Court File No. CV-14-10518-00CL

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 1511419 ONTARIO INC., FORMERLY KNOWN AS THE CASH STORE FINANCIAL SERVICES INC., 1545688 ALBERTA INC., FORMERLY KNOWN AS THE CASH STORE INC., 986301 ALBERTA INC., FORMERLY KNOWN AS TCS CASH STORE INC., 1152919 ALBERTA INC., FORMERLY KNOWN AS INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

BOOK OF AUTHORITIES OF THE APPLICANTS
(Amended ASC Privilege Protocol)

December 11, 2015

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Allen-Vanguard Corporation v. Richard L'Abbé et al

Master C. MacLeod

Judgment: December 23, 2011
Docket: 08-CV-43188, 08-CV-43544

Counsel: Thomas. G. Conway, Christopher Hutchison, Calina N. Ritchie, for Offeree shareholders
Eli S. Lederman, for Allen-Vanguard parties

Subject: Evidence; Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

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Master C. MacLeod:

1 Allen-Vanguard Corporation purchased the shares of Med-Eng Systems Inc. in September of 2007. In simplest terms this litigation is because Allen-Vanguard alleges it overpaid for those shares and seeks to recoup part of the purchase price out of a $40 million escrow fund. The central issue is whether or not Allen-Vanguard was negligently or fraudulently misled concerning the fundamentals of the business.

2 These actions are case managed but it has also been necessary to hear certain formal motions. I have released two previous sets of reasons dealing with production and discovery. [1] The issue before the court on this occasion is privilege asserted by Allen-Vanguard over a massive list of documents. There are approximately 6,000 documents listed in a more than 1,000 page Schedule B to the affidavit of documents.

3 I have approached this firstly by discussing certain general principles and how broad claims of privilege play out in the context of this particular litigation. I have taken the time to carefully consider first principles for two reasons. Firstly I am hoping that general declarations of principle will guide the parties in resolving or avoiding further procedural disputes. Secondly as we gain experience with new requirements of discovery planning and e-discovery, it is important to leave clear signposts for others to follow. The issues raised by this motion have broader implications.

4 The reasons next deal with a specific set of documents that were inadvertently disclosed and included in Schedule A and then with the Schedule B documents. Court inspection of 6,000 documents is not a viable option and I have placed the obligation of narrowing the parameters of the dispute in relation to those documents on the parties. I have given direction regarding procedural collaboration, creative solutions and time frames.

5 The motion highlights the need for new ways of dealing with documentary production in big document cases and in particular in cases dealing with large amounts of electronically stored information.

6 I have concluded that Allen-Vanguard has inappropriately asserted privilege over broad categories of documents including due diligence documents and virtually all communication with a host of legal advisors including in house counsel. Counsel for Allen-Vanguard recognizes there is work to be done. He has suggested that the motion was premature and there were better tools available to refine the privilege claims than such a blunt instrument. I would agree with this but for the fact that it was Allen-Vanguard which certified its affidavit of documents as complete and makes the sweeping claims of privilege. Given the inordinate delay that has already stalled documentary production, I am not inclined to be too critical of the response.

Background

7 Allen-Vanguard paid more than $640 million for Med-Eng. At issue in the litigation is a $40 million escrow fund held back from the purchase price. Allen-Vanguard advances claims against the fund for breach of specific warranties in the agreement of purchase and sale. It also claims to have been misled about the value of Med-Eng and accuses former Med-Eng management of misrepresentation and fraud.

8 As I have pointed out in the previous decisions there are some features of the manner in which the agreement of purchase and sale and the subsequent litigation are structured which complicate questions of production and privilege. These are as follows:

a. The offeree shareholders are not accused of any wrongdoing but are the defendants to Allen-Vanguard's claim. This is because under the agreement the escrow fund (part of the purchase price) is the property of the offeree shareholders unless Allen-Vanguard proves its claims.

b. The former Med-Eng senior managers are accused of fraudulent and negligent misrepresentation with the purpose of inducing Allen-Vanguard to pay an inflated price and to proceed with the transaction but they are not parties. No relief is claimed against them by Allen-Vanguard. No third party claim has been asserted by the offeree shareholders.

> c. Med-Eng (AVTI) is not named as a party by Allen-Vanguard because it is fully owned and managed by Allen-Vanguard and in fact is now amalgamated with Allen-Vanguard. Yet the warranties which are said to have been breached are expressed to be warranties given by Med-Eng itself. Moreover Med-Eng would have been vicariously liable for the acts of its officers and directors. But the only remedy for breach of the warranties is a claim against the escrow fund and the only remedy Allen-Vanguard seeks for misrepresentation is also a claim against the fund. [2]

9 Consequently the wrongdoing is asserted against non parties and the remedy is sought against parties who are not accused of wrongdoing though they are the beneficiaries by virtue of receiving the allegedly inflated purchase price. Had the remedy not been limited to the fund and had Allen-Vanguard and Med-Eng remained separate entities, one would have expected the former managers, the corporation and the offeree shareholders to be co-defendants. It should be noted that there is no claim by the former Med-Eng that the former senior managers were not acting in the best interests of the corporation. [3]

10 Central to the litigation are the questions of what representations were actually made, whether they were false and the extent to which Allen-Vanguard relied upon those representations. The critical issue is the valuation of Med-Eng shares and therefore of the value it was reasonable to attribute to the business of Med-Eng at the time of the purchase. Thus it is not so much the accuracy of Med-Eng financial statements that is in question but what was known and what should have been known concerning financial and cash flow projections, future opportunities and risks; in particular the risks associated with key military contracts.

