For the reasons set out above, I have concluded that the payments were received by the Senior Debt Holders at the Effective Time on March 31, 2006 and must be valued as of that time. There is, however, *no provision in either the Note Indenture or the Plan that specifically addresses the proper approach to the valuations* of the property received in reorganization. Accordingly, the issue for the Court is the most appropriate evidence of the value of the Distributions received by the Senior Debt Holders on March 31, 2006.

> The Court is not, of course, to conduct its own inquiry into the value of the securities. The Court must determine, instead, the best evidence of the value of the Distributions based on the evidence before it. *For this purpose, I am of the opinion that "value" means the price for the securities that the Senior Debt Holders could have received if they had sold their securities in an open market at the Effective Time on March 31, 2006*. This reflects the fact that, at that time, the Senior Debt Holders were in a position to realize the values of the securities paid to them by selling them in the market. *Accordingly, the Court must determine the market price paid for the securities at the Effective Time*. [Emphasis added.]

Later, the motion judge concluded:

> The issue for the Court is the determination of the prices that the Senior Debt Holders could have obtained for their securities if it had been possible to trade the securities at the Effective Time on the Plan Implementation Date.

[125] Respectfully, however, the issue for the Court to determine was not the price the Senior Debt Holders could have obtained had they been able to trade their new securities at 11:59 p.m. on March 31, 2006 – their "market value" at that time. The issue was how to determine the "concurrent payment or distribution" received from Stelco by the Senior Debt Holders at the time of Stelco's emergence from *CCAA* protection at 11:59 p.m. on that date, and how to give effect to that concurrent payment or distribution for purposes of resolving whether the Senior Debt Holders had been paid in full, in the context of the Note Indenture and the Plan documents.

[126] To interpret how to give effect to the payment received by the Senior Debt Holders "concurrently" – that is, concurrently with the payments received by, or on behalf of, the Noteholders in the *CCAA* insolvency proceedings – it is necessary to construe the provisions of the Note Indenture in the context of the language of the Plan itself and the negotiations leading up to its approval by the stakeholders and sanction by the Court. That is the factual matrix within which the meaning of this contract must be determined.

[127] What, then, was the concurrent payment or distribution received by the Senior Debt Holders in exchange for the compromise of their claims on the emergence of Stelco from *CCAA* protection? The answer to that question is found in Article 2.03 of the Plan. What the Affected Creditors under the Plan – the Senior Debt Holders and the Noteholders included – received was their *pro rata* share of each of:

a) $275 million (U.S.) of the New Secured Floating Rate Notes ("FRNs");

b) the Cash Pool (subject to section 2.07 of the Plan);

c) 1.1 million New Common Shares; and

d) the New Warrants.

[128] The argument on the appeal focused on the Senior Debt Holders' *pro rata* share of (b) and (c) above. The creditors were to receive a block of New Common Shares of Stelco as part of the compromise of their debt; they were prepared to invest and to take an equity position in the new Stelco to the extent of 1.1 million shares. They were also to receive a pool of cash which was to vary between $137.5 million and $108.5 million, depending upon the number of shares creditors elected to take up pursuant to Section 2.07 of the Plan, referenced in the caveat to (b) above.

[129] Section 2.07 is the "Share Election" provision in the Plan. It does two things. First, it permits each Affected Creditor to "elect to receive all or any part of its distribution from the Cash Pool in New Common Shares at $5.50 per share",[5] thus providing an opportunity for electing Affected Creditors to take a further risk, in effect by engaging in a new transaction and investing part of their cash proceeds in the future of the new Stelco. Second – and significantly from the perspective of resolving what the concurrent payment or distribution received by the Senior Debt Holders was – Section 2.07 makes it clear that the size of the Cash Pool to be received on distribution is to be reduced by $5.50 for each New Common Share that is elected to be taken. Hence, the amount of cash that Stelco would be required to pay to exit from the *CCAA* process varied in the range referred to above, depending upon the number of New Common Shares the creditors elected to acquire.

[130] All of this gives rise to the following questions. Viewed in the context of the Plan documentation and the negotiated compromise of the creditors' claims against Stelco, how should the words "give effect to any concurrent payment or distribution to the holders of such Senior Debt" in Articles 6.2(2) and (3) of the Note Indenture be interpreted? Leaving aside the FRNs and Warrants, was it the "concurrent payment or distribution" of cash and a bundle of $5.50 New Common Shares? Or was it the combination of cash and a bundle of shares distributed at the price they would fetch in the open market once trading commenced?

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[5] Subject to an aggregate of 5,264,000 shares, at which point the Share Elects are entitled to receive a *pro rata* share of that total.

[131] These are not questions of fact. They are questions of interpretation of the Note Indenture and the Plan documentation. Importantly, these questions focus on the proper approach to "giving effect to" the distribution of securities to the Senior Debt Holders as part of the reorganization. The motion judge's decision is therefore entitled to less deference on appeal than would be the case if what was at issue were simply a question of fact or of inferences drawn from the facts. See paragraph 83 above, and *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 33.

[132] In our opinion – although the motion judge was correct in observing that marketable securities are normally valued on the basis of what they will bring in the open market – he erred in focusing on "market value" and rejecting the "plan value" approach urged upon him by the Debentureholders and 2074600 in the circumstances of this case. By doing so, he lost sight of the real issue for determination which, as mentioned above, is how to give effect to the concurrent payments or distribution received by the Senior Debt Holders in order to establish the extent of the Deficiency Claim. "Plan value" as opposed to "market value" is the touchstone for resolving that issue. Once this is recognized, much of the force in the motion judge's reasons for dismissing the criteria urged on him by the Debentureholders and 2074600 dissipates.

[133] On a proper interpretation of Article 6 of the Note Indenture, in the context of the Plan documentation, what was paid or distributed by Stelco to the Senior Debt Holders and Noteholders pursuant to Section 2.03 of the Plan – leaving aside again the FRNs and the Warrants – was cash together with $5.50 New Common Shares (either as part of the Share Elect component or as part of the general New Common Share component of the payment or distribution to Affected Creditors). We say this for several reasons.

[134] First, it makes sense that the "concurrent payment or distribution" to the Senior Debt Holders under the Note Indenture be determined by the Plan documents, since the Stelco reorganization is the source of the payment or distribution in question. The indicia of distribution price in the Plan documents point to $5.50 per share.[6]

[135] Significantly, the Equity Sponsors under the Plan received 19,737,000 New Common Shares in exchange for their infusion of $108.5 million ($5.50 per share). Sunrise and Appaloosa – the two Noteholders leading this appeal – are two of the three Equity Sponsors. Each contributed approximately $27 million to acquire their roughly 4,950,000 shares at that price. Equally significantly, Senior Debt Holders and Noteholders who elected to take shares pursuant to Section 2.07 of the Plan (the "Share

[6] While there is provision in the Plan for market liquidation of the shares and distribution of the proceeds to the Affected Creditor, where the Affected Creditor is resident in a jurisdiction where there are restrictions on the distribution of the securities (Article 4.05(1)), we view this provision as simply creating a mechanism for dealing with a potential problem, rather than as an indication of the price of the securities for distribution purposes.

Elects") did so on the basis of accepting one New Common Share in lieu of $5.50 of their *pro rata* share of the Cash Pool.

[136] Secondly, other indicia point in the same direction. For instance, Stelco itself publicly valued the New Common Shares issued at $5.50 per share "upon its emergence from *CCAA*": see Stelco's First Quarterly Report, March 2006, at p. 15. In addition, Stelco's board of directors approved a compensation package for its incoming CEO on the Effective Date. This package included a grant of 1 million New Common Shares at a price of $5.50 per share and a grant of options to acquire an additional 1,044,000 New Common Shares at a strike price of $5.50 per share. This transaction was consummated at the Effective Time as well and could not have taken place without the approval of the TSX, which was obtained.[7]

[137] In the Amended Plan Sponsor Agreement, the Equity Sponsors (including Sunrise and Appaloosa) agreed (a) to inject new capital into Stelco in exchange for New Common Shares at a rate of $5.50 per share, and (b) to purchase any shares left over from the Share Election process at a price of $5.50. They also had a right to purchase any New Common Shares that a subscriber failed to purchase at the Effective Time for the same price.

[138] Finally, it is apparent from the foregoing that the deal which was struck as a result of the negotiations leading up to the Plan and the acceptance and sanctioning of the Plan contemplated the distribution of $5.50 New Common Shares at the Effective Time. The Noteholders, as well as the Senior Debt Holders, were integrally involved in what Farley J. referred to at the Sanction Hearing as the "direct protracted negotiations" and "hard bargaining" of sophisticated parties,[8] and voted in favour of the Plan. In short, everyone knew, understood, and had agreed, that this was to be the case.

[139] The notion of the "Effective Time" (11:59 p.m. on the Effective Date) is important. The entitlement of the Senior Debt Holders and the Noteholders to the payment or distribution only arises at that moment, which is when their claims are compromised and their debentures (subject to the Turnover Proceeds dispute) are cancelled. All other transactions relating to the emergence of Stelco from its insolvent state occur at, or as close as possible to, that moment as well.

[140] We note this because, in rejecting the "Plan value" approach, the motion judge placed considerable emphasis on the fact that the $5.50 price was negotiated at the time of the creditors' acceptance of the Plan in December 2005, and therefore was not

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[7] TSX approval is significant because TSX issuers may not grant options at less than the market price of the securities at the time the option was granted: see *TSX Company Manual*, s. 613(h)(i).
[8] Endorsement of Farley J. at the Sanctioning Hearing, January 20, 2006.

necessarily an accurate benchmark of the value of the shares on March 31, 2006. Similarly, the share election under Section 2.07 had to be made by January 20, 2006. These factors are of little import in assessing the payment or distribution received by the Senior Debt Holders at the Effective Time, however. Those creditors who elected to exercise their option under Section 2.07 and take shares in lieu of $5.50 in cash ("the Share Elect Creditors"), were not entitled to receive and did not have the right to receive those shares prior to the Effective Time. Though these decisions were made prior to the Effective Time, they were made with a view to what everyone agreed was the price of the New Common Shares at the Effective Time. The same is true of others who acquired New Common Shares as part of the reorganization.

[141] Stelco distributed its New Common Shares to the Equity Sponsors, the Share Elect Creditors (also including many Noteholders) and its new CEO at a price of $5.50 per share, effective 11:59 p.m. on March 31, 2006. The Equity Sponsors, Share Elect Creditors and the new CEO purchased the shares for that amount at the same time. It makes no sense to say that Share Elect Creditors received those shares – at the same time and for purposes of compromising their claims – at some different distribution price (the average market price three days later), all as part of the same reorganization process. Nor does it make any sense to differentiate between the distribution price of the Share Elect shares and that of the 1.1 million New Common Shares that were distributed generally as part of the payment to Affected Creditors. If all other New Common Shares that were being sold and acquired as part of the reorganization at the same Effective Time were being distributed at $5.50 per share, why would the New Common Share component of the payment to Senior Debt Holders and the other Affected Creditors be distributed at any other price?

[142] All of these factors – the provisions of Section 2.03 of the Plan itself; the robust negotiations leading up to acceptance of the Plan; the $5.50 price paid at 11:59 p.m. on the Effective Date by the Senior Debt Holders, the Noteholders and the Equity Sponsors for their New Common Shares, and the price at which the New Common Shares and the options were issued to the new CEO at the same time – demonstrate clearly that the price which was accepted and agreed to by everyone involved in the reorganization for purposes of Stelco's payment or distribution upon emerging from the *CCAA* process was $5.50 per share.

[143] This was the payment or distribution price for purposes of "[giving] effect to [the] concurrent payment or distribution to the holders of [the] Senior Debt" called for in section 6.2(3) of the Note Indenture.

[144] Moreover, the foregoing interpretation makes commercial sense. Stelco and the Affected Creditors – including the Senior Debt Holders and the Noteholders – needed certainty in order to make the reorganization work. Stelco needed to know, with as much certainty as possible, how much it was going to have to pay to compromise its debt and

emerge from the *CCAA* proceedings to start afresh. The Senior Debt Holders and Noteholders needed to know, again with as much accuracy as possible, how much they were going to be paid on account of their claims in order to decide whether to vote in favour of, or against, the Plan. These goals could not be achieved through an interpretation of the language in the Noteholders Indenture that would leave the quantum of the "concurrent payment or distribution" received by the Senior Debt Holders to the vagaries of the market after the distribution was completed.

[145] While the Affected Creditors as a whole were prepared to assume the risk of a relatively minor equity investment in the new Stelco – 1.1 million New Common Shares – as part of the price of arriving at a resolution of their claims – the Share Election provisions of Section 2.07 of the Plan provided a different opportunity. They gave creditors who were prepared to take the risk of a successful Stelco recovery a further opening to invest in that recovery by purchasing additional New Common Shares in what was, in effect, a second transaction following the distribution. The fact that Section 5.04 of the Plan notionally treats the subscriptions for shares pursuant to the Share Election under Section 2.07 as having occurred *after* the distributions to the Affected Creditors, lends support to this "second transaction" concept. For purposes of establishing the extent of the Deficiency Claim, what is distributed to the Senior Debt Holders as the Cash Pool is either cash or the share equivalent of $5.50 in cash.

[146] Although the foregoing analysis is limited to the Share Election shares, there is nothing in the Plan documentation or in the circumstances surrounding the reorganization – as we have mentioned above – to suggest that the New Common Shares as a whole should be treated on any different basis.

[147] The appeal must therefore be allowed in this regard and the order of the motion judge dated October 31, 2006, varied to provide that the New Common Shares were paid or distributed by Stelco under the Plan at a price of $5.50 per share. Based on the price per share, the New Warrants should be valued at $1.44 per warrant. Given our conclusion that Plan value is to govern, the FRNs should be valued as stated in the Plan.

[148] One further observation needs to be made. This decision should not be taken to have determined the value of the securities in the Turnover Proceeds to be used to provide "payment in full" of the Deficiency Claim. That issue was not before us.

V. The Share Elects' Appeal (C46916)

[149] We have before us an appeal from the order of the motion judge dated March 6, 2007. This appeal involves a dispute between the Debentureholders who elected to take shares under Section 2.07 of the Plan and those who did not, as to the appropriate method of allocating the Turnover Proceeds amongst themselves.

[150] The dispute had its genesis in the motion judge's earlier decision – the subject of the foregoing appeal – to apply a market value approach to the distributions under the Plan for purposes of quantifying the Senior Debt Holders' Deficiency Claim. Using the $17.72 per share market price per share fixed by the motion judge in his earlier decision for purposes of determining the allocation as between the Share Elect and the Cash Elect creditors had the effect of skewing the allocation of the Turnover Proceeds in favour of the Cash Elects and depriving the Share Elects of the benefit of their decision to invest in the new Stelco. The motion judge resolved this issue by concluding that the Turnover Proceeds should be allocated amongst the Senior Debt Holders based upon their respective claims under the Plan using a price of $5.50 per share. He said that this approach was consistent with what would have been the outcome of the earlier motion regarding the quantum of the Senior Debt Holders' Deficiency Claim if that issue had been resolved by determining the distribution price of the shares before giving effect to the Share Election, and hinted – none too subtly – that he may have erred in not doing so.

[151] All counsel on the second appeal agreed, however, that if the first appeal were allowed with respect to the distribution price of the New Common Shares, and that price were fixed at $5.50 per share, this second appeal becomes moot. At a price of $5.50 per share, the Share Elects and the Cash Elects are treated equally on the allocation of the Turnover Proceeds. It is therefore unnecessary for us to decide the second appeal and it is dismissed as moot.

VI. Costs

[152] As to costs, we ask counsel to discuss and resolve the issues if at all possible. If they are unable to do so, those parties seeking costs may make written submissions of no more than five pages each (in addition to their draft bills of costs) before July 31, 2007. Those opposing the requests may respond in writing, again no more than five pages, before August 15, 2007. Brief replies, if necessary, may be filed before August 20, 2007.

"D. O'Connor A.C.J.O."
"S.T. Goudge J.A."
"R.A. Blair J.A."

RELEASED: June 28, 2007

COURT FILE NO.: 04-CL-5530
DATE: 20060208

SUPERIOR COURT OF JUSTICE – ONTARIO
(Commercial List)

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

AND IN THE MATTER OF JTI-MACDONALD CORP.

BEFORE: FARLEY, J.

COUNSEL: Michael MacNaughton and John Marshall, for JTI-Macdonald Corp.
Robert I. Thornton and Leanne M. Hoyles, for the Monitor
L. Donaldson, for Her Majesty the Queen in Right of British Columbia
B. Zarnett and J.A. Carfagnini, for JT Canada
Paul Macdonald, for Minister of Revenue of Quebec
Ronald Slaght and Peter Osborne, for the Attorney General of Canada
Ron Carr, for the Attorney General of Ontario

HEARD: Wednesday, February 8, 2006

E N D O R S E M E N T

[1] What the applicant is seeking is an indulgence and partial relief from the restriction on payment in part as to debt to related entities as contained in the Initial Order of August 24, 2004. However, I do note that the continued operation of the applicant in the ordinary course is beneficial not only to the applicant and its related entities including the head parent JTI Japan, but it is beneficial to its various stakeholders including the employees and the tax collector (including the tax collectors of the various governments suing the applicant – who collect taxes not only from the corporate taxes and the tobacco excise tax but also from the tax on employment income). But for the litigation (of all sorts of problems) with the various governments, it appears to me that, all other things being equal, there would be no impediment on the applicant making the payments it has advised it wishes to make.

[2] However, under the present circumstances I think it fair that the governments be concerned that there is no leakage of funds/assets from the applicant which by their very payment, particularly since it is to related entities, would deplete the ability of the applicant to make good on any payment out of the ordinary course of business (specifically this would include the "mega" claims of the various governments of whatever nature and kind including the smuggling, health care and fraudulent conveyance actions – but I do not mean to include ordinary run of the mill immaterial permitted lawsuits which would be handled out of the ordinary cash flow and be provided for in any ordinary budget – but this would include a substantial lawsuit by a non-governmental party). I am satisfied that after payment of the amounts requested that the applicant will continue to have sufficient liquid assets/financing capacity to pay for its ongoing expenses in the ordinary course.

[3] If this were a one sided equation of merely a payment out, then I would have no hesitation in dismissing the motion even though the payments here would minimize interim capital tax, withholding tax and other accounts payable of the applicants and various of its related entities (as set out in paras. 19 and 21 of the applicant's factum). I pause to note here that the Federal Government expert fairly points out that the major tax impact may be blunted by use of a s. 78 ITA election; but he was only focusing on this aspect and not the others. As well, true enough that capital taxes in some of the various jurisdictions are being either reduced or eliminated; however that does not eliminate all the tax "difficulties" mentioned. As well the applicant and its various related entities have contractual obligations governing their debt and trade mark relationships – I think it too simplistic, with respect, to say that these relationships should be changed as it appears to me that the tax agencies may have some concerns about that *ex post facto* redeployment. Given those contractual relationships, the proposed letter of credit (L.C.) submitted and the terms surrounding it make sense in that the applicant is in essence making more than it would if it were not to make the payments and thereby incur higher interest costs that it has at least traditionally and presently been able to make on its own investments. Thus on a net basis, the applicant will be stronger financially to be able to make good on any judgment (or equivalent) the government(s) may obtain.

[4] The issue here is whether what is being substituted is at least equal to the money which is being paid out. If it is, then what we should have is a substitution of equivalent value as readily realizable as if it were the funds (proposed to be paid out) being actually retained in the applicant. In other words, it should not be the equivalent of me giving away my car as a gift, but rather that I substitute a blue 2005 Ford for a red 2005 Ford, same model, same mileage, same condition.

[5] There was some objection that given that the governments alleged that the Integration Transactions were fraudulent preferences, that an L.C. be put up for $1.6 billion. However that transaction (Integrated Transactions) is in the past and at this time has not been proven as a fraudulent preference. It has no material relevance to the request here being made by the applicant.

[6] Is the L.C. being proposed that red-blue Ford equivalent situation? As discussed during the hearing it was not; however with obvious modifications discussed, it can be made so. These would include that the L.C. be issued by a Canadian bank acceptable to the governments, there be separate L.C.s for the interest, that notices be given to the service list on a timely basis, that TM Corp. entitlement be conditioned appropriately (as discussed) and very importantly that anyone be able to come back to this court in these CCAA proceedings to request that the L.C.(s) be called on. An example of this would be a successful government smuggling case but could include any 3rd party having a successful suit. The reason for granting such a call on the L.C. order need not be restricted to successful lawsuits. The call request may be for any good and sufficient reason. I pause to note here that this open ended provision is not intended to be an invitation to the governments or third parties to come into court on a periodic or even spasmodic basis just to test the water as to a call – any moving party should act responsibly so that an objective bystander would comment: "Yes, that was a good motion even if it did not succeed."

[7] Counsel are to come back to me at 9:30 tomorrow with a revised order in the form discussed together with draft L.C.(s) encompassing the various changes discussed. I note that it may not be feasible to finalize the form of the L.C. with the chosen bank by tomorrow but it will be sufficient if the actual L.C.s are substantially the same and indeed that they are equivalent to the draft L.C. approved.

J.M. Farley

DATE: February 8, 2006

COURT FILE NO.: 09-CL-7950
DATE: 20090618

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

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

Applicants

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **Barry Wadsworth for the CAW and George Borosh et al**

Susan Philpott and Mark Zigler for the Nortel Networks Former Employees

Lyndon Barnes and Adam Hirsh for the Nortel Networks Board of Directors

Alan Mersky and Mario Forte for Nortel Networks et al

Gavin H. Finlayson for the Informal Nortel Noteholders Group

Leanne Williams for Flextronics Inc.

Joseph Pasquariello and Chris Armstrong for Ernst & Young Inc., Monitor

Janice Payne for Recently Severed Canadian Nortel Employees ("RSCNE")

Gail Misra for the CEP Union

J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services

Henry Jurovicsky for the Nortel Terminated Canadian Employees Steering Committee

Alex MacFarlane for the Official Unsecured Creditors Committee

M. Starnino for the Superintendent of Financial Services

HEARD: April 21, 2009

E N D O R S E M E N T

[1] The process by which claims of employees, both unionized and non-unionized, have been addressed in restructurings initiated under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "CCAA") has been the subject of debate for a number of years. There is uncertainty and strong divergent views have been expressed. Notwithstanding that employee claims are ultimately addressed in many CCAA proceedings, there are few reported decisions which address a number of the issues being raised in these two motions. This lack of jurisprudence may reflect that the issues, for the most part, have been resolved through negotiation, as opposed to being determined by the court in the CCAA process – which includes motions for directions, the classification of creditors' claims, the holding and conduct of creditors' meetings and motions to sanction a plan of compromise or arrangement.

[2] In this case, both unionized and non-unionized employee groups have brought motions for directions. This endorsement addresses both motions.

Union Motion

[3] The first motion is brought by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905, and/or 1915 (the "Union") and by George Borosh on his own behalf and on behalf of all retirees of the Applicants who were formerly represented by the Union.

[4] The Union requests an order directing the Applicants (also referred to as "Nortel") to recommence certain periodic and lump sum payments which the Applicants, or any of them, are obligated to make pursuant to the CAW collective agreement (the "Collective Agreement"). The Union also seeks an order requiring the Applicants to pay to those entitled persons the payments which should have been made to them under the Collective Agreement since January 14, 2009, the date of the CCAA filing and the date of the Initial Order.

[5] The Union seeks continued payment of certain of these benefits including:

(a) retirement allowance payments ("RAP");

(b) voluntary retirement options ("VRO"); and

(c) termination and severance payments.

[6] The amounts claimed by the Union are contractual entitlements under the Collective Agreement, which the Union submits are payable only after an individual's employment with the Applicants has ceased.

[7] There are approximately 101 former Union members with claims to RAP. The current value of these RAP is approximately $2.3 million. There are approximately 180 former unionized retirees who claim similar benefits under other collective agreements.

[8] There are approximately 7 persons who may assert claims to VRO as of the date of the Initial Order. These claims amount to approximately $202,000.

[9] There are also approximately 600 persons who may claim termination and severance pay amounts. Five of those persons are former union members.

Former Employee Motion

[10] The second motion is brought by Mr. Donald Sproule, Mr. David Archibald and Mr. Michael Campbell (collectively, the "Representatives") on behalf of former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a Nortel pension, or group or class of them (collectively, the "Former Employees"). The Representatives seek an order varying the Initial Order by requiring the Applicants to pay termination pay, severance pay, vacation pay and an amount equivalent to the continuation of the benefit plans during the notice period, which are required to be paid to affected Former Employees in accordance with the *Employment Standards Act, 2000* S.O. 2000 c.41 ("ESA") or any other relevant provincial employment legislation. The Representatives also seek an order varying the Initial Order by requiring the Applicants to recommence certain periodic and lump sum payments and to make payment of all periodic and lump sum payments which should have been paid since the Initial Order, which the Applicants are obligated to pay Former Employees in accordance with the statutory and contractual obligations entered into by Nortel and affected Former Employees, including the Transitional Retirement Allowance ("TRA") and any pension benefit payments

Former Employees are entitled to receive in excess of the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan"). TRA is similar to RAP, but is for non-unionized retirees. There are approximately 442 individuals who may claim the TRA. The current value of TRA obligations is approximately $18 million.

[11] The TRA and the RAP are both unregistered benefits that run concurrently with other pension entitlements and operate as time-limited supplements.

[12] In many respects, the motion of the Former Employees is not dissimilar to the CAW motion, such that the motion of the Former Employees can almost be described as a "Me too motion".

Background

[13] On January 14, 2009, the Applicants were granted protection under the CCAA, pursuant to the Initial Order.

[14] Upon commencement of the CCAA proceedings, the Applicants ceased making payments of amounts that constituted or would constitute unsecured claims against the Applicants. Included were payments for termination and severance, as well as amounts under various retirement and retirement transitioning programs.

[15] The Initial Order provides:

(a) that Nortel is entitled but not required to pay, among other things, outstanding and future wages, salaries, vacation pay, employee benefits and pension plan payments;

(b) that Nortel is entitled to terminate the employment of or lay off any of its employees and deal with the consequences under a future plan of arrangement;

(c) that Nortel is entitled to vacate, abandon or quit the whole but not part of any lease agreement and repudiate agreements relating to leased properties (paragraph 11);

(d) for a stay of proceedings against Nortel;

(e) for a suspension of rights and remedies vis-à-vis Nortel;

(f) that during the stay period no person shall discontinue, repudiate, cease to perform any contract, agreement held by the company (paragraph 16);

(g) that those having agreements with Nortel for the supply of goods and/or services are restrained from, among other things, discontinuing, altering or terminating the supply of such goods or services. The proviso is that the goods or services

> supplied are to be paid for by Nortel in accordance with the normal payment practices.

Position of Union

[16] The position of the CAW is that the Applicants' obligations to make the payments is to the CAW pursuant to the Collective Agreement. The obligation is not to the individual beneficiaries.

[17] The Union also submits that the difference between the moving parties is that RAP, VRO and other payments are made pursuant to the Collective Agreement as between the Union and the Applicants and not as an outstanding debt payable to former employees.

[18] The Union further submits that the Applicants are obligated to maintain the full measure of compensation under the Collective Agreement in exchange for the provision of services provided by the Union's members subsequent to the issuance of the Initial Order. As such, the failure to abide by the terms of the Collective Agreement, the Union submits, runs directly contrary to Section 11.3 of the CCAA as compensation paid to employees under a collective agreement can reasonably be interpreted as being payment for services within the meaning of this section.

[19] Section 11.3 of the CCAA provides:

> No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.

[20] In order to fit within Section 11.3, services have to be provided after the date of the Initial Order.

[21] The Union submits that persons owed severance pay are post-petition trade creditors in a bankruptcy, albeit in relation to specific circumstances. Thus, by analogy, persons owed severance pay are post-petition trade creditors in a CCAA proceeding. The Union relies on *Smokey River Coal Ltd. (Re)* 2001 ABCA 209 to support its proposition.

[22] The Union further submits that when interpreting "compensation" for services performed under the Collective Agreement, it must include all of the monetary aspects of the Collective Agreement and not those specifically made to those actively employed on any particular given day.

[23] The Union takes the position that Section 11.3 of the CCAA specifically contemplates that a supplier is entitled to payment for post-filing goods and services provided, and would

undoubtedly refuse to continue supply in the event of receiving only partial payment. However, the Union contends that it does not have the ability to cease providing services due to the *Labour Relations Act, 1995*, S.O. 1995, c. 1. As such, the only alternative open to the Union is to seek an order to recommence the payments halted by the Initial Order.

[24] The Union contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement it will abide by. By failing to abide by the terms of the Collective Agreement, the Union contends that the Applicants have acted as if the contract has been amended to the extent that it is no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

[25] The Union submits that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of the contract between parties and as the court cannot amend the terms of the Collective Agreement, the employer should not be allowed to act as though it had done so.

[26] The Union submits that no other supplier of services would countenance, and the court does not have the jurisdiction to authorize, the recipient party to a contract unilaterally determining which provisions of the agreement it will or will not abide by while the contract is in operation.

[27] The Union concludes that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and the court should direct the recommencement and repayment of those benefits that arise out of the Collective Agreement and which were suspended subsequently to the filing of the CCAA application on January 14, 2009.

Position of the Former Employees

[28] Counsel to the Former Employees submits that the court has the discretion pursuant to Section 11 of the CCAA to order Nortel to recommence periodic and lump-sum payments to Former Employees in accordance with Nortel's statutory and contractual obligations. Further, the RAP payments which the Union seeks to enforce are not meaningfully different from those RAP benefits payable to other unionized retirees who belong to other unions nor from the TRA payable to non-unionized former employees. Accordingly, counsel submits that it would be inequitable to restore payments to one group of retirees and not others. Hence, the reference to the "Me too motion".

[29] Counsel further submits that all employers and employees are bound by the minimum standards in the ESA and other applicable provincial employment legislation. Section 5 of the ESA expressly states that no employer can contract out or waive an employment standard in the ESA and that any such contracting out or waiver is void.

[30] Counsel submits that each province has minimum standards employment legislation and regulations which govern employment relationships at the provincial level and that provincial laws such as the ESA continue to apply during CCAA proceedings.

[31] Further, the Supreme Court of Canada has held that provincial laws in federally-regulated bankruptcy and insolvency proceedings continue to apply so long as the doctrine of paramountcy is not triggered: See *Crystalline Investments Ltd. v. Domgroup Ltd*., [2004] 1 S.C.R. 60.

[32] In this case, counsel further submits that there is no conflict between the provisions of the ESA and the CCAA and that paramountcy is not triggered and it follows that the ESA and other applicable employment legislation continues to apply during the Applicants' CCAA proceedings. As a result counsel submits that the Applicants are required to make payment to Former Employees for monies owing pursuant to the minimum employment standards as outlined in the ESA and other applicable provincial legislation.

Position of the Applicants

[33] Counsel to the Applicants sets out the central purpose of the CCAA as being: "to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business". (*Pacific National Lease Holding Corp. (Re)*, (1992) B.C.J. No. 3070, aff'd by 1992, 15 C.B.R. (3d) 265), and that the stay is the primary procedural instrument used to achieve the purpose of the CCAA:

> …if the attempt at a compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay. Hence the powers vested in the court under Section 11 (*Pacific National Lease Holding Corp. (Re), supra*).

[34] The Applicants go on to submit that the powers vested in the court under Section 11 to achieve these goals of the CCAA include:

(a) the ability to stay past debts; and

(b) the ability to require the continuance of present obligations to the debtor.

[35] The corresponding protection extended to persons doing business with the debtor is that such persons (including employees) are not required to extend credit to the debtor corporation in the course of the CCAA proceedings. The protection afforded by Section 11.3 extends only to services provided after the Initial Order. Post-filing payments are only made for the purpose of ensuring the continued supply of services and that obligations in connection with past services are stayed. (See *Mirant Canada Energy Marketing Ltd. (Re)* (2004), A.J. No. 331).

[36] Furthermore, counsel to the Applicants submits that contractual obligations respecting post employment are obligations in respect of past services and are accordingly stayed.

[37] Counsel to the Applicants also relies on the following statement from *Mirant, supra*, at paragraph 28:

> Thus, for me to find the decision of the Court of Appeal in Smokey River Coal analogous to Schaefer's situation, I would need to find that the obligation to pay

> severance pay to Schaefer was a clear contractual obligation that was necessary for Schaefer to continue his employment and not an obligation that arose from the cessation or termination of services. In my view, to find it to be the former would be to stretch the meaning of the obligation in the Letter Agreement to pay severance pay. It is an obligation that arises on the termination of services. It does not fall within a commercially reasonable contractual obligation essential for the continued supply of services. Only is his salary which he has been paid falls within that definition.

[38] Counsel to the Applicants states that post-employment benefits have been consistently stayed under the CCAA and that post-employment benefits are properly regarded as pre-filing debts, which receive the same treatment as other unsecured creditors. The Applicants rely on *Syndicat nationale de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.* (2003) Q.J. No. 264 (C.A.) ("*Jeffrey Mine*") for the proposition that "the fact that these benefits are provided for in the collective agreement changes nothing".

[39] Counsel to the Applicants submits that the Union seeks an order directing the Applicants to make payment of various post-employment benefits to former Nortel employees and that the Former Employees claim entitlement to similar treatment for all post-employment benefits, under the Collective Agreement or otherwise.

[40] The Applicants take the position the Union's continuing collective representation role does not clothe unpaid benefits with any higher status, relying on the following from *Jeffrey Mine* at paras. 57 – 58:

> Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.
>
> The same is true in the case of the loss of certain fringe benefits sustained by persons who have not provided services to the debtor since the initial order. These persons became creditors of the debtor for the monetary value of the benefits lost further to Jeffrey Mines Inc.'s having ceased to pay premiums. The fact that these benefits are provided for in the collective agreements changes nothing.

[41] In addition, the Applicants point to the following statement of the Quebec Court of Appeal in *Syndicat des employées et employés de CFAP-TV (TQS-Quebec), section locale 3946 du Syndicat canadien de la function publique c. TQS inc*., 2008 QCCA 1429 at paras. 26-27:

> [Unofficial translation] Employees' rights are defined by the collective agreement that governs them and by certain legislative provisions. However, the resulting claims are just as much [at] risk as those of other creditors, in this case suppliers whose livelihood is also threatened by the financial precariousness of their debtor.

> The arguments of counsel for the Applicants are based on the erroneous premise that the employees are entitled to a privileged status. That is not what the CCAA provides nor is it what this court decided in *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*

[42] Collectively, RAP payment and TRA payments entail obligations of over $22 million. Counsel to the Applicants submits that there is no basis in principle to treat them differently. They are all stayed and there is no basis to treat any of these two unsecured obligations differently. The Applicants are attempting to restructure for the final benefit of all stakeholders and counsel submits that its collective resources must be used for such purposes.

Report of the Monitor

[43] In its Seventh Report, the Monitor notes that at the time of the Initial Order, the Applicants employed approximately 6,000 employees and had approximately 11,700 retirees or their survivors receiving pension and/or benefits from retirement plans sponsored by the Applicants.

[44] The Monitor goes on to report that the Applicants have continued to honour substantially all of the obligations to active employees. The Applicants have continued to make current service and special funding payments to their registered pension plans. All the health and welfare benefits for both active employees and retirees have been continued to be paid since the commencement of the CCAA proceedings.

[45] The Monitor further reports that at the filing date, payments to former employees for termination and severance as well as the provisions of the health and dental benefits ceased. In addition, non-registered and unfunded retirement plan payments ceased.

[46] More importantly, the Monitor reports that, as noted in previous Monitor's Reports, the Applicants' financial position is under pressure.

Discussion and Analysis

[47] The acknowledged purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. (See *Pacific National Lease Holding Corp. (Re)*, (1992) B.C.J. No. 3070, aff'd by (1992), 15 C.B.R. (3d) 265, at para. 18 citing *Chef Ready Foods Ltd*. v. *Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315). The primary procedural instrument used to achieve that goal is the ability of the court to issue a broad stay of proceedings under Section 11 of the CCAA.

[48] The powers vested in the court under Section 11 of the CCAA to achieve these goals include the ability to stay past debts; and the ability to require the continuance of present obligations to the debtor. (*Woodwards Limited (Re)*, (1993), 17 C.B.R. (3d) 236 (S.C.).

[49] The Applicants acknowledged that they were insolvent in affidavit material filed on the Initial Hearing. This position was accepted and is referenced in my endorsement of January 14, 2009. The Applicants are in the process of restructuring but no plan of compromise or arrangement has yet to be put forward.

[50] The Monitor has reported that the Applicants are under financial pressure. Previous reports filed by the Monitor have provided considerable detail as to how the Applicants carry on operations and have provided specific information as to the interdependent relationship between Nortel entities in Canada, the United States, Europe, the Middle East and Asia.

[51] In my view, in considering the impact of these motions, it is both necessary and appropriate to take into account the overall financial position of the Applicants. There are several reasons for doing so:

(a) The Applicants are not in a position to honour their obligations to all creditors.

(b) The Applicants are in default of contractual obligations to a number of creditors, including with respect to significant bond issues. The obligations owed to bondholders are unsecured.

(c) The Applicants are in default of certain obligations under the Collective Agreements.

(d) The Applicants are in default of certain obligations owed to the Former Employees.

[52] It is also necessary to take into account that these motions have been brought prior to any determination of any creditor classifications. No claims procedure has been proposed. No meeting of creditors has been called and no plan of arrangement has been presented to the creditors for their consideration.

[53] There is no doubt that the views of the Union and the Former Employees differ from that of the Applicants. The Union insists that the Applicants honour the Collective Agreement. The Former Employees want treatment that is consistent with that being provided to the Union. The record also establishes that the financial predicament faced by retirees and Former Employees is, in many cases, serious. The record references examples where individuals are largely dependent upon the employee benefits that, until recently, they were receiving.

[54] However, the Applicants contend that since all of the employee obligations are unsecured it is improper to prefer retirees and the Former Employees over the other unsecured creditors of the Applicants and furthermore, the financial pressure facing the Applicants precludes them from paying all of these outstanding obligations.

[55] Counsel to the Union contends that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and further that the court does not have the jurisdiction to authorize a party, in this case the Applicants, to

unilaterally determine which provisions of the Collective Agreement they will abide by while the contract is in operation. Counsel further contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement they will abide by and that by failing to abide by the terms of the Collective Agreement, the Applicants acted as if the Collective Agreement between themselves and the Union has been amended to the extent that the Applicants are no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

[56] The Union specifically contends that the court has no jurisdiction to alter the terms of the Collective Agreement.

[57] In addressing these points, it is necessary to keep in mind that these CCAA proceedings are at a relatively early stage. It also must be kept in mind that the economic circumstances at Nortel are such that it cannot be considered to be carrying on "business as usual". As a result of the Applicants' insolvency, difficult choices will have to be made. These choices have to be made by all stakeholders.

[58] The Applicants have breached the Collective Agreement and, as a consequence, the Union has certain claims.

[59] However, the Applicants have also breached contractual agreements they have with Former Employees and other parties. These parties will also have claims as against the Applicants.

[60] An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.

[61] In addition, there is nothing on the record which addresses the issue of how the claims of various parties will be treated in any plan of arrangement, nor is there any indication as to how the creditors will be classified. These issues are not before the court at this time.

[62] What is before the court is whether the Applicants should be directed to recommence certain periodic and lump sum payments that they are obligated to make under the Collective Agreement as well as similar or equivalent payments to Former Employees.

[63] It is necessary to consider the meaning of Section 11.3 and, in particular, whether the Section should be interpreted in the manner suggested by the Union.

[64] Counsel to the Union submits that the ordinary meaning of "services" in section 11.3 includes work performed by employees subject to a collective agreement. Further, even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation, and relevant legal norms. Counsel submits that the courts must consider the entire context. As a result, when interpreting "compensation" for services performed under a collective agreement, counsel to the Union submits it must include all of the monetary aspects of the agreement and not those made specifically to those actively employed on any particular given day.

[65] No cases were cited in support of this interpretation.

[66] I am unable to agree with the Union's argument. In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed. (See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada Inc., 2008) at 483-485.) Section 11.3 applies to services provided after the date of the Initial Order. The ordinary meaning of "services" must be considered in the context of the phrase "services,…provided after the order is made". On a plain reading, it contemplates, in my view, some activity on behalf of the service provider which is performed after the date of the Initial Order. The CCAA contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services.

[67] The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

[68] The interpretation urged by counsel to the Union with respect to this section is not warranted. In my view, section 11.3 does not require the Applicants to make payment, at this time, of the outstanding obligations under the Collective Agreement.

[69] The Union also raised the issue as to whether the court has the jurisdiction to order a stay of the outstanding obligations under Section 11 of the CCAA.

[70] The Union takes the position that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of a contract between parties. The Union relies on *Bilodeau et al v. McLean*, [1924] 3 D.L.R. 410 (Man. C.A.); *Desener v. Myles*, [1963] S. J. No. 31 (Q.B.); *Hiesinger v. Bonice* [1984] A. J. No. 281; *Werchola v. KC5 Amusement Holdings Ltd.* 2002 SKQB 339 to support its position.

[71] The Union extends this argument and submits that as the court cannot amend the terms of a collective agreement, the employer should not be allowed to act as though it had been.

[72] As a general rule, counsel to the Union submits, there is in place a comprehensive regime for the regulation of labour relations with specialized labour-relations tribunals having exclusive

jurisdiction to deal with legal and factual matters arising under labour legislation and no court should restrain any tribunal from proceeding to deal with such matters.

[73] However, as is clear from the context, these cases referenced at [70] are dealing with the ordinary situation in which there is no issue of insolvency. In this case, we are dealing with a group of companies which are insolvent and which have been accorded the protection of the CCAA. In my view, this insolvency context is an important distinguishing factor. The insolvency context requires that the stay provisions provided in the CCAA and the Initial Order must be given meaningful interpretation.

[74] There is authority for the proposition that, when exercising their authority under insolvency legislation, the courts may make, at the initial stage of a CCAA proceeding, orders regarding matters, but for the insolvent condition of the employer, would be dealt with pursuant to provincial labour legislation, and in most circumstances, by labour tribunals. In *Re: Pacific National Lease Holding Corp*. (1992) 15 C.B.R. (3d) 265 (B.C.C.A.), the issue involved the question whether a CCAA debtor company had to make statutory severance payments as was mandatory under the provincial employment standards legislation. MacFarlane J.A. stated at pp. 271-2:

> It appears to me that an order which treats creditors alike is in accord with the purpose of the CCAA. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the CCAA is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.
>
> …
>
> This case is not so much about the rights of employees as creditors, but the right of the court under the CCAA to serve not only the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd., supra*. Such a decision may invariably conflict with provincial legislation, but the broad purpose of the CCAA must be served.

[75] The *Jeffrey Mine* decision is also relevant. In my view, the *Jeffrey Mine* case does not appear to support the argument that the Collective Agreement is to be treated as being completely unaffected by CCAA proceedings. It seems to me that it is contemplated that rights under a collective agreement may be suspended during the CCAA proceedings. At paragraphs 60 – 62, the court said under the heading Recapitulation (in translation):

> The collective agreements continue to apply like any contract of successive performance not modified by mutual agreement after the initial order or not disclaimed (assuming that to be possible in the case of collective agreements).

> Neither the monitor nor the court can amend them unilaterally. That said, distinctions need to be made with regard to the prospect of the resulting debts.
>
> Thus, unionized employees kept on or recalled are entitled to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3), in accordance with the terms of the original version of the applicable collective agreement by the union concerned. However, the obligations not honoured by Jeffrey Mine Inc. with regard to services provided prior to the order constitute debts of Jeffrey Mine Inc. for which the monitor cannot be held liable (s. 11.8 CCAA) and which the employees cannot demand to be paid immediately (s. 11.3 CCAA).
>
> Obligations that have not been met with regard to employees who were laid off permanently on October 7, 2002, or with regard to persons who were former employees of Jeffrey Mine Inc. on that date and that stem from the collective agreements or other commitments constitute debts of the debtor to be disposed of in the restructuring plan or, failing that, upon the bankruptcy of Jeffrey Mine Inc.

[76] The issue of severance pay benefits was also referenced in *Communications, Energy, Paperworks, Local 721G v. Printwest Communications Ltd.* 2005 SKQB 331 at paras. 11 and 15. The application of the Union was rejected:

> …The claims for severance pay arise from the collective bargaining agreement. But severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.
>
> …
>
> If the Union's request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise – and thereby be paid in full – such a result could not possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the application of the Union in this respect must be rejected.

Disposition

[77] At the commencement of an insolvency process, the situation is oftentimes fluid. An insolvent debtor is faced with many uncertainties. The statute is aimed at facilitating a plan of compromise or arrangement. This may require adjustments to the operations in a number of areas, one of which may be a downsizing of operations which may involve a reduction in the workforce. These adjustments may be painful but at the same time may be unavoidable. The alternative could very well be a bankruptcy which would leave former employees, both unionized and non-unionized, in the position of having unsecured claims against a bankrupt

debtor. Depending on the status of secured claims, these unsecured claims may, subject to benefits arising from the recently enacted *Wage Earner Protection Program Act*, be worth next to nothing.

[78] In the days ahead, the Applicants, former employees, both unionized and non-unionized may very well have arguments to make on issues involving claims processes (including the ability of the Applicants to compromise claims), classification, meeting of creditors and plan sanction. Nothing in this endorsement is intended to restrict the rights of any party to raise these issues.

[79] The reorganization process under the CCAA can be both long and painful. Ultimately, however, for a plan to be sanctioned by the court, the application must meet the following three tests:

(i) there has to be strict compliance with all statutory requirements and adherence to previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA;

(iii) the plan is fair and reasonable. *Re: Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.)

[80] At this stage of the Applicants' CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants. Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.

[81] It follows that the motion of the Union is dismissed.

[82] The Applicants also raised the issue that the Union consistently requested the right to bargain on behalf of retirees who were once part of the Union and that the concession had not been granted. Consequently, the retirees' substantive rights are not part of the bargain between the unionized employees and the employer. Counsel to the Applicants submitted that the union may collectively alter the existing rights of any employee but it cannot negatively do so with respect to retirees' rights.

[83] The Union countered that the rights gained by a member of the bargaining unit vest upon retirement, despite the fact that a collective agreement expires, and are enforceable through the grievance procedure.

[84] Both parties cited *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)* [1993] 2 S.C.R. 230 in support of their respective positions.

[85] In view of the fact that this motion has been dismissed for other reasons, it is not necessary for me to determine this specific issue arising out of the *Dayco* decision.

[86] The motion of the Former Employees was characterized, as noted above, as a "Me too motion". It was based on the premise that, if the Union's motion was successful, it would only be equitable if the Former Employees also received benefits. The Former Employees do not have the benefit of any enhanced argument based on the Collective Agreement. Rather, the argument of the Former Employees is based on the position that the Applicants cannot contract out of the ESA or any other provincial equivalent. In my view, this is not a case of contracting out of the ESA. Rather, it is a case of whether immediate payout resulting from a breach of the ESA is required to be made. In my view, the analysis is not dissimilar from the Collective Agreement scenario. There is an acknowledgment of the applicability of the ESA, but during the stay period, the Former Employees cannot enforce the payment obligation. In the result, it follows that the motion of the Former Employees is also dismissed.

[87] However, I am also mindful that the record, as I have previously noted, makes reference to a number of individuals that are severely impacted by the cessation of payments. There are no significant secured creditors of the Applicants, outside of certain charges provided for in the CCAA proceedings, and in view of the Applicants' declared assets, it is reasonable to expect that there will be a meaningful distribution to unsecured creditors, including retirees and Former Employees. The timing of such distribution may be extremely important to a number of retirees and Former Employees who have been severely impacted by the cessation of payments. In my view, it would be both helpful and equitable if a partial distribution could be made to affected employees on a timely basis.

[88] In recognition of the circumstances that face certain retirees and Former Employees, the Monitor is directed to review the current financial circumstances of the Applicants and report back as to whether it is feasible to establish a process by which certain creditors, upon demonstrating hardship, could qualify for an unspecified partial distribution in advance of a general distribution to creditors. I would ask that the Monitor consider and report back to this court on this issue within 30 days.

[89] This decision may very well have an incidental effect on the Collective Agreement and the provisions of the ESA, but it is one which arises from the stay. It does not, in my view, result from a repudiation of the Collective Agreement or a contracting out of the ESA. The stay which is being recognized is, in my view, necessary in the circumstances. To hold otherwise, would have the effect of frustrating the objectives of the CCAA to the detriment of all stakeholders.

MORAWETZ J.

DATE: June 18, 2009

CITATION: Re Essar Steel Algoma Inc. et al, 2016 ONSC 6459
COURT FILE NO.: CV-15-11169-00CL
DATE: 20161017

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

Applicants

BEFORE: Newbould J.

COUNSEL: *Jeremy Opolsky and Alexandra Shelley*, for the Port of Algoma Inc.

Stephen J. Weisz, for the GIP Primus, LP

John A. MacDonald, for Deutsch Bank AG

Ashley Taylor, for the applicants

Clifton Prophet and Nicholas Klug, for the Monitor

L. Joseph Latham, for the Ad Hoc Committee of Essar Algoma Noteholders

Massimo Starnino and Debra McKenna, *for* USW and Local 2724

Lou Brzezinski, for USW Local 2251

Karenn Ensslen, representative counsel for the retirees

Jeremy Nemers, for the City of Sault St. Marie

HEARD: October 6, 2016

ENDORSEMENT

[1] On June 29, 2016 I dismissed a motion by Port of Algoma Inc. (Portco) for orders (i) that Essar Algoma (Algoma) make payment of the post-filing amounts now owing and all future payments coming due under a Cargo Handling Agreement, and (ii) for an administrative charge over the assets of Algoma million to secure the obligations of Algoma to Portco.

[2] At the hearing of that motion there were issues raised by the DIP lenders regarding the unpaid US $19.8 million promissory note made by Portco to Algoma that was assigned to Essar Global Fund Limited (EGFL), the indirect parent company of both Algoma and Portco. The DIP lenders asserted that there was an equitable set-off issue that would have to be dealt with and that it was premature to deal with the Portco motion for payment under the Cargo Handling Agreement until that equitable set-off issue was dealt with.

[3] The Monitor in its report had expressed concerns regarding the entire Portco Transaction and the preceding recapitalization of Algoma that took place in 2014 under the CBCA and expressed the view that the Portco motion for payment under the Cargo Handling Agreement could not be determined in isolation and must be linked to a full understanding of both the Portco Transaction and the preceding recapitalization. The Monitor stated that the ability of Portco to rely on the release contained in the assignment and assumption agreement regarding the Portco promissory note and the applicability of set-off rights in relation to amounts due under the promissory note and the Cargo Handling Agreement might be affected by the views of the Court concerning the overall context of the Portco Transaction and the recapitalization.

[4] At the conclusion of my decision on the Portco motion I stated:

> [29] I agree with the DIP lenders that it is premature to make an order at this stage requiring Algoma to make any further payments under the Cargo Handling Agreement and I decline to make such an order or to order any security to be provided to Portco. The Portco motion is dismissed without prejudice to it being brought back on after the set-off issue is determined. The parties are directed to confer as to the most appropriate way to quickly deal with the set-off issue and the other issues raised by the Monitor. If there is no agreement, a conference is to be held during the first week of July to settle how to deal with the issues.

[5] Not a whole lot has changed although the amount of payments not made to Portco is approaching the amount of the unpaid Portco promissory note. Portco however says that the parties have not quickly conferred as to the most appropriate way to deal with the set-off or other issues and that it is now entitled to raise all of the issues that it raised on its first motion. It blames the other side for the delay.

[6] I cannot say that Algoma, the Monitor or the DIP lenders have let things slide. It was the Monitor's view that the validity of the Portco Transaction could well affect the equitable set-off issue on the Portco note and that the Portco motion could not be determined in isolation but must be linked to a full understanding of both the Portco Transaction and the recapitalization. At a 9:30 conference after the first decision, there was a discussion to the effect that the set-off issue should be looked at together with the review of the Portco Transaction.

[7] There was nothing to prevent Portco from applying earlier for a determination of the equitable set-off point on the Portco note, if it thought it could be determined in isolation and that the other parties were dragging their feet.

[8] On September 26, 2016 on order was made authorizing and directing the Monitor to commence an oppression proceeding (the "Related Party Proceeding") in relation to the Portco Transaction and certain other Related Party Transactions identified in the Monitor's Sixteenth Report. The order directs the Monitor to commence those proceedings by October 21, 2016. The DIP lenders and the Monitor remain of the view and have contended that determinations

concerning the relief now sought in the Portco motion cannot be made until the Related Party Proceedings have been dealt with.

[9] I must say that when I stated that the first Portco motion was dismissed without prejudice to it being brought back on after the set-off issue was determined, it was not intended to enable Portco to raise anew those issues that had been decided against it. It was intended to permit Portco to come back if it succeeded on the set-off point or the issues raised by the Monitor. Portco however continues to raise issues already decided against it.

[10] Portco again raises section 11.01 of the CCAA that prevents parties in a CCAA proceeding from being forced to perform a contract without payment after a stay order. The section provides:

> 11.01 No order made under section 11 or 11.02 has the effect of
>
> > (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or…

[11] Portco raised this section on its first motion. I held against Portco and said:

> [20] Portco says that under the Cargo Handling Agreement, it is responsible for providing to Algoma the cargo handling services required on the Port property. It says that if Algoma does not pay it for those services, it will mean that Portco is obliged to provide the services without being paid, contrary to section 11.01(a). I do not agree. The persons providing the services are not Portco employees but employees of Algoma. Under the Shared Services Agreement, Algoma provides all of the services as may be necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. Those services are paid for by Algoma.

[12] Portco raises the same argument again. It is not open to Portco to do so. It has been decided against Portco and there was no appeal from that decision. In any event, I am not persuaded that anything has changed regarding how the port is operated.

[13] As in the first motion, Portco contends that while it is Algoma that provides the employees under the Shared Services Agreement, it is Portco that manages and directs the provision of the services. That is not what the evidence is. There is no management or direction given by Portco to Algoma. Portco has no operating management at all. It is insolvent. As stated in my prior decision, under the Shared Services Agreement it is Algoma that provides all of the services as may be necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. Mr. Dwivedi has been the CEO of Portco since May 2015. He acknowledged in his affidavit that as a result of the Shared Services Agreement, Algoma provides Portco with employees "who attend to cargo handling, logistics and other operations for Portco."

[14] Portco now raises other arguments as to why section 11.01(a) requires payment under the Cargo Handling Agreement. I see this as no more than coming up with arguments that it could have raised in its first motion when it relied on that section. Litigation like this in piecemeal is not permitted. When relying on a section and having lost, it is not open to a party to come back and say that there are further arguments why that section requires the result the party was looking for in the first place.

[15] Portco says now that under the Master Purchase and Sale Agreement, Algoma sold the Port assets, including the docks, to Portco and under the Lease Agreement leased to Portco the real property upon which the Port is located. Portco contends that the rights granted to Algoma in the Cargo Handling Agreement to the use of the Port facilities and equipment (i.e. mechanical conveyors) are properly classified as providing a license for the use of Portco's property.

[16] This argument should have been made the first time. I will comment on it but in doing so do not accept that it is properly before me. It is not.

[17] The Cargo Handling Agreement states that Algoma has non-exclusive access to a number of things described as the Cargo Handling Facilities. That was obviously necessary because it is Algoma under the Shared Services Agreement that is to provide all of the services as may be necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. There is no

mention in the Cargo Handling Agreement of any licence from Portco to Algoma, and it has an entire agreements clause.

[18] Portco argues that a licence is merely a right that allows a licencee to do some act upon the land that would otherwise constitute a trespass. Thus it says the right of access to Algoma to the Portco facilities that were leased to Portco amounts to a licence that should be paid for. I do not agree. In the lease from Algoma to Portco, it expressly reserves to Algoma in section 6.2 the right to enter the Portco premises, including the docks, to exercise its access rights under the Cargo Handling Agreement. Algoma is required under the Shared Service Agreement to provide the services required by the Cargo Handling Agreement. There can be no issue of any trespassing.

[19] The argument of Portco essentially suggests that it is some independent supplier of premises or goods which amount to a licence granted to Algoma and should be treated as such in considering the various agreements and CCAA provisions. But Portco is not at arm's length. It and Algoma are controlled by the same Essar entity and the Portco transactions in 2014 were not arms' length transactions between Algoma and Portco. They were undertaken to put cash in the hands of Algoma. The parent of each, EGFL, refuses to pay on the Portco promissory note assigned to it as part of the Portco transaction that is now under attack.

[20] Whether in these circumstances Portco should be looked at as a party to be protected by section 11.01(a), assuming it were open to Portco to continue arguing that issue, cannot be divorced from the Related Party Proceeding being brought by the Monitor. The entire Portco transaction will be looked at through the lens of an oppression proceeding. I would not order the payment of amounts due under the Cargo Handling Agreement in the face of those proceedings.

[21] Portco again argues as it did in its prior motion that the Initial Order must be interpreted to require the payments under the Cargo Handling Agreement to be made to Portco and that otherwise the result would be an impermissible ignoring of the provisions in section 11.01(a) of the CCAA. The argument is based on its interpretation of paragraph 10 of the Initial Order of

language "for greater certainty" the debtors shall continue to pay Portco. I dealt with this thoroughly in my previous decision in paragraphs 13 to 18. The provisions of the DIP financing and the terms of the Initial Order made clear that money could not be paid without the consent of the DIP lenders, and that has not changed.

[22] Portco argues that to permit Algoma not to make payments under the Cargo Handling Agreement is in effect obtaining execution before judgment. By November 2016 (the exact date is contested) Algoma will have withheld as much money under the Cargo Handling Agreement as the entire amount of the Portco promissory note that EGFL has refused to pay. To continue to permit Algoma not to pay any further mount will be an execution before judgment.

[23] I understand the force of the argument and the colourful language used by Estey J. in *Aetna Financial Services Ltd. v Feigelman,* [1985] 1 S.C.R. 2 ("litigious blackmail") in dealing with the then relatively new remedy of mareva injunctions. I have serious doubts about the use of the concept of execution before judgment in the context of a CCAA proceeding. While the action of the Monitor will be an oppression action, it is still under the auspices of a CCAA proceeding in which there is a stay of proceedings, just as was the breach of contract case by Cliffs against Algoma. We are not dealing with a claim in which the only interests are a plaintiff and defendant as is the case with a typical mareva injunction case. We are dealing with attempts to have a debtor, in this case Algoma, survive to see another day under a new owner. There must be choices made as to who gets paid and who does not. As the Monitor says, these are often tough choices but a balance must be made between the debtor and its stakeholders and the party claiming payment.

[24] In this case, the Monitor has expressed the view that additional cash requirements, including those which would arise from the resumption of payments under the Cargo Handling Agreement, will increase risks to Algoma's projected liquidity. I do not read that statement, as counsel for GIP Primus suggests, to mean that the Monitor is saying the payments can be made without difficulty. There were already serious risks to Algoma's liquidity.

[25] Portco asks that if it is not entitled to payment under the Cargo Handling Agreement because the DIP lenders will not consent to it, then an order should be made varying the provisions of the Initial Order to permit Portco to cease operation of the Portco facilities and cease performance under the agreements with Algoma, and that for that purpose there should be a lift of the stay of proceedings to permit Portco to pursue its remedies for breach of agreement.

[26] I would not make such orders. First of all, as stated, the validity of the agreements is to be dealt with in the Related Party Proceedings. To permit Portco to effectively shut down the operations of Algoma would be completely contrary to the interests of all stakeholders, not the least of which are the employees and retirees, none of whom have supported the position of Portco on this motion. Such an order would have the effect of giving Portco complete control of this entire proceeding. That may be the wishes of its Essar parent who has in the past indicated an interest in acquiring all of the assets in the CCAA sales process, albeit now as a non-qualified bidder, but it is not in the interests of the majority of the stakeholders. As well, Portco has said it has no money and whatever it receives from Algoma under the Cargo Handling Agreement has gone straight to its lender GIP Primus. In those circumstances nothing would be achieved for Portco in being able to stop Algoma personnel from operating the Portco facilities.

[27] Portco also has contained argument in its factum that equitable set-off on the Portco promissory note is not available to Algoma. This issue is not properly before me and I am not prepared to deal with it divorced from the proceedings to be started by the Monitor.

[28] The motion is dismissed.

Newbould J.

Date: October 17, 2016

CITATION: Grant Forest Products Inc. (Re), 2013 ONSC 5933
FILE NO.: CV-09-8247-00CL
DATE: 20130920

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

BETWEEN

IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP, Applicants

- and -

GE CANADA LEASING SERVICES COMPANY, et al, Defendants

BEFORE: C. CAMPBELL J.

COUNSEL: Craig J. Hill, Roger Jaipargas for West Face Capital

Alex Cobb, for PWC, Pension Administrator

Mark Bailey, for Superintendent of Financial Services

Richard Swan, Jonathan Bell, for Peter Grant Sr.

David Byers, Daniel Murdoch, for Ernst & Young

Jane Dietrich, for the remaining applicants

HEARD: July 23, 2013

REASONS FOR DECISION

[1] This decision deals with issues in respect of two defined benefit pension plans of Grant Forest Products Inc. (GFPI) both now in the process of being wound up.

Procedural Issues

[2] The motion seeking relief was originally made returnable June 25, 2012 and adjourned on several occasions, the latest being to enable counsel to make submissions following the release in February of this year of the decision of the Supreme Court of Canada in *Sun Indalex Finance, LLC v. United Steelworkers [2013] SCJ No.6. (Indalex).*

[3] The several specific issues arise based on certain of the facts of this case which give rise to a priority claim by pension beneficiaries in respect of the remaining funds in the hands of the Monitor following the sale of the assets of GFPI. The priority issue is between the Administrator on behalf of the pension plans of GFPI and a Second Lien creditor of GFPI, namely, West Face Capital.

[4] The Initial Order under the CCAA was made June 25, 2009 and provided for a Stay of proceedings to enable a restructuring (liquidation) of the assets of the various entities which for the purposes of this decision can be referred to as the remaining applicant or GFPI.

[5] As at June 25, 2009 there was an outstanding Petition in Bankruptcy issued March 19, 2009 in respect of GFPI initiated by various senior secured creditors which has not to date been proceeded with.

[6] The Initial Order contained a term (standard model order language) that "entitled but not required" GFPI to make pension contributions among other ongoing expenses.

The Pension Plans

[7] As at the date of the Initial Order there were 4 pension plans of GFPI, two of which were defined benefit plans and are the ones at issue here.

[8] The relevant dates with respect to the windup of the two defined benefit plans are as follows:

> Salaried Plan:
>
> The initiation of windup was as a result of an Order dated February 27, 2012. The effective date of windup was made as of March 31, 2011.
>
> Executive Plan:
>
> The initiation of Plan windup was undertaken by the Superintendent of Financial Services as a result of the Order dated February 27, 2012 with the effective date of wind up being June 30, 2010.

[9] The "effective date" as the term appears in the *Pension Benefit Act* (PBA) Ontario is chosen for actuarial purposes as the last date of contributions to the Plans.

[10] None of the above dates preceded the Initial Order of June 2009. The major sale of assets to Georgia Pacific was by Order dated May 26, 2010 with the last significant sale of assets February 20, 2011.

[11] There were no deemed trusts in existence either at the date of the Initial Order of June 2009 or the last significant sale of assets in February 2011.

[12] The Court granted Orders that were unopposed on the 26th day of August and the 21st day of September 2011 which authorized the following:

i) GFPI to take steps to initiate windup of the Timmins Salaried Plan, the appointment of a replacement administrator of such plan;

ii) GFPI to take steps to initiate a windup of both the Salaried and Executive Plans.

[13] The orders directed the Monitor to hold back from any distribution to creditors of GFPI the amount estimated at that time to be the windup deficit in the plans. The Monitor began holding in escrow an amount of $191,245 with respect to the Salaried Plan and $2,185,000 with respect to the Executive Plan.

[14] The issue of deemed trust arising as a result of the Windup Orders was not sought to be determined by any party at the time of the August and September 2011 Orders.

[15] When motions now before the Court first came on for hearing on August 27, 2012 the Court was advised that the Supreme Court of Canada had under reserve its decision in *Indalex* which among other things was to deal with the existence and priority of deemed trust amounts under the *PBA* in the context of *CCAA* proceeding.

[16] The motion returnable on August 27, 2012 by the applicant was for direction with respect to the payment of amounts held in escrow by the Monitor in respect of pensions.

[17] The position of both the Monitor and GFPI at that time was that there should be no further payments made on behalf of the pension plans or distribution of any further amounts to the Second Lien Lenders until following release of the decision of the Supreme Court of Canada in *Indalex*.

[18] The Monitor reported for the motion of August 2012 that the expectation of a windup deficit of both plans would be in excess of $2.3 million. The position of PWC as Administrator of the Plans was that amounts available by way of windup deficit under both plans should be made pursuant to the provisions of the *PBA*.

[19] The position of the Monitor and GFPI prevailed, and the motion for direction adjourned to November 2012 when both that motion and the companion motion of West Face on behalf of Second Lien Lenders for a lifting of the stay under the *CCAA* to permit the petition in bankruptcy to proceed were heard.

[20] Following submissions in November 2012, decision was reserved and following the decision of the Supreme Court of Canada in *Indalex* in February 2013 the parties to this proceeding were invited to provide further submissions based on that decision together with updated figures on amounts held and sums claimed due under the windup of the Pension Plans.

[21] In addition Counsel and their clients did attempt to see if the issues could be resolved without the necessity of further decision. Not surprisingly, given the complexity of issues that still remain following *Indalex* and despite diligent efforts a determination on the motions is required.

Legal Analysis

[22] In the *Indalex* decision — the members of Supreme Court of Canada were divided and in particular on the issue of deemed trust arising on windup in the context of a *CCAA* proceeding.

[23] Justice Cromwell in the introduction to his reasons in *Indalex* at paragraph 85 of the decision describes the general problem associated with pensions and insolvent corporations.

> [85] When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.
>
> [86] Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c.C-36 ("CCAA"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act,* R.S.O. 1990, c. P.8 *("PBA"),* and a constructive trust arising from the company's alleged breaches of fiduciary duty.

[24] Justice Deschamps described in paragraph 44 the importance of the deemed trust under the *PBA:*

> The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against the adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing

> priorities between creditors, the remedial purpose favors an approach that includes all wind up payments in the value of the deemed trust in order to achieve a broad protection.

[25] The majority position as set out above in the reasons of Justice Deschamps prevailed over the reasons of Justice Cromwell (for himself Chief Justice McLachlan and Rothstein J.) which held in essence the deficiency amounts could only "accrue" as that word is used in s.57(4) of the *PBA* when the amount is ascertainable. All of the justices agreed that the deemed trust provision contained in s.57(4) of the *PBA* does not apply to the windup deficit of a pension plan that has not been wound up (the Indalex Executive Plan) at the time of *CCAA* proceedings.

[26] The legal analysis in *Indalex* commenced with the 2010 decision of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60.

[27] In addition to providing definitive guidance on the purpose of the *CCAA* and the relationship between the *CCAA* and the *BIA*, more specifically on the facts of *Century Services* the Court held the deemed trust provisions of the *Federal Excise Tax Act* did not give rise to a priority over other creditors in a CCAA proceeding.

[28] It was held in *Century Services* that the *CCAA* and the *BIA* are to be read harmoniously and further that in the absence of express language carving out an exception for GST claims the provisions in both statutes nullify statutory deemed trusts in favour of the Crown.

[29] In summary, the more limited and general provisions of the *CCAA* permit insolvent corporations to restructure or indeed liquidate in a flexible and less formal fashion than would otherwise prevail with respect to priorities under the *BIA*.

[30] Prior to the arrival of *Indalex* in this Court in 2009[1], the governing decision dealing with pension claims of a deemed trust under the *PBA* seeking priority for unpaid pension contributions over secured creditors in a *CCAA* proceeding where the companies were unable to restructure and secured creditors sought to put the company into bankruptcy is *Ivaco (Re)* [2006] OJ No. 4152 (C.A.).

[31] Laskin JA for the Court of Appeal dealt with the argument that the provincial deemed trust takes priority based on a gap that exists between the *CCAA* and the *BIA* in the following passage:

> [61] The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rests on the proposition that a gap exists between the *CCAA* and the *BIA* in which the Provincial deemed trusts can be executed. This proposition runs contrary to the federal bankruptcy and insolvency regime and to the principle that the province cannot reorder priorities in bankruptcy.

[1] Decision in this Court at 2010, ONSC 1114 and in Court of Appeal for Ontario, 2011 ONCA 265.

[62] The federal insolvency regime includes the *CCAA* and the *BIA*. The two statutes are related. A debtor company under the *CCAA* is defined in s.2 by the company's bankruptcy or insolvency. Section 11(3) authorizes a thirty-day stay of any current or prospective proceedings under the *BIA*, and s.11(4) authorizes an extension of the initial thirty-day period. During the stay period, creditor claims and bankruptcy proceedings are suspended. Once the stay is lifted by court order or terminates by its own terms, simultaneously the creditor claims and bankruptcy proceedings are revived and may go forward.

[63] For the Superintendent's position to be correct, there would have to be a gap between the end of the *CCAA* period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. All rights must crystallize simultaneously at the end of the *CCAA* period. There is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. That is obviously so on the facts in this case because the Bank of Nova Scotia had already commenced a petition for bankruptcy, which was stayed by the initial order under the *CCAA*. Once the motions judge lifted the stay, the petition was revived. In my view, however, the situation would be the same even if no bankruptcy petition was pending.

[64] Where a creditor seeks to petition a debtor company into bankruptcy at the end of *CCAA* proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings. The *CCAA* and the *BIA* create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.

[65] Also, giving effect to the Superintendent's position, in substance, would allow a province to do indirectly what it is precluded from doing directly. Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the BIA, neither can it do so indirectly. See *Husky Oil, supra,* at paras, 32 and 39. At bottom the Superintendent seeks to alter the scheme for distributing an insolvent company's assets under the *BIA*. It cannot do so.

[66] The Superintendent relies on one authority in support of its position: the decision of the motions judge in *Usarco, supra*. In that case, although a bankruptcy petition had been brought, Farley J. nonetheless ordered the receiver to pay to the pension plan administrator the amount of the deemed trusts under the *PBA*. However, the facts in *Usarco* differed materially from the facts in this case.

[67] In *Usarco, CCAA* proceedings did not precede the bankruptcy petition. Moreover, in *Usarco* the petitioning creditor was not proceeding with its bankruptcy petition because its principal had died, and no other creditor took steps to advance the petition. Thus, unlike in this case, in *Usarco* it was unclear whether bankruptcy proceedings would ever take place.

> [68] Recently in *Re General Chemical Canada Ltd.*, [2005] 0.J. No. 5436, Campbell J. relied on this distinction, followed the motions judge's decision in the present case and refused to order payment of the amount of the deemed trusts under the PBA. He wrote at para. 35:
>
> > To conclude otherwise (absent improper motive on the part of Company or a major creditor) would be to negate both *CCAA* proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions.
>
> I agree. The factual differences between *General Chemical* and this case on the one hand, and *Usarco* on the other, render *Usarco* of no assistance to the Superintendent on this appeal.
>
> [69] Because the federal legislative regime under the *CCAA* and the *BIA* determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given greater priority, Parliament, not the courts, must do so. And Parliament has at least signalled its intention to do so.

[32] The further argument of unfairness in permitting a petition into bankruptcy to proceed if the companies was rejected (see paragraph 77 in *Ivaco):*

> The motions judge took into account the likely result of the Superintendent's claims if the Companies are put into bankruptcy. He recognized that bankruptcy would potentially reverse the priority accorded to the pension claims outside bankruptcy. Nonetheless, having weighed all the competing considerations, he exercised his discretion to lift the stay and permit the bankruptcy petitions to proceed. In my view, he exercised his discretion properly. I would not give effect to this ground of appeal.

[33] The issues in *Indalex* involved, as those in this instance do, pension plans, but with a difference. While both the plans faced funding deficiencies when *Indalex* filed for an Initial Order under the CCAA and requested a stay, the financial distress threatened the interests of all plan members. Following the Initial Order the Company was authorized to borrow US$24.4 million from DIP (Debtor in Possession) lenders who were granted priority over all other creditors.

[34] The plan members in *Indalex* sought, at the time of the Sanction and Approval Order a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable by way of priority over secured creditors with respect to the proceeds of assets sold. The parties reached agreement on an amount to be held by the Monitor subject to the Courts' determination as to whether or not the funds held were being held subject to a deemed trust.

[35] This Court's decision in *Indalex*[2] held that the deemed trust did not prevail over the priority of DIP financers was appealed. On appeal to the Court of Appeal of Ontario the claims

[2] 2010 ONSC 114, 2011 ONCA 265.

of deemed trust, of breach of fiduciary duty against the company and the requested remedy of constructive trust were successful.

[36] At the time of the Initial Order in *Indalex* the *Indalex* salary plan was in windup with a windup deficiency order. As at the date of the *Indalex* Initial Order the executive plan had not been wound up.

[37] The Supreme Court of Canada in *Indalex* was divided on the issues before it. Four of the judges being Deschamps, Moldaver JJ joined by Lebel J. and Abella J. on the issue held that the deemed trust provision of s.57 (4) of the *PBA* did provide a statutory scheme to provide a deemed trust in respect of the plan which had been wound up, which trust extended to the windup deficiency payments required by s.75(1)(b) of the Act which had "accrued" but were not yet due at the time of the sale of assets.[3]

[38] The three judges of the minority on the issue, being Chief Justice McLachlin, Justices Rothstein and Cromwell JJ., concluded that given the legislative history and evolution of the provisions the legislature never intended to include windup deficiency in a statutory deemed trust — rather the legislative intent is to exclude from the deemed trust liabilities that arise only on the date of wind up.

[39] Five of the judges, which excluded Lebel and Abella JJ., concluded that given the doctrine of federal paramountcy the DIP charges superseded the provincial statutory deemed trust which Abella J., Lebel J., Deschamps J. and Moldaver J. had found.

[40] Those same five judges concluded that the circumstances for the application of a constructive trust were not met notwithstanding a breach of duty by the applicant to give all plan members notice prior to the return of the motion seeking an Initial Order.

[41] The context of *Indalex's* distress was set out in the following paragraph from the reasons of Deschamps J.:

> 8. Indalex's financial distress threatened the interests of all the Plan members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act,* R.S.C, 1985, c.B-3 *("BIA"),* they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Lid v. Minister of National Revenue,*

[3] Pension Benefit Act RSO 1990, c. P.8 57 Accrued contributions

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into a pension fund. R,S.O. 1990, c. P.8, s. 57 (3).

Wind up

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations. R.S.O. 1990, c.P.9,s.57 (4).

> [1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the *CCAA* the Plan Members' position was uncertain.

[42] As was noted by the Supreme Court of Canada in *Century Services*[4] the *CCAA* and the *BIA* are two statutory regimes for re-organization and or liquidation. Of the two federal statutes the *CCAA* provides the opportunity for orderly restructuring and or liquidation with supervision by the Court.

[43] The *BIA* deals with priority distribution when there is no further purpose for the application of the *CCAA*. In the ordinary case under the *CCAA* an applicant company, following the Initial Order, seeks out agreement with its creditors and the formulation of a proposed Plan to be voted on by the creditors which when approved by the Court in effect creates a contract between the company and its creditors. (see Red Cross (2002) 35 CBR (4^{th}) 43 (SCJ).

[44] What has become more prominent in recent times has been the occurrence of what has become to be known as the liquidating *CCAA* of which both *Indalex* and GFPI are leading examples.

The Factual Distinction between *Indalex* and GFPI

[45] In this case the 29th Report of the Monitor dated February 21, 2013 describes the nature of the business of GFPI and its subsidiaries which manufactured Strand Board from facilities located in Canada and the United States.

[46] The Report goes on at paragraphs 29 to 32 to detail the deficiencies in the special payments required to be paid under the PBA to fund the windup deficiencies in the plans. Unlike the situation in *Indalex* neither of the pension plans of GFPI were in windup process at the time of the Initial Order or for some time after. Unlike *Indalex* there was no request made for DIP prior to a sale of assets following the Initial Order.

[47] Unlike *Indalex*, the Initial Order re GFPI contemplated in this case that the business of the company would continue for the purpose of the orderly disposition of various assets being various types of mills in Canada and the United States. The most significant of which were sold to Georgia Pacific, which has continued the operation of some of the mills.

[48] The summary of the position of the Plans as of the date of July 2013 is as follows:

> The Salaried Plan Wind Up Report disclosed an estimated windup deficit of $726,481. The Required Salaried Plan Payment as of August 24, 2012 was $328,298 plus interest from March 31, 2012, which amount was due to be paid by GFPI into the Salaried Plan.
>
> The required Salaried Plan Payment as at November 27, 2012 was $339,923. This amount includes interest in the amount of $11,625 (determined using the same

[4] 2010 SCC60 at para. 77.

rate used in determining the amount of the annual special payments needed to liquidate the windup deficiency). It is contested that interest should be included.

The Required Salaried Plan Payment as at March 31, 2013 was $485,715, including interest in the amount of $15,883. It is contested that interest should be included.

The Executive Plan Wind-Up Report disclosed an estimated wind-up deficit of $2,384,688.

The required Executive Plan Payment as of August 24, 2012 was $1,263,186 plus interest from February 29, 2012, which amount was due to be paid by GFPI into the Executive Plan.

The required Executive Plan Payment as at November 27, 2012 was $1,281,639, including interest in the amount of $18,453. It is contested that interest should be included.

The required Executive Plan Payment as at March 31, 2013 was $1,764,275, including interest in the amount of $20,803. GFPI does not accept that interest should be included.

[49] Submissions with respect to the Pension Motion were heard on November 27, 2012. During the same hearing, submissions were also heard on a motion by West Face Capital Inc. for an order lifting the stay of proceedings herein to facilitate a bankruptcy order against GFPI (the Bankruptcy Motion). Following that hearing, further written submissions were provided by the parties concerning the impact of the decision of the Supreme Court of Canada in *Re Indalex* on the issues in the two motions.

[50] The GFPI situation is a prime example of the flexible operation of the *CCAA*. The assets of the liquidating company were sold in a manner to provide the maximum benefit possible to the widest group of stakeholders.

[51] In this case the sale of certain of the assets on a going concern basis permitted the continuation of employment and benefits for many in the locality of the plants that they had previously worked in. The alternative in bankruptcy under the *BIA* might well have resulted in loss of employment for many and less recovery for all the secured creditors.

[52] The liquidation of the applicant under the *CCAA* did not proceed under an explicit Plan voted on by the creditors and approved by the Court.

[53] What did proceed was an Initial Order that in addition to a stay of proceedings (which has continued), permitted, but did not require the Applicant to pay ordinary operating expenses in the course of liquidating assets under the *CCAA* for the benefit of all stakeholders.

[54] The Initial Order specifically provides in paragraph 5 as follows:

> [5] **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order;
>
> (a) all outstanding and future wages, salaries, employee benefits and pension contributions, vacation pay, bonuses, and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, which, for greater certainty, shall not include any payments in respect of employee termination or severance; and

[55] No creditors including those representing the members of the pension plans opposed the granting of the Initial Order; the representatives of pension plans did not oppose the sale of assets on the occasions in which approval was sought and did not raise the issue of deemed trust until the windup orders made in August 2012.

[56] There was no objection on the part of any party to the payment which the Applicant made to the pension plans being the regular and ordinary contributions under the plans from 2009 until the wind up date.

[57] Up to August 2012 there was no request made on the part of the pension plans to set aside the Initial Order and provide for what might have been expected to be a deemed trust under wind up.

THE FIRST ISSUE.

Are any funds held by the Monitor and/or GFPI deemed to be held in trust pursuant to subsections 57(3) or 57(4) of the PBA for the beneficiaries of each of the Pension Plans as a result of the wind-up of the Pension Plans, and if so, what amounts of the funds held by the Monitor and/or GFPI are deemed to be held in trust?

[58] As noted above one of the two defined benefit pension plans at issue in *Indalex* was wound up prior to the commencement of the *CCAA* proceeding, and the other pension plan was wound up after the filing and the sale of *Indalex's* assets. The Supreme Court of Canada in *Indalex* did not find a deemed trust in respect of the latter pension plan. In considering this first issue, therefore, it is necessary to address the threshold issue of whether a deemed trust can be created during the pendency of a stay of proceedings.