11 There are a number of specific misrepresentations alleged in the statement of claim. These can be found under the headings, "misrepresentation of MES revenue profile", "misrepresentations with respect to contingent and other liabilities", "misrepresentations with respect to status of MES contracts and commitments" in the latter half of the statement of claim. Importantly for purposes of this motion, however, the claim contains the following general assertions:

> MES made a number of misrepresentations as to its expected bookings, revenue and earnings and as to the status of MES's customer relationships ...
>
> These representations were made knowing that Allen-Vanguard would rely on such representations and were made to induce Allen-Vanguard to enter into the transaction and to pay an inflated purchase price.
>
> MES represented ... that there had been no Material Adverse Effect which could reasonably be expected to be materially adverse to the business, assets, liabilities, financial condition or results of operations of the corporation since June 30, 2007.
>
> MES further represented ... that there were no suits or proceedings pending or threatened which could materially adversely affect the corporation
>
> ... the former management of MES knew or ought to have known that these orders were unlikely to generate the revenue which had been projected or were unlikely to even materialize at all.
>
> ... The projections with respect to MES's expected revenue, earning and bookings, were made by the management of MES, knowing that they would impact on Allen-Vanguard's desire to enter into the transaction and the price it would be willing to pay for MES.

12 In the statement of defence there are specific contractual defences. The offeree shareholders deny that any wrongdoing by the non party former managers can trigger a claim against the escrow fund which they say is limited to satisfying any breaches of the specific warranties. More generally however, the offeree shareholders plead that there were no misrepresentations and in any event deny that Allen-Vanguard relied on any representations not contained in the contract. They deny any damages flowing from the alleged breaches and they put failure to mitigate in issue.

13 Because Allen-Vanguard is asserting claims of negligent and fraudulent misrepresentation in the formation of the contract and setting of the price, knowledge and reliance are critical issues. This puts in play the state of knowledge of both parties, what

communication took place, what independent inquiries were made or should have been made. The extent of due diligence by both parties will be in issue. A great deal of the communication between the parties and with proposed lenders leading up to the closing of the transaction is potentially relevant. Since the accuracy of projections and risk is in issue, as is failure to mitigate, what subsequently occurred and why will also be relevant. This list is not exhaustive.

14 Given the issues raised by the pleadings, and the fact that Allen Vanguard gained control of all Med-Eng documents, computers and the remaining employees following the closing, it is perhaps not surprising that Allen Vanguard has identified many thousand potentially relevant documents.

15 In my earlier reasons [4] , I outlined some of the difficulty and delay involved in the documentary production to that point. Allen Vanguard had originally identified 600,000 potentially relevant documents and had then narrowed those to closer to 400,000 for review. Almost 10,000 documents were ultimately identified as relevant and not subject to privilege. Those documents are now listed in Schedule A to the affidavit of documents.

16 There are two main issues raised by this motion. The first has to do with documents over which privilege is claimed but were inadvertently released to the offeree shareholders. The court must determine whether these documents are privileged and if so whether the privilege has been lost or waived. The second issue is the 6,000 documents that are listed in Schedule B. These by definition are documents that Allen Vanguard has identified as relevant but over which privilege is claimed. That claim of privilege is challenged. The onus is on Allen-Vanguard to prove that the Schedule B documents are properly privileged. [5]

17 In addition to the evidence set out in the affidavit of documents itself, Allen-Vanguard has filed additional affidavit evidence in support of the claims of privilege. Only two of the disputed documents were provided for court inspection as part of the motion material.

General Principles

18 Before dealing with the specific documents, it seems important to discuss general principles.

The need for collaborative discovery planning

19 First and foremost, when dealing with vast numbers of documents, particularly electronically stored information, the parties ought to be devising methods for cost effectively isolating the key relevant documents and determining claims of privilege To the extent that there is disagreement about the scope of relevance or privilege, it may be necessary to obtain rulings from the court but the onus is on counsel to jointly develop a workable discovery plan and to engage in ongoing dialogue. [6]

20 Allen-Vanguard complains that this motion is premature. Rather than launch a motion challenging the 6,000 claims for privilege, Allen-Vanguard argues that the offeree shareholders should have asked specific questions about the documents and the circumstances giving rise to privilege. While that might well have been a useful discussion in the context of discovery planning, Allen-Vanguard has declared that every one of these documents are privileged. As such, the onus is on Allen-Vanguard to justify the claims of privilege. The offeree shareholders are of course entitled to cross examine on the affidavit of documents during discovery and indeed certain questions were addressed to Mr. Luxton. There is however no requirement for the offeree shareholders to ask questions about every individual document before calling on Allen-Vanguard to justify its privilege claims.

21 I accept that faced with this volume of documents, new approaches must be adopted but this cannot be a unilateral exercise. It requires ongoing procedural collaboration with court direction if necessary. Collaboration will not always result in agreement but where agreement is not possible, transparency should be the order of the day. Faced with this number of documents, the parties and the court must re-evaluate traditional approaches. Caselaw developed for manageable numbers of paper based documents must also be re-evaluated. Painstaking scrutiny of each individual document is disproportionate to the objective and unjustified even for a claim of this magnitude. Technology must be harnessed. Creative solutions need to be embraced. Counsel owe it to their clients and to the administration of justice to find efficiencies without, obviously, sacrificing the objective of a just outcome.