[59] The majority in the Supreme Court of Canada in *Indalex* concluded that prior to an Initial Order a deemed trust did indeed arise when a pension plan was wound up in respect of windup deficits notwithstanding the difficulty in ascertaining the precise amount of the trust.

[60] One of the arguments made before the Supreme Court of Canada in *Indalex* and was rejected was that the priorities under the CCAA should parallel those under the *BIA* with the result that at the time of the Initial Order under the *CCAA* the *BIA* priorities by which pension claims would be unsecured would prevail. The following passage in the decision of Deschamps J. for herself and the majority that dealt with that issue rejected the proposition:

[50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII), 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

> Another point of convergence of the CCAA and the BIA relates to priorities. Because the CCAA is silent about what happens if reorganization fails, the BIA scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

[51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements, Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the BIA. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

[52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (Crystalline Investments Ltd. v. Domgroup Ltd,, 2004 SCC 3 (CanLII), 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the PPSA's scheme rather than the federal scheme set out in the *BIA*.

[56] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" *(Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation *(Husky Oil)*.

[57] None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected

> a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):
>
> > When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

[61] In the context of evaluating the important policy considerations of maintaining a stay of proceedings under a liquidating *CCAA*, it is important for the Court to consider the appropriate time for the *CCAA* proceeding to either come to an end or to lift the stay of proceedings to provide for an orderly transition from the *CCAA* process to the *BIA*. These proceedings are a good example. Initially, GE Canada initiated bankruptcy proceedings against GFPI. The response of GFPI was to seek protection under the *CCAA* and carry out an orderly liquidation of its assets. The Court permitted the orderly liquidation of the assets in the context of the *CCAA* to maximize recovery in the assets.

[62] Now, the usefulness of the *CCAA* proceedings has come to an end. Is it appropriate for the Court to allow the Second Lien Lenders to institute bankruptcy proceedings and to forthwith issue a Bankruptcy Order in respect of GFPI? The Second Lien Lenders urge that the regime that will be in place as a result of the Bankruptcy Order will be that contemplated by Parliament in the context of a liquidation and distribution of a bankrupt's assets. The process carried out for the transition from the *CCAA* proceedings to the *BIA* will it is suggested be as intended by Parliament and consistent with the principles established by the Supreme Court of Canada in the *Re Century Services* case.

[63] It is clear that there are insufficient proceeds to pay the claims of all of the creditors of GFPI. Reversing priorities can be a legitimate purpose for the institution of bankruptcy proceedings. Lifting the stay provided for in the Initial Order at this time, the Second Lien Lenders submit is the logical extension of that legitimate purpose. Accordingly, it is said appropriate in the circumstances of this case that the stay be lifted and that a Bankruptcy Order be issued by the Court in respect of GFPI forthwith.

[64] I accept that to impose the same priorities under the *CCAA* as the *BIA* without careful consideration might well undermine the flexibility of the *CCAA*. For example the *CCAA* Court itself may make an order on application on notice declaring a person to be a critical supplier (s.11.4) with the charge in favour of that supplier. This is but one example of the flexibility of the *CCAA* that may not be available under the *BIA* once approved by the Court. The same is the case for DIP financing as was the case in *Indalex*.

(65) Where there is a *CCAA* Plan approved by creditors the effect of the contract created may alter what would otherwise be priorities under the *BIA*.

[66] Where there is a liquidating *CCAA* which proceeds by way of an Initial Order and the subsequent sale of assets with Vesting Orders all the creditors have an opportunity to object to the

sales or process which is in effect an implicit *CCAA* Plan. A vote becomes necessary only when there is lack of consensus and a priority dispute requires resolution by a vote. In this case the claim of the secured creditors exceeded and continues to exceed, the value of the assets.

[67] There may be good and solid reasons acceptable to creditors and stakeholders who agree to a process under the *CCAA* either in a formal Plan or during the course of a liquidation to alter the priorities that would come into play should there be an assignment or petition into bankruptcy.

[68] The position of the Pension Administrator, the Superintendent of Financial Services and those parties in support of their position, in this case is that in the circumstances the deemed trust which they say arises under the *PBA* should prevail over other creditor claims notwithstanding the *CCAA* Initial Order.

[69] The arguments in support of a deemed trust arising upon windup of the pension plans within the *CCAA* regime are summarized as follows:

i) GFPI should not be excused from any obligation with respect to the pension plans.

ii) The wind ups which triggered the deemed trusts were the subject of specific judicial authorization and even assuming the stay of proceedings under the Initial Order applies, leave of the Court has been given to windup which triggers the deemed trusts.

iii) The deemed trusts are triggered automatically upon wind up by independent operation of a valid provincial law which has not been overridden by specific order.

iv) The Second Lien Creditor should not be permitted to challenge the deemed trusts at this stage since they did not challenge the windup orders.[5]

[70] From my review of the decisions of the Supreme Court of Canada in *Century Services* and *Indalex* I am of the view that the task of a *CCAA* supervising judge when confronted with seeming conflict between Federal insolvency statute provisions and those of Provincial pension obligations is to make the provisions work without resort to the issue of federal paramountcy except where necessary.

[71] The decision of the Supreme Court of Canada in *Indalex* assists in the execution of this task. The deemed trust that arises upon wind up prevails when the windup occurs before insolvency as opposed to the position that arises when wind up arises after the granting of an Initial Order.

[5] submission was made in the factum of PWC that all funds held by the Monitor should be regarded as proceeds of accounts and inventory therefore resulting in priority being directed by the Personal Property Security Act (PPSA) s.30 (7) which would subordinate other security to the deemed trusts. This submission was not seriously pursued and in view of the conclusion I reached on other grounds it is not necessary to deal with the argument.

[72] The *Indalex* decision provides predictability and certainty of entitlement to the stakeholders of an insolvent company. If on the application for an Initial Order any party seeks to challenge that priority for the purpose of providing DIP financing in furtherance of a Plan or work out liquidation they are free to do so at the time of the Initial Order. Secured creditors can then decide whether they are willing to pursue a Plan or immediately apply for a bankruptcy order.[6]

Should GFPI be excused from wind up deficiency payments?

[73] I am of the view that the question advanced by the Pension Administrators should be put another way "Is GFPI obligated in view of the provisions in para. 5 of the Initial Order (see paragraph 54) above to make the special payments that arise by virtue of the provisions of the *PBA*?

[74] I accept the argument of the Pension Administrator and all those urging the deemed trust application that the Approval and Vesting Orders necessarily do not for all purposes freeze priorities at the point of sale. Absent other order of the Court, made at the time however, they do provide the certainty required by creditors who are asked to concur with the sales.

[75] In the situation of GFPI there was a recognition in para. 5 of the Initial Order that there may be a challenge to expenses on an ongoing basis.

[76] Where distribution to creditors is made following a sale of assets on full notice, that distribution in accordance with an Approval and Vesting Order does freeze the priorities with respect to that distribution, absent specific direction otherwise.

[77] In this case, the issue of priority is said to arise in respect of a specific sum of money in the hands of the Monitor in respect of funds from assets sold and not distributed and is said to be determined in accordance with the Court Order made at the time of determination which acknowledged all the pension obligations including wind up.

[78] To suggest that all claims and priorities never sought would apply to the Approval Orders past or future would, in my view, be entirely contrary to the principles and scheme of the *CCAA*. To conclude otherwise would risk that secured creditors to whom distribution had been made would be at risk of disgorgement and unpaid secured creditors to uncertainty of priority in future recovery.

[79] This is why in my view the only consistent and predictable operation of the *CCAA* should give predictability as of the Initial Order to enable an informed decision to be made whether or not to proceed with bankruptcy. This issue is implicitly revisited every time there is a sale and distribution of assets.

[6] It is not entirely clear from the various decisions in *Indalex* as to precisely when the deemed trust which can take priority operates. The date of the Initial Order was given as one possibility the other being the date of sale of the assets. In this case it does not really matter which date applies as the Initial Order and primary asset sale pre-date any deemed trust.

[80] The Supreme Court of Canada decision in *Indalex* stands for the proposition that provincial provisions in pension areas prevail prior to insolvency but once the federal statute is involved the insolvency provision regime applies.

[81] Justice Cromwell at paragraphs 177 and 178 in *Indalex* spoke of the problem of extending the deemed trust. While he was speaking of the entirety of the issue his comments below are equally applicable to a deemed trust said to arise during insolvency:

> 177 Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.
>
> 178 While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*.

[82] That consistency prevails if the limitation on deemed trust is limited to those plans already in windup as of the date of the Initial Order.

[83] During the course of the sale of assets the Initial Order continued to operate presumably to the advantage of all stakeholders since the asset sale as here proceeded in an advantageous fashion for maximizing return on assets, for the benefit of those who were able to transfer employment and in an advantageous fashion for the pension plans which received the benefit of ongoing regular payments.

[84] The alternative had the bankruptcy petition proceeded would have seen a significant loss particularly to the pension plans.

[85] I note as have many judges before me that the solution to the problem created by section 67 of the *BIA* which leaves pension obligations unsecured and Provincial statutes which seek to raise the priority lies with the federal and provincial governments not with judicial determination. As Justice Deschamps noted in Indalex:

> [81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009- 68; see also Bill C-

501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency — at its essence — is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

[86] I conclude that given the uncertainty in this area of legal decision together with the provisions of paragraph 5 of the Initial Order that GFPI was not under an obligation to make the special windup payments and was correct is seeking direction from this Court.

[87] I can only presume that had GFPI sought to make the special payments that they would have been opposed on much the same grounds as now advanced by the Second Lien Lenders.

THE SECOND ISSUE

Did the Court Order authorize the Deemed Trust?

[88] It is urged in the second ground for priority of the deemed trust that this Court authorized the wind up of the Pension plans which by the operation of the *PBA* imposes the deemed trust.

[89] The Order authorizing the windup in its operative provisions with respect to wind up is as follows:

> **This Court Orders** that the Monitor is hereby authorized and directed, until further Court Order, to hold back from any distribution to creditors of GFPI an

> amount of $191,245.00 which is estimated to be the amount necessary to satisfy the wind-up deficit of the Timmins Salaried Plan. For greater certainty nothing in this order affects or determines the priority or security of the claims against these funds.
>
> **This Court Orders** that with respect to the Remaining Applicants, the Stay Period as defined by the Initial Order, be and is hereby extended to November 30, 2011.

[90] Similar wording was in the order with respect to the Executive Plan.

[91] Nothing in those Orders dealt with the issue of deemed trust. No one appearing raised the issue of deemed trust. The paragraph above dealt with the issue presented and preserved the argument that arises today namely whether in context of a claimed deemed trust the estimated windup deficit was to be held from distribution.

[92] One can understand why the issue was not raised beyond setting aside the amount and leaving the issue for later determination. For their own reasons each side was content to have the *CCAA* process continued. It was to the benefit of all party stakeholders.

[93] When a pension plan is wound up the precise amount of money necessary to fulfill the obligation to each and every pensioner is at that time uncertain. Over time as windup occurs those amounts become more certain and that is why the deemed trust concept comes into play.

[94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a *CCAA* order unless agreed to. Even if the obligation could be said to be in the ordinary course for an insolvent company GFPI was not obliged to make the payments, (See paragraph 45 of the Initial Order above).

[95] This is precisely the reason for the granting of a stay of proceedings that is provided for by the *CCAA*. Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made. The decision of the Supreme Court of Canada in *Indalex* appears to stand for the proposition that once a valid Initial Order is made under the *CCAA* the Federal insolvency regime is paramount, and absent any agreement or other Order where there is conflict, the Initial Order prevails over an applicant's obligation under the provincial statute.

[96] This conclusion provides the predictability and certainty that is necessary for those who are willing to consider financing a distressed entity. It is unlikely that lenders would be willing to support a distressed entity if they had little or no information on the amount or timing of pension obligations.

[97] The Supreme Court of Canada decision in *Indalex* alerts lenders who are aware or are taken to be aware prior to insolvency of the fact of a deemed trust when there is wind up even though the amount may not be known.

[98] Where a pension plan has not been wound up prior to insolvency the potential for a windup deficiency is entirely uncertain. Since a deemed trust does not arise until there is a windup order it would be entirely inconsistent with the insolvency regime of the *CCAA* (absent additional legislation) to expose lending creditors to an uncertain priority both in time and amount.

[99] It is to be noted that on the sale of assets as they occurred there was no issue raised about the priority of claims prior to those sales or distribution of assets as reflected in the fact that payments were made to entirely discharge the security of the First Lien Lenders and a portion of the obligation to the Second Lien lenders.

[100] The Court did not authorize a deemed trust to prevail in insolvency by granting windup orders.

Should the Stay be lifted to permit the petition in bankruptcy to proceed?

[101] If one accepts the above analysis a lifting of the stay to permit bankruptcy is not necessary to defeat a deemed trust said to arise after the Initial Order.

[102] The basis of the motion on behalf of West Face Capital Inc. (the Second Lien Lenders) is set out in paragraph 2 of their factum:

> The Second Lien Lenders seek an Order lifting the stay of proceedings in respect of GFPI for the purpose of facilitating the issuance of a Bankruptcy Order in respect of GFPI forthwith. It is appropriate that a bankruptcy proceeding be put into place immediately, otherwise the priority secured interests of the Second Lien Lenders will be irrevocably prejudiced. In the absence of a bankruptcy proceeding, certain parties with an interest in advancing the claims of the pension beneficiaries have taken steps to re-position claims as priority claims or claims that must be paid immediately. The factual and legal basis for those claims have been advanced during the *CCAA* proceedings, notwithstanding the stay of proceedings.

[103] Those opposed to the motion to lift the stay (which is supported by GFPI and the Monitor) urge that what is being requested is extraordinary relief from the requirements of the *PBA* and GFPI should not be excused from its obligation to make special payments simply at the asking.

[104] While acknowledging that the court does have broad discretion, it is urged there is nothing in the circumstances of this case which would justify relieving GFPI of its obligation to make special payments.

[105] It is further submitted that there is no decision that stands for the proposition that bankruptcy is automatic at the end of a *CCAA* proceeding and no independent reason for granting the bankruptcy order.

[106] It is well settled that bankruptcy may well be an appropriate outcome of a *CCAA* process that has failed or has run its course. In *Century Services* 2010 SCC 60 at paragraph 23, Justice Deschamps noted "because the *CCAA* is silent about what happens if reorganization fails, the

BIA scheme of liquidation distribution necessarily supplies the backdrop for what will happen if a *CCAA* is ultimately unsuccessful".

[107] The issue of terminating a CCAA proceeding by permitting a petition in bankruptcy to proceed is one of discretion on the part of the supervising judge (see *Ivaco* (Re) [2006] 0.J. No. 4152 para. 77 and Nortel Networks Corp. (Re) 2009 ONCA 833 at para 41.)

[108] Those who seek to have a stay lifted or to oppose the stay being lifted to obtain other relief must be acting in good faith. There is no evidence of lack of good faith here beyond the suggestion of delay.

[109] The parties resisting the lifting of the stay urge that it not be granted on several grounds. The first is based on the delay on the part of West Face in bringing the motion. It is asserted that the motion should have been brought when the applicant first made it returnable on its motion for direction.

[110] It is also urged that given the passage of time that the Monitor should be directed to make payments of those amounts which would otherwise have been made to date under the windup orders of the Superintendent.

[111] The argument advanced by the Pension Administrator is that the *CCAA* process has completed what it set out to do, namely, liquidate the assets of GFPI and therefore there is no purpose to be served by lifting the stay and therefore the Order should not be granted to allow bankruptcy.

[112] West Face seeks to lift the stay of proceedings granted by the Initial Order to enable the Petition commenced in March 2010 to proceed.

[113] Like those opposing, West Face takes the position that the *CCAA* process has run its course and there is no likelihood of recovery on any other assets and adds therefore no reason for the applicant to continue to make any pension payments on account of pension plans. Since the security of West Face on behalf of the Second Liens Lenders is valid they are entitled to be paid from the assets on hand and a bankruptcy Order would expedite recovery.

[114] What then is the process that is involved under the CCAA when there is not one but several sales of assets of an insolvent company over a period of time during which no one objects to the continuation of "payments being made in the ordinary course" which include ongoing payments to pension plans.

[115] The *CCAA* continues to be sufficiently flexible to allow for an ongoing sale of assets without the necessity of a formal plan voted on by creditors. As I noted above, a sale of assets following an Initial Order is an implicit plan.

[116] In this case following the sale of the major assets to Georgia Pacific there was a distribution the effect of which was to pay out the First Lien Lenders in entirety and indeed some payments to the Second Lien Lenders.

[117] Following the granting of leave in *Indalex* by the Supreme Court of Canada all of the parties in this case recognized that the issue of priority of deemed trusts would likely be clarified by that Court's decision in that case.

[118] From the time that the motion of GFPI for direction with respect to payments on windup deficiency was first brought before this court, there was agreement by all Counsel that the Supreme Court decision in *Indalex* if not determinative would provide considerable guidance on the issues in this case.

[119] To my knowledge no party has been prejudiced by the delay in dealing with the priority issue. For this reason I do not accept the proposition that West Face should be denied leave on the basis of delay.

[120] This leaves the question as to whether or not on the facts of this case leave to lift the stay should be granted. It was to the advantage of all stakeholders presumably including the pension plans and the Second Lien Lenders that the *CCAA* process be utilized for the sale of assets rather than the *BIA* process.

[121] I am of the view that in the absence of provisions in a Plan under the *CCAA* or a specific court order, any creditor is at liberty to request that the *CCAA* proceedings be terminated if that creditor's position may be better advanced under the *BIA*.

[122] The question then is whether it is fair and reasonable bearing in mind the interests of all creditors that those of the creditor seeking preference under the *BIA* be allowed to proceed. In this Court's decision in *Indalex*, I questioned whether it would be fair to permit the stay to be lifted if it was simply because of the uncertainty as to whether at that time prior to the later appeals that the deemed trust provisions of the *PBA* prevailed.

[123] In this case West Face urges its interests should prevail because otherwise a deemed trust which did not exist at the time of the Initial Order would *de facto* be given priority by the requirement that GFPI make wind up deficiency payments, to pay priorities that would not be recognized under the *BIA*.

[124] I conclude that the argument on behalf of West Face should succeed. The purpose of the process under insolvency is to provide predictability to the interests of creditors but at the same time allow for flexibility as under the *CCAA* where that provides a greater return than would the operation of the *BIA*. That has been the case here.

[125] If the purpose under the insolvency statutes is to maximize recovery to the extent possible for all concerned, then the imposition of a priority which arises only in the middle of insolvency except where made like a DIP financing, for the purpose of enhancing recovery would likely result in credit being much more difficult if not impossible to obtain in the first instance.

[126] The Supreme Court of Canada in *Indalex* limited the deemed trust provisions of the *PBA* to obligations prior to insolvency. To deny the relief sought by West Face would in my view be at odds with that decision.

[127] For the above reasons the Order sought by West Face will be granted. Those opposing the stay urged that all payments that should have been made under the deficiency wind up be made until the date of this decision.

[128] While I have some sympathy for the position of the pension plans in these circumstances I am satisfied that the amounts held by the Monitor should not be applied to the pension plans. From the time of the return of the motion for directions all parties were aware of the need for a determination to be made following the Supreme Court of Canada decision in *Indalex*.

Conclusion

[129] As noted above in this decision virtually all of the judges who have had to deal with this difficult issue of pensions and insolvency have commented that ultimately these are matters to be dealt with by the Federal and Provincial governments.

[130] The difficulty of dealing with these complex issues is not restricted to Canada. In her book of 2008[7] Prof. Janis Sara has chronicled the way in which various countries around the world have sought to deal with the difficulty of pension priority in the context of business financing and insolvency. The conclusion is there is no easy answer.

[131] I have no doubt that the question of pensions will be an ongoing issue for some time to come. There is an urgency that legislators both Federal and Provincial address the issue.

[132] In this case and for the above reasons the priority of proceeds will be to the Secured Creditors in respect of those amounts that otherwise would be payable in respect of windup deficiencies.

[133] I would not think this is an appropriate matter for costs disposition but if any Counsel disagrees or there is any further issue with respect to an Order following from this decision I may be spoken to.

C. L. CAMPBELL J.

Date: September 20, 2013

[7] Employee & Penson Claims during Company Insolvency – A Comparative Study of 62 Jurisdictions, Thomson & Carswell.

Court File No. CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 8TH
	)	
JUSTICE MORAWETZ	)	DAY OF MAY, 2012

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 SINO-FOREST CORPORATION

ORDER

(Pöyry Settlement Leave Motion)

THIS MOTION made by the Ad Hoc Committee of Purchasers of the Applicant's Securities (the "**Moving Party**"), for advice and direction regarding the impact of the stay of proceedings herein on certain proceedings in the action styled as Trustees of the Labourers' Pension Fund of Central and Eastern Canada et al. (the "**Ontario Plaintiffs**") v. Sino-Forest Corporation et al., bearing (Toronto) Court File No. CV-11-431153-00CP (the "**Ontario Class Action**") and in the action styled as Guining Liu (the "**Quebec Plaintiff**") v. Sino-Forest Corporation et al., bearing (Quebec) Court File No. 200-06-000132-111 (the "**Quebec Class Action**"), was heard this day, at the courthouse at 330 University Avenue, Toronto, Ontario,

ON READING the materials summarized in Schedule "A" to the factum dated May 7, 2012, filed on behalf of the Monitor, as amended, and on hearing the submissions of counsel for FTI Consulting Canada Inc. in its capacity as monitor (the "**Monitor**") and in the presence of counsel for the Moving Party, Pöyry (Beijing) Consulting Company Limited ("**Pöyry**"), Sino-Forest Corporation, the directors and officers named as defendants (the "**Directors**") in the Ontario Class Action, Ernst & Young LLP, BDO Limited, the Underwriters named as defendants

in the Ontario Class Action, and an ad hoc Committee of Bondholders and those other parties present, no one appearing for the other parties served with notice of this motion, although duly served as appears from the affidavit of service, filed:

1. **THIS COURT ORDERS** that further service of the Notice of Motion and Motion Record on any party not already served is hereby dispensed with, such that this motion is properly returnable today.

2. **THIS COURT ORDERS** that:

   a. the Ontario Plaintiffs may proceed on May 17, 2012 in the Ontario Class Action only for the relief sought in paragraphs (f) and, to the extent required, paragraph (g) of the prayer for relief set out in the notice of motion dated April 2, 2012 in Court File No. CV-11-431153-00CP filed in the Ontario Class Action, which notice of motion is in respect of a settlement between the Ontario Plaintiffs, Quebec Plaintiff and Pöyry (the "**Ontario Pöyry Settlement Motion**"); and,

   b. the Quebec Plaintiff may proceed with similar relief as described in paragraph 2(a) of this order on a similar schedule in a companion motion (the "**Quebec Pöyry Settlement Motion**") brought in the Quebec Class Action.

3. **THIS COURT ORDERS** that the Ontario Plaintiffs and the Quebec Plaintiff may proceed after September 1, 2012 with (1) the balance of the relief sought in the Ontario Pöyry Settlement Motion and the Quebec Pöyry Settlement Motion, (2) a motion for approval of the settlement between the Ontario Plaintiffs, the Quebec Plaintiff and Pöyry and (3) any motions that are necessary to give effect to the motions mentioned in (1) and (2) above, on dates to be fixed by the Courts supervising the Ontario Class Action and the Quebec Class Action, such motions to be brought on notice to the parties in the Ontario Class Action and the Service List.

4. **THIS COURT ORDERS** that this order is without prejudice to the defendants' rights to oppose in the Ontario Class Action and Quebec Class Action the relief

CITATION: Elleway Acquisitions Limited v. 4358376 Canada Inc., 2013 ONSC 7009
COURT FILE NO.: CV-13-10320-00CL
DATE: 20131203

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c.C.43, AS AMENDED.

RE: **ELLEWAY ACQUISITIONS LIMITED, Applicant**

AND:

4358376 CANADA INC. (OPERATING AS ITRAVEL 2000.COM), THE CRUISE PROFESSIONALS LIMITED (OPERATING AS THE CRUISE PROFESSIONALS), AND 7500106 CANADA INC. (OPERATING AS TRAVELCASH), Respondents

BEFORE: **MORAWETZ J.**

COUNSEL: **Jay Swartz and Natalie Renner, for the Applicant**

John N. Birch, for the Respondents

David Bish and Lee Cassey, for Grant Thornton, Proposed Receiver

HEARD
&ENDORSED: NOVEMBER 4, 2013

REASONS: **DECEMBER 3, 2013**

ENDORSEMENT

[1] At the conclusion of argument on November 4, 2013, the motion was granted with reasons to follow. These are the reasons.

[2] On November 4, 2013, Grant Thornton Limited was appointed as Receiver (the "Receiver") of the assets, property and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com ("itravel")), 7500106 Canada Inc., (operating as Travelcash ("Travelcash")), and The Cruise Professionals Limited, operating as The Cruise Professionals ("Cruise" and, together with itravel2000 and Travelcash, "itravel Canada"). See reasons reported at 2013 ONSC 6866.

[3] The Receiver seeks the following:

(i) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "itravel APA") between the Receiver and 8635919 Canada Inc. (the "itravel Purchaser") dated on or about the date of the order, and attached as Confidential Appendix I of the First Report of the Receiver dated on or about the date of the order (the "Report");

(b) approving the transactions contemplated by the itravel APA;

(c) vesting in the itravel Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the itravel APA) (collectively, the "itravel Assets"); and

(d) sealing the itravel APA until the completion of the sale transaction contemplated thereunder; and

(ii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Cruise APA", and together with the itravel APA and the Travelcash APA, the "APAs") between the Receiver and 8635854 Canada Inc. (the "Cruise Purchaser"), and together with the itravel Purchaser and the Travelcash Purchaser, the "Purchasers") dated on or about the date of the order, and attached as Confidential Appendix 2 of the Report;

(b) approving the transactions contemplated by the Cruise APA; and

(c) vesting the Cruise Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Cruise APA) (the "Cruise Assets", and together with the itravel Assets and the Travelcash Assets, the "Purchased Assets"); and

(d) sealing the Cruise APA until the completion of the sales transaction contemplated thereunder; and

(iii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Travelcash APA") between the Receiver and 1775305 Alberta Ltd. (the "Travelcash Purchaser") dated on or about the date of the order, and attached as Confidential Appendix 3 of the Report;

(b) approving the transactions contemplated by the Travelcash APA;

(c) vesting in the Travelcash Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Travelcash APA) (collectively, the "Travelcash Assets"); and

(d) sealing the Travelcash APA until the completion of the sale transaction contemplated thereunder.

[4] The Receiver further requests a sealing order: (i) permanently sealing the valuation reports prepared by Ernst & Young LLP and FTI Consulting LLP, attached as Confidential Appendices 4 and 5 of the Report, respectively; and (ii) sealing the Proposed Receiver's supplemental report to the court dated on or about the date of the order (the "Supplemental Report"), for the duration requested and reasons set forth therein.

[5] The motion was not opposed. It was specifically noted that Mr. Jonathan Carroll, former CEO of itravel, did not object to the relief sought.

[6] The Receiver recommends issuance of the Orders for the factual and legal bases set forth herein and in its motion record. The purchase and sale transactions contemplated under the APAs (collectively, the "Sale Transactions") are conditional upon the Orders being issued by this court.

General Background

[7] Much of the factual background to this motion is set out in the endorsement which resulted in the appointment of the Receiver (2013 ONSC 6866), and is not repeated.

[8] The Receiver has filed the Report to provide the court with the background, basis for, and its recommendation in respect of the relief requested. The Receiver has also filed the Supplemental Report (on a confidential basis) as further support for the relief requested herein.

[9] In the summer of 2010, Barclays Bank PLC ("Barclays") approached Travelzest and stated that it no longer wished to act as the primary lender of Travelzest and its subsidiaries, as a result of certain covenant breaches under the Credit Agreement. This prompted Travelzest to consider and implement where possible, strategic restructuring arrangements, including the divestiture of assets and refinancing initiatives.

[10] In September 2010, Travelzest publicly announced its intention to find a buyer for the Travelzest business.

Travelzest's Further Sales and Marketing Processes

[11] In the fall of 2011, a competitor of itravel Canada contacted Travelzest and expressed an interest in acquiring the Travelzest portfolio. Negotiations ensued over a period of three months. However, the parties could not agree on a Purchase Price or terms, and negotiations ceased in December 2011.

[12] In early 2012, an informal restructuring plan was developed, which included the sale of international companies.

[13] The first management offer was received in April 2012. In addition, a sales process continued from May to October 2012, which involved 50 potential bidders within the industry. Counsel advised that 14 parties pursued the opportunity and four parties were provided with access to the data room. Four offers were ultimately made but none were deemed to be feasible, insofar as two were too low, one withdrew and the management offer was withdrawn after equity backers were lost.

[14] In September 2012, a second management offer was received, which was subsequently amended in November 2012. The second management offer did not proceed.

[15] In January 2013, discussions ended and the independent committee was disbanded.

[16] In March and April 2013, three Canadian financial institutions were approached about a refinancing. However, no acceptable term sheet was obtained.

[17] In May 2013, Travelzest entered into new discussions with a prior bidder from a previous sales process. Terms could not be reached.

[18] In May 2013, a third management offer was received which was followed by a fourth management offer in July, both of which were rejected.

[19] In July 2013, a press release confirmed that Barclays was not renewing its credit facilities with the result that the obligations became payable on July 12, 2013. However, Barclays agreed to support restructuring efforts until August 30, 2013.

[20] In August 2013, a fifth management offer was made for the assets of itravel Canada, which included limited funding for liabilities. This offer was apparently below the consideration offered in the previous management offers. The value of the offer was also significantly lower than the Barclays' indebtedness and lower than the aggregate amount of the current offer from the Purchasers.

Barclays' Assignment of the Indebtedness to Elleway

[21] On August 21, 2013, a consortium led by LDC Logistics Development Corporation ("LDC"), which included Elleway (collectively, the "Consortium") submitted an offer for

Barclays debt and security, as opposed to the assets of Itravel Canada. On August 29, 2013, Elleway and Barclays finalized the assignment deal, which was concluded on September 1, 2013.

[22] The consideration paid by Elleway was less than the amount owing to Barclays. Barclays determined, with the advice of KPMG London, that the sale of its debt and security, albeit at a significant discount, was the best available option at the time.

[23] itravel Canada is insolvent. Elleway has agreed pursuant to the Working Capital Facility agreement to provide the necessary funding for itravel Canada up to and including the date for a court hearing to consider the within motion. However, if a sale is not approved, there is no funding commitment from Elleway.

Proposed Sale of Assets

[24] The Receiver and the Purchasers have negotiated the APAs which provide for the going-concern purchase of substantially all of the itravel Canada's assets, subject to the terms and conditions therein. The purchase prices under the APAs for the Purchased Assets will be comprised of a reduction of a portion of the indebtedness owed by Elleway under the Credit Agreement and entire amount owed under the Working Capital Facility Agreement and related guarantees, and the assumption by the Purchasers of the Assumed Liabilities (as defined in each of the Purchase Agreements and which includes all priority claims) and the assumption of any indebtedness issued under any receiver's certificates issued by the Receiver pursuant to a funding agreement between the Receiver and Elleway Properties Limited. The aggregate of the purchase prices under the APA is less the amount of the obligations owed by itravel Canada to Elleway under the Credit Agreement and Working Capital Facility Agreement and related guarantees.

[25] Pursuant to the APAs, the Purchasers are to make offers to 95% of the employees of itravel Canada on substantially similar terms of such employees current employment. The Purchasers will also be assuming all obligations owed to the customers of itravel Canada.

[26] In reviewing the valuation reports of FTI Consulting LLP and Ernst & Young LLP and considering the current financial position of itravel Canada, the Receiver came to the following conclusions:

(a) FTI Consulting LLP and Ernst & Young LLP concluded that under the circumstances, the itravel Canada companies' values are significantly less than the secured indebtedness owed under the Credit Agreement;

(b) Barclays, in consultation with its advisor, KPMG London, sold its debt and security for an amount lower than its par value;

(c) the book value of the itravel Canada's tangible assets are significantly less than the secured indebtedness; and

(d) Elleway has the principal financial interest in the assets of itravel Canada, subject to priority claims.

[27] The Receiver is of the view that the Sale Transactions with the Purchasers are the best available option as it stabilizes itravel Canada's operations, provides for additional working capital, facilitates the employment of substantially all of the employees, continues the occupation of up to three leased premises, provides for new business to itravel Canada's existing suppliers and service providers, assumes the liability associated with pre-existing gift certificates and vouchers, allows for the uninterrupted service of customer's travel arrangements and preserves the goodwill and overall enterprise value of the Companies. In addition, the Receiver believes that the purchase prices under the APAs are fair and reasonable in the circumstances, and that any further marketing efforts to sell itravel Canada's assets may be unsuccessful and could further reduce their value and have a negative effect on operations.

[28] The Receiver's request for approval of the Orders raises the following issues for this court.

A. What is the legal test for approval of the Orders?

B. Does the legal test for approval change in a so-called "quick flip" scenario?

C. Does partial payment of the purchase price through a reduction of the indebtedness owed to Elleway preclude approval of the Orders?

D. Does the Purchasers' relationship to itravel Canada preclude approval of the Orders?

E. Is a sealing of the APAs until the closing of the Sale Transactions contemplated thereunder and a permanent sealing of the FTI Consulting LLP and Ernst & Young LLP valuation and the Supplemental Report Warranted?

A. What is the Legal Test for Approval of the Orders?

[29] Receivers have the powers set out in the order appointing them. Receivers are consistently granted the power to sell property of a debtor, which is, indeed, the case under the Appointment Order.

[30] Under Section 100 of the *Courts of Justice Act (Ontario)*, this Court has the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

[31] It is settled law that where a Court is asked to approve a sales process and transaction in a receivership context, the Court is to consider the following principles (collectively, the "*Soundair* Principles"):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;

b. the interests of all parties;

c. the efficacy and integrity of the process by which the party obtained offers; and

d. whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.); *Skyepharma PLC v. Hyal Pharmaceutical Corp*. (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)).

[32] In this case, I am satisfied that evidence has been presented in the Report, the Jenkins Affidavit and the Howell Affidavit, to demonstrate that each of the *Soundair* Principles has been satisfied, and that the economic realities of the business vulnerability and financial position of itravel Canada (including that the result would be no different in a further extension of the already extensive sales process) militate in favour of approval of the issuance of the Orders.

B. Does the Legal Test for Approval Change in a So-called "Quick Flip" Scenario?

[33] Where court approval is being sought for a so-called "quick flip" or immediate sale (which involves, as is the case here, an already negotiated purchase agreement sought to be approved upon or immediately after the appointment of a receiver without any further marketing process), the court is still to consider the *Soundair* Principles but with specific consideration to the economic realities of the business and the specific transactions in question. In particular, courts have approved immediate sales where:

(a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and

(b) delay of the transaction will erode the realization of the security of the creditor in sole economic interest.

Fund 321 Ltd. Partnership v. Samsys Technologies Inc. (2006), 21 C.B.R. (5th) 1 (Ont. S.C.J.); *Bank of Montreal v. Trent Rubber Corp*. (2005), 13 C.B.R. (5th) 31 (Ont. S.C.J.).

[34] In the case of *Re Tool-Plas,* I stated, in approving a "quick flip" sale that:

> A "quick flip" transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a "quick flip" transaction, the court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the "quick flip" transaction would realistically be any different if an extended sales process were followed.

Tool-Plas Systems Inc., Re (2008), 48 C.B.R. (5th) 91 (Ont. S.C.J.).

[35] Counsel submits that the parties would realistically be in no better position were an extended sales process undertaken, since the APAs are the culmination of an exhaustive marketing process that has already occurred, and there is no realistic indication that another such process (even if possible, which it is not, as itravel Canada lacks the resources to do so) would produce a more favourable outcome.

[36] Counsel further submits that a "quick flip" transaction will be approved pursuant to the *Soundair* Principles, where, as in this case, there is evidence that the debtor has insufficient cash to engage in a further, extended marketing process, and there is no basis to expect that such a process will result in a better realization on the assets. Delaying the process puts in jeopardy the continued operation of itravel Canada.

[37] I am satisfied that the approval of the Orders and the consummation of the Sale Transactions to the Purchasers pursuant to the APAs is warranted as the best way to provide recovery for Elleway, the senior secured lender of itravel Canada and with the sole economic interest in the assets. The sale process was fair and reasonable, and the Sale Transactions is the only means of providing the maximum realization of the Purchased Assets under the current circumstances.

C. Does Partial Payment of the Purchase Price Through a Reduction of the Indebtedness Owed to Elleway Preclude Approval of the Orders?

[38] Partial payment of the purchase price by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owned under the Working Capital Facility Agreement does not preclude approval of the Orders. This mechanism is analogous to a credit bid by a secured lender, but with the Purchasers, instead of the secured lender, taking title to the purchased assets. As noted, the Receiver understands that following closing of the transactions contemplated under the APAs, that Elleway (or an affiliate thereof) will hold an indirect equity interest in the Purchasers. It is well-established in Canada insolvency law that a secured creditor is permitted to credit bid its debt in lieu of providing cash consideration.

Re White Birch Paper Holding Co. (2010), 72 C.B.R. (5th) 74 (Qc. C.A.); *Re Planet Organic Holding Corp*. (June 4, 2010), Toronto, Court File No. 10-86699-00CL, (S.C.J. [Commercial List]).

[39] This court has previously approved sales involving credit bids in the receivership context. See *CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.* (April 26, 2012), Toronto, Court File No. CV-12-9622-00CL, (S.C.J. [Commercial List]).

[40] It seems to me that, in these circumstances, no party is prejudiced by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owed under the Working Capital Facility Agreement as part of the Purchasers' payment of the purchase prices, as the Purchasers are assuming all claims secured by liens or encumbrances that rank in priority to Elleway's security. The reduction of the indebtedness owed to Elleway will be less than the total amount of indebtedness owed to Elleway under the Credit Agreement. As such, if cash was paid in lieu of a credit bid, such cash would all accrue to the benefit of Elleway.

[41] Therefore, it seems to me the fact that a portion of the purchase price payable under the APAs is to be paid through a reduction in the indebtedness owed to Elleway does not preclude approval of the Orders.

D. Does the Purchasers' Relationship to itravel Canada preclude approval of the Orders?

[42] Even if the Purchasers and itravel Canada were to be considered, out of an abundance of caution, related parties, given that LDC is an existing shareholder of Travelzest and part of the Consortium or otherwise, this does not itself preclude approval of the Orders.

[43] Where a receiver seeks approval of a sale to a party related to the debtor, the receiver shall review and report on the activities of the debtor and the transparency of the process to provide sufficient detail to satisfy the court that the best result is being achieved. It is not sufficient for a receiver to accept information provided by the debtor where a related party is a purchaser; it must take steps to verify the information. See *Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]).

[44] In addition, the 2009 amendments to the BIA relating to sales to related persons in a proposal proceedings (similar amendments were also made to the *Companies' Creditors Arrangement Act* (Canada)) are instructive. Section 65.13(5) of the BIA provides:

> If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that:
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

[45] The above referenced jurisprudence and provisions of the BIA (Canada) demonstrate that a court will not preclude a sale to a party related to the debtor, but will subject the proposed sale to greater scrutiny to ensure a transparency and integrity in the marketing and sales process and require that the receiver verify information provided to it to ensure the process was performed in good faith. In this case, the Receiver is of the view that the market for the Purchased Assets was sufficiently canvassed through the sales and marketing processes and that the purchase prices under the APAs are fair and reasonable under the current circumstances. I agree with and accept these submissions.

[46] The Receiver requests that the APAs be sealed until the closing of the Sale Transactions contemplated thereunder. It is also requesting an order permanently sealing the valuation reports prepared by Ernst & Young LLP and FIT Consulting LLP and, attached as Confidential Appendices 4 and 5 of the Report, respectively.

[47] The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, held that a sealing order should only be granted when:

> (a) an order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53; *Re Nortel Networks Corporation* (2009), 56 C.B.R. (5TH) 224, (Ont. S.C.J. [Commercial List]), at paras. 38-39.

[48] In my view, the APAs subject to the sealing request contain highly sensitive commercial information of itravel Canada and their related businesses and operations, including, without limitation, the purchase price, lists of assets, and contracts. Courts have recognized that disclosure of this type of information in the context of a sale process could be harmful to stakeholders by undermining the integrity of the sale process. I am satisfied that the disclosure of the APAs prior to the closing of the Sale Transactions could pose a serious risk to the sale process in the event that the Sale Transactions do not close as it could jeopardize dealings with any future prospective purchasers or liquidators of itravel Canada's assets. There is no other reasonable alternative to preventing this information from becoming publicly available and the sealing request, which has been tailored to the closing of the Sale Transactions and the material terms of the APAs until the closing of the Sale Transactions, greatly outweighs the deleterious effects. For these same reasons, plus the additional reason that the valuations were provided to Travelzest on a confidential basis and only made available to Travelzest and the Receiver on the express condition that they remain confidential, the Receiver submits that the FTI Consulting LLP and Ernst & Young LLP valuations be subject to a permanent sealing order. Further, the Receiver submits that the information contained in the Supplemental Report also meets the foregoing test for the factual basis set forth in detail in the Supplemental Report (which has been filed on a confidential basis). I accept the Receiver's submissions regarding the permanent sealing order for the valuation materials. For these reasons, (i) the APA is to be sealed pending closing, and (ii) only the valuation material is to be permanently sealed.

Disposition

[49] For the reasons set forth herein, the motion is granted. Orders have been signed to give effect to the foregoing.

MORAWETZ J.

Date: December 3, 2013

Annual Review of Insolvency Law 2013

Dr. Janis P. Sarra

Editor

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Imhotep's Ingenuity, Developing Canada's Capacity to Address Corporate Group Insolvency

*Janis Sarra**

I. INTRODUCTION

As Canada moves into its 2014 review of insolvency legislation, it is timely to commence a public policy discussion on Canada's capacity to effectively address corporate group insolvency. In 2008, I wrote an article discussing the challenges posed when entities in a corporate group are insolvent, using the imagery of Maidum, the first attempted true pyramid that suffered spectacular collapse due to structural problems.[1] In Canada and elsewhere, corporate structures are often pyramidal, with related enterprises conducting business in multiple jurisdictions; and when they financially collapse, creditors of different entities within the group compete for limited assets that may or may not be located in the entity in which they have advanced credit and thus have claims. Six years

* Dr. Janis Sarra, Professor of Law, Faculty of Law, University of British Columbia, and Director, Peter Wall Institute for Advanced Studies, UBC.

1 Janis Sarra, "Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies" (2008) 17 *International Insolvency Review* 73-122.

claims, the better approach may be to develop international consensus before enshrining substantive provisions in Canadian insolvency statutes.

XI. LEGAL AND PROFESSIONAL FEES

The best limitation on legal and professional fees is where banks and secured parties refuse to fund unnecessary litigation. Where secured creditors' claims are impaired or at risk, such creditors can serve as an important check on excessive litigation and excessive professional fees. Where this situation is not the case, there are few controls on the amount of legal and professional fees in insolvency cases, particularly where the fees are coming out of the debtor's assets, a situation that is exacerbated in international corporate group insolvency proceedings. There is a lack of transparency about the amount of the value of the assets that is going to professionals, a lack of accountability regarding the quantum of fees, and the inability of the court to control the fees. While Canadian courts can do little to control foreign professional fees, there could be some basic statutory requirements that might temper excessive fees being paid out of the Canadian debtor's assets.

There could be an obligation on the monitor to report on legal, administrative and professional fees, making transparent the real costs of the proceedings, who is paying and who is being prejudiced by the diminution of the value of the assets to meet these costs. There could be a threshold imposed, whereby accounts need to be taxed, regardless of type of professional, if the fees are being paid out of the debtor's assets. There could be a requirement to approve fees on an ongoing basis, with an obligation to disclose to parties the extent to which fees are coming out of the assets that would otherwise be available to claimants. In the US, a guideline effective November 2013 requires that legal firms disclose their fees in larger Chapter 11 US *Bankruptcy Code* cases to the court, the US trustee and

major parties, including disclosing blended hourly rates and fees per task.[85]

In civil litigation in Canada, the "loser pays" costs system serves to make parties more responsible in respect of deciding when and how aggressively to litigate. Insolvency proceedings have tended in the past not to award costs, because the proceeding is viewed as trying to facilitate a going-forward resolution to the debtor company's financial distress. However, that practice should be revisited in light of the excessive litigation and unwillingness to settle issues that is increasingly becoming the norm in insolvency proceedings, particular cross-border cases. Fees for motions before the court could be allocated on the loser pays system, a shift from the usual cost consequences of insolvency cases, which should serve as a temper on the litigious nature of parties.[86]

Arguably, there could also be some control on costs if parties were required to disclose what economic interests they had at risk in the proceedings. If fully hedged through credit default swaps or other credit derivatives, there could be a prohibition on the party making motions, or alternatively, the court could take account of that economic interest in refusing to allow a motion or a submission, or endorsement of professional fees.[87]

---

85 US Department of Justice, "Appendix B Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases", Federal Register / Vol. 78, June 2013, http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/Fee_Guidelines.pdf. See also Australian Government, *Proposal paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia*, December 2011, http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/2011/Reforms%20to%20Modernise%20and%20Harmonise%20Insolvency/Key%20Documents/PDF/Proposals_Paper_insolvency.ashx.

86 There have been a couple of instances where courts have awarded costs, but they are rare thus far.

87 Sarra, "Credit Derivatives Market Design", *supra* note 46.

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-022220-115
(500-11-041322-112)

DATE: October 23, 2012

CORAM: THE HONOURABLE ANDRÉ ROCHON, J.A.
PIERRE J. DALPHOND, J.A.
NICHOLAS KASIRER, J.A.

IN RE: GEORGES MARCIANO

JOSEPH FAHS
STEVEN CHAPNICK
ELIZABETH TAGLE
APPELLANTS – Creditors/Respondents

DAVID GOTTLIEB
APPELANT – Foreign Representative/Respondent

PRICEWATERHOUSECOOPERS INC.
APPELLANT – Receiver/Interim Receiver

v.

GEORGES MARCIANO
MICHEL BENSMIHEN, in his capacity as Trustee for the CKSM Family Trust
9204-7570 QUÉBEC INC.
9211-9882 QUÉBEC INC.
9213-4568 QUÉBEC INC.
RESPONDENTS – Co-Petitioners

JUDGMENT

---

[1] On appeal from a judgment of the Superior Court, District of Montreal, rendered on December 8, 2011 (the Honourable Mr. Justice Mark Schrager) granting respondents' motions to review, rescind and vary various orders rendered *ex parte* under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[2] For the reasons of Dalphond, J.A., with which Rochon and Kasirer, JJ.A. agree;

THE COURT:

[3] **ALLOWS** the appeal, without costs;

[4] **SETS ASIDE** paras. 197 to 216 and replaces them by the following:

> [197] **GRANTS** in part the Motion to Review, Rescind and Vary Various Orders Rendered pursuant to the *Bankruptcy and Insolvency Act* of Georges Marciano;
>
> [198] **GRANTS** in part the Motion to Quash the Issuance of a Search Warrant and Authorization to Seize the Property of the Debtor, to Rescind and Dismiss Orders and for the Issuance of Safeguard Orders of Michel Bensmihen, ès qualités of trustee of the C.K.S.M. Trust, 9204-7570 Québec Inc., 9211-9882 Québec Inc. and 9213-4568 Québec Inc.;
>
> [199] **RESCINDS** the following orders, issued by Justice Chantal Corriveau dated September 15, 2011 :
>
> 1. Paras. 9, 10 and 13 of the judgment on the motion for the Recognition of a main Foreign Proceeding and replaces paras. 11 and 12 by the following:
>
> > [11] **APPOINTS** PWC as interim receiver of Georges Marciano's property located in Canada;
> >
> > [12] **EMPOWERS** PWC to seize any moveable assets that belong or could have been under the control of Marciano and that could easily be moved or otherwise disposed of, and **RESERVES** to PWC the right to apply to this Court for any further orders that may be necessary or appropriate to protect the rights of Marciano's creditors;
>
> 2. Paras. 8 and 9 of the judgment on the motion for the Issuance of a search warrant and the authorization to seize property of the Debtor;
>
> 3. All orders made further to the motion for an Interim Receiver.
>
> [200] **QUASHES** all seizures of immovables made in virtue of the Warrant of Search and Seizure dated September 15, 2011, the Second Warrant of Search and Seizure dated September 16, 2011 and the Amended Second Warrant of Search and Seizure dated September 16, 2011 and;

[201] **GRANTS** mainlevée of all of the seizures practiced in the present record of all immovable property and more specifically, with regard to the following:

« a) La fraction de l'immeuble détenu en copropriété divise ayant front sur la rue St-Jacques, en la ville de Montréal, province de Québec, comprenant :

- La partie privative (unité résidentielle) connue et désignée comme étant le lot numéro TROIS MILLIONS QUATRE CENT DOUZE MILLE SEPT CENT CINQUANTE-SEPT (3 412 757) du cadastre du Québec, circonscription foncière de Montréal;

- La quote part afférente à ladite partie privative dans la partie commune et connue et désignée comme étant le lot numéro TROIS MILLIONS QUATRE CENT DOUZE MILLE SEPT CENT CINQUANTE-SIX (3 412 756) du cadastre du Québec, circonscription foncière de Montréal.

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 13 061 075.

Avec la bâtisse dessus érigée portant le numéro **262, Saint-Jacques, Montréal, province de Québec, H2Y 1N1**. »

b) « Un certain emplacement ayant front sur la rue Saint-Paul est dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE HUIT CENT DIX-NEUF (1 181 819) du cadastre du Québec, circonscription foncière de Montréal, avec les bâtisses dessus érigées notamment celle portant le numéro **320, rue Notre-Dame Est, Ville de Montréal, province de Québec, H2Y 1C7**. »

c) « Un certain emplacement ayant front sur la Place d'Armes dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT QUARANTE-ET-UN (1 180 941) et de la moitié indivise (1/2) du lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT TRENTE-NEUF (1 180 939) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant le numéro **501-507, Place d'Armes, Ville de Montréal, province de Québec H2Y 2W8**. »

d) « Un certain emplacement situé sur la Place Jacques Cartier, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SIX CENT TRENTE-HUIT (1 181 638) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant les numéros **444-454 Place Jacques Cartier, Ville de Montréal, province de Québec, H2Y 3C3**. »

e) « Un certain emplacement situé sur la rue Saint-Paul est dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE HUIT CENT ONZE (1 181 811) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse de cinq étages dessus érigée portant les numéros **281 et 295 rue Saint Paul est, Ville de Montréal, province de Québec H2Y 1H1**. »

f) « Un certain emplacement ayant front sur la rue Saint-Paul est dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE NEUF CENT QUATRE (1 181 904) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse de cinq étages dessus érigée portant les numéros **262 et 264 rue Saint Paul est, Ville de Montréal, province de Québec H2Y 1G9**. »

g) « Un certain emplacement situé sur la Place Jacques Cartier, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SIX CENT QUARANTE (1 181 640) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant les numéros **438 à 442 Place Jacques Cartier, Ville de Montréal, province de Québec H2Y 3B3**. »

h) « Un certain emplacement ayant front sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant les lots numéros UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT CINQUANTE-HUIT (1 180 958) et TROIS MILLIONS DEUX CENT QUARANTE QUATRE MILLE SIX CENT QUATRE-VINGT-SEPT (3 244 687) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigé portant l'adresse **11 – 21, rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1S5**. »

i) « Un certain emplacement situé sur la rue de la Commune Ouest, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE DEUX CENT SOIXANTE-ET-ONZE (1 181 271) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble dessus érigé portant les numéros **109, 111, 115, 117 et 119, rue de la Commune Ouest et 115, rue de la Capitale, Ville de Montréal, province de Québec H2Y 2C7**. »

j) « Un certain emplacement situé sur la rue de la Commune Ouest, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE DEUX CENT SOIXANTE-TROIS (1 181 263) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant le numéro **133, rue de la Commune Ouest, Ville de Montréal, province de Québec H2Y 2C7**. »

k) « Un certain emplacement situé sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE SEPT CENT QUATRE-VINGT QUATORZE (1 180 794) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigé portant les numéros **200-212, rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1T3**. »

l) « La fraction de l'immeuble détenu en copropriété divise situé dans la Ville de Montréal (Arrondissement Ville-Marie) comprenant :

- La partie privative connue et désignée comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SEPT CENT QUATRE-VINGT-HUIT (1 181 788) du cadastre du Québec, circonscription foncière de Montréal, correspondant à l'appartement dont l'adresse est le **428 Place Jacques Cartier, Ville de Montréal, province de Québec, H2Y 3B3**;

- La quote part afférente à ladite partie privative dans les parties communes connues et désignées comme étant les lots numéros UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-NEUF (1 285 169), UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-DIX (1 285 170) et UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-ET-ONZE (1 285 171) du cadastre du Québec, circonscription foncière de Montréal,

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 3 913 667 telle qu'amendée aux termes de l'acte publié à Montréal sous le numéro 5 242 571. »

m) « Un certain emplacement situé sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT QUARANTE-SIX (1 180 946) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigé portant le numéro **60 rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1S6**. »

n) « Un certain emplacement situé sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT QUARANTE-SEPT (1 180 947) du cadastre du Québec, circonscription foncière de Montréal, avec les bâtisses ci-dessus érigées notamment celle portant les numéros **54 et 56 rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1S6**. »

o) « Un certain emplacement ayant front sur la rue Saint-Jacques ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le

lot numéro UN MILLION CENT QUATRE-VINGT MILLE SIX CENT TRENTE-SEPT (1 180 637) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigée portant les adresses **249-251, rue Saint-Jacques, Ville de Montréal, province de Québec H2Y 1M6**

p) « La fraction de l'immeuble détenu en copropriété divise situé dans la Ville de Montréal (Arrondissement Ville-Marie) comprenant :

- La partie privative connue et désignée comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SEPT CENT QUATRE-VINGT-SEPT (1 181 787) du cadastre du Québec, circonscription foncière de Montréal, correspondant à l'appartement dont l'adresse est le **422 Place Jacques Cartier, Ville de Montréal, province de Québec, H2Y 3B3**;

- La quote part afférente à ladite partie privative dans les parties communes connues et désignées comme étant les lots numéros UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-NEUF (1 285 169), UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-DIX (1 285 170) et UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-ET-ONZE (1 285 171) du cadastre du Québec, circonscription foncière de Montréal,

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 3 913 667 telle qu'amendée aux termes de l'acte publié à Montréal sous le numéro 5 242 571. »

q) « La fraction de l'immeuble détenu en copropriété divise situé dans la Ville de Montréal (Arrondissement Ville-Marie) comprenant :

- La partie privative connue et désignée comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SEPT CENT QUATRE-VINGT-NEUF (1 181 789) du cadastre du Québec, circonscription foncière de Montréal, correspondant à l'appartement dont l'adresse est le **424 Place Jacques Cartier, Ville de Montréal, province de Québec H2Y 3B3**;

- La quote part afférente à ladite partie privative dans les parties communes connues et désignées comme étant les lots numéros UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-NEUF (1 285 169), UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-DIX (1 285 170) et UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-ET-ONZE (1 285 171) du cadastre du Québec, circonscription foncière de Montréal,

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 3 913 667 telle qu'amendée aux termes de l'acte publié à Montréal sous le numéro 5 242 571. »

[202] **ORDERS** the cancellation of all inscriptions of such immovable seizures from the Index of Immovables;

[203] **ORDERS** Joseph Fahs, Steven Chapnick and Elizabeth Tagle to return any and all documents and computer hard discs seized in any form, and not to retain copies of any such documents or computer records, in any form;

[204] **ORDERS** PricewaterhouseCoopers Inc. to render account of any and all receipts and disbursements of any business interests in their possession or under their control or surveillance as Interim Receiver in this file since September 15, 2011;

[205] **RESERVES** the rights and recourses of Georges Marciano, Michel Bensmihen ès qualités of Trustee to the C.K.S.M. Trust, 9204-7570 Québec Inc., 9211-9882 Québec Inc. and 9213-4568 Québec Inc. to return to this Court for supplemental orders as may be necessary to give effect hereto;

[206] **ORDERS** provisional execution of this judgment notwithstanding appeal;

[207]**THE WHOLE** with costs against Joseph Fahs, Steven Chapnick and Elizabeth Tagle, solidarily.

ANDRÉ ROCHON, J.A.

PIERRE J. DALPHOND, J.A.

NICHOLAS KASIRER, J.A.

Mtre Bernard Boucher
Mtre Réal A. Forest
Mtre Caroline Dion
BLAKE, CASSELS & GRAYDON
For the appellants (Joseph Fahs, Steven Chapnick, Elizabeth Tagle and David Gottlieb)

Mtre Martin Desrosiers
Mtre Alexandre Fallon
OSLER, HOSKIN & HARCOURT
For the appellant (Pricewaterhousecoopers inc.)

Mtre Jean-Yves Fortin
Mtre Hubert Sibre
Mtre Mélanie Martel
DAVIS
For the respondent Georges Marciano

Mtre Mortimer G. Freiheit
Mtre Marion Soumagne
FREIHEIT LEGAL INC.
For the respondent Michel Bensmihen

Mtre C. Jean Fontaine
Mtre Pierre-Paul Daunais
STIKEMAN ELLIOTT
For the respondents (9204-7570 Québec inc., 9211-9882 Québec inc. and 9213-4568 Québec inc.)

Date of hearing: March 28, 2012

REASONS OF DALPHOND, J.A.

[5] These reasons deal with an appeal by three US creditors, a US trustee and a Canadian receiver from a judgment rendered by Mr. Justice Mark Schrager of the Quebec Superior Court on December 8, 2011, granting respondents' motions to review, rescind and vary various orders rendered *ex parte* by Madam Justice Chantal Corriveau under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA).

[6] This appeal raises the issues of the conduct of a party applying for an order *ex parte* and of the power of the Superior Court to review and rescind its orders under the BIA, as well as the effect in Canada of foreign civil judgments condemning a party to pay millions of dollars in non-pecuniary damages that are enforceable notwithstanding appeal and of a foreign bankruptcy judgment obtained to compel the execution of these civil judgments.

THE FACTS

[7] Respondent Georges Marciano is a wealthy businessman. He estimates his net worth at about US$175,000,000. Marciano's *de facto* spouse is a Montreal native. Between 2006 and 2009, he acquired 18 buildings in Old Montreal, including a boutique hotel. Currently a Montreal resident, he has brought with him from California various moveable items, such as luxury cars worth $3,225,000, a collection of jewellery and watches worth $30,736,821, and an art collection (paintings and sculptures) worth $36,205,953.

[8] In August 2007, while a California resident, he sued five former employees, in Los Angeles Superior Court including the appellants Joseph Fahs, Steven Chapnick and Elizabeth Tagle ("Fahs et al."), for embezzlement and related claims (L.A. Sup. Ct Case No. BC375824). He also filed complaints against them with the local police, the FBI and the tax authorities. He claimed from them about US$400,000,000 in total. The employees filed cross-complaints in which they claimed damages for defamation and intentional infliction of emotional harm. During the proceedings, Marciano often changed attorneys and failed to comply with various discovery obligations. At one point, a judge concluded that he had committed an abuse of process, which led to the summary dismissal of his complaint and of his answers to all of the cross-complaints and the authorization to cross-complainants to proceed by default (called in California "terminating sanctions"). An *ex parte* prove-up hearing took place in front of an advisory civil jury which in July 2009 rendered five identical verdicts of US$74,000,000 for future economic loss, moral and punitive damages, significantly in excess of the amounts sought, totalling US$370,000,000. Later, the awards were reduced as follows by the trial

judge so as to not exceed the amounts claimed by the cross-complainants in their proceedings:

Joseph Fahs	US$55,000,000 (instead of US$74,044,000 including US$5 million in punitive damages)
Steven Chapnick	US$25,000,000 (instead of US$74,044,000 including US$5 million in punitive damages)
Elizabeth Tagle	US$15,300,000 (instead of US$74,044,000 including US$5 million in punitive damages)
Miriam Choi	US$55,000,000 (instead of US$74,044,000 including US$5 million in punitive damages)
Camille Abat	US$55,000,000 (instead of US$74,044,000 including US$5 million in punitive damages)

These Los Angeles Superior Court judgments total US$205,300,000.

[9] In separate proceedings instituted in 2008, Marciano also sued his former tax accountant, Gary Iskowitz and two related parties for considerable amounts. The defendants later filed cross-complaints for emotional harm and defamation (L.A. Sup. Ct Case No. BC384493). On August 26, 2009, Marciano's claim was summarily dismissed and subsequently the cross-complainant Iskowitz was awarded US$45,000,000 (including US$5,000,000 for loss of professional and personal reputation, 10,000,000 for emotional harm and US$10,000,000 on for hurt feelings the whole without expert evidence of emotional harm), and the two other co-cross-claimants were awarded US$5,000,000 each.

[10] The total amount of the awards against Marciano is a little over US$260,000,000 ("Civil Judgments"). Most of the amounts awarded are not related to economic losses, but rather to emotional distress, harm to reputation, hurt feelings and punitive damages, all granted without the benefit of fully contested evidentiary hearings.

[11] Marciano appealed the Civil Judgments. According to California law, a bond of an amount of one and a half times the amounts awarded must be posted for the judgments not to be enforceable notwithstanding appeal, unless appellant obtains a judicial stay pending appeal, called "*supersedeas*". Marciano's attempts to obtain a stay were unsuccessful, including a majority decision by a panel of the California Court of Appeal. Despite his considerable wealth, Marciano was unable to post the required statutory bond. Accordingly the Civil Judgments remained enforceable despite the appeal proceedings, a situation that the creditors, including the appellants, decided to act upon to their advantage, as will be further explained below.

[12] Concurrently, Marciano caused the transfer of his 18 Montreal buildings to three companies: 9204-7570 Québec inc., 9211-9882 Québec inc. and 9213-4568 Québec inc. that are now controlled by the CKSM Family Trust the beneficiaries of which are Marciano and his four children. Michel Bensmihen is the representative of the three companies and the trustee of the family trust, which are together designated as the "Interveners".

[13] Unable to seize any property of significance, some of the US creditors, including the appellants, decided to petition Marciano into bankruptcy in October 2009. Despite the fact that appeals were pending that might drastically reduce the awards, a California bankruptcy judge declared Marciano bankrupt on December 28, 2010. For a time, Marciano remained in possession of his assets as "debtor-in-possession" until he failed to comply with specific orders of the Bankruptcy Court. David Gottlieb was then named as trustee and took control of Marciano's Californian assets evaluated at about US$50,000,000, including his L.A. residence estimated at US$25,000,000.

[14] On September 15, 2011 the bankruptcy judgment was upheld by a majority of a Bankruptcy Appellate Panel. The dissenting judge strongly objected to the use of bankruptcy proceedings in such a context.

[15] On September 14, 2011 the legal saga moved to Montreal where Marciano now lives. That day, Fahs et al., Gottlieb and PricewaterhouseCoopers inc. (PWC) filed four motions:

> i) a "Motion to Obtain the Recognition of a Main Foreign Proceedings (section 272 of the Bankruptcy and Insolvency Act)", dated September 13, 2011. In this motion Gottlieb sought recognition of the bankruptcy judgment as a foreign main proceeding under the BIA and of him as the foreign representative. Orders were also sought to allow for the examinations of various persons including, Marciano, and the appointment of PwC as receiver pursuant to s. 272(1)(d) BIA with various powers over the assets of Marciano, the interveners and other corporate and trust entities;

ii) a "Petition for a Receiving Order" under s. 43 BIA, dated September 13, 2011 filed by Fahs et al. in order to have Marciano declared bankrupt in Canada, presentable October 4, 2011;

iii) a "Motion to Appoint an Interim Receiver (section 46 of the Bankruptcy and Insolvency Act)", dated September 13, 2011 filed by Fahs et al. pursuant to which PwC was to be appointed as interim receiver under the BIA with respect to Marciano's Canadian assets and those of various related entities;

iv) a "Motion to Obtain the Issuance of a Search Warrant and the Authorization to Seize the Property of the Debtor (section 189 of the Bankruptcy and Insolvency Act)", dated September 13, 2011 filed by PwC pursuant to which an authorization to search various premises was sought with the power to seize property found therein belonging to Marciano and related corporate and trust entities.

[16] The very same day, these proceedings, save for the Petition for a Receiving Order, were presented *ex parte* to the Commercial Division of the Superior Court, supported by thirteen binders of exhibits. The following day, September 15, 2011, Corriveau J. granted the three motions. Her judgments are in fact endorsements of draft judgments prepared by the petitioners with extremely brief reasons. The first declares that the United States bankruptcy proceeding is a foreign main proceeding, recognizes that Gottlieb is entitled to act as a foreign representative, orders that the administration and realization of all Marciano's Canadian assets shall be carried out by PWC acting as a receiver and gives PWC a number of powers. The second appoints PWC as an interim receiver pursuant to s. 46 BIA and grants it all powers provided by law. The third issues a warrant authorizing PWC to enter and search several premises and to seize any item of Marciano's property. On September 16, 2011, an additional search warrant order was granted *ex parte* by Corriveau J. at the request of PWC.

[17] In the following hours, the full might of the law was made manifest and the events made headlines in the local media. PWC proceeded with searches and seizures at various locations. Seven hundred paintings, prints and sculptures, 375 watches, an 84.37 carat diamond worth over $16,000,000, 16 cars (including 10 Ferraris, 2 Rolls-Royces, 2 Mercedes), 18 buildings, cash, computers and various documents belonging to Marciano and related entities (corporations or trusts) were seized. PWC assumed control of the hotel, posted guards there and removed art works, in some instances having to use a crane.

[18] On September 26, 2011, Montreal lawyers acting for Marciano filed Notices of Appeal against the appointing orders and the search orders. Judgments in these appeals are being rendered concurrently with the judgment in this appeal.

[19] On September 28, 2011, Marciano filed a motion to review, rescind and vary the various orders rendered *ex parte* (Marciano's Motion). Other lawyers did likewise on behalf of the family trust and the three Quebec corporations (Interveners' Motion).

[20] On October 5, 2011, Marciano appealed the judgment of the Appellate Panel before the United States Court of Appeals, Ninth Circuit.

[21] That same day, the Quebec Superior Court (Lalonde J.) granted in part a motion of PWC to authorize the payment of its judicial costs up to an amount of $554,796.56 and a provision for costs of $250,000. Unable to ascertain whether the fees dedicated to the execution of the orders of Corriveau, J. were reasonable and considering that PWC as receiver must be compensated for the costs incurred, the motions judge granted PWC the sum of $556,636.98 to pay its judicial costs up to an amount of $56,636.98, the balance ($500,000) being only a provision for costs. The funds come principally from accounts held by the numbered companies; these companies and the family trust filed an appeal against that order and a judgment released concurrently deals with it.

[22] On October 14, 15 and 17, 2011, the motions to rescind of Marciano and the Interveners were heard by Schrager J.

[23] In the course of the US bankruptcy appeal, the creditors were invited to mediate their claims with the trustee. Between October 17 and 19, 2011, a mediation took place presided by Cruz Reynoso, a former judge of the California Supreme Court. The judgment creditors agreed to resolve their claims for US$8,625,00 each to Fahs, Chapnick, Tagle and Abat, US$9,625,000 to Choi, US$17,250,000 to Gary Iskowitz, and US$2,250,000 to Theresa Iskowitz, plus interest. The total amount due to civil creditors for bankruptcy purposes would then be around US$63,625,000, which means the Civil Judgments would be reduced to an amount slightly more than the value of Marciano's Californian assets. According to the representations made by counsel for the appellants at the hearing before this Court, this settlement agreement is not enforceable because the bankruptcy judge, Madam Justice Kaufman, has decided to wait for the judgments of the California Court of Appeal in the civil appeals. Schrager J. was informed of the results of the mediation in California.

[24] On December 8, 2011, Schrager J. granted Marciano's Motion as well as the Interveners' Motion. PWC as receiver/interim receiver was dismissed and ordered to return all property seized at its own costs.

[25] On December 28, 2011, the Interveners filed a motion for contempt of court against Gottlieb before the Quebec Superior Court alleging that some documents seized were not remitted on time.

[26] On January 12, 2012, the Interveners filed an action in damages in the Quebec Superior Court asking for the condemnation of Fahs et al. in the amount of $3,200,000 for what they consider to be abusive seizures.

[27] On January 13, 2012, a judgment was rendered by the US Bankruptcy Court condemning Marciano for contempt of court and ordering the issuance of a warrant for his arrest.

[28] On March 6, 2012, the hearing of the civil appeal in the related action of Iskowitz et al. took place in the California Court of Appeal (*Marciano v. Iskowitz*, 2d Cir. No. B216029, 219558). At the opening of the hearing, the panel issued the following tentative ruling:

> We do not think there was an abuse of discretion in the imposition of the terminating sanctions, which resulted in the entry of Marciano's default. But, the amount of damages, which were awarded on the default prove up, we felt were excessive. What we plan to do, short of listening to counsel here today, is to reverse the judgment and remand the matter for a new prove up before a different judge. I don't think it's fair to send this thing back to the judge who felt really put upon by this fact situation and by Mr. Marciano.

[29] During the exchange that followed, the Court pointed to the lack of evidence of ongoing treatment or of economic loss and said that the amounts of damages awarded were often duplicative. In reply to a question from the Court, Gottlieb's attorney suggested that it would have been fair to award Iskowitz about $1,000,000 for all emotional harm, exclusive of punitive damages.[1] Counsel for Iskowitz replied that the amount should not be less than 50% of the amounts granted by the Superior Court. The case is now under advisement and it is not clear if the Court of Appeal will suggest numbers or just remand. It bears noting that Iskowitz agreed during the mediation in the bankruptcy file to an amount of US$17,250,000. In all likelihood, he will be awarded less than that at the end of the day from the civil courts.

[30] In a brief filed on March 23, 2012 in the civil appeal dealing with the first five former employees, including the three respondents before us, Gottlieb's attorney, acting on behalf of Marciano as bankrupt, wrote that the L.A. Superior Court judgments "lack sufficient evidentiary support and are internally duplicative", "appear to result from passion and prejudice, rather than from a reasoned analysis based upon compensatory or constitutional law" and "the trial court abused its discretion by imposing terminating sanctions rather than other serious sanctions that would, nonetheless, have permitted Marciano's counsel to participate in the determination of damages". The conclusion to this brief states that these judgments "should be reversed and vacated".

[31] From the latest developments, it appears that the argument over what amounts should be awarded to all the defendants/cross-plaintiffs is to resume before the L.A. Superior Court, unless settlements are reached, and that the civil awards eventually to be awarded will most likely be considerably less than the initial ones. It is even possible that Marciano's US Chapter 11 estate will be solvent in the end unless the US trustee fees and disbursements prevent it (the latter amounting to over US$12,000,000 thus far).

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[1] Marciano's and Interveners' motions to be authorized to adduce new evidence, March 22, 2012. We are told that in California punitive damages may range between 8 to 16 times compensatory damages.

THE JUDGMENT UNDER APPEAL

[32] Schrager J., held that Marciano's Motion and the Interveners' Motion is not a disguised appeal but a set of new circumstances or fresh evidence because the orders under review were made on an *ex parte* basis:

> [42] In the view of the undersigned, given that the orders under review were made on an *ex parte* basis, virtually every argument and fact brought forward by Marciano and the Interveners constitutes a new circumstance (unless perhaps any such fact or argument was already raised and fully discussed at the *ex parte* hearing). This Court has a broad discretion under section 187(5) BIA and this is particularly so where the initial orders were granted on an *ex parte* basis. None of the arguments upon which the undersigned has relied were put before Justice Corriveau – either not at all or not fully.
>
> [44] (…) Again, this Court reiterates that on rescinding the decisions, the undersigned has relied on facts before the Court and legal arguments presented to the undersigned that were not put before Justice Corriveau. (…)

He therefore concluded that it was within his power to rescind the orders issued by Corriveau J.

[33] Once his jurisdiction established, he found as a first ground to rescind the fact that Corriveau J. may have believed that the Civil Judgments were final, notably because the notices of appeal were not produced at all (this factual premise is erroneous since the binders given to Corriveau J. included copies of these notices). In his opinion, the appellants should have clearly told Corriveau J. that the Civil Judgments and the bankruptcy judgment were subject to pending appeals even though they were enforceable under American law. According to him, this failure to disclose fully and frankly that the Civil Judgments were not final justified the rescinding of all the orders:

> [76] In the case before the undersigned and as more fully set forth hereinafter, the failure to disclose in this case is fatal not merely because of such failure *per se* but because the information which was not disclosed was fatal to the applications, even on a contested basis.
>
> [77] In summary, an *ex parte* hearing cannot be used as an opportunity by the moving party to obtain a strategic advantage. The moving party has the obligation to disclose all material points of fact and law and particularly those which might militate in favor of the absent party and even the possible dismissal of the applications. In the case at bar the failure to disclose that the judgments for which recognition and enforcement was sought were not final but rather subject to appeal was highly material and not subject to any debate. From the review of the facts above there can be no other conclusion than that the moving parties

> and their attorneys chose to conceal the existence of the appeals and to give the impression that the Civil Judgments and the Bankruptcy Judgment were final because they were enforceable.
>
> [78] The failure to fully and frankly disclose to Justice Corriveau that the Civil Judgments and Bankruptcy Judgment were not final is sufficient to rescind the orders. (…)

[34] Nevertheless Schrager J. dealt with the other substantive grounds raised by the respondents and adjudicated them in order to dispel any doubt on the final outcome. In his reasons, he wrote that the foreign judgments whose recognition were sought could not be enforced directly or indirectly through the Canadian bankruptcy process because they were not final. According to him It was impermissible to rely on the foreign bankruptcy order as a foreign main proceeding because it was not final; moreover it merely sought to enforce civil damage awards which were themselves not final and enforceable at the time of the hearing before Corriveau J.

[35] He also addressed issues of public policy. According to him, the damages awarded in the Civil Judgments were arbitrary and clearly excessive from a Quebec or Canadian point of view. Therefore, their recognition would be contrary to public order as provided in the C.C.Q. and the BIA.

[36] With regard to the search warrants, he wrote that s.189 BIA applies only after a bankruptcy judgment is made by a Canadian court. Since Marciano is not a bankrupt under the BIA, the search warrants should be quashed. He also concluded that the seizures of the immovables and documents were illegal considering that they belong to third parties and not to Marciano. With regard to movable property, he did not conclude that the seizures were to be quashed solely on the basis of arguments relating to the title of the property seized, but he would nevertheless annul the order on other grounds.

[37] As a result, Schrager J. rescinded all the orders rendered by Corriveau J., granted a release from all the seizures of property owned by Marciano and the Interveners and ordered PWC to return, at its expense, the movable property and documents seized as well as cash seized and amounts received on account of fees and disbursements. Finally, he ordered provisional execution of his judgment.

[38] On December 8, 2011, a joint notice of appeal on behalf of the US trustee, the US creditors and PWC was filed by the same law firm (on December 16, 2011, PWC retained its own counsel that filed a separate amended notice of appeal[2] and later a brief, and made representations before us). On December 22, 2011, a judge of this Court dismissed a motion to suspend the provisional execution Schrager J. had ordered and referred the appellants' motion for the issuance of a safeguard order to a panel. On

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[2] A re-amended notice of appeal was filed on February 24, 2012. It is contested by the US creditors. For the reasons given below, there is no need to rule on this re-amended notice.

February 3, 2012, a panel of this Court dismissed the motion for a safeguard order and suspension of provisional execution as well as a motion by Marciano for security for costs.

ISSUES IN DISPUTE

[39] The issues raised in this appeal can be summarized as follows :

- The conduct of an applicant during an *ex parte* hearing;

- The scope and extent of the power to review and rescind under s. 187(5) BIA;

- The enforceability of the Californian judgments in Quebec;

- The meaning of the word "bankrupt" in s. 189 BIA and the right to seize assets belonging *prima facie* to third parties;

- The right of the receiver to be paid for the searches and seizures of Marciano and Interveners' assets.

ANALYSIS

I. The conduct of a party applying for an order *ex parte*

[40] The adversary nature of the proceedings before our courts is considered to be a safeguard against injustice and arbitrariness. The rights of a person should not be affected unless he or she has been provided an opportunity to be heard and present proof and arguments before a neutral decision-maker, preferably with the assistance of a counsel. This partakes of the essence of our judicial system.

[41] However, there are some exceptions to the requirement of a contested hearing in rare circumstances, such as in cases where there is a likelihood that without an *ex parte* order property or documents will disappear or be destroyed (e.g., seizure before judgment, *Mareva* injunction, *Anton Piller* order) or irreparable harm will occur (e.g., some provisional injunctions; some initial orders under the *Companies' Creditors Arrangement Act*, R.S.C.1985, c. C-36 (CCAA) in exceptional situations). Even there, the judge will grant only temporary conclusions or conclusions subject to review.

[42] In Ontario, the courts have held that a party seeking an *ex parte* order has a duty of full and frank disclosure. In *United States of America v. Friedland*, 1996 O.J. No. 4399 (Sup. Ct.), a case where a *Mareva* injunction freezing US$152,000,000 worth of shares owned by the defendant Friedland was issued *ex parte*, Sharpe J., as he then was, sitting on a motion to renew, wrote:

26. It is a well established principle of our law that a party who seeks the extraordinary relief of an *ex parte* injunction must make full and frank disclosure of the case. The rationale for this rule is obvious. The Judge hearing an *ex parte* motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. As a British Columbia judge noted recently:

> There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an *ex parte* injunction.[3]

27. For that reason, the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.

28. If the party seeking *ex parte* relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party.

29 These principles are so well established in the law that it is hardly necessary to cite supporting authority. They find expression in the Rules of Court. Rule 39.01(6) provides:

> Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

30 The principle has been affirmed and reaffirmed by judicial decision. In the leading Ontario case on Mareva injunctions, *Chitel v. Rothbart* (1982) 39 O.R. (2d) 513, a judgment of the Court of Appeal, Associate Chief Justice MacKinnon stated, at page 519:

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[3] *Watson v. Slavik*, [1996] B.C.J. No. 1885, paragraph 10.

> There is no necessity for citation of any authority to state the obvious that the plaintiff must, in securing an *ex parte* interim injunction, make full and frank disclosure of the relevant facts, including facts which may explain the defendant's position if known to the plaintiff. If there is less than this full and accurate disclosure in a material way or if there is a misleading of the court on material facts in the original application, the court will not exercise its discretion in favour of the plaintiff and continue the injunction.

31 The duty of full and frank disclosure is, however, not to be imposed in a formal or mechanical manner. *Ex parte* applications are almost by definition brought quickly and with little time for preparation of material. A plaintiff should not be deprived of a remedy because there are mere imperfections in the affidavit or because inconsequential facts have not been disclosed. There must be some latitude and the defects complained of must be relevant and material to the discretion to be exercised by the Court. (See *Mooney v. Orr*, (1994) 100 B.C.L.R. (2d) 335; *Rust Check v. Buchowski* (1994) 58 C.P.R. (3d) 324.

32 On the other hand, a Mareva injunction is far from a routine remedy. It is an exception to the basic rule that the Defendant is entitled to its day in court before being called upon to satisfy the Plaintiff's claim or to offer security for the judgment. This is clear from the decision in *Chitel v. Rothbart*, supra. It was emphasized by the decision of the Supreme Court of Canada in *Aetna Financial Services v. Feigelman* [1985] 1 S.C.R. 2, where Justice Estey referred to what he described as "the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be obtained prior to trial".

33 Justice Estey went on to say:

> There is still ... a profound unfairness in a rule that sees one's assets tied up indefinitely pending a trail of an action which may not succeed, and even it does succeed, which may result in an award far less than the caged assets.

34 Justice Estey stated as well:

> A plaintiff with an apparent claim, without ultimate substance, may, by the Mareva exception to the Lister rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons cannot afford to await the ultimate vindication after trial.

35 For this reason, it has been said that respect for the duty of full and frank disclosure is especially important with respect to Mareva injunctions because, by their very nature, they are liable to cause substantial prejudice to the defendant. (See the leading English text, Gee, *Mareva Injunctions and Anton Piller Relief* (3d Edition 1995 at p. 97).