22 The notion that the court or even the parties themselves should manually review 6,000 Schedule B documents is unworkable, impractical and unduly resource intensive. In this case the parties are using outside e-discovery experts and they have agreed on a number of important protocols such as format, coding, data fields and electronic exchange of documents but when it comes to the substantive questions of relevance and privilege they appear to be working in isolation. Rather than unilateral decision making, collaboration between counsel and their respective experts might yield some promising efficiencies.

23 Various e-discovery solutions are available including software solutions such as predictive coding and auditing procedures such as sampling. It is naive to expect complete procedural agreement in an adversarial system but there should be a mutual interest in identifying critical documentary evidence while preserving legitimate claims for privilege. [7] Suffice to say traditional approaches to production motions cannot be used for production on this scale.

24 Even with $40 million at stake, efficiency and cost effectiveness in production and discovery should be a mutual goal. Questions of relevance and privilege must be answered of course but it is necessary to apply those filters in a practical manner. Central to that exercise is to ensure that both relevance and privilege claims are properly focused and calibrated. Adjudication may be an important part of that exercise. Equally or more important is the need for collaborative and creative goal oriented problem solving by the parties and their respective counsel.

The scope of relevance and privilege

25 Generally speaking when huge numbers of documents are identified as potentially relevant, one suspects the ambit of relevance is being drawn too widely. Perhaps a more useful goal than mere relevance would be to consider utility. The massive number of documents identified as relevant suggests a failure to think clearly about probative value, and the matters which ultimately may have to be proven at trial.

26 I recognize that the ambit of relevance is broadly sketched by these pleadings but no one can possibly believe 10,000 Schedule A documents will actually be introduced into evidence at trial or that there are 6,000 critical Schedule B documents that can legitimately be withheld. The objective should be to isolate the documents that actually have probative value — that prove or disprove the disputed allegations. In the remote event that all those documents are actually important, then what is really necessary is a form of audit and review. In that case the documents will ultimately be distilled through the lens of expert testimony. Indeed, access to the source documents by experts may well be a necessary solution in a case such as this.

27 Turning to the specific claims of privilege, it is obvious those claims have also been drawn too broadly. Allen-Vanguard has asserted privilege over all of the due diligence documents and over almost all documents sent to or from its legal counsel. As I will discuss in a moment, that may have been an appropriate starting point for internal review but it is not an appropriate position at this stage in the litigation.

Solicitor-Client Privilege

28 More accurately referred to as client & lawyer privilege, there is no question that the privilege which exists between a client and his or her lawyer is now regarded as a fundamental civil and legal right. [8] Moreover it is a right that is critically important to the administration of justice and as such it is one of the rare class of privileges which cloaks the communication with presumptive inadmissibility. [9] Solicitor client privilege must therefore be taken very seriously. It is so important that no matter how important or probative the information might be, the truth seeking function of the justice system must generally yield to the importance of maintaining the privilege. Conversely of course it is important to confine claims of privilege to their proper ambit. Inappropriate claims of privilege cannot be permitted to shield admissible evidence from disclosure. Misuse of privilege is to debase it.

29 There is no dispute about the essential requirements for privilege to attach to a document. The privilege attaches to written or oral communication which was confidential in nature and is between a client and a lawyer in relation to seeking, formulating or giving of legal advice. The privilege may extend to information conveyed between the client and lawyer through

an agent or other intermediary. The objective of the privilege is to ensure that effectual legal assistance may be obtained by fully and frankly disclosing all material facts to the lawyer in confidence. [10] It is however the communication between the client and the lawyer that is privileged and not objects or documents that otherwise exist. [11] Simply providing a document that is otherwise not privileged to a lawyer in order to obtain legal advice does not render the document itself a privileged document. Consequently attachments to privileged e-mails may or may not be privileged themselves.

Litigation Privilege

30 I need not say much about litigation privilege at this point as it is generally understood to be a type of privilege which may overlap with solicitor client privilege but is not identical to it. Litigation privilege exists for the proper functioning of the adversary system and it is essentially designed to protect litigation strategy. It is a form of privilege that is not permanent and may end when the litigation ends. Providing documents have been created for the dominant purpose of use by counsel in the litigation process, they will be privileged. [12]

Settlement Privilege

31 I do need to say something about claims for privilege over settlement discussions. This is an area of law which has been evolving. It has long been understood that offers to settle litigation are privileged within the context of that litigation. Specifically the trier of fact should not be aware of the offer before rendering a decision. This is to avoid the decision being tainted by the idea that an offer is an admission of liability or to avoid the assessment of damages being coloured by the quantum of an offer. Formal offers to settle are specifically protected by the Rules of Civil Procedure. [13] All communications made in mediation are also deemed to be without prejudice settlement discussions. [14]

32 Settlement discussion privilege has gradually been more broadly recognized. It goes beyond offers and it is not confined to mediation. All discussions intended to resolve litigation, including discussions that take place in contemplation of the litigation should now be considered inadmissible in the litigation at least until after the trial. [15] This is not a privilege that attaches to contractual negotiation generally. The privilege will apply if litigation is in existence or in contemplation; if the communication is made with the express or implied intention that it will not be disclosed to the court in the event the negotiations fail; and, if the purpose of the communication is to effect a settlement or buy peace.

33 Like litigation privilege, and unlike solicitor client privilege, this privilege is not a substantive rule of law nor is it a fundamental civil right. It will yield more readily in the balance between truth seeking and preservation of confidence. That is to say that it is not as important as solicitor client privilege. Also like litigation privilege, it is not a durable privilege. It exists only for a transitory purpose and that is to encourage settlement by ensuring that settlement discussions do not prejudice the parties if litigation must continue.

Waiver of Privilege

34 I will come back to the question of waiver more than once. Privilege may be waived by the party entitled to rely upon it. But waiver may be inferred. The two most common methods of attracting an inference of waiver are either releasing the information so that it is no longer confidential or by putting the privileged advice in issue in the litigation. Once privilege has been waived, the privilege is gone over the entire subject matter of the communication because a party may not "cherry pick". [16]

35 As I will discuss shortly, I am of the view that the pleadings in this action constitute a waiver over any privilege attaching to due diligence. This is an example of the second method. Disclosure of privileged information to third parties or to the other side in the litigation may be an example of either explicit or implicit waiver because it demonstrates that the client no longer considers the privileged information to be confidential.

36 It follows however that inadvertent disclosure — if it is truly inadvertent — should not be treated as a waiver of privilege unless the party making the disclosure is truly reckless or delays in reasserting the privilege or certain other conditions are met.

Inadvertent Disclosure

37 I need not say a great deal more than that about inadvertent disclosure. Privilege is not waived by disclosure unless the party making the disclosure intended to waive privilege and was authorized to do so. [17] On the other hand privilege may be lost through inadvertent disclosure based on considerations such as the manner of disclosure, the timing of disclosure, the timing of reassertion of privilege, who has seen the documents, prejudice to either party and the requirements of fairness, justice and search for truth. [18] Both parties referred to the same authorities and the law in this area is not seriously in dispute.

38 In cases involving large numbers of documents, it must be expected that some privileged documents might inadvertently be disclosed. This is frequently addressed in discovery plans by way of clawback agreements. [19] Inadvertence will not by itself amount to waiver but this does not mean the court will protect a party from reckless release of privileged documents. [20] In any event notwithstanding the attempt to reassert privilege, the court may determine that privilege has been lost and may decline to permit the documents to be removed from Schedule A of the affidavit of documents.

39 Of course the court may inspect the documents that have been released in addition to the evidence when determining the matter. There are at least three possible findings: the documents are not privileged documents; the documents would ordinarily be privileged but privilege has been waived (explicitly or implicitly); or the documents would ordinarily be privileged but it would be unjust to require them to be returned. In my view the latter would be extraordinary. Ordinarily inadvertent disclosure will not constitute waiver and if privilege is reasserted in a reasonable and timely manner, the documents should be ordered returned and removed from Schedule A.

Due Diligence & Privilege

40 One of the categories of documents over which privilege is claimed is due diligence conducted by Allen-Vanguard as part of the decision to purchase the Med-Eng shares or as part of the process of raising financing. In effect these are the same thing because Allen-Vanguard's decision whether or not to proceed with the transaction was contingent on satisfying its lenders and raising the necessary capital.

41 Due diligence needs to be properly understood. It is a phrase susceptible to different meanings. It has been described as a "malleable concept that is used in both corporate and regulatory law, with origins in the tort law concept of the reasonable person." [21] In other words due diligence ordinarily means demonstrably meeting a standard of reasonable care. In corporate and securities practice, "due diligence" describes a prospective buyer's or broker's investigation and analysis of a target company, property or security. [22]

42 Of course the regulatory and corporate worlds are related. As a publicly traded company seeking additional investment and subject to prospectus requirements, "due diligence" in making a major acquisition may be a necessary component of defence to subsequent civil or criminal prosecution under securities and other legislation. The agreement contemplated a public offering by Allen-Vanguard but the due diligence conducted with an eye to regulatory compliance in this case cannot be readily separated from due diligence conducted to decide whether or not to close the transaction. In the context of my reasons, "due diligence" refers to the steps taken by Allen-Vanguard to assess the merits and risks of proceeding with the purchase of Med-Eng at the agreed upon price.

43 In mergers and acquisitions generally there is a time period during which the proposed purchaser has the right and obligation to satisfy itself of the quality of the investment. This is often a multi step process in which there must first be tokens of good faith and commitment. In exchange, the proposed purchaser is given complete access to the target company in order to drill down deeply into the books, records and operations of the company and to satisfy itself that it should proceed with the transaction. Often subsumed under the rubric of "due diligence", the searches and investigations conducted on behalf of the prospective purchaser or investor are frequently co-ordinated by transactional counsel. Due diligence reports and audits will usually be reviewed or even commissioned by counsel. While frequently extremely complex, in essence these pre-closing investigations

are similar to searches, inspections, surveys and environmental audits regularly conducted in residential or commercial real estate transactions. Typically the purchaser has an option to terminate the agreement if not satisfied with the results.

44 In agreements to acquire or invest in a business due diligence is often broken down into a series of audits or tests such as financial audits, marketing audits, production and inventory audits, management audits, risk analysis, and of course legal opinions. Clearly there is a legal component to much due diligence.

45 In particular, lawyers may be asked to opine concerning regulatory compliance, contractual interpretation, or prospects of litigation. Legal analysis is frequently part of risk analysis. It would be odd if it were otherwise. Contracts will have to be interpreted. The risk of litigation will have to be analyzed. Regulatory risks in different jurisdictions must be assessed. Clauses will have to be drafted or interpreted during the negotiation process. Lawyers are frequently in the thick of merger and acquisition work. But not all of that work and certainly not all of the accounting or other work done in support of that work can attract solicitor client privilege

46 It is important to remember that the ultimate objective of these inquiries is a business decision — whether or not to proceed with the purchase or whether or not to lend money to fund the acquisition. In that sense the ultimate outcome is not a legal opinion but business advice. Most of the inquiries made in support of the due diligence processes are not legal inquiries and they are not gathered for the purpose of giving legal advice.