> 36 It is also clear from the authorities that the test of materiality is an objective one. Again to quote the Gee text at page 98:
>
> > ... The duty extends to placing before the court all matters which are relevant to the court's assessment of the application, and it is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same. The test as to materiality is an objective one, and it is not for the applicant or his advisers to decide the question; hence it is no excuse for the applicant subsequently to say that he was genuinely unaware, or did not believe, that the facts were relevant or important. All matters which are relevant to the 'weighing operation' that the court has to make in deciding whether or not to grant the order must be disclosed.
>
> 37 This principle is affirmed by decisions in Canada. (See *Leung v. Leung* (1993) 77 B.C.L.R. (2d) 305 at 313; *Canadian Pacific Railway v. United Transportation Union* (1970) 14 D.L.R. (3d) at 497; and *Panzer v. The Queen* (1990) 74 O.R. (2d) 130.

[43] These principles are now part of *Rule 4 Relationship to the Administration of Justice*, of the *Rules of Professional Conduct* adopted by the Law Society of Upper Canada. In the commentary under *Rule 4.01 The Lawyer as Advocate*, it is stated:

> When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations where the full proof and argument inherent in the adversary system cannot be achieved, the lawyer must take particular care to be accurate, candid, and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

[44] In other common law provinces, the same attitude prevails. For example, Justice Green, as he then was, of the Newfoundland and Labrador Court of Appeal stated in *Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.* (1997), 150 Nfld. & P.E.I.R. 203 at para. 18:

> On any ex parte application, the utmost good faith must be observed. That requires full and frank disclosure of all material facts known to the applicant or counsel that could reasonably be expected to have a bearing on the outcome of the application. Because counsel for the applicant is asking the judge to invoke a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard, counsel is under a super-added duty to the court and the other parties to ensure that as balanced a consideration of the issue is undertaken as is consonant with the circumstances.

(A thorough review of the situation in the Federal Courts and in the Common Law provinces is found in Professor Robert J. Currie, "Nobody Expects the Spanish

Inquisition: A Primer on the Use (and Abuse) of *Ex Parte* Proceedings in Civil Cases" (2009) *Annual Review of Civil Litigation*, 443).

[45] In Quebec, the case law reflects the principle that *ex parte* orders can be made only in exceptional circumstances and must be limited to what is absolutely necessary (see for ex.: *Wilhelmy c. Radiomutuel inc.*, J.E. 93-354 (C.A., motions' judge)).

[46] In *Microcell Solutions Inc. c. Telus Communications Inc.*, J.E. 2004-738 (Sup. Ct.), Dufresne J., then at the Superior Court, dealing with two motions to strike orders for contempt made *ex parte*, echoing the *Friedland* judgment, stated:

> [16] Malgré que ces principes aient été énoncés dans le cadre d'une injonction *Mareva* qui, en soi, a un caractère bien exceptionnel et malgré l'existence d'une règle de pratique de l'Ontario Court of Justice (General Division), règle qui ne trouve pas son équivalent dans nos règles de procédure, l'obligation de divulgation complète et franche peut trouver néanmoins application en matière d'autorisation ou d'ordonnance obtenue *ex parte*, en l'absence de l'autre partie.
>
> [17] Cette obligation découle du caractère exceptionnel d'une ordonnance ou d'une autorisation obtenue dans pareille condition. (…)
>
> [18] L'obligation de divulgation franche et complète (« full and frank disclosure ») existe et est d'autant plus grande que le remède recherché en est un d'exception. Une requête pour demander l'émission d'une citation à comparaître pour outrage au tribunal présentée *ex parte* à un juge est nécessairement une procédure d'exception, la règle étant la procédure contradictoire.
>
> [19] La partie qui obtient une autorisation d'un juge à la suite d'une demande entendue *ex parte* s'expose à voir sa demande rejetée subséquemment s'il devait être démontré que des faits significatifs pour la décision du juge d'émettre l'autorisation avait fait l'objet d'omission délibérée ou stratégique de la part de celui qui recherchait l'autorisation. L'omission doit évidemment être flagrante.
>
> [20] Bien que cette obligation peut nécessiter l'allégation de faits qui pourraient être favorables à la défense, cette obligation ne va toutefois pas jusqu'à obliger la partie qui recherche une autorisation d'inclure dans sa requête les moyens de défense que pourrait faire valoir la partie visée par l'autorisation. L'omission reprochable porte essentiellement sur des faits déterminants et connus de la partie qui recherche l'autorisation.
>
> [Emphasis added]

[47] I fully agree with my colleague Justice Dufresne in *Microcell*. As a general rule, an obligation of full and frank disclosure applies in Quebec in connection with any *ex parte* orders because counsel for the applicant is asking the judge to engage in a

procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard. In my view, it follows that in cases where opposing interests are certain to exist, the moving party "is under a super-added duty to the court" (*Canadian Paraplegic Association*, *supra*) to state its own case fairly and to inform the Court of any points of fact or law known to it which favour the other side that may have a bearing on the outcome of the application. This obligation should be considered according to an objective standard: what would a reasonably qualified lawyer have done in the same circumstances?

[48] This was the substance of Schrager J.'s view in the instant case and I find there to be no error of law. The attorneys for the US creditors nevertheless argue that the trial judge erred in fact by concluding that they did not meet that obligation and in making harsh comments on their conduct in the *ex parte* proceeding held before Corriveau J.

[49] One may well understand that it is a sensitive issue for them. However, as the Court points out in its February 3, 2012 judgment (2012 QCCA 256), Schrager J.'s judgment should not be read as concluding that these attorneys chose to conceal material facts, namely that the civil and bankruptcy judgments were subject to appeals, but rather that they did not adequately disclose the nature of the appeals (under the direction of Gottlieb before the California Court of Appeal and under the direction of Marciano before the ninth Circuit Court of Appeals) and the fact that neither the Civil Judgments nor the bankruptcy judgments were final:

> [24] Sans minimiser la portée et la valeur de cet argument, il convient de noter que M. le juge Schrager n'a pas exactement conclu que *PWC, Gottlieb* et le *groupe Fahs* avaient caché à Mme la juge Corriveau l'existence des appels interjetés par M. Marciano en Californie. Il a plutôt indiqué qu'à son avis ceux-ci n'avaient pas adéquatement ou objectivement dévoilé ce fait à Mme la juge Corriveau. Il écrit :
>
> > [56] By far the most striking omission which is of sufficient importance by itself to rescind the orders, is the failure to adequately disclose to Justice Corriveau that both the Civil Judgments and the Bankruptcy Judgment, were subject to appeal. They were not final at the time of the hearing before Justice Corriveau nor were they final at the time of the hearing before the undersigned.
> >
> > [57] Counsel for the Creditors points to one verbal mention to Justice Corriveau at one point on the second day of his presentation (September 16, 2011). At that time, he mentioned almost « en passant » that appeals had been filed, putting the emphasis however on the fact that all judgments were enforceable.

[Emphasis added by the panel]

[50] Without attributing any intent to mislead Corriveau J. by the attorneys acting then for both the US creditors and the US trustee, it remains, considering some comments made by the *ex parte* judge,[4] that she did not properly understand the true status of the civil and bankruptcy judgments, namely that none was final and that there was a genuine likelihood that the amounts awarded by the California Superior Court would be significantly reduced on appeal or upon negotiation (a fact that Gottlieb and his counsel could reasonably not ignore).

[51] It was then up to the lawyers for the moving parties under their super-added duty to the court to correct her misapprehension of these important aspects of the file. As stated above, an attorney acting in an *ex parte* proceeding has an obligation to disclose all relevant material facts including those favouring the absent adversely affected party, especially when, as is the case here, the appeal procedures are different from those with which the judge is familiar and bear distinctive consequences (the bankruptcy appeal decision relied upon was from a panel of the trial court; existence of a right of appeal from that decision before the ninth circuit US Court of Appeals; a civil appeal does not suspend execution under the *California Code of Civil Procedure* and the need to post a statutory bond for an uncommon amount failing a *supersedeas* order; position of the US trustee in the civil appeals strongly contesting the rights of the creditors; etc).

[52] In case of insufficient disclosure, in the common law jurisdictions the case law provides for two distinct judicial approaches, that are described by Antonio F. Azevedo in "The duty to disclose on motions without notice for injunctive relief ", (2000) 23 Advocates Quarterly 499, at p. 503 as the "punitive approach" and the "discretionary approach"; see also Robert J. Sharpe, *Injunctions and Specific Performance*, Looseleaf Edition, Canada Law Book, at. paras 2.40 and 2.45.

[53] Under the first approach, the failure to disclose a material or relevant fact, even inadvertently, causes a judgment setting aside or dissolving the *ex p*arte injunction possibly with solicitor and client costs and even damages. Under the second, the courts

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[4] Justice Corriveau warned the appellants that she had not had time to look at the documents so that she was counting on the attorney to point out all relevant documents (Fahs et al.'s factum, vol. 10, DP-4 Transcripts of the hearing of September 14 and 15, 2011, p. 3650). She also made comments that could be read as indicative of a certain confusion about the final character of the bankruptcy judgment and the enforceability of the civil judgments:
THE COURT:
On s'entend? Le seul jugement qui a été rendu, le jugement final, c'est aux Etats-Unis. Ici, on n'a pas de jugement. On a un débiteur aux Etats-Unis, on n'a pas un débiteur canadien. C'est pour ça que c'est la logique de faire reconnaître la procédure étrangère, je crois, avant de dire: "Maintenant, on a …
Me BERNARD BOUCHER:
Oui.

found that notwithstanding material non-disclosure there was a residual discretion to continue the injunction.

[54] In England, two Court of Appeal decisions adopted the second approach: *Brink's-Mat Ltd v. Elcombre* [1988] 3 All E. R. 188 and *Memory Corporation PLC v. Sidhu (No.2)* [2000] 1 W.L.R. 1443. The rationale for it is explained as follows in *Brink's-Mat* by Lord Justice Slade:

> Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, *ex parte* applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making *ex parte* applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom *ex parte* injunctions have been granted, or of their legal advisers, to rush to the *Rex v. Kensington Income Tax Commissioners* (1917) 1 K.B. 486 principle as *a tabula in naufragio*, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.
>
> Though in the present case I agree that there was some material, albeit innocent, non-disclosure on the application to Roch J., I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such nondisclosure, to refuse to continue the injunction granted by Roch J. on 9 December 1986.

[55] In Canada, so also held the Alberta Court of Appeal in *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* [1994] A.J. No. 138, the Manitoba Court of Appeal in *Pulse Microsystems Ltd. V. Safesoft Systems Inc.* (1996), 134 D.L.R.(4th) 701 and the British Columbia Court of Appeal in *Girocredit Bank A.G v.Bader* [1998] B.C.J. No. 1516 and in *Bank of Credit and Commerce International (Overseas) Ltd. (Liquidator) v. Akbar*, 2001 BCCA 204.

[56] In my view the second approach should be adopted in Quebec as well. When there is material non-disclosure, the following factors should be considered by the judge hearing a motion to rescind or annul an *ex parte* order:

- the importance of the omitted facts to each of the issues decided by the judge;

- whether the omission was inadvertent, its relevance was misconstrued or whether the omission was made with the intent to mislead the judge;

- the prejudice occasioned to the party affected by the *ex parte* order;

- whether the order reviewed could be granted again on the basis of a corrected record.

In the end, this analysis shall in no way excuse counsel who did not discharge his or her heavy duty of candour and care. In fact, failure to comply with the obligation of full and frank disclosure is a serious breach by a court officer calling for discipline by the Court and/or the Bar.

[57] To sum up, in the present case there are two opposite ways of thinking about the situation. On the one hand, some of the unusual features of the various US proceedings were not fully brought to the attention of Corriveau J., an omission that may justify rescinding orders, as explained below. On the other hand, some features of the foreign proceedings may not have been fully understood by her, a situation that may justify redress in appeal, as explained in the concurrent judgments in files no. 500-09-022041-115 and 500-09-022040-117.

II. The power to review and rescind under the BIA

[58] It cannot be seriously disputed that *ex parte* orders can be made under the BIA in appropriate circumstances, such as the issuance of a search warrant (see s. 189(1) BIA; L.W. Houlden, G.B. Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. rev. looseleaf, (Toronto: Carswell, 2009) vol. 3 at p. 7-61 and following).

[59] Normally in cases where an *ex parte* order may be obtained, the applicable law provides for a means by which the affected party may challenge, suspend or review the *ex parte* order by the issuing court (for ex.: art. 757 (injunction), art. 738 (seizure before judgment) C.C.P.). Even when the rules are silent, a superior court has the inherent power to rescind or annul an order made *ex parte* when appropriate.

[60] The power of the Quebec Superior Court to review orders made under the BIA is provided at s. 187(5) BIA, which reads as follows:

187 (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.	187 (5) Tout tribunal peut réviser, rescinder ou modifier toute ordonnance qu'il a rendue en vertu de sa juridiction en matière de faillite.

[61] A motion pursuant to s. 187(5) BIA, rather than an appeal, should be preferred in a situation such as the present one for various reasons. First, fresh evidence may be adduced as of right, whereas leave is necessary to do so on appeal. Second, a court of appeal is ill-equipped to deal with fact-finding. Third, the appeal procedure and process is more complex and expensive (for example transcripts in seven copies) than the hearing of a motion by a single trial judge. Without excluding the possibility of an appeal, all these elements favour the use of s. 187(5) BIA.

[62] It should also be resorted to when there is a change in circumstance or discovery of significant evidence that was unknown at the time of the issuance of the previous order, even if made after having heard all the parties, and which might have led to a different result. In *Elias v. Hutchison* (1981), 14 Alta. L.R. (2d) 268, the Alberta Court of Appeal wrote:

> While the language of this section is broad, it seems to me that it is designed to permit of a judge to deal with continuing matters in the bankruptcy so as not to be [b]ound by an earlier decision if faced by changing circumstances.

[63] A motion under s. 187(5) BIA can be produced even if an appeal is pending.[5] However, it cannot be brought as a substitute for an appeal in situations where all the parties were heard and the losing one merely seeks a reversal, alleging an error of law or fact; in such a case, an appeal is the only suitable procedure. In *Ontario (Motor Vehicle Dealers Act, Registrar) v. A. Farber & Partners Inc.,* 2008 ONCA 390, 293 D.L.R. (4th) 455, the Court of Appeal of Ontario recalled that the power to rescind or review is unique and not a substitute for an appeal:

> 27 It has been said that s. 187(5) is unique to insolvency in that it allows the court to review and rescind or vary an order made by a court of co-ordinate jurisdiction, and applies to any order made in the exercise of bankruptcy jurisdiction: *Fitch v. Official Receiver*, [1996] 1 W.L.R. 242 (C.A.), discussing s. 375(1) of the English *Insolvency Act 1986*, which is virtually identical to s. 187(5) of the *BIA*. However, unlike rule 37.14(1), no conditions apply before resort can be had to s. 187(5). As I will explain, a motion under s. 187(5) cannot be brought as a substitute for an appeal, such as when the time to appeal has expired. An appeal is brought when it is believed that there is reversible error in the court below. A motion under s. 187(5) is essentially different. As the English Court of Appeal states in *Fitch* at p. 246, for the provision to apply, there must be a fundamental change in circumstances, between the original hearing and the time of the motion to vary, or evidence must have been discovered that was not known at the time of the original hearing and which could have led to a different

[5] *Re Richelieu Oil Co.* (1946), 28 C.B.R. 110 (Qué. C.A.); *Re Northlands Cafe Inc.* (1996), 44 C.B.R. (3d) 170 (Alta Q.B.).

> result. Or, as the leading Canadian case has put it, the court should not hear a motion under s. 187(5) if its only purpose it to obtain an opportunity to appeal where the time to appeal has elapsed: *Re Catalina Exploration and Development Ltd.* (1981), 121 D.L.R. (3d) 95 (Alta. C.A.), rev'g (1980), 35 C.B.R. (N.S.) 30 (Alta. Q.B.). By this motion and the appeal, the Registrar asks that the court rehear the trustee's motion for directions and make another order in the place of the one already made, drawn up, entered and acted upon. This, of course, the court cannot do.
>
> [Emphasis added]

[64] Schrager J. correctly applied these rules when he asserted his jurisdiction to review:

> [42] In the view of the undersigned, given that the orders under review were made on an *ex parte* basis, virtually every argument and fact brought forward by Marciano and the Interveners constitutes a new circumstance (unless perhaps any such fact or argument was already raised and fully discussed at the *ex parte* hearing). This Court has a broad discretion under section 187(5) BIA and this is particularly so where the initial orders were granted on an *ex parte* basis. None of the arguments upon which the undersigned has relied were put before Justice Corriveau – either not at all or not fully.

[65] Schrager J. also based his decision to rescind the orders on the fact that it was understood by Corriveau J. that her orders would be subject to review, at it is usual for initial *ex parte* orders made by the commercial division of the Superior Court in CCAA proceedings. He wrote at para. 47:

> [47] The arguments seeking to limit the scope of review by the undersigned are also somewhat specious in that it was understood that there would be a review of the orders issued by Justice Corriveau. On a number of occasions during the hearing before her, Justice Corriveau states that there will be a review or « comeback » hearing with opposing counsel present.

In such a context, the moving parties cannot seriously argue that the only recourse against the *ex parte* orders should be an appeal.

[66] In conclusion, Schrager J. did not err regarding his authority to entertain motions to review and rescind under s. 187(5) BIA in the case at bar.

III. The enforceability of the US bankruptcy judgment in Canada

[67] The motion of the US Trustee was a proceeding in relation to a foreign bankruptcy proceeding. The US creditors' petition for a receiving order was an attempt

to have Marciano declared bankrupt under the BIA for failing to have paid the Civil Judgments.

[68] Marciano's lawyers argue that since the appellants proceeded *ex parte*, they were prevented from showing that not only the Civil Judgments were not final but they offended Canadian public order by their sheer magnitude and the circumstances under which they were obtained (by default/*ex parte* according to them). So too was the case of the related bankruptcy judgment in their opinion. Therefore Corriveau J. should have dismissed the orders sought and Schrager J. was right to rescind them.

[69] Part XIII, *Cross-Border Insolvencies*, ss. 267-284 of the BIA, added in 1997, specifically provides mechanisms for dealing with foreign bankruptcy judgments aiming amongst other things, at promoting cooperation between authorities and to protect the value of the debtors' property (s. 267 BIA). For Part XIII to apply, "a debtor must have 'property in Canada'; it is unnecessary for the debtor to be a Canadian resident" (Houlden, Morawetz and Sarra, *supra*, at p. 7-377).

[70] Under s. 269, a foreign representative such as Gottlieb was entitled to petition the Superior Court of Quebec, the Canadian province where Marciano owns directly or indirectly substantial assets, for a recognition of the US bankruptcy judgment even if not final since s. 281 BIA provides that the foreign proceeding does not have to be final:

281. A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.	281. Le fait qu'une instance étrangère fait l'objet d'un appel ou d'une révision n'a pas pour effet d'empêcher le représentant étranger de présenter toute demande au tribunal au titre de la présente partie; malgré ce fait, le tribunal peut, sur demande, accorder des redressements

The fact that under art. 3155 C.C.Q. a foreign civil judgment cannot be enforceable if it is not final is not relevant since s. 281 BIA prevails over the C.C.Q. when there is a conflict: *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24.

[71] However, as pointed out by Schrager J., a foreign representative's application for recognition may be denied if considered contrary to public policy in Canada, a situation specifically contemplated by s. 284(2):

284. (…)	284. (…)
(2) Nothing in this Part prevents the	(2) La présente partie n'a pas pour

court from refusing to do something that would be contrary to public policy.

effet d'empêcher le tribunal de refuser de prendre une mesure contraire à l'ordre public

[Emphasis added]

[72] Since s. 284 BIA is included in Part XIII of the BIA dealing with foreign bankruptcy proceedings, we must construe the "public policy" (*ordre public*) exception in the context of private international law.[6] It follows that the teachings of our Supreme Court in *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, become very relevant. In *Beals*, an action was brought in a Florida court over the sale of a land valued at US$8,000 and a jury awarded US$210,000 in compensatory damages and US$50,000 in punitive damages. The Supreme Court of Canada considered a defence to counter the enforcement of this judgment in Ontario based on the notion of public policy, at paras. 71-77:

The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to our view of basic morality. As stated in Castel and Walker, *supra*, at p. 14-28:

> … the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts. . . .

Le troisième et dernier moyen de défense est fondé sur l'ordre public. Ce moyen de défense empêche l'exécution d'un jugement étranger contraire à la notion de justice canadienne. Il s'agit de savoir si le droit étranger est contraire à nos valeurs morales fondamentales. Comme l'affirment Castel et Walker, *op. cit.*, p. 14-28 :

> [TRADUCTION] . . . le moyen de défense traditionnel fondé sur l'ordre public paraît axé sur la notion de lois répugnantes et non sur la notion de faits répugnants...

How is this defence of assistance to a defendant seeking to block the enforcement of a foreign judgment? It would, for example, prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment

Quelle est l'utilité de ce moyen de défense pour le défendeur qui veut empêcher l'exécution d'un jugement étranger? Il sert notamment à interdire l'exécution d'un jugement étranger fondé sur une loi contraire aux valeurs morales fondamentales du régime juridique canadien. De même, le moyen de défense fondé sur l'ordre public empêche l'exécution du

[6] In fact, the proper interpretation must refer to what is manifestly inconsistent with public order, as it is understood in international relations like for art. 3155(5) CCQ.

rendered by a foreign court proven to be corrupt or biassed.
[…]

The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.

The award of damages by the Florida jury does not violate our principles of morality. The sums involved, although they have grown large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada. Even if it could be argued in another case that the arbitrariness of the award can properly fit into a public policy argument, the record here does not provide any basis allowing the Canadian court to re-evaluate the amount of the award. The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada.

jugement d'un tribunal étranger indubitablement corrompu ou partial.
[…]

Le recours au moyen de défense fondé sur l'ordre public pour contester l'exécution d'un jugement étranger signifie que l'on attaque la validité de ce jugement en dénonçant la loi étrangère sur laquelle il est fondé. Ce moyen de défense ne doit pas être invoqué à la légère. Rien ne justifie d'en élargir la portée de manière à pouvoir l'invoquer pour remédier à des injustices perçues qui ne heurtent pas notre sens des valeurs. Le moyen de défense fondé sur l'ordre public devrait continuer d'être appliqué d'une manière restrictive.

Le montant des dommages-intérêts accordés par le jury de la Floride ne fait pas entorse à nos principes. Malgré l'ampleur qu'elles ont prise, les sommes en question ne justifient pas, à elles seules, un refus d'exécuter le jugement étranger au Canada. Même s'il était possible, dans une autre affaire, d'invoquer l'ordre public pour faire valoir que le montant accordé est arbitraire, rien dans le dossier soumis en l'espèce n'autorise le tribunal canadien à réévaluer le montant accordé. Le moyen de défense fondé sur l'ordre public n'est pas destine à empêcher l'exécution du jugement d'un tribunal étranger ayant un lien réel et substantiel avec la cause d'action, pour le seul motif que la demande présentée dans ce ressort étranger ne donnerait pas lieu à des dommages-intérêts comparables au Canada.

> There was no evidence that the Florida procedure would offend the Canadian concept of justice. I disagree for the foregoing reasons that enforcement of the Florida monetary judgement would shock the conscience of the reasonable Canadian.
>
> [Emphasis added]

> Rien ne prouvait que la procédure suivie en Floride était contraire à la notion de justice canadienne. Pour les motifs qui précèdent, je ne suis pas d'accord pour dire que l'exécution du jugement rendu en Floride choquerait la conscience des Canadiens et des Canadiennes raisonnables.

[73] The right to seek damages for harm to one's reputation and related consequences under California law cannot be said to be a law contrary to the fundamental morality of the Canadian legal system. On the contrary, it is a remedy well recognized under both legal traditions of this country, civil law and common law.

[74] The same is true of the possibility for a court to control abuses of process by dismissing the abusive party's claim or restricting otherwise his rights. Before the California Superior Court, a foreign court not proven to be corrupt or biased, Marciano's behaviour was depicted as abusive. His refusal to provide certain information, his erratic answers on key facts, such as his financial worth, and the firing of his acting attorneys on 16 occasions are all indications that the finding of the California Superior Court may be well founded. It is not up to us to decide that but to the California Court of Appeal; suffice to say that the decisions to exclude Marciano and to reject summarily his claims do not appear contrary to the fundamental morality of the Canadian legal system.

[75] What was apparently shocking the trial judge is the size of the civil awards. Schrager J. wrote:

> [123] In the case at bar, one of the judgment creditors who is not a party to the Canadian litigation, Mr. Iskowitz, proceeded to prove his damages before a judge alone and there is evidence in this record of the actual proof that was made of damages suffered by Itzkowitz to his reputation and his accounting practice. However with respect to the five Fahs Judgment Creditors (including the three seeking recognition in this Court) the record before the undersigned of that which was placed before the jury underscores that the damage awards were arbitrary on the face of the record : Chapnick was an administrative assistant, Tegal a bookkeeper and Fahs an IT specialist. They earned $35,000 to $50,000 annually. One ill imagines the reputation and lost earning potential of such individuals to be in the magnitude of the jury awards. The jury awards were identical to the dollar for each party. The examination of Marciano by the attorney of judgment creditors Choi and Abat is an exercise in embarrassing and shaming Marciano. No cross-examination by Marciano's counsel was permitted. Michael Resnick in his testimony in this record raises serious questions about the integrity of the

> process as a whole and specifically the so called « prove-up » hearing with regard to damages.
>
> […]
>
> [137] The dissenting judge on the Bankruptcy Appeal Panel in addressing whether the debt allegedly due by Marciano was the subject of a *bona fide* dispute before the Bankruptcy Court, characterized the civil process referred to above as follows :
>
> > « The massive judgment against Marciano is not a judgment on the merits of petitioning creditors' claims, but rather an unprecedented sanction for Marciano's conduct with respect to the determination of those claims. The only reason that there is no dispute is that the state court precluded Marciano from defending himself by striking his answer and entering judgment as if he had made no appearance at all. Simply put, Marciano undisputedly disputes the claim; it is just that the state court muzzled him. […] if ever there were a case in which the debtor could claim a dispute, this would be it. ». (emphasis added)

[76] It is quite true that the final civil awards made by the California Superior Court are well beyond what a Canadian court would likely grant in similar circumstances. However it should not be forgotten that Marciano himself was claiming very substantial amounts against the defendants/cross-plaintiffs who, as the trial judge pointed out, were earning $35,000 to $50,000 annually. In appearance, the Civil Judgments are commensurate with Marciano's claims and should not be considered in themselves a basis to refuse enforcement in Canada. Considering that the defence of public policy should have a narrow application, it could not be invoked to refuse to recognize the US bankruptcy judgment. Gottlieb's motion to obtain the recognition of the US bankruptcy judgment could not be denied on grounds of public policy.

[77] Could it then be granted *ex parte*?

[78] In my view, the order could be granted *ex parte* given the tenor of the allegations made by Gotlieb, a US court officer, concerning Marciano's past behaviour: "left his creditors in the lurch by leaving the United States", "brought with him all the assets he could easily transport, including his art collection", "is attempting to frustrate his creditors by transferring his assets to companies", " has the option, if advised of the U.S. Trustee's attempts to file the present motion, to once flee Canada taking as many assets with him as he can, as he has already done once", "has demonstrated his contempt for judicial process", "publically (sic) declared that he did not intend to pas a single penny to his creditors". In these circumstances, Corriveau J. did not abuse of her discretion in proceeding *ex parte*.

[79] Once she decided to recognize the US bankruptcy proceeding, Corriveau J.had to specify whether it was a foreign “main” proceeding or a foreign “non-main” proceeding. In her judgment on Gotlieb's motion rendered on September 15, 2011, she declared that the US bankruptcy proceeding was a foreign main proceeding pursuant to s. 270(2) BIA.

[80] Under s. 272(1) BIA, once the foreign judgment recognized, Corriveau J. was empowered to make any order that she considered appropriate for the protection of the debtor's property or the interests of the creditors:

272. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor’s property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order	272. (1) Si l’ordonnance de reconnaissance a été rendue, le tribunal, sur demande présentée par le représentant étranger demandeur, peut, s’il est convaincu que la mesure est nécessaire pour protéger les biens du débiteur ou les intérêts d’un ou de plusieurs créanciers, rendre toute ordonnance qu’il estime indiquée, notamment pour :
(*a*) if the foreign proceeding is a foreign non-main proceeding, imposing the prohibitions referred to in paragraphs 271(1)(*a*) to (*c*) and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;	*a*) s’il s’agit d’une instance étrangère secondaire, imposer les interdictions visées aux alinéas 271(1)*a*) à *c*) et préciser, le cas échéant, à quelles exceptions elles sont subordonnées, par l’effet du paragraphe 271(3);
(*b*) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s property, affairs, debts, liabilities and obligations;	*b*) régir l’interrogatoire des témoins et la manière de recueillir les preuves et de fournir des renseignements concernant les biens, affaires, dettes, obligations et engagements du débiteur;
(*c*) entrusting the administration or realization of all or part of the debtor’s property located in Canada to the foreign representative or to any other person designated by the court; and	*c*) confier l’administration ou la réalisation de tout ou partie des biens du débiteur situés au Canada au représentant étranger ou à toute autre personne;
(*d*) appointing a trustee as receiver of all or any part of the debtor’s property	*d*) nommer, pour la période qu’il estime indiquée, un syndic comme

in Canada, for any term that the court considers appropriate and directing the receiver to do all or any of the following, namely,	séquestre à tout ou partie des biens du débiteur situés au Canada et ordonner à celui-ci :
(i) to take possession of all or part of the debtor's property specified in the appointment and to exercise the control over the property and over the debtor's business that the court considers appropriate, and	(i) de prendre possession de tout ou partie des biens du débiteur mentionnés dans la nomination et d'exercer sur ces biens ainsi que sur les affaires du débiteur le degré d'emprise que le tribunal estime indiqué,
(ii) to take any other action that the court considers appropriate.	(ii) de prendre toute autre mesure que le tribunal estime indiquée.
(2) If any proceedings under this Act have been commenced in respect of the debtor at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.	(2) Si, au moment où l'ordonnance de reconnaissance est rendue, une procédure a déjà été intentée sous le régime de la présente loi contre le débiteur, l'ordonnance prévue au paragraphe (1) doit être compatible avec toute ordonnance qui peut être rendue dans le cadre de cette procédure.
(3) The making of an order under paragraph (1)(*a*) does not preclude the commencement or the continuation of proceedings under this Act, the *Companies' Creditors Arrangement Act* or the *Winding-up and Restructuring Act* in respect of the debtor.	(3) L'ordonnance rendue au titre de l'alinéa (1)a) n'a pas pour effet d'empêcher que soit intentée ou continuée, contre le débiteur, une procédure sous le régime de la présente loi, de la Loi sur les liquidations et les restructurations ou de la Loi sur les arrangements avec les créanciers des compagnies.
[Emphasis added]	

[81] Since a judge may go as far as appointing a trustee as receiver for all of the debtor's property located in Canada with the power to exercise full control over them,

including their realization, the issue then becomes what kind of *ex parte* orders were appropriate in the circumstances for the protection of the interests of the creditors.

[82] I have no hesitation in concluding, based on the facts alleged, that Corriveau J. was right to appoint a person to assist the US representative in order to protect either the debtor's property or the interest of the US creditors.

[83] However, before determining the extent of the powers to be granted *ex parte* to such a person, she had to take into consideration not only the apprehension expressed by the US trustee and his allegations about Marciano past behaviour, but also the following:

> - the claims of the creditors were not yet final. As said by the dissenting judge of the appeal panel of the Bankruptcy Court, "if ever there were a case in which the debtor [Marciano] could claim a dispute, this would be it";
>
> - the likelihood that the Civil Judgments will be considerably reduced by the California Court of Appeal and the fact that Marciano had substantial assets in California;
>
> - once she had recognized the US bankruptcy proceeding as a foreign main proceeding, s. 271 BIA provides for an automatic stay of proceedings in Canada and an interdiction for Marciano to sell or otherwise dispose of any property;
>
> - the fact that there was no allegation that Marciano was running his business in Montreal in an inadequate manner and that his Canadian creditors were not paid in due course or their interests at risk.

[84] In my view, in these circumstances, the person appointed should have been the equivalent of an interim receiver under the BIA. The powers granted *ex parte* should have been limited to the search and seizure of movable property that could be easily disposed of or transferred. There was no need to authorize *ex parte* examination of Marciano and third parties, seizure of 18 buildings located in Montreal, management and control over Marciano's assets by the receiver, including the hotel, and removal of valuable paintings and piece of arts exposed in the hotel or nearby, a public place that could easily be monitored pending the next step of the Quebec proceedings. These overreaching aspects of the initial orders could also be annulled in the appeals filed by Marciano against the Corriveau's orders.

[85] I am also of the view that Schrager J. could rescind the excessive seizure orders made under the foreign representative's motion once he had concluded that Corriveau J. was not sufficiently informed about the nature of the US proceedings, including their lack of finality. However, he had no reason to rescind the recognition order and the consequential orders, including: stay of proceedings, prohibition to sell or dispose of property, appointment of PWC and search and seizure of valuable items that could

easily be moved. The failure to explain sufficiently the lack of finality of the Civil Judgments could justify some criticism and a rescission of the orders related to this failure, but not a total rejection of the foreign representative's motion who was in other respects proceeding properly under the BIA, especially considering the purpose of Part XIII of the BIA to promote cooperation and protect the interests of creditors, as expressed at s. 267.

IV. The US creditors' motion :

[86] Pursuant to s. 362(d)(1) of *Chapter 11* (US bankruptcy law), the US creditors were prohibited from commencing proceedings to enforce their claims outside the US bankruptcy context, unless duly authorized by the US bankruptcy court. At the time, they did not have such authorization, a fact undisclosed to Corriveau J. since the moving parties' lawyers seemed to be unaware of it. In fact, an authorization was obtained only on November 17, 2011, though with retroactive effect. It remains that in September 2011, the US creditors were not legally entitled to petition the Montreal Superior Court to have Marciano declared a bankrupt under the BIA (s. 43 BIA) and to have an interim receiver appointed in the interim under s. 46 BIA. If Marciano had been represented at the hearing, this lack of authorization would most likely have been raised.

[87] In any case, nothing justified the US creditors to proceed *ex parte* on the motion to appoint an interim receiver once the foreign main proceeding recognition order was issued, including the limited accessory orders described above. Their motion could wait for a full and contradictory hearing where Marciano would have argued that the claims of these creditors were not yet final, that it was likely that they would be significantly reduced and that he had committed no act of bankruptcy in Canada.

[88] Marciano's appeal with regard to the orders issued at the request of the US creditors should be granted.

[89] I also am of the view that after having heard the arguments of Marciano and taken cognizance of the new facts disclosed in connection with the claims of the US creditors, Schrager J. was correct to rescind the orders made under their motion to appoint an interim receiver.

[90] I will now consider PWC's motion for a search warrant.

V. The interpretation of s. 189 BIA

[91] S. 189 BIA provides that the Superior Court may issue a warrant authorizing the interim receiver to enter and search a place where there is property of the bankrupt and to seize it:

189. (1) Where on *ex parte*	189. (1) Sur demande *ex parte* du

application by the trustee or interim receiver the court is satisfied by information on oath that there are reasonable grounds to believe there is in any place or premises any property of the bankrupt, the court may issue a warrant authorizing the trustee or interim receiver to enter and search that place or premises and to seize the property of the bankrupt, subject to such conditions as may be specified in the warrant.	syndic ou du séquestre provisoire, le tribunal peut, s'il est convaincu, sur la foi d'une dénonciation sous serment, qu'il y a des motifs raisonnables de croire à la présence de biens du failli en un endroit quelconque, délivrer un mandat l'autorisant, sous réserve des conditions éventuellement fixées, à y perquisitionner et à y saisir les biens du failli.
(1.1) In executing a warrant issued under subsection (1), the trustee or interim receiver shall not use force unless the trustee or interim receiver is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.	(1.1) Le syndic ou le séquestre provisoire ne peut recourir à la force dans l'exécution du mandat que si celui-ci en autorise expressément l'usage et que si lui-même est accompagné d'un agent de la paix.
(2) Where the court commits any person to prison, the commitment may be to such convenient prison as the court thinks expedient.	(2) Lorsque le tribunal fait incarcérer quelqu'un, l'incarcération peut s'opérer dans telle prison convenable que le tribunal juge appropriée.
[Emphasis added]	

[92] Justice Schrager decided that s. 189 BIA only applied to the property of a "bankrupt" as defined by s. 2 BIA:

2. In this Act, […]	2. Les définitions qui suivent s'appliquent à la présente loi. […]
"bankrupt" *« failli »*	« failli » *"bankrupt"*
"bankrupt" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person;	« failli » Personne qui a fait une cession ou contre laquelle a été rendue une ordonnance de faillite. Peut aussi s'entendre de la situation

[…]	juridique d'une telle personne. […]

According to him, Marciano does not fit this definition because no bankruptcy order has been made against him under the BIA; so s. 189 BIA was not available to PWC.

[93] This interpretation seems inconsistent with what Houlden, Morawetz and Sarra, *supra*, at p. 7-87, describe as the scope of s. 189 BIA:

> In *Re Kadri Food Corp.* (1996), 41 C.B.R. (3d) 272, 1996 CarswellNS 312, Nathanson J. of the Nova Scotia Supreme Court held that s. 189 does not authorize a warrant to be issued against any person other than a bankrupt. If this is a correct interpretation of s. 189, then the provision for an interim receiver to apply for a warrant contained in s. 189 is difficult to understand, since an interim receiver is appointed when a debtor is not in bankruptcy. On the basis of *Re Kadri*, an interim receiver would be unwise to apply for a warrant under s. 189 unless he or she had adequate indemnity from the applicant creditor.

Thus, according to these learned authors, s. 189 BIA could apply to a debtor who is not a bankrupt. I share this interpretation; otherwise, the words "interim receiver" found at s. 189 are in meaningless.

[94] Moreover, pursuant to s. 272 BIA, once a recognition order made, the Superior Court can, if satisfied that it is necessary for the protection of the interests of the creditors, issue <u>any</u> order that it considers appropriate. This could readily include the issuance of search warrants *ex parte* when necessary to preserve assets.

[95] However, the scope of s. 189 BIA cannot be extended to authorize a trustee, an interim receiver or a court-appointed officer under Part XIII to search and seize the property of third parties. As Houlden, Morawetz and Sarra, *supra*, write at p.7-87:

> Section 189 is restricted to the issuance of a search warrant with respect to property of the bankrupt; it is not wide enough to include property of a third party. Thus a search warrant may be issued to seize the books, records and documents of the bankrupt, but a search warrant may not be issued to seize the books, records and documents of a third party.

[96] This should not be read as meaning that an immovable belonging to a third party in which debtor's asset may possibly be found may not be searched but rather that the search must be designed only to retrieve the debtor's assets in order to seize them.

[97] In PWC's motion to obtain the issuance of a search warrant and the authorization to seize, the four premises to be searched are well-defined as places where Marciano either lives or stores his property and the items to be seized therein are movable

alleged to belong to him. As pointed out by Schrager J., it was difficult to ascertain allegedly belonging ownership of these items so that the seizures relating to them could not be quashed on the basis of arguments relating to title of property. In these circumstances, the orders authorizing search of these premises and seizure of any movables that belong or could be under the control of Marciano's currently located therein complied with s. 189 BIA and should not have been rescinded.

[98] As for the eleven bank accounts for which an authorization to seize was granted, it was alleged that they contain funds belongings to Marciano.

[99] However, PWC should not have been authorized to seize the immovables since, according to the registry office, they belonged to numbered companies. Seizure would only be valid if Corriveau J. had been convinced that these entities were mere *alter ego* of Marciano and that there was a serious risk of an attempt to dispose of them before a contradictory hearing, a conclusion she did not express in her judgments.

[100] As for Marciano's documents found in the designated premises to be searched, described above, Schrager J. wrote that their seizure is not permitted under s. 189 because the seizure of documents is not available under provincial law. I disagree and prefer to hold that s. 189 BIA allows for the seizure of documents as Duval Hesler J., as she then was, wrote in *Volailles Montréal inc. (Syndic de)*, [1996] R.J.Q. 2705 (Sup. Ct.). This opinion is confirmed by s.16 (3.1) BIA that specifically refers to the obligation for the trustee to obtain a search warrant under s. 189 in order to enter premises occupied by a third party to gain access to books, records and documents of the bankrupt.