47 Additionally, the legal opinions forming part of due diligence are for the most part opinions based not on confidential information of the client as would ordinarily be the case but based on confidential information disclosed by the target corporation. It may be concluded that not all aspects of due diligence are subject to solicitor client privilege and those which might yield to different policy considerations when assessing whether or not privilege has been waived.

48 It is here that Allen-Vanguard has it backwards. In their factum they seek to bring all of the due diligence inquiries conducted by accountants or others under the umbrella of solicitor client privilege. This is because these inquiries inform the giving of legal advice. In my view however the legal advice is ancillary to the fundamental inquiry whether or not to make the investment. The legal opinions inform the investment decision.

49 Finally there is the question of waiver. Due diligence or lack thereof is at the very heart of this proceeding. Allen-Vanguard cannot claim to have been misled if it already knew the risks associated with the purchase. Moreover the analyses conducted at the time are pertinent to determining if the information conveyed to Allen-Vanguard can be said to be materially misleading or false. It cannot be open to Allen-Vanguard to take the position that it was misled by representations which it now says were false and then refuse to disclose what due diligence was carried out and what information was available to it through the due diligence process. In fact it will also be relevant to know what if any searches or inquiries Allen-Vanguard should have undertaken but failed to do. Implicit in the very notion of due diligence is a standard of reasonable care.

50 There is authority to the effect that putting state of mind in issue when legal advice formed part of the basis for that state of mind should be regarded as waiving privilege.[23] Similarly in my view by implicitly putting due diligence in issue there is waiver of privilege over legal advice integral to the pre-closing inquiries and searches. To avoid the limitations of liability in the contract Allen-Vanguard may have to show that the risks that materialized were not within the contemplation of the parties when the agreement was signed.

51 In summary, I do not rule out the possibility that there are legal opinions over which privilege may legitimately be maintained. For example it may be that legal advice concerning regulatory compliance by Allen-Vanguard itself or in relation to its lenders following the sale can be distinguished from work done to assess the merits of the investment, to accept the price, to waive conditions and to proceed with the purchase. In general however I would hold that any privilege existing over Allen-Vanguard's due diligence has been waived and exceptions would have to be justified on a case by case basis. But even if that is incorrect, in my view financial analysis and similar audits forming part of Allen-Vanguard's pre-closing investigation of Med-Eng's business never attracted solicitor client privilege even if those investigations were co-ordinated by counsel.

52 This is because the ultimate objective was business advice and not legal advice. It is certainly possible to have privileged legal advice obtained for business purposes and it is not always possible to draw a bright line between legal and other advice. It is clear however that purely business advice, even if given by a lawyer, is not subject to solicitor client privilege. [24] It is even less likely that purely business advice sent to a lawyer or assembled in the office of a lawyer attracts such privilege.

53 For all of these reasons, I conclude that the due diligence documents are not inherently privileged. Any claims of privilege over specific components of the due diligence will have to be shown to be exceptions. That would require that they be either legal advice or documents created for the principal purpose of obtaining such advice and that also survive any deemed waiver of privilege created by these pleadings.

Whose privilege is it?

54 Another consideration in assessing privilege claims is the question of who is inside the privilege tent. In the course of conducting due diligence a great deal of information including financial information, business practices, trade secrets and even legal opinions that would normally be held confidential by the target corporation is shared not only with the purchaser but also with prospective lenders, outside review agencies and with counsel for the vendor offeree shareholders. Contractual provisions are ordinarily in place to ensure that misuse is not made of this information, that it retains its character as proprietary confidential information and that all copies of the information are returned if the transaction does not proceed. Of course when the transaction closes, the bundle of ownership rights including privilege that belong to the target corporation passes to the new owners. In this case Med-Eng became AVTI and ultimately was amalgamated with Allen-Vanguard itself. Allen-Vanguard thus inherits Med-Eng's claims to privilege but in this case any pre-closing privileges enjoyed by Med-Eng cannot be exclusive.

55 It is particularly questionable whether any Med-Eng privileges can be asserted against the offeree shareholders in the context of this litigation. There is a difference between confidentiality and privilege. It is one thing to preserve the confidential character of information when it is shared with other parties. It is quite another to argue that that information is privileged against the party that was made privy to that information in subsequent litigation. All of the documents and information provided by Med-Eng to Allen-Vanguard or to third parties at the request of Allen-Vanguard was information to which Med-Eng management and the offeree shareholders would have had access in the course of the negotiations. [25] Indeed the right of the offeree shareholders to have access to confidential documents supplied to Allen-Vanguard continues to exist after closing. That right is preserved in the agreement of purchase and sale. [26]

56 I therefore agree with the submission that the offeree shareholders, Med-Eng and Med-Eng management would have had common interest privilege prior to the closing. Med-Eng privileges up to the date of closing cannot be asserted against the offeree shareholders in the context of this litigation. [27] I am not suggesting that Allen-Vanguard does not have its own claims for privilege apart from privilege inherited from Med-Eng. The point however is that the question of whose privilege is involved in different pieces of communication is potentially complicated. This also militates against overly broad privilege claims.

Communications involving Elisabeth Preston

57 Quite apart from the due diligence, Allen-Vanguard cannot assert blanket claims of privilege over all communication to or from Elisabeth Preston or other legal advisors. Ms. Preston was a partner at Lang, Michener and was transactional counsel for Allen-Vanguard but she also played the role of in-house counsel. She formally assumed the role of Chief Legal Officer after closing and was then part of the senior management of Med-Eng and later Allen-Vanguard. [28]

58 As either general counsel or as part of the senior management team, Ms. Preston would have received requests for legal advice and would have dispensed legal advice which would be subject to privilege. She would also have received information that was not privileged and may have given advice that was not legal advice. Certainly she would have been in receipt of information that was not information for the purpose of giving specific legal advice. It is not enough that her role in management was because of her legal expertise or that she would only be involved if there was a legal dimension to the decision. It has been

held for example that general legal information collected in the office of counsel or made available by counsel for the general legal education of an organization is not privileged. [29] It will not do to simply isolate any documents bearing Ms. Preston's name and to assert that they are privileged.

59 The same may be true of other legal advisors who played multiple roles. Allen-Vanguard has identified numerous law firms and lawyers who they say provided relevant and important advice relating to the transaction generally or due diligence in particular. These claims will have to be explored with greater particularity having regard to my ruling on due diligence. A balance will have to be struck between the nature and purpose of the claim for privilege on the one hand and on the other, the need to elucidate whether or not anything communicated by the former managers could have misled Allen-Vanguard.

60 With those general observations, I can turn to the specific items in dispute.

The inadvertently disclosed documents

61 Certain disputed documents are already in the hands of the offeree shareholders. All of these are currently in Schedule A of the Allen-Vanguard affidavit of documents but they are documents over which Allen-Vanguard now seeks to assert privilege. The court must first determine if the documents are privileged, then determine if the privilege has been waived. If they are and remain privileged then it would be necessary to formulate appropriate relief. The relief requested is the return of the privileged documents and amendment of Schedule A to the affidavit of documents.

62 I will deal with each of the listed documents in turn.

The KPMG Report — AVC00023109

63 The first and most significant of the documents is the "draft" KPMG report. This document was produced for inspection. It is entitled "Project Superman Due Diligence Assistance, Draft, September 7, 2007" and was prepared for the CFO of Allen-Vanguard Corporation to "assist Allen-Vanguard ... in performing due diligence" in connection with the proposed investment. The document appears in Schedule A of both parties so it was in the hands of the offeree shareholders before the litigation commenced. It turns out that its provenance is problematic. Allen-Vanguard takes the view that it is in reality a privileged document and now wishes it returned.

64 Apparently during the negotiations leading up to the share purchase, there was a meeting at the offices of McCarthy Tetrault in Ottawa. The KPMG report was seemingly left behind by someone on the Allen-Vanguard negotiating team and was collected along with other papers by McCarthy Tetrault staff. It then remained in the possession of Mr. Chapman who was counsel for the offeree shareholders until his file was obtained for the purpose of preparing for this litigation. There is no evidence that Mr. Chapman was even aware he had it or that his clients ever had access to it during the negotiation.

65 I need not deal with whether or not the report was a privileged document in the context of the negotiations that were ongoing at that time. I am satisfied that at the very least it was confidential and that it was left behind inadvertently. I accept that if it is a document to which privilege then attached, leaving it behind after a meeting would not in and of itself be a waiver of privilege though there are circumstances in which inadvertent disclosure can lead to loss of privilege. [30] I need not determine if those factors lead to loss of privilege in this case because in my view the document is not a privileged document at this time in the context of this litigation.

66 The report sets out the procedures KPMG was retained to perform and the results of those procedures. It is a document that was available to Allen-Vanguard and was one of the documents used by Allen-Vanguard in deciding whether or not to purchase Med-Eng and in assessing a fair price. Though it is marked as a "draft" it was quite clearly part of Allen-Vanguard's due diligence process. I have already expressed my general view that due diligence is not covered by solicitor client privilege. Inspection of the KPMG report reinforces my opinion that this is not a privileged document. There is a covering letter directed to Rob Ryan, Chief Financial Officer of Allen-Vanguard which clearly sets out that the sole purpose of the report is "to assist [Allen-Vanguard] in its evaluation of the Target". On its face the document was intended to assist Allen-Vanguard in determining

whether or not to proceed with the transaction and whether or not the price was fair. That is business and investment advice and it is not privileged.

67 Accordingly the offeree shareholders need not return the report. It is not privileged and it properly remains part of the Schedule A documents.

Document AVC00026667

68 This is the only other document that was produced for inspection. It is an e-mail from Elisabeth Preston to Chris Waitman copied to Andrew Munro & John Milne and dated July 29th, 2008. It deals with "clearing milestones". It has already been partially redacted. Since the e-mail seems to deal not with legal advice but whether or not certain steps had been completed to fulfil an agreement, I see nothing in the copy that was produced that reveals privileged information.

69 Inspecting this document reveals the futility of examining individual documents out of context. It is impossible to determine from looking at the document itself why it is relevant or what aspect of it would be privileged. I presume it is relevant because it is part of the narrative of the eventual breakdown of a relationship with General Dynamics Armaments and Technical Products (GDATP). It is dated many months after closing.

70 In any event I am not satisfied that privileged information is disclosed in the document and it will remain in the productions in the form that has been produced.

Draft Statement of Claim — Document OS0000345

71 A draft pleading was sent by e-mail from Mr. Luxton to Paul Echenberg of Shroeders[31] for the specific purpose of settlement discussions. The e-mail expresses that the pleading is a draft of a claim, that it is for settlement purposes and that it is delivered on condition it will be returned if there is no settlement. Nothing could be clearer. The draft pleading was prepared for the purpose of discussing settlement and the communication is protected by settlement discussion privilege. It is in my view improper to use it in the litigation. The settlement proposal was with a view to avoiding exactly the litigation the parties are now involved in.