[101] To sum up, Schrager J. erred regarding the application of s. 189 BIA in the context of a cross-border bankruptcy. Moreover, his decision to rescind and quash was based on the erroneous conclusion that a foreign bankruptcy judgment, which is not final and itself based on civil judgments that are not final, is not enforceable under the BIA. He should not have rescinded the orders made under the PWC's motion, except for the part dealing with the seizure of the 18 described immovables.

VI. The right of PWC to obtain payment of its fees and disbursements

[102] Schrager J. ordered PWC to return at its expense the movable property and documents seized as well as cash seized and sums received on account of fees and disbursements, the whole notwithstanding appeal. PWC did comply after a failed attempt to have the provisional execution suspended. It is now claiming $1,223,855.24.

[103] Who should bear PWC's fees and disbursements? To what extent?

[104] PWC contends that because it is an officer of the court, it should not have been stripped of all the rights and protections afforded to it by Corriveau J. in the appointing orders and upon which it relied to accept the appointment and to carry out its duties. It

adds that it had no independent duty to investigate the merits of the assertions made by the US creditors and the US Trustee; so it should not bear the consequences of the improper conduct of Fahs et al. and Gottlieb, if any. PWC also pleads that Schrager J. ruled *ultra petita* by:

> - ordering PWC to return movable property and documents at its expense;
>
> - ordering PWC to bear the expense of the return by guardians of the property in their possession;
>
> - ordering PWC to bear the expense of any assistance by executing bailiffs;
>
> - ordering PWC to pay to Marciano and one of the third Parties the sum of $582,028.74;
>
> - condemning PWC to costs.

[105] The texts of the motions to rescind and to quash themselves indicate that Schrager J. has ruled partly *ultra petita*. Relevant excerpts of Marcinao's motion to review, rescind and vary various orders (PWC being designated as a respondent and interim receiver/receiver) read as follows:

> **ORDER** PricewaterhouseCoopers to, upon pronouncement of the judgment to intervene herein, return any and all assets, moveable or immoveable, to the Petitioner, along with a detailed listing of assets seized since the issuance of the Orders that belong to the Petitioner;
>
> **ORDER** the Respondents to provide an undertaking to be responsible and abide by any Order that the Court may make as to damages sustained by the Petitioner by reason of the appointment of the Interim Receiver, or in the event the Petition for a receiving order is dismissed, including as to repayment of all fees and disbursements paid to PricewaterhouseCoopers inc. and Blakes, Cassels & Graydon LLP from the Petitioner's property;
>
> […]
>
> **THE WHOLE WITH COSTS.**

The Interveners' motion to quash contains similar conclusions. Thus the *ultra petita* argument has some validity, especially with the parts of the judgment that mean that PWC must return at its expenses the property seized and bear the expenses incurred in the execution of Corriveau J.'s orders.

[106] Moreover, I agree with PWC that it was not incumbent upon PWC to conduct an independent assessment of the claims of the US creditors or of the validity of the US

bankruptcy judgment. As held by the late Chief Justice Brenner of the Supreme Court of British Columbia in *Re Down* (2003), 46 C.B.R. (4th) 58 at para. 10:

> There is no duty on an interim receiver to review or comment on the strengths or weaknesses of a petitioner's case in a bankruptcy proceeding. It is not the role of an intended receiver to conduct an independent assessment of a claim. Prior to its appointment, an interim receiver has no real status in the proceedings except to comment on the form of the order and any arrangements which the order seeks to authorize the interim receiver to enter into.

[107] In the present case, there is no evidence of bad faith or wilful blindness. PWC could rely on the situation described in the motions prepared by Gottlieb and the US creditors as conclusive about the need to urgently seize the assets that could easily be displaced and moved out of the reach of the Superior Court. In these circumstances, it was neither inappropriate nor unreasonable for PWC to ask for search warrants and seizure orders. In my view, PWC is entitled to be paid its reasonable fees and expenses incurred in discharging its duties an officer of the Court.

[108] I will now address the liability for the fees and disbursements.

[109] In *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp*. (1972), 29 D.L.R. (3d) 373 (Man. C.A.), and in *Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc.* (1984),10 D.L.R. (4th) 572 (B.C. C.A.), it was held that the receiver's remuneration must come out of the assets under the control of the Court. In *Braid*, writing for the Manitoba Court of Appeal, Dickson J.A. (as he then was) wrote:

> The disposition of this appeal does not present any difficulty if one bears in mind that a receiver appointed by the Court is the receiver of the Court, not the receiver of the parties who sought the appointment: *Boehm v. Goodall*, [1911] 1 Ch. 155, followed by the British Columbia Court of Appeal in *Johnston v. Courtney*, [1920] 2 W.W.R. 459. In the performance of his duties the receiver is subject to the order and direction of the Court, not the parties. The parties do not control his acts nor his expenditures and cannot therefore in justice, be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the Court and not from the pocket of those who sought his appointment. This is subject, however, to the proviso that at the time of the appointment the Court may direct that one or other of the parties be responsible for such remuneration, as was done in *Howell v. Dawson* (1884), 13 Q.B.D. 67.

[110] The notion of assets under the control of the court has been interpreted widely enough to include any assets subject to the administration of the court officer, including assets held in trust for third parties: *Ontario Securities Commission v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 386 (Ont. C.A.).

[111] I see no reason to detract from these principles. I wish to add that in a case of an *ex parte* application, the receiver or interim receiver may be wise to ask for an alternative proviso at the time of the appointment.

[112] In the case at bar, the fact that Corriveau J.'s orders could be rescinded, in part or in totality, cannot retroactively deprive an officer of the court that acted accordingly of the rights and protections granted upon its appointment. By trying to give retroactive effect to the rescinding order, Schrager J. overstepped his proper authority. The entitlement of a court officer to appropriate compensation for fees and expenses incurred under the auspices of, and during the currency of a court order, cannot be affected by the ultimate validity of such a court order: *Ontario* (*Registrar of Mortgage Brokers) v. Matrix Financial Corp*. (1993), 106 DLR (4th) 132 (Ont. C.A.).

[113] Moreover, for the reasons indicated above, I am of the view that Corriveau J. was right to grant in part Gottlieb's motion for recognition of the US bankruptcy judgment as a foreign main proceeding and to appoint PWC, though not as receiver of the Canadian assets but rather as an interim receiver. The fact that she should have refused to grant to this court officer extensive powers does not alter the fact that PWC was properly appointed and acted according the terms of the orders issued.

[114] In these circumstances, Schrager J. should only have terminated this appointment or reduced the powers granted to PWC. Under both scenarios, PWC remains entitled to its fees and disbursements.

[115] In a document entitled "Second Interim Report" filed on October 31, 2011, PWC indicated that $414,754.32 has been used to pay for its disbursements and $109,121.92 for its fees and that $699,979 in fees and disbursements remained owing (for a total of $1,223,855.24).

[116] Are part of the fees and disbursements excessive? This issue is best decided later in the course of a contradictory hearing on PWC's accounts, which is the usual procedure under the BIA.

[117] The reasonable disbursements and fees to be paid to PWC as a court officer appointed at the request of the US Trustee "shall form a first charge" on Marciano's Canadian assets, including the assets owned or controlled by him indirectly, including the trust and the numbered companies, as per the appointing order made by Corriveau J.

[118] If at the end of the day, the US bankruptcy proceedings are invalidated or considered abusive, excessive or something similar by the US bankruptcy courts or the Court of Appeal for the 9th circuit, the reasonable amounts to be granted to PWC should be considered as a consequential damage suffered by Marciano as a result of the various proceedings initiated by the US creditors, to be offset from any amount due to them by him under the final Civil Judgments.

VII. A pragmatic solution

[119] Since Schrager J. dismissed PWC while I propose to confirm the appointment of PWC made by Corriveau J., though with limited powers, what is the best manner to proceed?

[120] Considering all the new facts brought to the attention of this Court and the likely content of the impending judgments of the California Court of Appeal, it should be left to the US trustee, if he considers it appropriate, to petition again the Quebec Superior Court to have PWC or another entity appointed with the necessary powers to protect Marciano's creditors. The file is open and a contradictory debate could be held shortly.

[121] The best solution no doubt remains a settlement out of court, an option that would be the best means of bringing an end to a legal saga for which both Marciano and the US creditors bear responsibility.

CONCLUSION

[122] For these reasons, I propose allow the appeal, without costs, to set aside the judgment of the Superior Court dated December 8, 2011 and to replace its paras. 197 to 216 by the following:

> [197] **GRANTS** in part the Motion to Review, Rescind and Vary Various Orders Rendered pursuant to the *Bankruptcy and Insolvency Act* of Georges Marciano dated September 28, 2011;
>
> [198] **GRANTS** in part the Motion to Quash the Issuance of a Search Warrant and Authorization to Seize the Property of the Debtor, to Rescind and Dismiss Orders and for the Issuance of Safeguard Orders of Michel Bensmihen, es qualité of trustee of the C.K.S.M. Trust, 9204-7570 Québec Inc., 9211-9882 Québec Inc. and 9213-4568 Québec Inc. dated September 28, 2011;
>
> [199] **RESCINDS** the following orders, issued by Justice Chantal Corriveau dated September 15, 2011 :
>
> Namely :
>
> 1. Paras. 9, 10 and 13 of the Order (Recognition of a main Foreign Proceeding) and replaced paras. 11 and 12 by the following:
>
> > [11] **APPOINTS** PWC as interim receiver of Georges Marciano's property located in Canada;

> [12] **EMPOWERS** PWC to seize any moveable assets that belong or could have been under the control of Marciano and that could easily be moved or otherwise disposed of, and **RESERVES** to PWC the right to apply to this Court for any further orders that may be necessary or appropriate to protect the rights of Marciano's creditors;

2. Paras. 8 and 9 of the Order (Issuance of a search warrant and the authorization to seize property of the Debtor);

3. Order (Interim Receiver).

[200] **QUASHES** all seizures of immoveable made in virtue of the Warrant of Search and Seizure dated September 15, 2011, the Second Warrant of Search and Seizure dated September 16, 2011 and the Amended Second Warrant of Search and Seizure dated September 16, 2011 and;

[201] **GRANTS** mainlevée of all of the seizures practiced in the present record of all immovable property and more specifically, with regard to the following:

« a) La fraction de l'immeuble détenu en copropriété divise ayant front sur la rue St-Jacques, en la ville de Montréal, province de Québec, comprenant :

- La partie privative (unité résidentielle) connue et désignée comme étant le lot numéro TROIS MILLIONS QUATRE CENT DOUZE MILLE SEPT CENT CINQUANTE-SEPT (3 412 757) du cadastre du Québec, circonscription foncière de Montréal;

- La quote part afférente à ladite partie privative dans la partie commune et connue et désignée comme étant le lot numéro TROIS MILLIONS QUATRE CENT DOUZE MILLE SEPT CENT CINQUANTE-SIX (3 412 756) du cadastre du Québec, circonscription foncière de Montréal.

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 13 061 075.

Avec la bâtisse dessus érigée portant le numéro **262, Saint-Jacques, Montréal, province de Québec, H2Y 1N1**. »

b) « Un certain emplacement ayant front sur la rue Saint-Paul est dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE HUIT CENT DIX-NEUF (1 181 819) du cadastre du Québec, circonscription foncière de Montréal, avec les bâtisses dessus érigées notamment celle portant le numéro **320, rue Notre-Dame Est, Ville de Montréal, province de Québec, H2Y 1C7**. »

c) « Un certain emplacement ayant front sur la Place d'Armes dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT QUARANTE-ET-UN (1 180 941) et de la moitié indivise (1/2) du lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT TRENTE-NEUF (1 180 939) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant le numéro **501-507, Place d'Armes, Ville de Montréal, province de Québec H2Y 2W8**. »

d) « Un certain emplacement situé sur la Place Jacques Cartier, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SIX CENT TRENTE-HUIT (1 181 638) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant les numéros **444-454 Place Jacques Cartier, Ville de Montréal, province de Québec, H2Y 3C3**. »

e) « Un certain emplacement situé sur la rue Saint-Paul est dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE HUIT CENT ONZE (1 181 811) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse de cinq étages dessus érigée portant les numéros **281 et 295 rue Saint Paul est, Ville de Montréal, province de Québec H2Y 1H1**. »

f) « Un certain emplacement ayant front sur la rue Saint-Paul est dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE NEUF CENT QUATRE (1 181 904) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse de cinq étages dessus érigée portant les numéros **262 et 264 rue Saint Paul est, Ville de Montréal, province de Québec H2Y 1G9**. »

g) « Un certain emplacement situé sur la Place Jacques Cartier, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SIX CENT QUARANTE (1 181 640) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant les numéros **438 à 442 Place Jacques Cartier, Ville de Montréal, province de Québec H2Y 3B3**. »

h) « Un certain emplacement ayant front sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant les lots numéros UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT CINQUANTE-HUIT (1 180 958) et TROIS MILLIONS DEUX CENT QUARANTE QUATRE MILLE SIX CENT QUATRE-VINGT-SEPT (3 244 687) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigé portant l'adresse **11 – 21, rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1S5**. »

i) « Un certain emplacement situé sur la rue de la Commune Ouest, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE DEUX CENT SOIXANTE-ET-ONZE (1 181 271) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble dessus érigé portant les numéros **109, 111, 115, 117 et 119, rue de la Commune Ouest et 115, rue de la Capitale, Ville de Montréal, province de Québec H2Y 2C7**. »

j) « Un certain emplacement situé sur la rue de la Commune Ouest, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE DEUX CENT SOIXANTE-TROIS (1 181 263) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant le numéro **133, rue de la Commune Ouest, Ville de Montréal, province de Québec H2Y 2C7**. »

k) « Un certain emplacement situé sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE SEPT CENT QUATRE-VINGT QUATORZE (1 180 794) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigé portant les numéros **200-212, rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1T3**. »

l) « La fraction de l'immeuble détenu en copropriété divise situé dans la Ville de Montréal (Arrondissement Ville-Marie) comprenant :

- La partie privative connue et désignée comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SEPT CENT QUATRE-VINGT-HUIT (1 181 788) du cadastre du Québec, circonscription foncière de Montréal, correspondant à l'appartement dont l'adresse est le **428 Place Jacques Cartier, Ville de Montréal, province de Québec, H2Y 3B3**;

- La quote part afférente à ladite partie privative dans les parties communes connues et désignées comme étant les lots numéros UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-NEUF (1 285 169), UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-DIX (1 285 170) et UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-ET-ONZE (1 285 171) du cadastre du Québec, circonscription foncière de Montréal,

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 3 913 667 telle qu'amendée aux termes de l'acte publié à Montréal sous le numéro 5 242 571. »

m) « Un certain emplacement situé sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT QUARANTE-SIX (1 180 946) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigé portant le numéro **60 rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1S6**. »

n) « Un certain emplacement situé sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT QUARANTE-SEPT (1 180 947) du cadastre du Québec, circonscription foncière de Montréal, avec les bâtisses ci-dessus érigées notamment celle portant les numéros **54 et 56 rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1S6**. »

o) « Un certain emplacement ayant front sur la rue Saint-Jacques ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE SIX CENT TRENTE-SEPT (1 180 637) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigée portant les adresses **249-251, rue Saint-Jacques, Ville de Montréal, province de Québec H2Y 1M6**

p) « La fraction de l'immeuble détenu en copropriété divise situé dans la Ville de Montréal (Arrondissement Ville-Marie) comprenant :

- La partie privative connue et désignée comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SEPT CENT QUATRE-VINGT-SEPT (1 181 787) du cadastre du Québec, circonscription foncière de Montréal, correspondant à l'appartement dont l'adresse est le **422 Place Jacques Cartier, Ville de Montréal, province de Québec, H2Y 3B3**;

- La quote part afférente à ladite partie privative dans les parties communes connues et désignées comme étant les lots numéros UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-NEUF (1 285 169), UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-DIX (1 285 170) et UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-ET-ONZE (1 285 171) du cadastre du Québec, circonscription foncière de Montréal,

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 3 913 667 telle qu'amendée aux termes de l'acte publié à Montréal sous le numéro 5 242 571. »

q) « La fraction de l'immeuble détenu en copropriété divise situé dans la Ville de Montréal (Arrondissement Ville-Marie) comprenant :

- La partie privative connue et désignée comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SEPT CENT QUATRE-VINGT-NEUF (1 181 789) du cadastre du Québec, circonscription foncière de Montréal, correspondant à l'appartement dont l'adresse est le **424 Place Jacques Cartier, Ville de Montréal, province de Québec H2Y 3B3**;

- La quote part afférente à ladite partie privative dans les parties communes connues et désignées comme étant les lots numéros UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-NEUF (1 285 169), UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-DIX (1 285 170) et UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-ET-ONZE (1 285 171) du cadastre du Québec, circonscription foncière de Montréal,

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 3 913 667 telle qu'amendée aux termes de l'acte publié à Montréal sous le numéro 5 242 571. »

[202] **ORDERS** the radiation of all inscriptions of such immovable seizures from the Index of Immovables;

[203] **ORDERS** Joseph Fahs, Steven Chapnick and Elizabeth Tagle to return any and all documents and computer hard discs seized in any form, and not to retain copies of any such documents or computer records, in any form;

[204] **ORDERS** PriceWaterhouseCoopers Inc. to render account of any and all receipts and disbursements of any business interests in their possession or under their control or surveillance as Interim Receiver in this file since September 15, 2011;

[205] **RESERVES** the rights and recourses of Georges Marciano, Michel Bensmihen es qualités of Trustee to the C.K.S.M. Trust, 9204-7570 Québec Inc., 9211-9882 Québec Inc. and 9213-4568 Québec Inc. to return to this Court for supplemental orders as may be necessary to give effect hereto;

[206] **ORDERS** provisional execution of this judgment notwithstanding appeal;

[207]**THE WHOLE** with costs against Joseph Fahs, Steven Chapnick and Elizabeth Tagle, solidarily.

PIERRE J. DALPHOND, J.A.

2014 ONSC 6116
Ontario Superior Court of Justice

CanaSea PetroGas Group Holdings Ltd., Re

2014 CarswellOnt 14845, 2014 ONSC 6116, 18 C.B.R. (6th) 283, 246 A.C.W.S. (3d) 18

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

In the Matter of a Proposed Plan of Compromise or Arrangement of Canasea PetroGas Group Holdings Limited, Canasea Oil and Gas Group PTE. Ltd., Canasea International PTE. Ltd., Canasea Petrogas Investment Inc. and Canasea Oil and Gas Ltd.

Penny J.

Heard: October 16, 2014
Judgment: October 21, 2014 *
Docket: CV-14-10700-00CL

Counsel: Greg Azeff, Brent McPherson, Martha Garland for Applicants
Kyla Mahar for Monitor
Shawn Irving, Andrea Lockhart for Equity Ventures International Holdings Limited
Pamela Huff, Matthew Kanter for Blue Energy Holdings Limited

Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Initial order was made in context of ex parte application by applicants for protection under Companies' Creditors Arrangement Act — Moving parties brought motion for order varying initial order — Initial order terminated and declared void ab initio — Evidence and submissions provided at brief hearing of application for initial order led court to conclude that each applicant had liabilities in excess of $5 million and was clearly insolvent, that each applicant was unable to meet its obligations as they came due, and that each applicant's finances were inextricably intertwined through intercompany debt obligations — Evidence now produced as result of moving parties' motion did not support those conclusions — Evidence only supported conclusion that three specified applicants had obligations in excess of $5 million and were insolvent — One of those applicants, although Canadian company, essentially carried on no business, and other two, real debtors in proceeding, were Singapore companies and had very little connection to Canada — Section 10(2)(c) of Act required disclosure of all financial statements prepared during year before application, and it was not established that applicants had complied with this obligation — Had court been aware of facts, as now found, it would not have issued initial order — It was not established that applicants filled their high obligations of candor and disclosure on ex parte application.
Table of Authorities
Statutes considered:
Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 10(2)(c) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 38.11 — considered

Words and phrases considered:

asset

An asset is something that is owned and has value.

doing business

While there is some authority for the proposition that a company seeking the protection of the [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36] does not need to be carrying on "active" business in Canada, the weight of authority supports the proposition that "doing business" should be given its plain and ordinary meaning, which necessarily entails some form of commercial activity or active management. Passive ownership of shares does not constitute "doing business."

***Penny J.*:**

Overview

1 This is a motion for an order varying my order of September 19, 2014. That order was an "initial order" made in the context of an *ex parte* application by the applicants for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The basis for the motion is that the Ontario Superior Court lacks jurisdiction over the applicant CanaSea Oil and Gas Group Pte. Ltd. (COGG).

2 The moving parties are Equity Ventures International Holdings Limited and Blue Energy Holdings Limited. Equity Ventures and Blue Energy are both creditors of COGG under convertible loans. They are owed approximately $13 million. Their loans constitute 90% of the debt obligations of COGG and 49% of the total debt obligations of the applicants, or the CanaSea group, as a whole.

3 These Convertible Noteholders oppose this proceeding. The Convertible Noteholders indicate they have no intention of supporting any plan of compromise that may be made. They wish to pursue their remedies in Singapore, where their loan documents provide that any dispute should be adjudicated.

4 The principal argument of the Convertible Noteholders is that COGG is not a "company" within the meaning of the CCAA because it has no assets in Canada and does not do business in Canada, as required by the provisions of the CCAA. The material filed, however, also raises a question about whether applicants which unquestionably have assets or do business in Canada, i.e., Canasea PetroGas Investment Inc. and Canasea Oil and Gas Limited are, in fact, insolvent and have debts of at least $5 million, also as required by the provisions of the CCAA.

The Issues

5 The Convertible Noteholders' motion raises three basic issues:

(1) The adequacy of the financial disclosure;

(2) Whether COGG has any "assets" in Canada; and

(3) Whether COGG "does business" in Canada.

Background

6 The applicant Canasea Petrogas Holdings Limited (CPGH) is a holding company incorporated under the *Canada Business Corporations Act* with its head office in Toronto. The other applicants are all subsidiaries of CPGH. CPGH owns 100% of the shares of Canasea Oil and Gas Group Pte. Ltd. (COGG), a Singapore company. COGG owns 100% of the shares of Canasea Investment Inc. (CPII), a CBCA company. CPII owns 100% of the shares of Canasea Oil and Gas Limited (COGL), the Saskatchewan operating company. Canasea International Pte. Inc. (CPIL), another Singapore company, is also wholly owned by CPGH.

7 The application for an initial order was brought *ex parte*.

8 The affidavit of Zhenyu Fang filed in support of the initial order purported, in para. 58, to attach "unaudited financial statements" for COGG, CPII and COGL at Exhibit V. Fang deposed that these unaudited financial statements showed that COGG, CPII and COGL "are collectively and individually insolvent."

9 In paras. 60 and 61 of his affidavit, Fang deposed that COGG's assets of $15 million were "comprised almost entirely of loans to COGL and other investments in its subsidiaries" and that:

> COGG's assets are entirely comprised of its shares in CPII. Consequently, its value is dependent on that of CPII (which is insolvent). CPII's assets are entirely comprised of its shares in COGL. Consequently, its value is dependent on that of COGL (which is insolvent). COGL's most recent unaudited financial statements for the period ending July 31, 2014 (a copy of which is attached hereto as Exhibit W) indicate that it has assets valued at $12,245,669.42 and liabilities of $17,072,817.80 and is thus insolvent.

10 The Fang affidavit also states, in para. 72, that "the Applicants are insolvent on both an individual and consolidated basis. The July 31, 2014 financial statements of COGL (copies of which are previously attached at Exhibit BB hereto), the operating company, show net year to date losses in the amount of $1,115,634.94."

11 The applicants' factum on the application for an initial order stated, among other things:

> In the present case each of the applicants has liabilities in excess of $5 million and is clearly insolvent.
>
> Each of the applicants is unable to meet its obligations as they generally become due.
>
> The applicant's finances are also inextricably intertwined through intercompany advances.

12 On the strength of this evidence and these representations, I found, among other things, in my September 19, 2014 endorsement:

> Further, the applicants' finances are inextricably intertwined through intercompany arrangements.
>
> Under the CCAA a "debtor company" includes a company which is bankrupt or insolvent. Each of the applicants has liabilities which exceed $5 million. Each of the applicants is, on the evidence, unable to meet its obligations as they fall due. Further, each of the applicants' assets is less than the amount of their obligations due and owing.
>
> CPII and COGL received the benefit of these funds and are liable under intercompany loan arrangements. None of these companies can repay this indebtedness. I am therefore satisfied on the evidence available that the applicants are indebted for over $5 million and are insolvent.

Analysis

13 Rule 38.11 of the *Rules of Civil Procedure* permits a party who is affected by a judgment made *ex parte* to bring a motion before the judge who granted the judgment to set aside or vary the judgment on such terms as are just. In addition, paragraph 51 of my initial order (commonly referred to as the "comeback clause") permits any interested party

to apply to the court to vary or amend the initial order on not less than seven days' notice to any other party likely to be affected by the order sought.

14 Given that the hearing for the initial order was conducted *ex parte* and that the moving parties represent 90% of COGG's debt obligations, I have no hesitation in finding that the moving parties meet the requirements of the Rules and the comeback clause in order to bring this motion.

Financial Disclosure

15 As noted above, the applicants' evidence and submissions on the initial order were to the effect that, although COGG was the borrower under the Convertible Notes, as a result of intercompany obligations, COGG's subsidiaries, being CPII and COGL, were also liable or somehow "on the hook" for the Convertible Noteholders' loans. It was this submission that allegedly brought the applicants other than COGG within the insolvency and $5 million thresholds required by the CCAA.

16 The cross examination of Fang and the further scrutiny of Fang's evidence by the Convertible Noteholders have convinced me that:

> (a) there is no evidence (apart from the conclusory assertions of Fang) that CPII or COGL are insolvent;
>
> (b) there is no evidence that CPII or COGL have debt obligations in excess of $5 million; and
>
> (c) there is no evidence of intercompany debt obligations which make CPII or COGL liable to COGG for its debt to the Convertible Noteholders.

17 The documents at Exhibit V of the Fang affidavit are, on closer inspection, not financial statements at all. Exhibit V is some kind of profit and loss statement as of December 31, 2013. It is unclear by whom or when it was prepared or for what purpose. It is, as it turns out, the only document which even hints at any obligation "due" from CPII or COGL and is, at best, ambiguous about what "due" means and to which entity the alleged amounts are "due." In addition, the attachments to Exhibit V which are specific to CPII and COGL, record no obligations of these companies to COGG whatsoever.

18 Fang was, in my view, evasive in his cross-examination about whether these entries represented intercompany loans (p.71, qq. 257 to 259) and finally admitted (at p. 72 q. 261) that there were no intercompany loan agreements. In addition, Exhibit 2 to the Fang cross-examination lists COGL's creditors - COGG is not among them. COGL is shown to have debts of only $108,000.

19 In fact, the CanaSea group has a financial advisor - E&Y Singapore. It came out as a result of Fang's cross-examination that E&Y Singapore had prepared unaudited financial statements for the year end December 31, 2013 which were not filed with the application for an initial order. These were produced only at the return of the Convertible Noteholders' motion.

20 There is no suggestion in these financial statements that CPII or COGL owe COGG any material amount. COGG is simply said to have a $13.8 million asset referred to as "investment in subsidiaries."

21 Note 20 to these financial statements indicates that COGL was audited by E&Y Canada, although no audited financial statements of COGL were produced in evidence on the application or the motion.

22 Instead, what Fang purported to file, as Exhibit W to his affidavit on the application, was unaudited financial statements of COGL. Exhibit W is, however, plainly not a financial statement at all. Again, it is not clear for what purpose or by whom this document was prepared. It appears to be a general ledger of some sort. In any event, it discloses no evidence of material obligations owing by COGL to COGG.

23 Fang was, I find, again evasive during his cross-examination on Exhibit W. He refused to admit that Exhibit W was merely a ledger that might feed into the income statement. He then retreated into professed ignorance about what Exhibit W was at all, deferring any further questions to his "accountants."

24 Fang's affidavit states that Exhibit BB is a COGL financial statement. This too is belied by a close inspection of the document. Exhibit BB is, on its face, nothing more than a profit and loss statement for COGL. It provides no evidence of any material obligations owing to COGG. Although the document shows COGL as having negative cash flow of over $1 million, there is no evidence of the value of COGL's assets, the underlying petroleum and natural gas licenses. This profit and loss statement therefore is no evidence of COGL's solvency, independent of COGG.

25 The evidence and submissions provided at the brief hearing of the application for an initial order led me to conclude that:

(1) each applicant had liabilities in excess of $5 million and was clearly insolvent;

(2) each applicant was unable to meet its obligations as they came due; and

(3) each applicant's finances were inextricably intertwined through intercompany debt obligations.

26 The evidence now produced as a result of the Convertible Noteholders' motion simply does not support those conclusions. These conclusions were, in fact, wrong on the basis of the evidence now available. The evidence only supports the conclusion that CPGH, CIPL and COGG have obligations in excess of $5 million and are insolvent. CPGH, although a Canadian company, essentially carries on no business - it is a holding company. CIPL and COGG, the real debtors in this proceeding, are Singapore companies and have very little connection to Canada.

27 Section 10(2)(c) of the CCAA requires disclosure of all financial statements prepared during the year before the application. I cannot be satisfied, on the basis of my findings above, that the applicants have complied with this obligation.

28 More importantly, I have reached the conclusion that if I had been aware of the facts discussed above, as now found, I would not have issued the initial order. I am not satisfied that the applicants filled their high obligations of candor and disclosure on an *ex parte* application. For this reason, my initial order is terminated. I declare my order of September 19, 2014 void *ab initio*.

Assets in Canada

29 Although, in light of this conclusion, it is not necessary for the disposition of these proceedings to review the second and third issues raised by the Convertible Noteholders on this motion, I shall do so briefly in deference to counsel's extensive submissions.

30 An asset is something that is owned and has value. It is conceded that even a modest bank account in Canada would meet the Canadian asset requirement. I tend to agree with the Convertible Noteholders that the mere fact that an entity holds any share in a Canadian corporation would not necessarily qualify as an asset in Canada for jurisdiction purposes. However, in this case COGG owns 100% indirect control of the company in Canada which owns the only underlying assets that all these parties are fighting about - the Saskatchewan petroleum and natural gas licenses.

31 Accordingly, absent the problem dealt with above, I would have been inclined to the view that COGG owned an asset in Canada.

Does Business in Canada

32 COGG is a Singapore company. According to Fang's evidence on cross-examination, it carries on no business. The applicants submitted, however, that Fang, as the directing mind of COGG, is active in Canada and, therefore, COGG must carry on business in Canada.

33 I do not think this argument gives adequate content to the concept of "doing business in Canada." The applicants' argument really amounts to the proposition that wherever Fang happens to be at any given time, all the corporations of which he is the directing mind are "doing business." While there is some authority for the proposition that a company seeking the protection of the CCAA does not need to be carrying on "active" business in Canada, the weight of authority supports the proposition that "doing business" should be given its plain and ordinary meaning, which necessarily entails some form of commercial activity or active management. Passive ownership of shares does not constitute "doing business."

34 For these reasons I would have concluded that COGG was not doing business in Canada.

Conclusion

35 Notwithstanding my legal conclusion on jurisdiction under the CCAA, had the facts now available been known to me on September 19, 2014, I would not have issued the initial order.

36 The evidence does not support the conclusion that CPII or COGL qualify as applicants under the CCAA. On the evidence, the only entities which meet the insolvency and $5 million thresholds are at the COGG level or above. COGG is a Singapore company with a tenuous connection to Canada, whose loan agreements provide for the resolution of disputes in Singapore under Singapore law.

37 Had the evidence reviewed in this endorsement been brought to my attention earlier, my discretion would not have been exercised in favour of issuing the initial order.

38 Accordingly my September 19, 2014 order is terminated and I declare it to be void *ab initio*.

Costs

39 Absent agreement among the parties, costs may be requested in brief written submissions, not to exceed two typed double-spaced pages, supported with a Bill of Costs, to be filed to my attention within two weeks. Any response to such a request, subject to the same page limit, shall be submitted within a further 10 days.

Order accordingly.

Footnotes

* Leave to appeal refused at *CanaSea PetroGas Group Holdings Ltd., Re* (2014), 2014 CarswellOnt 17259, 2014 ONCA 824 (Ont. C.A.).

2014 ONCA 824
Ontario Court of Appeal

CanaSea PetroGas Group Holdings Ltd., Re

2014 CarswellOnt 17259, 2014 ONCA 824, 247 A.C.W.S. (3d) 754

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

In the Matter of a Plan of Compromise or Arrangement of CanaSea PetroGas Group Holdings Limited, CanaSea Oil and Gas Group Pte. Ltd., CanaSea International Pte. Ltd., CanaSea PetroGas Investment Inc. and CanaSea Oil and Gas Ltd.

Robert Sharpe J.A., In Chambers

Heard: October 31, 2014
Judgment: November 20, 2014
Docket: CA M44375

Proceedings: refusing leave to appeal *CanaSea Petrogas Group Holdings Ltd., Re* (2014), 18 C.B.R. (6th) 283, 2014 ONSC 6116, 2014 CarswellOnt 14845, Penny J. (Ont. S.C.J.)

Counsel: Rebecca Huang, Brent McPherson, Martine S.W. Garland for Moving Parties, CanaSea PetroGas Group Holdings Limited
Shawn T. Irving, Andrea Lockhart for Respondent, Equity Ventures International Holdings Limited
Pamela L.J. Huff, Matthew Kanter for Respondent, Blue Energy Holdings Limited

Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.4 Appeals
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals
Moving parties applied for and obtained initial order ex parte — Respondents were creditors of one of moving parties, which was Singapore company — Respondents brought motion to set aside initial order — Initial order was set aside — Moving parties brought motion for leave to appeal — Motion dismissed — It was for Companies' Creditors Arrangement Act (CCAA) judge to assess evidence as to nature of debts from which moving parties sought relief, nature of financial relationships between various companies and degree of connection between alleged insolvency and Canada — There was ample evidence to support CCAA judge's findings and he did not make any error in principle or misapprehend evidence — No merit was seen to contention that simply because debtor Singapore companies were part of larger group under umbrella of Canadian holding company, they could somehow claim benefit of CCAA in relation to debt they incurred in Singapore that was subject to Singapore law — Moving parties were unable to provide any authority to support their claim that there existed common law doctrine of "common enterprise insolvency" that went to such length.
Table of Authorities
Cases considered by *Robert Sharpe J.A., In Chambers*:
Air Canada, Re (2003), 2003 CarswellOnt 2074, 173 O.A.C. 154 (Ont. C.A. [In Chambers]) — referred to
Country Style Food Services Inc., Re (2002), 158 O.A.C. 30, 2002 CarswellOnt 1038 (Ont. C.A. [In Chambers]) — considered

Regal Constellation Hotel Ltd., Re (2004), 23 R.P.R. (4th) 64, 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, (sub nom. *Regal Constellation Hotel Ltd. (Receivership), Re*) 188 O.A.C. 97, 71 O.R. (3d) 355, (sub nom. *HSBC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of)*) 242 D.L.R. (4th) 689 (Ont. C.A.) — referred to

1078385 Ontario Ltd., Re (2004), 2004 CarswellOnt 8034, 16 C.B.R. (5th) 152, (sub nom. *1078385 Ontario Ltd. (Receivership), Re*) 206 O.A.C. 17 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 13 — considered

***Robert Sharpe J.A., In Chambers*:**

1 The moving parties seek leave to appeal from a judgment setting aside a *Companies' Creditors Arrangement Act* ("CCAA") Initial Order.

2 The moving parties are five affiliated companies, the "CanaSea Group". The corporate structure was described by the application judge, at para. 6, as follows:

> The applicant CanaSea PetroGas Holdings Limited (CPGH) is a holding company incorporated under the *Canada Business Corporations Act* with its head office in Toronto. The other applicants are all subsidiaries of CPGH. CPGH owns 100% of the shares of CanaSea Oil and Gas Group Pte. Ltd. (COGG), a Singapore company. COGG owns 100% of the shares of CanaSea Investment Inc. (CPII), a CBCA company. CPII owns 100% of the shares of CanaSea Oil and Gas Limited (COGL), the Saskatchewan operating company. CanaSea International Pte. Inc. (CPIL), another Singapore company, is also wholly owned by CPGH.

3 The moving parties applied for and obtained the Initial Order *ex parte*. I pause here to observe that in oral argument on this motion, counsel for the moving parties was unable to offer an acceptable explanation for having moved *ex parte*.

4 The respondents on this motion, Equity Ventures International Holdings Limited ("Equity Ventures") and Blue Energy Holdings Limited ("Blue Energy") are creditors of the Singapore company, COGG. They are owed $13 million, approximately 90% of the debt obligations of COGG and 49% of the total debt obligations of the CanaSea Group as a whole. They oppose any restructuring of COGG and intend to enforce their loans in Singapore where they have initiated proceedings against COGG in accordance with the loan documents which provide for Singapore jurisdiction.

5 Equity Ventures and Blue Energy moved to set aside the Initial Order on the ground that the CCAA court lacks statutory jurisdiction over COGG as well as jurisdiction *simpliciter*.

6 The application judge agreed and set aside his Initial Order.

7 The moving parties argue that they were denied procedural fairness before the application judge. They characterize the basis of the application judge's reasons for setting aside the Initial Order as being their failure to make full and frank disclosure on the *ex parte* application. They argue that had they been put on notice that this was the issue, they could have satisfied the application judge that the disclosure was adequate.

Preliminary Issue: Jurisdiction of a single judge

8 The respondents submit that as a single judge, I should decline to hear this motion for leave to appeal and defer the matter to be dealt with in writing by a panel of the court.

9 The CCAA, s. 13, provides:

> Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

10 It is clear from the wording of s. 13 that a motion for leave to appeal in a CCAA proceeding may be heard either by a judge of the court or by the court: see *1078385 Ontario Ltd., Re* (2004), 16 C.B.R. (5th) 152, 206 O.A.C. 17 (Ont. C.A.), at para. 2: "Section 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, provides the moving party with the procedural option of bringing a leave motion to a single judge"; *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377, 158 O.A.C. 30 (Ont. C.A. [In Chambers]). While the usual practice is to bring CCAA leave motions before a panel in writing (see *Air Canada, Re* (2003), 173 O.A.C. 154 (Ont. C.A. [In Chambers])) and while there are no doubt advantages to proceeding before a full panel in writing, both to the party seeking leave and to the court, I am not persuaded that there is any proper basis shown upon which I should decline to hear this motion.

Should leave to appeal be granted?

11 In my view, the moving parties fail to make out a case for granting leave to appeal.

12 I do not agree with their characterization of the application judge's reasons. While the application judge was plainly troubled by what he regarded as the misleading picture the moving parties had painted on the *ex parte* application, I cannot agree that he set aside the Initial Order on purely procedural grounds not signaled by the respondents' Notice of Motion. I agree with the respondents that the real basis for setting Initial Order is found at paras. 24 to 26 of his reasons where he finds that the evidence filed by the moving parties contains "no evidence of COGL's solvency, independent of COGG" and that "CIPL and COGG, the real debtors in this proceeding, are Singapore companies and have very little connection to Canada."

13 The application judge observes that he granted the *ex parte* order on the basis that:

> (1) each applicant had liabilities in excess of $5 million and was clearly insolvent;
>
> (2) each applicant was unable to meet its obligations as they came due; and
>
> (3) each applicant's finances were inextricably intertwined through intercompany debt obligations.

14 Upon closer examination of the record and with the benefit of opposing argument, he found, at para. 26, that in fact, the situation was entirely different:

> The evidence now produced as a result of the Convertible Noteholders' motion simply does not support those conclusions. These conclusions were, in fact, wrong on the basis of the evidence now available. The evidence only supports the conclusion that CPGH, CIPL and COGG have obligations in excess of $5 million and are insolvent. CPGH, although a Canadian company, essentially carries on no business — it is a holding company.

15 The claim that the finances of all the applicants "were inextricably intertwined through intercompany debt obligations" could not withstand scrutiny in the face of the admission given by the moving parties' principal on cross-examination that there were no documented inter-company loans.

16 The application judge concluded, at para. 36:

> The evidence does not support the conclusion that CPII or COGL qualify as applicants under the CCAA. On the evidence, the only entities which meet the insolvency and $5 million thresholds are at the COGG level or above. COGG is a Singapore company with a tenuous connection to Canada, whose loan agreements provide for the resolution of disputes in Singapore under Singapore law.