72 To be honest I do not understand why this document is an issue at all. No one has explained why it is relevant or what probative value it could possibly have. One might speculate that a draft pleading containing a different version of events or a different calculation of damages could raise suspicions about the accuracy of what was ultimately pleaded in the real statement of claim but it is not a sworn document and would be of limited utility.

73 In my view, based on the description of the document AVC00026319 is also subject to settlement privilege.

Document AVC00014475 and attachments

74 According to the affidavit of Stephanie Cousins, this is an e-mail exchange between Elisabeth Preston and U.S. counsel in the context of seeking legal advice in relation to an "assist audit" which was then taking place. The assist audit is relevant in the litigation because it commenced prior to closing and one of the specific pleadings has to do with alleged failure to disclose "what this request signified or how this request amounted to a significant contingent liability of MES".

75 It is also pleaded that the former managers had retained U.S. legal counsel and a U.S. consulting firm to advise them on how to avoid possible liability under the Federal Acquisition Regulations. The managers are accused of concealing this information and failing to disclose how serious the potential exposure would be. This allegation is disputed. The offeree shareholders state that Med-Eng advised of the audit and responded as required under the U.S. legislation. I would imagine that to prove that allegation there will have to be evidence about the effect of U.S. legislation provided by an American legal expert.

76 The communication for the purpose of obtaining legal advice in 2008 is *prima facie* subject to client lawyer privilege. While the seriousness of the assist audit and whether or not the Med-Eng response to the audit in 2007 is in issue, the legal advice obtained in 2008 has not been specifically brought into play. But it may happen.

77 Accordingly I do not rule out the possibility that the advice of U.S. counsel will subsequently be brought into issue. Failure to mitigate is an issue and presumably there will have to be evidence about the ultimate outcome of the audit, whether it in fact resulted in liability to AVTI and whether anything Med-Eng did prior to closing or Allen-Vanguard or AVTI did after closing could have changed the outcome. I was not however directed to anything in the evidence that indicates waiver of this privilege at this point in time.

78 The issue may be revisited in future. For the moment I uphold the privilege though I suggest that Allen-Vanguard consider carefully whether it is wise to assert it. By doing so they will have to undertake not to call American counsel as an expert at trial and by asserting privilege cannot call him or her as a fact witness either.

79 I am not able to determine from the evidence before me whether the attachments are also subject to privilege. This will depend on whether or not they are documents prepared for the purpose of obtaining legal advice or are relevant documents that exist independently which were sent to counsel to obtain that advice. In that case the original of the attachments would not itself be privileged and must be produced.

80 I will inspect the attachments and provide further direction unless of course that general direction is sufficient. Mr. Lederman is to provide me with a copy of the document and the attachments for further review.

Documents AVC00047336 & AVC00027074

81 These documents are partially redacted e-mail chains. Apparently there are inadvertently unredacted portions which contain legal advice given by Ms. Preston. If that is the case then those portions containing legal advice are protected by solicitor client privilege.

82 At this point in time it does not appear there is a waiver of privilege over advice given to Mr. Timmis or advice given to Allen-Vanguard concerning the dispute with GDATP. Of course that dispute itself may be relevant because it is one of the things that went wrong and it is pleaded as one of the misrepresentations. Again careful thought will be required as to whether any of this information will be required at trial.

83 As with the documents above, this advice may subsequently become relevant and subject to a deemed waiver of privilege. For the moment however I uphold the privilege.

Document AVC00039574 & AVD00039575

84 This is said to be a document sent by Rob Ryan, the former CFO of Allen-Vanguard to assemble information for the purpose of this claim. If that is accurate then it is a document collecting information with the predominant purpose of litigation. It may be protected by litigation privilege.

85 Attached to this document is document AVC00039575. This is described as a financial analysis. It is not clear whether or not the financial analysis was itself prepared for the use of counsel or to instruct counsel in the litigation. If the financial analysis was itself prepared for any other purpose then it would not be privileged. Ms. Cousins affidavit states that the analysis is specifically "directed at the litigation". She also deposes that Rob Ryan was specifically engaged by AVC to assist it with this litigation. Providing this means that he was engaged to assist with gathering the information to be used by counsel or to instruct counsel, this type of communication would be covered by litigation privilege. It is not enough for employees to have discussions in contemplation of litigation unless they are part of the chain of gathering information for the purpose of counsel conducting the litigation.

86 It is important to remember that the purpose of litigation privilege is to permit counsel a zone of privacy in strategizing and preparing for the litigation. Accordingly it is not the evidence gathered that is privileged. It is the process of gathering the evidence, communication about the case, work product of the lawyer and information that would reveal what avenues the lawyer and client have been exploring that is within the zone of privacy. I require additional information to confirm that the financial analysis was itself prepared for the dominant purpose of the litigation as that phrase is understood.