17 That finding and conclusion, fatal to the request for CCAA protection, corresponds precisely with the grounds set out in the Notice of Motion to set aside the initial order and I do not accept that the moving parties were taken by surprise.

18 It is firmly established that the test for leave to appeal in insolvency proceedings is stringent where it involves the exercise of discretion as to the assessment of competing interests and the availability of the special protection afforded by the CCAA: see *Country Style Food Services Inc., Re*, at para. 16; *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355, 242 D.L.R. (4th) 689, [2004] O.J. No. 2744 (Ont. C.A.) at para. 22.

19 In my view, this case falls squarely within the category in which deference is owed to the CCAA judge and where leave to appeal will be refused. It was for the CCAA judge to assess the evidence as to the nature of the debts from which the moving parties seek relief, the nature of the financial relationship between the various components of the CanaSea Group and the degree of connection between the alleged insolvency and Canada. There was ample evidence in the record to support the findings he made and I am far from persuaded that he made any error in principle or that he misapprehended the evidence.

20 I see no merit to the contention that simply because the debtor Singapore companies are part of a larger group under the umbrella of a Canadian holding company (CPGH), they can somehow claim the benefit of the CCAA in relation to debt they incurred in Singapore that is subject to Singapore law. The moving parties were unable to provide any authority to support their claim that there exists a common law doctrine of "common enterprise insolvency" that goes to such a length.

Disposition

21 Accordingly, I refuse leave to appeal. The respondents are entitled to their costs of this motion fixed at $20,000 for Equity Ventures and $16,000 for Blue Energy, both amounts inclusive of disbursements and taxes.

Motion dismissed.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Re: Hester Creek Estate Winery Ltd.,***
2004 BCSC 345

Date: 20040317
Docket: L040416
Registry: Vancouver

Between:

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

And

IN THE MATTER OF HESTER CREEK ESTATE WINERY LTD.

PETITIONER

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment (From Chambers)

Counsel for the Petitioner	W.E.J. Skelly
Counsel for 658302 B.C. Ltd.	J.I. McLean
Counsel for Bank of Montreal	H.M.B. Ferris
Date and Place of Hearing:	March 1, 2 and 4, 2004 Vancouver, B.C.

[1] This is a motion on behalf of the Petitioner that the relief provided in the February 16, 2004 Order be confirmed and extended under certain terms, including that, first, the Petitioner call a meeting for no later than May 14, 2004 for the purpose of considering and voting on a plan of arrangement and compromise and, second, that the Monitor appointed on February 16, 2004 prepare what is referred to as a solicitation package to solicit offers for the assets of the Petitioner, with any such offers to be received by April 21, 2004.

[2] There is also a motion by the Bank of Montreal and 658302 B.C. Ltd. that, first, this proceeding under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985 c. C-36 ("***C.C.A.A.***") be dismissed and, second, the *ex parte* order made February 16, 2004 pursuant to s. 11(3) of the ***C.C.A.A.*** be set aside. While I will deal with the Motion of the Bank of Montreal and 658302 B.C. Ltd. first, many of the conclusions I have reached also apply to the question of whether the Petitioner should be granted the extension of time it seeks.

[3] The primary basis upon which the order is sought by the Bank of Montreal and 658302 B.C. Ltd. is that a number of matters were not disclosed by the Petitioner when the February 16, 2004 Order was made, that these matters were collectively

of a material nature, that they should have been disclosed, that the Order would not have been made if they had been disclosed, and that the Order now sought by the Petitioner should not be granted.

[4] I am satisfied that I am bound by the decision in ***Philip's Manufacturing Ltd.*** (1991), 60 B.C.L.R. (2d) 311, (B.C.S.C.), regarding the question of whether the order should have been granted on February 16, 2004. In ***Philip's***, Macdonald, J. dealt with a similar application and stated:

> I have concluded that none of the facts alleged, or where all of them taken together, would have influenced my decision to grant the *ex parte* order in the first place.

[5] I am also satisfied that the obligation of a Petitioner on an *ex parte* application under the ***C.C.A.A.*** can be likened to the obligation of an applicant for a Mareva injunction. In ***Mooney v. Orr*** (1994), 100 B.C.L.R. (2d) 335, (B.C.S.C.), that obligation was described as follows by Huddart, J., as she then was, as being that the Applicant: "... must make full and fair disclosure of all material facts known to him and make proper inquiries for any additional relevant facts before making the application." I am also satisfied that the obligation includes the requirement to disclose what Huddart,J. described as "facts relevant to the defendant's position to the extent it is known."

[6] Huddart, J. then concluded in ***Mooney*** as follows:

> If there is less than full disclosure, or if there is a misleading of the court about material facts, the order should be discharged.

[7] The material facts said to have been withheld to the court in the original materials are said to be numerous. If known by me, I have concluded that a number of factors would have led me to a contrary decision to the one I made February 16, 2004 as I have concluded that there was not a full and fair disclosure of all material facts.

[8] Dealing first with the government debt, the Petition states it to be $227,000, whereas the material now indicates it to be $340,000. In this regard, I am satisfied that this is not a fact which could have been known after making proper inquiries, and, therefore, the fact that the figure has changed would not have influenced my decision at the time as it does not appreciably increase the debt that is owing by the Petitioner.

[9] Regarding the overall debt owed by the Petitioner, I find that the debt owed and how the debt was owed to the parent company of Hester Creek was a material fact not disclosed. I am also satisfied the overall debt was not sufficiently described because potential amounts owing to three employees whose employment had been terminated were not included in the

list of debts. The Petition showed that the secured debt included $875,000 owing to European and Allied Commerce Ltd. ("European"). In fact and well within the knowledge of Mr. Odishaw who swore the Affidavit verifying the information set out in the Petition, there was no debt owing to European. The debt described was actually a shareholders loan to the parent company of Hester Creek, being Valtera Wines Ltd. ("Valtera").

[10] The significance of this fact is twofold. First, the debt is owing by shareholders loan and it would undoubtedly be the case that a shareholder would not be in the same class of creditors as would secured creditors, so that the likelihood of any plan of arrangement being approved may well be diminished, taking into account that the Bank of Montreal and 658302 B.C. Ltd. would then represent almost 98% of the secured debt, rather than only about 80%. This percentage change combined with the known but undisclosed views of the Bank of Montreal and 658302 B.C. Ltd. make it almost impossible to conclude that any plan of reorganization will be successful.

[11] Second, the debt owing to Valtera becomes suspect in the context of whether the total debt of Hester Creek reaches the minimum of $5 million which is required under the ***C.C.A.A.*** The debt set out in the petition materials totals $5,315,000,

of which $4,759,000 is secured debt. Now that it is apparent that $875,000 is not owed to European as a secured debt but is owed to Valtera as a shareholders loan, the amount said to be owing has decreased from $875,000 to what the Petitioner now says and what the Monitor appointed under the February 16, 2004 Order says is $686,922. While the total debt is then reduced only $188,000 to $5,126,922, the $686,922 figure does not have the sufficient certainty which would have allowed me to conclude that the Petitioner had met the $5 million threshold required under the C.C.A.A.

[12] First, the financial statements which were part of the Petition materials show the shareholders loan to Valtera as being $927,528 at December 31, 2001, $487,411 at December 31, 2002, and $556,003 at September 30, 2003. There is no explanation why no amount was shown as owing to Valtera in the Petition despite the fact that the financial statements were available to the Petitioner and were included in the Petition materials. There is no certainty that the shareholders loan was at least $560,000 when the Petition was filed in order that the total debt, including the shareholders loan, would be at least $5 million.

[13] Second, there is no credible explanation from Mr. Odishaw why he would omit any debt as owing to Valtera while stating

that there was secured debt owing to European. By December 2003, Mr. Odershaw was a director of both Valtera and Hester Creek. I cannot conclude his affidavit sworn February 16, 2004 constitutes full and fair disclosure of all material facts known to him or that it could be said that he had made proper inquiries about relevant facts before he swore his misleading affidavit.

[14] Third, it appears that Valtera was able to obtain funds from European and that those funds were used either to pay debts of Hester Creek directly or to advance funds to Hester Creek so that Hester Creek could pay its debts directly. It is not clear whether funds advanced to Hester Creek were advanced by shareholders loan, whether the balances reflected in the financial records of Hester Creek reflect all such advances made, or whether funds paid directly by Valtera to creditors of Hester Creek are reflected as shareholders loans.

[15] In this regard, I note the following. In his December 17, 2003 letter to the Farm Debt Mediation Service, Mr. Odishaw states that Valtera will pay "back salaries" of various Hester Creek employees on an “*ex gratia* basis”, and that "all advances" made on behalf of Hester Creek by Valtera are "and will be on an *ex gratia* basis." In the February 27, 2004 report of the Monitor appointed in the February 16, 2004

Order, the Monitor states that the $686,922 now stated to be the balance owing under the shareholders loan includes all payments made by Valtera on behalf of Hester Creek since the new management took over in November 2003, and that this amount is $106,999. If this sum represents *ex gratia* payments not to be included in the amount of the shareholders loan, then the total debt owing may well be reduced to an amount which is perilously close to the $5 million minimum.

[16] Fourth, it is difficult to see how $875,000 advanced by European to Valtera so that Valtera could purchase the shares of Hester Creek could end up being part of any shareholders loan owed by Hester Creek to Valtera. Accordingly, any part of the shareholders loan representing the original $875,000 advanced by European to Valtera would have to be removed from the balance owing under the shareholders loan balance said to be owing.

[17] Accordingly, I have concluded that there was less than full disclosure and a misleading of the Court about material facts regarding the overall debt owed by the Petitioner and that, if those facts had been known, the Order made February 16, 2004 would not have been made.

[18] Regarding the possibility of a Farm Credit Corporation Loan as a possible source of financing, the Petition materials state:

> The management of Hester Creek has also recently had discussions with Mr. Raymond Wagner of Farm Credit Corporation of Canada ("F.C.C.C."). In respect of potential financing, Mr. Wagner indicated that F.C.C.C. may be prepared to extend as much as $2,500,000, representing approximately 50% of the value of Hester Creek's hard assets.

[19] What was not disclosed was that an application had been made to F.C.C.C. in the summer of 2003 and that this application had been turned down by F.C.C.C. I consider that material as it appears to close the door on F.C.C.C. being a realistic source of funding in any restructuring plan to be advanced by Hester Creek. Also, the impression left by Mr. Odishaw and the Petition that possible F.C.C.C. financing is a recent possibility is adversely affected by the knowledge that this is the second time around for such an application.

[20] Regarding the role of European in these matters, European is described in the Petition materials as having provided Valtera with some of the financing for the acquisition of the shares of Hester Creek and as being a company that might be willing to invest $1 million in Hester Creek. In what Mr. Odershaw describes as a February 16, 2004 letter, but which is, in fact, undated, European states that it is reviewing "a

financial restructuring package," that any decision would depend on "further due diligence by us and a further review of the business plan," and that a decision would be made in 30 to 45 days. Full disclosure would have required that Hester Creek provide some explanation about the business plan referred to as that plan has not been made available to the court, about why it would be necessary for European to undertake due diligence on a company that it had been involved with for over 5 years, and about why European was a likely candidate for $1 million of investment. In this latter regard, I note that the former President of Hester Creek in her February 26, 2004 affidavit states that the principal of European advised her in 2003 that European "had no further funds to invest in Valtera or Hester Creek." The failure to disclose that there might be some doubts about whether an undated letter represented a realistic source of funds was material to the question of whether the plan of reorganization had any likelihood of success and was material to the question of whether or not I would have granted the February 26, 2004 order.

[21] The statement in the Petition that Hester Creek has "excellent prospects of obtaining financing" cannot be sustained if Hester Creek is relying only on European.

However, that statement may also apply to the possibility of financing through Fog Cutter Capital Group (“Fog Cutter”) of Portland, Oregon. In the Petition materials, Fog Cutter is described as an investment banker lender who had expressed a great deal of interest and who was in the process of completing due diligence with respect to the potential investment of $3,500,000. In his affidavit, Mr. Odishaw states that, but for a holiday on February 16, 2004 in the United States, Hester Creek would have had a letter available outlining the intention of Fog Cutter. The possible financing from this source also appears to be illusory. No such letter was subsequently produced. Nothing is filed to refute the statement in the February 26, 2004 affidavit of the former President of Hester Creek that one of the principals of Hester Creek has mentioned Fog Cutter since 2003 as a potential source of funds and that some of the principals of Fog Cutter are also principals of Valtera.

[22] Regarding the financial position of Valtera, the following statement is made in the Petition:

> From a short-term perspective, Valtera has indicated that it would be prepared to provide up to $100,000 in debtor-in-possession financing to allow Hester Creek to satisfy its post-filing obligations until sufficient cash flow is generated for that purpose.

[23] What is not set out in the materials was a material failure to disclose the following. First, the shares of Valtera are pledged to European so that Valtera is not in a position to provide any security by the hypothecation of its shares in Hester Creek when and if Valtera seeks funds. Second, the Bank of Montreal obtained a judgment against Valtera on January 15, 2004 which totals $3,217,335.14 as at February 18, 2004. The failure to disclose these facts would have resulted in the Order granted on February 16, 2004 not being made as there could be no assurance that the financial status of Valtera would allow the debtor-in-possession financing which is so critical to the expense of the Monitor and to the cost of running Hester Creek. The judgment in favour of the Bank of Montreal was granted more than a month before Mr. Odishaw swore his affidavit. The failure to advise the Court regarding this judgment is inexcusable.

[24] The details provided about the foreclosure proceedings of 657302 B.C. Ltd. do not constitute full disclosure. The Petition materials indicate that a June 2002 mortgage was granted, Hester Creek breached its obligations under that mortgage within six months, that foreclosure proceedings were commenced in December 2002, that the original debt was assigned to 657302 B.C. Ltd., and that Hester Creek entered

into a forbearance agreement with 657302 B.C. Ltd. What was not revealed was that a three-month redemption period was granted. I take that to be a reflection of the court's determination of the jeopardy being faced by the mortgagee about whether the balance owing under all three charges against the land could be satisfied. Also not revealed in the Petition materials was that there was an order absolute of foreclosure application pending, that a June 2003 appraisal of $3,400,000 was filed in the foreclosure proceedings, that the forbearance agreement with 657302 B.C. Ltd. was signed by both Hester Creek and Valtera, and that Valtera agreed not to displace Ms. Warwick as a director and President of Hester Creek. I consider the failure to disclose those facts as a failure to make full and fair disclosure and to set out the facts about the likely views of a major creditor when that view was well known by the Petitioner.

[25] The other matters about the foreclosure action which were not disclosed also constitute a failure to make full and fair disclosure of all material facts. First, the January 20, 2004 appraisal material revealed in the Petition materials showed a value of $5,030,000 while the appraisal that was filed in the foreclosure proceedings indicating a value of $3,400,000. The difference of an appraisal obtained only about eight months

earlier is significant. Second, in view of the engineered departure of Ms. Warwick who had solicited the take-out financing by 657302 B.C. Ltd. and whose presence was demanded by 657302 B.C. Ltd., it might well be unlikely that 657302 B.C. Ltd. would vote in favour of any plan of reorganization. Third, the assessment by the court that a three-month redemption period was warranted and the fact that an order absolute of foreclosure application was available to 657302 B.C. Ltd. should have been revealed. Fourth, if the $3,400,000 appraisal of land was accurate, there was considerably less, if not very little certainty that any plan of reorganization could be successful without great amounts of equity participation being available. Certainly Hester Creek could not borrow itself out of its problems with both debt and assets of about $5,000,000 to $5,500,000. Fifth, the picture presented in the Petition materials that the future would be better for Hester Creek now that Ms. Warwick was gone ignored the added complication of the unhappiness of 657302 B.C. Ltd. that Ms. Warwick was no longer President.

[26] There was also not full and fair disclosure regarding the forbearance agreements that were in place. The Petition materials indicate forbearance agreements with the Bank of Montreal and 658302 B.C. Ltd. but do not disclose the

following. First, there were four forbearance agreements with the Bank of Montreal not one. Second, the first forbearance agreement with the Bank of Montreal provided that Valtera would seek equity partners and inject a minimum of $500,000 into Hester Creek. Third, the four forbearance agreements generally acknowledge that Hester Creek was in default of conditions surrounding its indebtedness to the Bank of Montreal back to 2002. Fourth, the third and fourth forbearance agreements provided that Hester Creek would not seek relief under the ***C.C.A.A.*** or the ***Bankruptcy and Insolvency Act*** (“***B.I.A.***") without the prior written consent of the Bank of Montreal. Fifth, that same provision is in the forbearance agreement between Valtera, Hester Creek and 658302 B.C. Ltd.

[27] I consider these matters to be material non-disclosures because the Petition materials fail to set out that: (a) Hester Creek and Valtera have been attempting to arrange new financing since April 2002 and have been unsuccessful in doing so; (b) that the indulgences granted by the Bank of Montreal were gained partially on the agreement of Hester Creek not to seek ***C.C.A.A.*** or ***B.I.A.*** protection; and (c) that Hester Creek has been in default since April 2002 whereas the Petition materials leave the impression that the financial problems

have only resulted as a result of poor management. Although it may be that the covenant not to seek ***C.C.A.A.*** or ***B.I.A.*** relief is unenforceable against Hester Creek, it is a factor that I would have taken into account in determining the possibility of any plan of reorganization being successful in view of the position taken by the Bank of Montreal and 658302 B.C. Ltd., who represent somewhere between 98% and 100% of what I now know to be three and not four secured creditors.

[28] I am also satisfied that there was not full and fair disclosure about an application made by Hester Creek under the Federal ***Farm Debt Mediation Act***. Nothing is set out in the Petition materials about such a filing. I consider that a material non-disclosure having the effect of misleading the Court. An application for the appointment of a Receiver Manager by the Bank of Montreal in its action to enforce its security was to be heard on December 12, 2003 and was then adjourned to December 16, 2003. On December 13, 2003, Hester Creek applied under the ***Farm Debt Mediation Act*** for a stay of proceedings, a review of its financial affairs, and for a mediation with its creditors. A stay of proceedings was granted automatically on December 16, 2003 but, after counsel for the Bank of Montreal made representations, the stay was terminated by Agricultural and Agri-Food Canada as at January

9, 2004. On January 8, 2004, Hester Creek appealed that termination of the stay of proceedings, stating that it had not had the opportunity "to present to all creditors or the majority thereof any arrangement for consideration." The appeal of Hester Creek produced a further stay to February 14, 2004. However, the appeal board reached its decision on January 19, 2004 and determined that the original decision to terminate the stay of proceedings should be upheld.

[29] All of this information was known to Hester Creek when the Petition materials were filed on February 16, 2004. All of this information should have been revealed in the Petition materials as it goes to provide background to the longstanding efforts of Hester Creek to make arrangements with its creditors and to fully advise the court of the position which would have been taken by the Bank of Montreal regarding a potential restructuring. The refusal of the Bank of Montreal to enter into further discussions would have been apparent if there had been full disclosure. This knowledge about the likely position of the Bank of Montreal regarding a possible restructuring would have influenced my decision about whether the Order made February 16, 2004 should have been made or not. This information was also relevant regarding whether any plan of reorganization would have any chance of approval. This

failure to provide full and fair disclosure of all material facts and to set out the likely position of the Bank of Montreal on a potential reorganization was less than full disclosure and amounted to misleading the Court about material facts.

[30] For the reasons set out above, I have concluded that if there had been full and fair disclosure or if the Petitioner had not inadvertently or advertently misled the court, the order that was made on February 16, 2004 would not have been made. On ex parte applications and in all materials which will be presented to the Court and to the creditors of a company seeking protection under the **C.C.A.A.**, it is unacceptable for the materials to constitute anything less than full and fair disclosure. Affidavit material prepared by counsel for a petitioner should not be presented to the Court without counsel making proper inquiries about all material facts. Affidavits should not be sworn in support of a petition without the affiant making proper inquiries about all material facts. Materials which constitute less than full disclosure or which mislead the Court about material facts are unacceptable. In the case at bar, the materials prepared and filed were not only woefully inadequate but were also

purposely misleading. In the circumstances, the Order will be discharged.

[31] After notice to Valtera as to the charge created for the debtor-in-possession advances and to the Monitor as to the administrative charge set out in the February 16, 2004 Order, the Petitioner, the Bank of Montreal, 658302 B.C. Ltd. or the Monitor will be at liberty to speak to the question of whether the debtor-in-possession financing charge and the administrative charge will or will not retain the priority ranking set out in the February 16, 2004 Order. The granting of the Order today will not affect that question. The question of who should bear the costs of the Motion of the Bank of Montreal and 658302 B.C. Ltd. will also not be dealt with today. The Bank of Montreal and 658302 B.C. Ltd. will be at liberty to speak to that question in due course.

[32] The stay of proceedings set out in the February 16, 2004 Order and by the March 2, 2004 Order will expire at 12 o'clock noon today. The Petitioner shall deliver up its assets to the Receiver Manager appointed in the Bank of Montreal proceedings.

[33] If I am found to be wrong in deciding that the February 16, 2004 Order should be discharged, then I have also reached the conclusion that the test set out under s. 11(6) of the

C.C.A.A. has not been met as I cannot be satisfied that the circumstances which exist are such that the order sought by Hester Creek is appropriate or that Hester Creek has acted and is acting in good faith and with due diligence. I cannot be satisfied that continued protection under the ***C.C.A.A.*** is appropriate. I am satisfied that any plan of reorganization of Hester Creek is doomed to fail. Hester Creek has reached the end of a two-year road and the creditors of Hester Creek should no longer be delayed. The application of Hester Creek is therefore dismissed.

[34] The application to join Valtera as a co-Petitioner is also dismissed. That dismissal will not affect the ability of Valtera to file its own proceedings under the ***C.C.A.A.*** if it so wishes. I will hear any such application by Valtera. Any such application will be heard only upon notice to the secured creditors of Valtera, to the Bank of Montreal, and, if it is a creditor of Valtera, to 658302 B.C. Ltd.

"G.D. Burnyeat, J."
The Honourable Mr. Justice G.D. Burnyeat

CITATION: Nelson Education Limited (Re), 2015 ONSC 3580
COURT FILE NO.: CV15-10961-00CL
DATE: 20150602

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

BEFORE: Newbould J.

COUNSEL: *Robert J. Chadwick, Caroline Descours and Sydney Young*, for the Applicants

D.J. Miller and Kyla E.M. Mahar, for the Royal Bank of Canada

Kevin J. Zych, for the First Lien Lenders

Jay Swartz and Robin Schwill, for Alvarez & Marsal Canada Inc.

HEARD: May 29, 2015

ENDORSEMENT

[1] On May 12, 2015, Nelson Education Ltd. ("Nelson") and its parent company, Nelson Education Holdings Ltd. sought and obtained an initial order pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA"). Notice had been given to RBC only late the day before and RBC took the position that it had not had sufficient time to consider or prepare a response to the application. The resulting initial order was pared

down from what was sought by the applicants and it provided that on the comeback date the hearing was to be a true comeback hearing and that in moving to set aside or vary any provisions of the initial order, a moving party did not have to overcome any onus of demonstrating that the order should be set aside or varied.

[2] On the comeback date, RBC moved to have Alvarez & Marsal Canada Inc. ("A&M Canada") replaced with FTI Consulting Canada Inc. ("FTI") as the Monitor, and for other relief. At the conclusion of the hearing, I ordered that FTI replace A&M Canada as Monitor for reasons to be delivered. These are my reasons.

Relevant History

[3] Nelson is a Canadian education publishing company, providing learning solutions to universities, colleges, students, teachers, professors, libraries, government agencies, schools, professionals and corporations across the country.

[4] The business and assets of Nelson were acquired by an OMERS entity and certain other funds from the Thomson Corporation in 2007 together with U.S. assets of Thomson for U.S. $7.75 billion, of which US$550 million was attributed to the Canadian business. The purchase was financed with first lien debt of approximately US$311.5 million and second lien debt of approximately US$171.3 million.

[5] The first lien debt is currently approximately US$269 million plus accrued interest. There are 22 first lien lenders. RBC is a first lien lender holding approximately 12% of the principal amount outstanding. The first lien debt matured on July 3, 2014. It has not been repaid.

[6] The second lien debt is currently approximately US$153 million plus accrued interest. RBC is a second lien lender, holding the largest share of the principal amounts outstanding, and is the second lien agent for all second lien lenders. The maturity date is July 3, 2015 subject to acceleration.

[7] According to Mr. Greg Nordal, the CEO of Nelson, the business of Nelson has been affected by a general decline in the education markets over the past few years. In the past year, overall revenues in the K-12 market have declined by 13% and in the higher education market by 3%.

[8] Notwithstanding the industry decline over the past few years, Nelson according to Mr. Nordal has maintained strong EBITDA, which is a credit I am sure to the efforts of Mr. Nordal and the management of Nelson. Nelson's EBITDA has remained positive over the last several years. For the fiscal year ended June 30, 2011 it was $47.4 million, for the fiscal year ended June 30, 2012 it was approximately $37.3 million and for the year ended June 30, 2013 it was approximately $40.9 million.

[9] Mr. Nordal is of the view that Nelson is well positioned to take care of increasing future opportunities in the digital educational market.

[10] Nelson had a leverage ratio of debt to EBITDA of approximately 17:1 for the fiscal year 2015. Its first lien debt matured and has not repaid and it has made no interest payments on the second lien debt since March 31, 2014.

[11] Nelson's efforts to deal with this situation have led to a proposed sale transaction under which the business of Nelson would be sold to the first lien lenders by way of a credit bid and the second lien lenders would be wiped out. In their application requesting an initial order, the applicants proposed a hearing date to be held nine days after the Initial Order to approve this sale transaction. That request was not granted.

[12] In March 2013, Nelson engaged Alvarez and Marsal Canada Securities ULC ("A&M") as its financial advisor to assist the Company in reviewing and considering potential strategic alternatives, including a refinancing and/or restructuring of its credit agreements.

[13] Commencing in April 2013, Nelson, with the assistance of A&M and legal advisors, entered into discussions with a number of stakeholders, including RBC as the second lien agent, the first lien steering committee, and their advisors, in connection with potential alternatives to address Nelson's debt obligations. A number of without prejudice and confidential proposed transaction term sheets were discussed between August 2013 and September 2014, without any agreement being reached.

[14] During this time, interest continued to be paid on the first lien debt. In March, 2014 Nelson did not paid interest on the second lien debt. In return for a short cure period to May 9, 2014, a partial payment of US$350,000 towards interest was paid on the second lien debt. A further cure period to May 30, 2014 was given on the second lien debt but nothing was paid on it by that date. No further cure period was agreed and no further interest has been paid. Initially during the discussions that took place with the second lien lenders' agent, the professional fees of the advisors to the second lien lenders were paid by Nelson but these were stopped in August, 2014 after there was no agreement regarding further extensions of the second lien debt or agreement on any term sheet.

[15] On September 10, 2014, Nelson announced to the first lien lenders Nelson's proposed transaction framework on the terms set out in the First Lien Term Sheet dated September 10, 2014 (the "First Lien Term Sheet") for a sale or restructuring of the business and sought the support of all of its first lien lenders.

[16] In connection with the First Lien Term Sheet, Nelson entered into a support agreement (the "First Lien Support Agreement") with first lien lenders representing approximately 88% of the principal amounts outstanding under the first lien credit agreement. The consenting first lien lenders comprise 21 of the 22 first lien lenders, the only first lien lender not consenting being RBC. Consent fees of approximately US$12 million have been paid to the consenting first lien lenders.

[17] Pursuant to the terms of the First Lien Term Sheet and the First Lien Support Agreement, Nelson, with the assistance of its financial advisor, A&M, commenced on September 22, 2014, a sale and investment solicitation process (the "SISP") to identify one or more potential purchasers of, or investors in, the Nelson business, which process was conducted over a period of several months. According to Mr. Nordal, Nelson and A&M conducted a thorough canvassing of the market and are satisfied that all alternatives and expressions of interest were properly and thoroughly pursued.

[18] The SISP did not result in an executable transaction acceptable to the first lien lenders holding at least 66 2/3% of the outstanding obligations under the first lien credit agreement. Accordingly, pursuant to the First Lien Support Agreement Nelson wishes to proceed with a transaction pursuant to which the first lien lenders will exchange and release all of the indebtedness owing under the first lien credit agreement for: (i) 100% of the common shares of a newly incorporated entity that will own 100% of the common shares of the purchaser to which substantially all of the Nelson's assets would be transferred, and (ii) the obligations under a new US$200 million first lien term facility to be entered into by the purchaser.

[19] The proposed transaction provides for:

(a) the transfer of substantially all of Nelson's assets to the purchaser;

(b) the assumption by the purchaser of substantially all of Nelson's trade payables, contractual obligations (other than certain obligations in respect of former employees, obligations relating to matters in respect of the second lien credit agreement, and a Nelson promissory note) and employment obligations incurred in the ordinary course and as reflected in the Nelson's balance sheet; and

(c) an offer of employment by the purchaser to all of Nelson's employees.

[20] Under the proposed transaction, with the exception of the obligations owing under the second lien debt and intercompany amounts, substantially all of the liabilities of Nelson are

being paid in full in the ordinary course or are otherwise being assumed by the purchaser. The purchaser will not assume Nelson's obligations to the second lien lenders.

[21] On September 10, 2014, pursuant to the First Lien Support Agreement Nelson agreed not to make further payments in connection with the second lien debt, including any payment for fees, costs or expenses to any legal, financial or other advisor to RBC, the second lien agent, without the consent of the consenting first lien lenders.

Role of A&M Securities

[22] Nelson engaged A&M, an affiliate of Alvarez & Marsal Canada Inc., as its financial advisor in March, 2013. A&M has been operating as a financial advisor to Nelson for more than two years prior to the date of the Initial Order.

[23] The scope of A&M's engagement in 2013 included the following:

(a) Analyze and evaluate Nelson's financial condition;

(b) Assist Nelson to prepare its 5-year financial model, including balance sheet, income statement and cash flow statement and its 5-year business plan;

(c) Assist Nelson to respond to questions from its lenders regarding Nelson's business plan and financial model;

(d) If requested by management, attend and participate in meetings of the board of directors with respect to matters on which A&M was engaged to advise Nelson; and

(e) Other activities as approved by management or the board of Nelson and agreed to by A&M.

[24] In September 5, 2014 A&M was further engaged to act as the exclusive lead advisor for the transaction that has led to the proposed transaction, including the SISP process undertaken by Nelson. A&M's goal was identified as completing a successful transaction in the most expedient manner. Under this second engagement, A&M's compensation was described as being based on time billed at standard hourly rates and "subject to any other arrangements agreed upon among Nelson, the lenders and A&M". The word "lenders" referred only to the first lien lenders.

[25] In undertaking its mandate under the 2013 and 2014 engagements, A&M was authorized to utilize the services of employees of its affiliates under common control with A&M and subsidiaries. The sample accounts provided by A&M indicate that a substantial number of hours were billed to the A&M engagement for work of the personnel who are intended to act on behalf of the Monitor in this proceeding. A total of approximately $5.5 million plus HST and disbursements have been billed by A&M for its services to Nelson.

[26] An affiliate of A&M was engaged in 2013 to advise Cengage Learnings, the name of the U.S. operations of Thomson that was changed when Thomson sold its business. The 2013 and 2014 engagements of A&M by Nelson sought Nelson's waiver of any conflict of interest in connection with an A&M affiliate's engagement with Cengage. At the time of the 2013 engagement, A&M U.S. was engaged by Cengage to provide restructuring and financial advisory services and Cengage and Nelson had common shareholders. At the time of the September 2014 engagement, an A&M affiliate was providing financial advisory and financial management services to Cengage. Nelson maintains a strong relationship with Cengage and is the exclusive distributor for Cengage educational content in Canada pursuant to an agreement that expires on January 1, 2018. Cengage also provides certain operational support to Nelson. According to Mr. Nordal, Cengage is a preferred and key business partner of Nelson.

[27] A&M was present at the meetings of Nelson's board of directors wherein the decision was made by that board to not make interest payments to the second lien lenders on March 20, 2014, March 27, 2014, April 7, 2014 and June 27, 2014. A&M was also involved in discussions

with RBC and its financial advisors in connection with the extension of the cure period for payment of interest to the second lien lenders as the financial advisor to Nelson.

Analysis

[28] In its factum, RBC asserted that the application by Nelson was not an appropriate use of the CCAA as it was intended to be a nine-day proceeding to bless a quick flip credit bid by the first lien lenders to acquire the business of Nelson and extinguish the second lien lenders interest in the assets. RBC however also took the position that it would support a CCAA proceeding on the basis that there would be a neutral Monitor. I must say that in reviewing the circumstances of this application, I can see the issues raised by RBC as to whether this CCAA proceeding was an appropriate use of the CCAA. However in light of the position taken by RBC and my ruling that A&M Canada should be replaced by FTI as Monitor, I make no further comment or finding on the issue.

[29] This is a true comeback motion with no onus on RBC to establish that A&M Canada should not be the Monitor. Rather the situation is that it is Nelson who is required to establish that A&M Canada is an appropriate monitor.

[30] The problem is that Nelson has proposed a quick court approval of a transaction in which the first lien lenders will acquire the business of Nelson and in which essentially all creditors other than the second lien lenders will be taken care of. Nelson has asserted in its material that the SISP process undertaken by Nelson prior to the CCAA proceedings has established that there is no value in the Nelson business that could give rise to any payout to the second lien lenders. The SISP process was taken on the advice of A&M and under their direction. It was put in Nelson's factum that:

> The Applicants, with the assistance of their advisors, conducted a comprehensive SISP which did not result in an executable transaction that would result in proceeds sufficient to repay the obligations under the First Lien Credit Agreement in full or would otherwise be supported by the First Lien Lenders;

[31] Nelson intends to request Court approval of the proposed transaction. An issue that will be front and centre will be whether the SISP process prior to this CCAA proceeding can be relied on to establish that there is no value in the security of the second lien lenders and whether other steps could have been taken to obtain financing to assist Nelson in continuing in business other than a credit bid by the first lien lenders. A&M was centrally involved in that process. It is in no position to be providing impartial advice to the Court on the central issue before the Court.

[32] There is no suggestion that A&M are not professional or not aware of their responsibilities to act independently in the role of a monitor. A&M is frequently involved in CCAA matters and is understandably proud of its high standard of professionalism. However, that is not the issue. In my view, A&M should not be put in the position of being required to step back and give advice to the Court on the essential issue before the Court in light of its central role in the whole process that will be considered.

[33] In an article in the Commercial Insolvency Reporter, (LexisNexis, August 2010), entitled *Musings (a.k.a. Ravings) about the Present Culture of Restructurings*, former Justice James Farley, the doyen of the Commercial List for many years and no stranger to CCAA proceedings, had this to say about the role of a monitor:

> I mean absolutely no disrespect or negative criticism towards any monitor when I observe that they are only human. I think it is time to consider whether a monitor can truly be objective and neutral under present circumstances- it would take a true saint to stand firm under the pressures now prevailing. It should be appreciated that monitors are in fact hired by the debtor applicant (aided by perhaps a party providing interim financing, possibly in the role of the power behind the throne) and retained to advise the debtor well before the application is made. Is it not human nature for a monitor to subconsciously wonder where the next appointment will come from if it crosses swords with its hirer?

[34] Mr. Farley went on to suggest that the role of a monitor be split in two. That may be a laudable objective, but would require legislation. In this case, I do not think it would be appropriate in light of the extremely extensive work done by A&M over the course of two years.

[35] A monitor is an officer of the Court with fiduciary duties to all stakeholders and is required to assist the Court as requested. It has often been said that a monitor is the eyes and ears of the Court. It is critical that in this role a monitor be independent of the parties and be seen to be independent. I can put it no better than Justice Topolniski in *Winalta Inc. (Re)*, 2011 ABQB 399 in which she said:

> **67** A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.
>
> **68** Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236:
>
> > The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

[36] In this case, A&M is in no position to comment independently on the activities of Nelson in regards to the very issue in this case, namely the reliability of the SISP program in determining whether the second lien lenders' security has any value.

[37] There is also a question of the appearance of a lack of impartiality. During the two years that A&M was engaged prior to this CCAA proceeding, for which it billed over $5 million, it was involved in advising Nelson during negotiations with the interested parties, including RBC, and in participating in those negotiations with RBC on behalf of Nelson. This history can cause an appearance of impartiality, something to be avoided in order to provide public confidence that the insolvency system is impartial. See *Winalta* at para. 82. It was this concern of a perception of bias that led to the prohibition being added to section 11.7(2) of the CCAA preventing an auditor of a company acting as a monitor of the company.

[38] The issue of an appropriate monitor requires the balancing of interests. This is not like some cases in which a financial advisor has had some advisory role with the debtor and then becomes a monitor, usually with no objection being raised. Often it may be appropriate for that to occur taken the knowledge of the debtor acquired by the advisor. This case is different in that the financial advisor has been front row and centre in the very sales process that will be the subject of debate in these proceedings and has engaged in negotiations on behalf of Nelson.

[39] In all of the circumstances of this case, I concluded that it would be preferable for another monitor to be appointed and for that reason replaced A&M Canada as Monitor with FTI.

Other issues

[40] In the Initial Order, RBC was directed to continue its cash management system. There was no charge provided in favour of RBC. RBC says that it should not be required to continue the cash management system without the protection of a charge. During this hearing, Mr. Chadwick on behalf of Nelson said that it might be possible to satisfy RBC by requiring some minimum balance in the accounts, failing which a charge would be provided in favour of RBC. I take it that this issue will be worked out.

[41] In the draft Initial Order that accompanied the CCAA application at the outset, a paragraph was included that provided that Nelson could not pay any amounts owing by Nelson to its creditors except in respect of interest, expenses and fees, including consent fees, payable to the first lien lenders and fees and expenses payable to the first lien agent under the support agreement. That provision was deleted from the Initial Order. It was replaced with a provision that Nelson could pay expenses and satisfy obligations in the ordinary course of business.

[42] RBC takes the position that there should be a level playing field for the second lien lenders consistent with the treatment of the first lien lenders in this CCAA process, and that if interest is to be paid to the first lien lenders and expenses of their financial and legal advisors paid, the same should happen to the second lien lenders.

[43] RBC points out that it was Nelson who decided in June, 2014 to stop paying interest on the second lien debt and a little later reduce paying RBC's advisors in light of Nelson's view that there was not sufficient progress in negotiations with RBC. Payment of these professional fees was stopped in August, 2014. In September 2014 Nelson agreed in the First Lien Support Agreement not to make further payments in connection with the second lien debt, including any payment for fees, costs or expenses to any legal, financial or other advisor to RBC, the second lien agent, without the consent of the consenting first lien lenders. The consenting first lien lenders are opposed to any interest or expenses being paid to the second lien lenders.

[44] The second lien credit agreement provides for interest to be paid on the debt and in section 10.03 for all costs of the second lien agent, RBC, arising out of CCAA proceedings. The intercreditor agreement between the first and second lien agents provides in section 3.1(f) that nothing in the agreement save section 4 shall prevent receipt by the second lien agent payments for interest, principal and other amounts owed on the second lien debt. Section 4 provides that any collateral or proceeds of sale of the collateral shall be paid to the first lien agent until the first lien debt has been repaid and then to the second lien agent. As there has been no sale of the collateral, there is nothing in the intercreditor agreement that prevents payment of interest and expenses of the second lien lenders. The second lien lenders are contractually entitled to receive payment of their interest, costs, expenses and professional fees.

[45] No determination has been made in these proceedings that there is no value available for the second lien lenders. RBC disputes the applicants' views on this point. RBC contends that these CCAA proceedings should not commence with the Court accepting as a *fait accompli* that the second lien lenders should not be paid in the proceeding when every other stakeholder is being paid.

[46] There is no evidence that Nelson has not been in a position to pay the interest, costs, expenses and professional fees of the second lien lenders since it made a decision in 2014 to stop paying these amounts. Since the First Lien Support Agreement with the consenting first lien

lenders, the decision has been taken out of the hands of Nelson and turned over to the consenting first lien lenders.

[47] In my view, on the basis of the evidence, there is no justification to pay all of the interest, costs and expenses of the first lien lenders but not pay the same to the second lien lenders. In the circumstances, it is only fair that pending further order, Nelson be prevented from paying any interest or other expenses to the first lien lenders unless the same payments owing to the second lien lenders are made, and it is so ordered.

[48] RBC has requested costs of the comeback motion and I believe other costs. A request for costs may be made in writing by RBC within 10 days, along with a proper cost outline, and the parties against whom costs are claimed shall have 10 days to file a response to the cost request.

Newbould J.

Date: June 2, 2015

CITATION: GuestLogix Inc. (Re), 2016 ONSC 1047
COURT FILE NO.: CV-16-11281-00CL
DATE: 2016-02-24

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GUESTLOGIX INC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Robert Thornton* and *Rebecca Kennedy* for the Applicant

Robert Kennedy for Vistara Capital Partners Fund I Limited Partnership, by its General Partner, Vistara Fund I GP Inc.

Sonja Pavic for the Directors

Orestes Pasparakis for Deloitte Restructuring Inc., Proposed Monitor

Brett Harrison and Caitlin Fell for Comerica Bank

HEARD & ENDORSED: February 9, 2016

REASONS: February 24, 2016

ENDORSEMENT

[1] GuestLogix Inc. (the "Applicant") brings this Application for an Order pursuant to the *Companies' Creditors Arrangement Act* ("Canada"), ("CCAA") for an order staying proceedings against the Applicant and its Integrated Subsidiaries, GuestLogix USA Inc. ("GuestLogix US"), GuestLogix Technologies Limited ("GuestLogix UK"), GuestLogix Asia Pacific Limited ("GuestLogix Asian") and GuestLogix Ireland Limited ("GuestLogix Ireland") and, collectively with its Integrated Affiliates, ("GuestLogix"). The Applicant also seeks an order appointing Deloitte Restructuring Inc. ("Deloitte") as Monitor in the CCAA proceedings, and authorization for a first ranking super-priority charge in the amount of $250,000.00 ("Administration Charge"), as security for the fees and disbursements of the Monitor, its counsel, the Applicant's counsel, counsel for the Directors of the Applicant and the Applicant's financial advisor ("Administration Charge Beneficiaries").

[2] The Applicant also requests authorization for a second ranking super-priority charge in the amount of $1,385,000.00 (the "Directors' Charge") over all assets of the Applicant, as security for any post-filing obligations of the directors and officers of the Applicant (the "Directors' Charge Beneficiaries") that they may incur by virtue of so acting.

[3] The matter came on for a hearing prior to the opening of trading on the Toronto Stock Exchange on February 9, 2016. At that time, I endorsed the record as follows: "9:20 a.m. CCAA application has been issued. CCAA initial protection granted. Stay of proceedings granted. Form of order to be submitted for signature later today."

[4] The initial order was subsequently signed at 2:30 p.m. on February 9, 2016. PricewatershouseCoopers Inc. was appointed as Monitor.

[5] The DIP hearing is scheduled for Thursday for February 11, 2016 at 8:30 a.m. and the comeback hearing is scheduled for Friday, March 4, 2016 at 8:30 a.m..

[6] The Applicant is a public company listed on the Toronto Stock Exchange and incorporated under the *Business Corporations Act* (Ontario) ("OBCA"). The Applicant carries on the Canadian operations of the GuestLogix Group.

[7] The Applicant has four wholly owned subsidiaries: GuestLogix US, GuestLogix UK, GuestLogix Asian, and GuestLogix Ireland.

[8] GuestLogix Ireland has a wholly subsidiary, OpenJaw Technologies Limited ("OpenJaw") which was acquired in 2014.

[9] GuestLogix and OpenJaw provide both retail and payment technology in business intelligence solutions delivered to the passenger travel industry both on board and off board.

[10] GuestLogix has forty one customers who operate in the airline and ground transportation industries. GuestLogix customers are based in Asia, Australia, Europe, North America and assist in the transportation of people all over the world.

[11] The Master Services Agreement ("MSA") is the governing document between GuestLogix and its customers in relation to any Master Statements of Work ("MSOW") or associated Statements of Work ("SOW") for the provision of the Solutions and Services. These agreements contain default provisions but to date, no notices of default have been given to GuestLogix.

[12] The Affidavit of John Gillberry, Interim Chief Executive Officer of GuestLogix states that in response to financial difficulties that GuestLogix is facing, senior management initiated a reduction-in-force action plan. In October 2015, the Applicant and its subsidiaries (including OpenJaw) had a workforce of 417 people. As of February 5, 2016, this number had been reduced to 334 people worldwide as well as 15 contractors. 288 people are full-time employees and 46 people are part-time/offshore. None of GuestLogix employees are unionized.

[13] The Applicant provides a standard benefit plan to its employees. GuestLogix also offers defined contribution pension plans to all full-time employees in Canada, USA, United Kingdom and Ireland.

[14] As of September 30, 2015, GuestLogix, on a consolidated basis, had assets totaling approximately US $85,000,000 of which approximately US $23,500,000 consist of current

assets. The remaining assets consisted net finance receivables, fixed assets, long term receivables, deferred development costs, intangibles, goodwill and a deferred tax asset.

[15] As of September 30, 2015, GuestLogix, on a consolidated basis, had liabilities totaling approximately US $45,800,000 of which approximately US $29,500,000 consist of current liabilities.

[16] Comerica Bank ("Comerica") provides GuestLogix with a senior secured credit facility with a maximum borrowing amount of US $7,500,000 ("Comerica Facility"). As of January 29, 2016, the amount of outstanding on the Comerica Facility was approximately US $5,200,000. The Comerica Facility, under the terms of an expired forbearance agreement, bears interest at US Prime Referenced Rate plus 3% in respect of advances denominated in US Dollars.

[17] GuestLogix US, GuestLogix Ireland and OpenJaw are guarantors of the Comerica Facility and each of them has entered into general security agreements in connection with the Comerica Facility.

[18] Beedie Capital Partners Inc. and Vistara Fund I GP Inc. (collectively the "Second Secured Lenders") have provided GuestLogix with a second secured non revolving term credit facility with a principal amount of Cdn $9,000,000 ("Second Secured Term Loan").

[19] GuestLogix US, GuestLogix Ireland and OpenJaw are guarantors of the Second Secured Term Loan.

[20] GuestLogix has issued unsecured convertible debentures in the amount of $20,000,000.00 ("Convertible Debentures"). The amount outstanding on Convertible Debentures, as of December 31, 2015 was $20,700,000.

[21] GuestLogix has received reassessments from Canada Revenue Agency ("CRA") for the 2011-2014 period, in the amount of $8,521,237 dollars. GuestLogix intends to appeal these reassessments.

[22] As of February 5, 2016, GuestLogix has unsecured liabilities to vendors, suppliers and trade creditors in the amount of US $6,086,315. Some of the suppliers are critical to the operation of GuestLogix.

[23] GuestLogix has other unsecured liabilities as detailed in Mr. Gillberry's affidavit of paragraph 64-68.

[24] In the fall of 2015 GuestLogix pursued efforts to bring down its debts and implement cost saving initiatives in order to improve its financial position. GuestLogix engaged Canaccord Genuity Corp. ("Canaccord") as its financial advisor to assist in reviewing and considering potential strategic alternatives.

[25] Canaccord commenced an informal sale and investment solicitation process to identify potential sale and investment transactions for GuestLogix. Canaccord contacted the total 60 potential buyers.

[26] Mr. Gillberry at paragraph 75 of his affidavit states that based on the expressions of interested Canaccord received, it would appear that the value of the business operated by GuestLogix and OpenJaw are many times the value of the outstanding amount due under the Comerica Loan.

[27] Concurrent with the administration of the informal strategic process, the Applicant continued its operational review and Mr. Gillberry states that GuestLogix determined that it may not have been following proper corporate accounting principles regarding revenue recognition.

[28] The Board of Directors formed an independent committee (the "Special Committee") to supervise a review of the financial statements and the Special Committee retained independent counsel to assist in the investigation. Independent counsel engaged Deloitte LLP to continue its review of the revenue recognition practices of the company.

[29] Mr. Gillberry states that as a result of a detailed balance sheet analysis, the company took significant reserves against certain account receivables and these charges along with the charge for the restructuring reserve triggered a default on the minimum trailing EBITDA covenant in the Second Secured Term Loan Agreement. The defaults under the Second Secured Term Loan Agreement led to cross defaults under the Comerica Facility as a result of which the Comerica Facility is entirely due and payable.

[30] Beyond the issues with the secured creditors, Mr. Gillberry advises that Morganti LLP has recently filed a class action law suit against GuestLogix as a result of the revenue recognition issues.

[31] Mr. Gillberry further states that GuestLogix has been unable to find an out of court solution that would enable it to repay or refinance the amounts owing under the Comerica Facility, the Second Secured Loan Agreement or the Convertible Debentures.

[32] Mr. Gillberry concludes that the Applicant is therefore insolvent, and the directors have determined that it is in the best interest of the Applicant and its subsidiaries, and their stakeholders to file for protection under the CCAA.

[33] The company nominated Deloitte Restructuring Inc. as Monitor. At the initial hearing, I raised the question as to whether it was appropriate for Deloitte Restructuring Inc. to act as Monitor, in light of the engagement of Deloitte LLP to conduct a review of revenue recognition practices. Counsel to Comerica Bank submitted that there was a risk that the Proposed Monitor may be required to review the advice given by Deloitte LLP with respect to the Applicant's historical revenue recognition protection. In my view, the potential impact on stakeholders of the investigation could be significant and could lead to the appearance of conflict. It is essential that the Monitor be seen to be completely independent. The risk raised by Comerica Bank has to be taken into account. In my view, it would be appropriate for Deloitte Restructuring Inc. to withdraw as proposed Monitor.

[34] The application was brought on short notice. The Applicant has outlined in its materials that it intends to return to court to seek a DIP loan, but this issue does not have to be addressed today.

[35] The Applicant does seek the Administration Charge.

[36] I am satisfied that the amount of $250,000.00 for the Administration Charge is both reasonable and appropriate and it is approved.

[37] Likewise, I am satisfied that it is appropriate to grant a Directors' Charge in the amount of $1,385,000 on the terms set out in the order. It is acknowledged that the benefit of the Directors' Charge is only available to the extent that liabilities are not covered by the D&O Insurance.

[38] The priorities of the various charges are set out at paragraph 33 of the draft order.

[39] In summary, having reviewed the record, I am satisfied that the Applicant is a "debtor company" within the meaning of CCAA and that the Applicant has unsecured liabilities in excess of the required $5,000,000.

[40] I am also satisfied that the Applicant is insolvent and has defaulted on its obligations. Furthermore, it seems to me that the Applicant requires a stay of proceedings to provide the breathing space necessary to continue normal operations while it solicits parties willing to purchase the assets of the Applicant.

[41] The required financial statements have been filed.

[42] Accordingly, circumstances exist in this case that make it appropriate to grant the Applicant protection under the CCAA.

[43] Prior to the completion of submissions, counsel to the Applicant advised that PricewaterhouseCoopers Inc. had provided its consent to act as Monitor, in place of Deloitte Restructuring Inc.

[44] Accordingly, CCAA protection is granted. PricewaterhouseCoopers Inc. is appointed as Monitor. The stay is in effect until March 7, 2016. The comeback hearing has been scheduled for March 4, 2016.

_____

Regional Senior Justice G.B. Morawetz

Date: February 24, 2016

CITATION: General Motors v. Trillium Motor World Ltd., 2019 ONSC 520
COURT FILE NO.: CV-18-602241-00CL
DATE: 20190122

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
GENERAL MOTORS OF CANADA COMPANY	)	*Sean Campbell*, *Natasha MacParland*, and *Natalie Renner*, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
TRILLIUM MOTOR WORLD LTD.	)	*David Sterns*, *Andy Seretis*, *Allan Dick*, *Marie-Andree Vermette*, and *Michael Statham*, for the Respondent
	)	
Respondent	)	
	)	
	)	*Robert Thornton* and *Rachel Bengino*, for the Proposed Interim Receiver FTI Consulting Canada Inc.
	)	
	)	
	)	**HEARD:** September 18, 2018

REASONS FOR DECISION

MCEWEN J.

[1] The applicant, General Motors of Canada Company ("GM"), brings this application seeking a number of orders as follows:

- An order adjudging Trillium Motor World Ltd. ("Trillium") bankrupt;
- An order that the costs award obtained by Trillium against Cassels Brock & Blackwell LLP ("Cassels") be deemed the property of Trillium;
- An order declaring that GM as a secured creditor has a first-ranking security interest over the Costs Award, and specifically ranks in priority to Class Counsel; and

- Alternatively, if the court is not prepared to make a bankruptcy order at this time, an order that FTI Consulting Canada Inc. ("FTI") be appointed as interim receiver over all of the assets, undertakings and property of Trillium, pending the determination of the bankruptcy issue.

[2] Class Counsel seek two things:

- An order dismissing the application; and

- An order in the alternative declaring that the Costs Award is made not in Trillium's personal capacity and as such does not form part of Trillium's estate or, in the alternative, an order that the Costs Award is payable to Trillium subject to a first charge in favour of Class Counsel in priority to any claims GM may have as a secured creditor.

OVERVIEW

[3] This application is essentially a contest between GM and Class Counsel as to who is entitled to the costs that I awarded to be paid to Trillium by Cassels together with the subsequent related costs award of the Ontario Court of Appeal, which two amounts now total $3,072,831.50 plus applicable interest (collectively, the "Costs Award").

[4] This Costs Award has now been satisfied and it is being held in trust pending the outcome of this dispute.

[5] In my earlier endorsement dated December 5, 2018, I approved the retainer agreement between Class Counsel and Trillium pursuant to s. 32(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). In that decision I approved the assignment of the Costs Award from Trillium to Class Counsel. As noted in the endorsement I did so without prejudice to GM's right to argue that the costs ought to be paid to it as opposed to Trillium or Class Counsel.

[6] As a result of my decision at trial and the subsequent decision of the Court of Appeal, Trillium owes costs to GM in the amount of $4,828,005.32. This is an unsecured debt.

[7] GM subsequently entered into an agreement with the Business Development Bank of Canada ("BDC") whereby GM obtained a secured debt BDC held with respect to Trillium. As a result, Trillium also owes $2,797,681.71 to GM on a secured basis. Trillium also has other known debts including money owed to the Canada Revenue Agency on account of unpaid GST/HST of approximately $220,000, plus interest.

[8] GM, as a secured creditor, now seeks to put Trillium into bankruptcy and collect the Costs Award in priority to Class Counsel.

[9] Essentially, GM, supported by FTI, submits that the Costs Award is the property of Trillium and the provisions of the *Personal Property Security Act (Ontario)*, R.S.O. 1990, c. P.10 ("PPSA"), provide that GM should have priority over Trillium's assets in a bankruptcy, including as against Class Counsel.

ANALYSIS

[10] The application raises four issues and I will deal with each in turn.

There is no active paramountcy issue between the CPA and the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA")?

[11] This issue was raised in the parties' facta, which caused me some concern since GM did not serve the federal and provincial Attorneys General with a Notice of Constitutional Question. GM in its Reply Factum, however, clarified its position and conceded that there was no conflict between the BIA and CPA.

[12] Further, at the application, the parties agreed that there was no issue of paramountcy and that essentially the dispute involved an interpretation of the CPA, PPSA, common law and law of equity.

[13] I agree with the parties that paramountcy is not an issue on this application. I would not have found a conflict in any case.

[14] Paramountcy ought to be narrowly construed. Historically, Canadian courts have followed the course of restraint in holding valid provincial laws to be inoperative under paramountcy. In the context of cooperative federalism, paramountcy must be narrowly construed with the effect that harmonious interpretations of federal and provincial legislation should be favoured: *Saskatchewan (Attorney General) v. Lemare Lake Logging*, 2015 SCC 53 at para. 21.

[15] I would not have given effect to the suggestion that *Hislop v. Canada (Attorney General)*, 2009 ONCA 354, stands for the proposition that the first charge provided by s. 32(3) of the CPA is inherently suspect in bankruptcy because of our constitutional framework. *Hislop* considered the application of s. 32(3) of the CPA where the section conflicted with the broad prohibition against charging pension benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8. In that case there was actual conflict between the federal and provincial statutes because the CPA purported to provide a charge over something which could not be charged. Dual compliance was thus impossible, but *Hislop* is silent about the BIA. *Hislop* would not substantially help this court determine what compliance with the BIA would require in the context of this application.

[16] The BIA is capable of integrating property rights created by provincial legislation. There is no inherent impossibility of dual compliance. The Supreme Court has said that the BIA is itself contingent on the provincial law of property for its operation: *Husky Oil Operations Ltd. v. Minister of* Revenue, [1995] 3 S.C.R. 453 at para. 31. In this application, as noted, GM, supported by FTI, itself relies upon a provincial property right under the PPSA to secure the debt it holds as a preferred secured creditor.

[17] In my view, the live conflict which I must address on this application is the one between the PPSA and the CPA, two pieces of provincial legislation which in this case provide different property rights over a single fund. I will do so below.

Trillium should be adjudged bankrupt

[18] Currently, GM is a secured creditor of Trillium. GM holds a security interest which has been perfected under Part III of the PPSA. Trillium is entitled to the Costs Award and as a result, pursuant to my approval of the retainer agreement, Class Counsel is entitled to receive as fees both the Costs Award plus 20% of the judgment amount and interest pursuant to the provisions of the CPA.

[19] As noted, the approval of the retainer agreement was done on a without prejudice basis GM to argue the issue of priority. Counsel agreed with this method of proceeding.

[20] It is my view that it is immaterial whether I decide the bankruptcy issue before or after I decide the issues regarding entitlement to the Costs Award. Since GM and FTI concede that there is no paramountcy issue, the scheme of distribution under s. 136(1) of the BIA will not be disturbed in any case. It would not constitute a preference if Trillium ultimately succeeds on the priority issue; rather, the task for this court is to determine the nature of the provincial rights upon which the BIA shall be superimposed.

[21] I will first start with the issue of bankruptcy.

[22] In my view, GM is entitled to an order adjudging Trillium bankrupt. Trillium closed its dealership in June 2009. It has no ongoing operations. Its only assets appear to the honourarium that I previously awarded, its share of the damages award, and potentially the Costs Award which I will discuss below.

[23] There is no question that Trillium's debts far outweigh its assets.

[24] In these circumstances s. 42(1)(j) of the BIA is met and there has been an act of bankruptcy. I am satisfied that Trillium has ceased to meet its liabilities generally as they become due: see *Re Ryan* (1997), 50 C.B.R. (3d) 60 (Ont. Gen. Div.), aff'd (1998), 9 C.B.R. (4th) 107 (Ont. C.A.).

[25] Although not dealt with in its factum, Trillium argues that a bankruptcy order is unnecessary since Class Counsel can distribute the funds as part of the administration of the Class Action settlement. I disagree. In my view, since Trillium has failed to meet its liabilities and there is evidence of significant debt, a bankruptcy order is warranted following the act of bankruptcy. Trillium's creditors are entitled to bring such an application under s. 43(1) of the BIA and I would not interfere with that entitlement.

[26] In these circumstances an interim receiver is not necessary.

[27] While GM proposed that FTI be appointed interim receiver it made no submissions as to the identity of the trustee in bankruptcy.

[28] Trillium opposed FTI being appointed as interim receiver on the basis that it took a partisan position at the application and, as a result, lacks the necessary partiality to act in this matter.

[29] In my view, the objections raised by Trillium regarding the appointment of FTI as interim receiver apply with equal force to the possibility that FTI might be appointed as the trustee in bankruptcy.

[30] Section 39 of the *Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c. 368, states that a trustee must be "impartial." In *Re Confederation Treasury Services Ltd.* (1995), 37 C.B.R. (3d) 237, Farley J. affirmed this rule at para. 14: "[t]he trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate."

[31] In *Confederation Treasury* Farley J. also quoted with approval the words of McQuaid J. in *Prince Edward Island v. Bank of Nova Scotia* (1998), 72 Nfld. & P.E.I.R. 191 (P.E.I. T.D.) at 220:

> It is the duty of the trustee, who is an officer of the court, to represent impartially the interests of all creditors; he is obligated to hold an even hand as between competing classes of creditors; he must act for the benefit of the general body of creditors; he is not an agent of the creditors, but an administrative official required by law to gather in and realize on the assets of the bankrupt and to divide the proceeds in accordance with the scheme of the Bankruptcy Act among those entitled. And perhaps most importantly, he must conduct himself in such a manner as to avoid any conflict, real or perceived, between his interest and his duty.

[32] In the present case, FTI took a partisan position in favour of a single creditor at the hearing of this matter. FTI positioned itself on the side of GM as more an advocate than an administrator. FTI displayed further partiality in favour of GM when it suggested at the hearing that the choice of Trillium as a representative plaintiff was an improper tactic intended to frustrate possible creditors. I am of the view that in the circumstances it would be inappropriate to appoint FTI as Trillium's trustee in bankruptcy as FTI has aligned itself with GM. There is, at least, the appearance of a lack of independence on the part of FTI prior to any potential appointment. I will hear further submissions if GM wishes to advance an alternative trustee, if necessary.

The Costs Award is the property of Trillium

[33] First, Class Counsel submits that the Costs Award does not belong to Trillium and therefore does not form part of Trillium's estate.

[34] In this regard, Class Counsel submits primarily that a representative plaintiff is not entitled to profit from the class action beyond its share of the damages and any honourarium. They further submit that Class Counsel agreed to pursue this action on contingency fee basis. Trillium has not paid legal fees to Class Counsel and the Costs Award is an indemnity for the payment of legal fees.

[35] While I share Class Counsel's concern that a representative plaintiff ought not to profit from a class action, I disagree that such a concern is active in this case. I approved a retainer agreement which assigned the Costs Award to Class Counsel, so there is no possibility that Trillium would enjoy a windfall payment in its favour even if GM were unsuccessful in this issue.

[36] In my view, the argument advanced by Class Counsel is driven by hypothetical policy arguments rather than decided law. I have not been referred to any known cases that support the assertion that the class as a collective, and not the representative plaintiff has incurred or must pay, subject to court approval, the fees and disbursements in the class proceeding. This is also seemingly runs contrary to s. 31(2) of the CPA which explicitly provides that the class members, other than the representative plaintiff, are not liable for costs.

[37] The above reasoning reflects the reality of class actions in an opt-out jurisdiction. Class members often do not know anything about the litigation being carried on. It would be unfair to present them with an account for a lawsuit in these circumstances and, similarly, where class members have no liability for costs it is fairer to conclude that they also have no interest in costs received. This conclusion is supported, at least in part, by the decision of Brockenshire J. in *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Gen. Div.) at paras. 26, 28, 29 and 30, wherein he held:

> This entitlement to costs is clearly a property right, which would be assignable by the client, were such assignment not somehow prohibited. S.33(1) of the *Act* removes the prohibitions in relation to class proceedings.
>
> […]
>
> As between the parties, any party-party costs awarded are the property of the client. Under R. 59.03(6), an order for the payment of costs shall direct payment to the party entitled, and not to the party's solicitor. However, the client can, and commonly does, agree with the solicitor to assign such entitlement to the solicitor, and directs payment accordingly.
>
> Here, under the contingency fee agreement, the entitlement of the solicitor is contingent on success at trial or by settlement. If pursuant to the client's direction or otherwise, payments of costs are received by the solicitor before judgment or settlement there would

> be an obligation to account, if in the end the proceedings should fail.
>
> However, that is a matter between counsel and the client. It does not in any way affect the right of the client to claim costs or the power and authority of the court to award costs.

[38] I am in agreement with the above sentiment that costs are those of the party and not the solicitor, or in this case the class.

[39] A finding that the representative plaintiff, in this case Trillium, has an unencumbered right to costs would also preserve the integrity of the retainer agreement. Trillium cannot give what it does not have. If the proprietary interest in costs was split between all the class members it would create additional confusion for both future Class Counsel and representative plaintiffs. Trillium has agreed to assign the Costs Award to Class Counsel and, in my view, cannot now assert that the retainer agreement speaks to something else.

[40] I therefore conclude that the Costs Award is the property of Trillium and forms part of its estate in bankruptcy.

Class Counsel's interest in the Costs Award has priority

[41] I should start by stating that GM concedes that it has no claim over the 20% of the judgment amount and interest being claimed by Class Counsel. GM restricts its claim solely to the Costs Award that Trillium obtained from Cassels.

[42] GM, supported by FTI, submits that its security under the PPSA gives it priority to Class Counsel for the Costs Award. FTI made the primary submissions on this issue.

[43] I disagree with those submissions.

[44] Again, this is essentially a contest between the security granted under the PPSA and the security granted under the CPA. There are no cases directly on point.

[45] FTI submits that the "first in time" rules under the PPSA apply to the CPA charge and the CPA charge, which I have granted, is subordinated to the prior perfected secured creditor, GM.

[46] In this regard, FTI relies upon s. 4 of the PPSA which provides as follows:

> **Non-application of Act**
>
> 4(1) Except as otherwise provided under this Act, this Act does not apply,
>
> **(a) to a lien given by statute or rule of law, except as provided in subclause 20(1)(a)(i) or section 31** […] [emphasis added]

[47] FTI submits that the first charge provided by the CPA is not a lien in the relevant sense of s. 4(1)(a) of the PPSA.

[48] As a result, FTI further submits that s. 20(1)(a)(ii) of the PPSA specifically provides that, *until perfected*, a security interest in collateral is subordinate to the interest of a person who causes the collateral to be seized through a charging order but, *once perfected*, the security interest is not subordinate to a seizure under a charging order. In such a case the secured creditor is perfected by registration.

[49] The relevant portions of the section read as follows:

> Unperfected security interests
>
> **20 (1) Except as provided in subsection (3), until perfected, a security interest,**
>
> **(a) in collateral is subordinate to the interest of,**
>
> (i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or
>
> **(ii) a person who causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or**
>
> (iii) all persons entitled by the *Creditors' Relief Act, 2010* or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has caused seizure of the collateral, or the proceeds of such property […] [emphasis added]

[50] In my view, these arguments fail by virtue of the fact that the charge that is created by s. 32(3) of the CPA should be treated as effectively a solicitor's lien which is an exception in s. 4(1)(a) of the PPSA. As a result, the PPSA does not apply and s. 20(1)(a)(ii) never takes effect to give the perfected security interest priority over seizure under a charging order.

[51] Although, as noted, there are no cases directly dealing with these issues the most useful starting point is the decision of the Court of Appeal in *Hislop v. Canada (Attorney General)*, 2009 ONCA 354. In *Hislop* at para. 32, the Court of Appeal defined the first charge provided for by the CPA as "essentially a solicitor's lien". Admittedly this is *obiter*, but there are no

competing decisions and, in my view, the analogy is a sound one. Solicitor's liens are also more well-known to the law than the first charge provided s. 32(3) of the CPA. There is instructive jurisprudence as to how one should resolve conflict between such liens and other security interests.

[52] The common law of solicitor's liens has been codified in Ontario by s. 34(1) of the *Solicitors Act*, R.S.O. 1990 c. S. 15, which provides:

> Where a solicitor has been employed to prosecute or defend a proceeding in the Superior Court of Justice, the court may, on motion, declare the solicitor to be entitled to a charge on the property recovered or preserved through the instrumentality of the solicitor for the solicitor's fees, costs, charges and disbursements in the proceeding.

[53] Henry J. in *Re Tots & Teens Sault Ste. Marie Ltd.* (1975), 11 O.R. (2d) 103 (Bank. Ct.), considered the issue of whether a solicitor's lien for costs in respect of the successful defence of litigation for the client, who later becomes bankrupt, constitutes a charge upon the fund recovered by the lawyer in the litigation so as to give him status of a secured creditor in the bankruptcy.

[54] Henry J. distinguished a solicitor's lien on the property of a client from a solicitor's claim on the "fruits of the litigation for which the solicitor has successfully expended his efforts". Henry J. called the latter a "charging lien". He went on to state that a court's charging order, with respect to the charging lien, was "declaratory" in that it gave effect to a pre-existing right.

[55] Henry J. further held that a solicitor's charging order obtained prior to a bankruptcy would create a secured creditor entitled to realize his claim out of the fund against the trustees. He concluded that he should exercise his discretion to declare an inchoate charging lien and secure the debt owed to the solicitor even after the event of bankruptcy.

[56] Perell J. in *Thomas Gold Pettinghill LLP v. Ani-Wall Concrete Forming Inc.*, 2012 ONSC 2182 at para. 101, had the opportunity to review Henry J.'s decision in *re Tots & Teens* and held:

> For present purposes, the three points to note from Justice Henry's decision in *Tots & Teens Sault Ste. Marie Ltd., Re* about a charging lien made under the court's inherent jurisdiction are: first, the charging lien creates the proprietary interest of a secured creditor; second, subject to being declared, the charging lien is an inchoate interest that pre-dates the court's declaration; and third, the charging lien is intrinsically declaratory in nature.

[57] The recent Court of Appeal decision in *Weenen v. Biadi*, 2018 ONCA 288, reinforces the idea that solicitor's liens should be readily found where a solicitor has risked being unpaid and has been instrumental in the recovery of a fund for their client. In *Weenen* the firm had

represented a client and was instrumental in the recovery of $390,000. The firm applied for a solicitor's lien under the *Solicitors Act* to ensure the payment of its fees in full. The firm was met with a jurisdictional challenge in the Court of Appeal, and brought an alternative claim for a common law lien pursuant to the Court's inherent jurisdiction. Although the Court did not grant the lien, in the particular circumstances of that case, it held that it did have jurisdiction to do so. In particular, the Court held at paras. 16-17 that:

> Charging orders exist alongside, and in addition to, a court's inherent jurisdiction to grant a solicitor's lien. Although distinct, they are two sides of the same coin, and overlap significantly in purpose and effect.
>
> […]
>
> In our view, the conceptual differences between the two orders, such as how and when they are acquired, do not justify the application of different tests. The two types of charges cover the same circumstances and have identical objectives.

[58] There seems to remain no meaningful distinction, for the purposes of this application, at least, between a solicitor's lien in the common law and by virtue of statute. It is my view, in light of Court of Appeal's dictum in *Hislop* that the first charge provided for in the CPA is "essentially a solicitor's lien", that the CPA first charge overlaps significantly with solicitor's liens in terms of purpose and effect. It is also appropriate to adopt a broad, purposeful approach in interpreting the CPA: *Jeffery v. London Life Insurance Company*, 2018 ONCA 716 at para. 44.

[59] I see no equitable concerns that are substantial enough to displace such a broad approach. GM submits in this regard that since Class Counsel chose Trillium to be its representative defendant, it has to live with the consequences of Trillium insolvency. As I discussed above, GM also raises the spectre that the selection of Trillium was a tactical decision to frustrate creditors.

[60] I disagree for two reasons.

[61] First, there is no evidence that a tactical decision was made by Class Counsel. Furthermore, in the circumstances of this class action litigation, it is difficult to accept that any proposed representative plaintiff would have been solvent as a result of the actions of GM which closed all of the Class Members' car dealerships.

[62] Second, GM had the opportunity to seek security for costs or to seek costs from a non-party. GM did so at the outset and obtained an order for security for costs, but then did not renew its request for additional security for costs until this matter was before the Court of Appeal at which time the motion was dismissed. In determining the motion, reported as *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2016 ONCA 702, Huscroft J.A. commented at para. 34:

> GM's decision not to bring a motion for security for costs was made for tactical reasons. At the hearing of the motion, GM stated candidly that it did not bring a motion earlier because it was not willing to expose its people to cross-examination. That was GM's choice, and GM must bear the burden of that choice. It would be inappropriate for this court to relieve GM of the consequences of its tactical decisions.

Huscroft J.A. also noted at paras. 27-29 that GM took no steps to replace Trillium as the representative plaintiff.

[63] I am therefore of the view that the CPA first charge should be viewed as a lien for the purposes of the priority dispute with the PPSA and that, pursuant to s. 4(1)(a), the PPSA does not apply.

[64] This conclusion is bolstered by the decision in *Dalcor Inc. v. Unimac Group Ltd.*, 2017 ONSC 945, in which Sutherland J. at paras. 32, 33 and 34, held:

> If the legislature intended to interfere with the common law, law of equity or statutory right of a solicitor's charging order, it would have provided explicit language that it intended to do so. Absent such explicit language, it is presumed that the legislature did not intend to interfere with the common law, law of equity or statutory right to solicitors' charging orders.
>
> The ordinary wording of the *PPSA* gives different consequences to liens and charging orders. The wording is contradictory in that liens are excluded under section 4(1) of the *PPSA* but charging orders are not. This contradictory wording makes it difficult to ascertain the intention of the legislature that, specifically, solicitors' charging orders, encompassing a lien component and statutory charging order component, are subject to a perfected security under the *PPSA*. It does not make logical sense to me that the legislature intended that the statutory charging order component of solicitors' charging orders is subject to the provisions of the *PPSA* but the lien component of a charging order is not. It seems to me that this could lead to an unjust and inequitable result, where one element being the lien component has a greater priority than that of the other element, the statutory component.
>
> Consequently, to extinguish the inchoate right of solicitors' charging orders requires, in my opinion, explicit wording from the legislature. No such wording exits in the *PPSA*. It is therefore my conclusion that the *PPSA* does not include solicitors' charging orders and as such, a perfected *PPSA* security does not have priority over a solicitor's charging order.

[65] I also consider my conclusion to be in keeping with scholarly opinions on the application of s. 4(1)(a) of the PPSA. Professor Jacob Ziegel and David Denomme have written that the PPSA "only applies to consensual security interests" and that the essential characteristic of interests governed by the PPSA is their origin in an agreement between the parties: *The Ontario Personal Property Security Act Commentary and Analysis*, 2nd ed. (Toronto & Vancouver: Butterworths, 2000) at 78-79. Class Counsel rely on an interest originating in the CPA, not an agreement between the parties. Professor Ziegel and Mr. Denomme also provide a helpful discussion on the definition of "lien" in s. 4(1)(a) of the PPSA:

> The term "lien" is not a term of art. In determining whether a particular lien is excluded from the [PPSA], the emphasis should be on the lien's non-consensual character, whether arising by statute or rule of law, and not on the precise content of the lien in question. "Lien" was defined in an early Ontario case as meaning, "the right of a person having possession of the property of another to retain it until some charge upon it or some demand due to him is satisfied." This definition has been overtaken by events, since it is common for modern statutes to create non-possessory as well as possessory liens (particularly in taxation legislation) and to couple them with the right to seize and dispose of the collateral.

[66] In my view, the CPA first charge fits comfortably within the language of the PPSA. I am not persuaded by the arguments raised by GM and FTI which sought to restrict or distinguish the meaning of the words "first charge".

[67] First, I do not accept the argument that, because the common law would have considered contingency fees champertous, Class Counsel should not obtain the benefit of the development in the law of solicitor's liens. In my view, such an analysis is out of touch with the realities of modern practice and the development of the case law, and would subvert class proceedings. Counsel would be understandably reticent to advance claims on behalf of impecunious litigants.

[68] Second, I do not accept the argument that *Dalcor* is meaningfully distinguishable. Counsel for FTI submits that the "double aspect" of the charge granted under the *Solicitors Act*, i.e. its having both a statutory and common law aspect, does not apply to first charges under s. 32(3) of the CPA.

[69] In *Dalcor* at para. 30, Sutherland J. found two aspects to a charging order because "a solicitor's charging order encompasses a statutory order and a charging lien, a declaratory order under the common law and law of equity". It was the second aspect that was determinative in *Dalcor*: "[t]he charging lien aspect of a charging order…takes it out of the explicit wording of the PPSA." FTI contends that a CPA first charge has no declaratory aspect because the common law is not applicable to this "pure creature of statute" and therefore the PPSA does apply.

[70] It is true that the CPA is a statutory regime which codifies procedures which would not have been recognized under the common law. It is not clear, however, that the law of equity does

not apply with equal force to the CPA first charge provisions and require that they take on a declaratory aspect. Sutherland J. noted at para. 45 of *Dalcor* that the unique purpose of a solicitors' charging order was "to protect solicitors' services and to encourage and facilitate legal representation of persons who cannot necessarily afford to pay for legal services as these services are incurred."

[71] These concerns are the same that are embodied by the CPA. The Ontario Court of Appeal, in *Hislop*, recognized this affinity when it said that the CPA first charge was "essentially a solicitor's lien". Since it seems reasonable to characterize a CPA first charge as a declaratory order under the law of equity at least, it is unclear how the common law's historical antipathy to class proceedings could distinguish the present case from *Dalcor*, even assuming that FTI's position is correct so far as the common law goes. There are residual equitable concerns - namely that solicitors' work should be protected in order to ensure that they continue to represent those who cannot necessarily afford a cash retainer, thus ensuring access to justice - which counsel for FTI did not address. At para. 44 of *Jeffery, supra*, Court of Appeal recently indicated the importance of preserving the CPA's access to justice purpose: "Second, s. 32(3) of the *CPA* should be interpreted generously, with a view to the overarching purposes of the *CPA*. The most fundamental of these is encouraging access to justice."

[72] Both GM and FTI, in submissions, also further sought to distinguish *Dalcor* on the basis that a distinction should be drawn between a lien and a charging order, and that since the CPA first charge is written in a statute it should be read more narrowly. Again, given the dictum in *Hislop*, it is difficult for me to understand why *Dalcor* should be distinguished on this basis. GM and FTI should not prevail because they can draw formal distinctions where there is little or no substantial difference recognized in the case law. More importantly, GM and FTI should not prevail since the CPA first charge is a non-consensual security interest to which the PPSA does not properly apply as a result of s. 4(1)(a). It little matters whether that non-consensual security interest is called a lien or a charge.

[73] Finally, FTI also submitted that Class Counsel could not get past the test laid out in *Weenen*, at para. 15, for granting a solicitor's lien because in this case there was no doubt that Class Counsel would be paid some money by way of the contingency fee arrangement (i.e. the 20% of the damages and interest). In particular, FTI relies upon the requirement that "there must be some evidence that the client cannot or will not pay not the lawyer's fees" in order obtain a charging order.

[74] The contingency fee situation was considered previously in *Guergis v. Hamilton*, 2016 ONSC 4428, a case cited by the Court of Appeal in *Weenen*. In *Guergis* at para. 7, Hackland J. refused to "deny the plaintiff's solicitors a charging order merely because they appear[ed] to have a contingency fee arrangement, which implie[d] an acceptance by the solicitors of a degree of risk of non-payment." In this case there is no doubt that Trillium cannot pay its fees; the mere presence of a contingency fee agreement should not constitute good reason to award Class Counsel less than it bargained for. This court should not safeguard Class Counsel's fees by awarding them an additional percentage of the judgment amount as suggested by GM and FTI as this would unfairly reduce the judgment amount available to the Class.

[75] In summary, I am of the view that the PPSA has no application to the first charge obtained under the CPA. The language of the CPA establishes a super-priority, and so the CPA first charge should take priority over the perfected interest under the PPSA. Following *Tots & Teens*, Class Counsel should rank as a secured creditor with an inchoate interest arising at the moment the Costs Award becomes available through Class Counsel's work. Given my findings, I need not address the submission of GM and FTI that s. 73 of the PPSA applies to resolve any conflict between the CPA and the PPSA in favour of GM.

DISPOSITION

[76] GM is entitled to its order adjudging Trillium bankrupt. Class Counsel, however, shall receive the Costs Award pursuant to the first charge against that fund. The Costs Award is to be applied to Class Counsel's fees and disbursement as per the prior approval of this court. If the parties cannot agree on the issue of costs with respect to this and the other related motions, or the appointment of a trustee, I can be spoken to at a 9:30 appointment to set a schedule for submissions.

McEwen J.

Released: January 22, 2019

CITATION: General Motors v. Trillium Motor World Ltd., 2019 ONSC 520
COURT FILE NO.: CV-18-602241-00CL
DATE: 20190122

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GENERAL MOTORS OF CANADA COMPANY

Applicant

– and –

TRILLIUM MOTOR WORLD LTD.

Respondent

REASONS FOR DECISION

McEwen J.

Released: January 22, 2019

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF:

JTI-MACDONALD CORP.	**Court File No. CV-19-615862-00CL**
IMPERIAL TOBACCO CANADA LIMITED AND **IMPERIAL TOBACCO COMPANY LIMITED**	**Court File No. CV-19-616077-00CL**
ROTHMANS, BENSON & HEDGES INC.	**Court File No. CV-19-616779-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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