87 The following table summarizes my findings.

Document Number	*Description*	*Disposition*
AVC00023109{*}	KPMG Project Superman Due Diligence Assistance Draft, September 7, 2007	This document is not privileged and will remain in Schedule A
AVC00026667{*}	Portion of e-mail chain said to contain communication from Canadian counsel for purpose of providing legal advice	This document is not privileged and will remain in Schedule A
OS0000345	Draft Statement of Claim provided by AVC for discussion of potential settlement	This document is covered by settlement discussion privilege
AVC00026319	Oct., 2008 e-mail exchange between David Luxton, AVC and Genuity Capital Markets in respect of potential settlement between the parties to be facilitated by Genuity	This document is covered by settlement discussion privilege
AVC00014475	Sept 19,2008 e-mail between individuals at AVC and Canadian and U.S. counsel concerning an "Assist Audit" in the U.S.	This document is privileged
AVC00014517	Attachment to AVC0014475 "Assist Audit Response & Actions"	This document is privileged
AVC00014476, AVC00014477, AVC00014479 AVC00014507	Additional attachments to AVC00014475	I will inspect these documents to determine if they are privileged.
AVC00047336	Sept 18, 2007, e-mail chain including e-mail from Paul Timmis, V.P. Med-Eng to Canadian counsel requesting legal advice. AVC wishes to redact that portion of the e-mail chain	The legal advice is privileged.
AVC00027074	AVC wishes to redact additional portions of an already redacted document. Said to be in furtherance of legal advice concerning a dispute with GDATP	The legal advice is privileged.
AVC00039574—AVC00039578	August 8, 2008 e-mail from Rob Ryan, CFO, AVC seeking information for this claim and attaching a financial analysis	The document is privileged. The financial analysis may be privileged.—Further evidence is to be provided about the provenance and purpose of this document.

Notes: * These two documents were produced (sealed) as part of the motion materials

88 With respect to the documents over which privilege has been upheld, there arises the question of remedy. I am prepared to order those documents returned to Allen-Vanguard and to deem them struck from Schedule A or in the case of the semi redacted documents, to permit them to be substituted with more fully redacted ones. This is a discretionary remedy. I will order it on terms and the term is that there be no further suggestion that counsel has behaved improperly in not returning the documents nor that having seen the documents there arises a conflict of interest that would require counsel be removed. Otherwise I would be inclined to the view that ordering the documents returned at this stage in the litigation would be unfair with the consequence that the privilege should be deemed to have been lost. [32]

89 I am satisfied that in the context of the large volume of documents the release of these few documents that are in fact privileged was inadvertent. It was however a considerable time later that the claim of privilege was reasserted. I am satisfied on the evidence that when this was raised, counsel for the offeree shareholders then appropriately segregated the documents

to await the outcome of the motion. I do not accept that the claims of privilege were so self evident that it was improper for counsel for the offeree shareholders not to have realized it immediately.

90 There should be no suggestion of a sanction against the offeree shareholders for receiving the privileged documents and notwithstanding the importance to be ascribed to privilege generally I am also of the view that any prejudice to Allen-Vanguard is *de minimus*. This is precisely the opposite of the finding in *Nova Growth Corp. v. Kepinski*[33]

The remaining documents.

91 This brings me to the balance of the Schedule B documents. Counsel for the offeree shareholders has attempted to group the documents into categories and has done a great deal of work to do so. It is nevertheless a fruitless task for me to try to rule on the documents by simply reviewing the descriptions or the categories. As an example all of the due diligence documents are shown as subject to solicitor client privilege. I have determined that is not proper but there may still be documents over which privilege is proper and which should be legitimately protected.

92 Were I to take a traditional approach to this problem it would be open to me to order all of the documents produced if I was not satisfied that Allen-Vanguard had met the onus of proving privilege.[34] This however would impose on the offeree shareholders the burden of reviewing 6,000 documents and though they are willing to do so I do not consider that an appropriate response.

93 I could inspect all of the documents. I have already indicated my view of that idea. The court should not be called upon to review thousands of documents. I could adopt an audit approach however and inspect only selected documents from each category. Perhaps I could permit each party to select a certain number of documents for inspection. The problem with that idea is that the party opposing the privilege does not usually get to see the documents and then must make submissions guessing what is in them. While this approach has merit it lacks a certain transparency that I think is important to ensure that both parties see that justice is dispensed fairly. I invite the parties to consider how sampling and auditing might be fairly conducted and I reserve the right to impose such a solution if necessary.

94 The parties or the court could appoint an expert to inspect and review the documents and to report. Apparently this is a solution used in some jurisdictions where discovery referees or special masters are a feature of civil litigation. This may be worth considering.

95 What I think is necessary is for the parties to do some further work to prepare this issue for more efficient adjudication. Firstly the parties should try to reach a meeting of the minds with respect to probative value and relevance.

96 Just how is Allen-Vanguard proposing to prove fraud, misrepresentation and damages? Exactly what information will the offeree shareholders require to meet that case? Clear thinking about this should render it possible to determine how much of this dispute about production is legitimately necessary and useful.

97 The parties should then have regard to the principles discussed in these reasons and the rulings made to date. Can they agree on categories of documents that really ought to be available at trial? It is important to remember that if privilege is claimed and upheld, the evidence cannot be used by either party.

98 Finally, once the number of documents has been reduced, the parties must consider what process can be used to filter the documents for relevance and privilege. Technological solutions should be considered as well as manual ones. Cost effectiveness, practicality and efficiency should be the touchstones. The exercise should be governed by the "3Cs" of co-operation, communication and common sense.[35] These principles of advocacy are at the very heart of effective litigation. They summarize neatly the expectations for effective discovery and production planning.

99 I require counsel to confer regarding these matters and to reattend in person or by telephone at a case conference on a date to be set by the registrar in February of 2012. Counsel are reminded that at their request the trial date has been set for the fall of 2013 and they will be expected to develop a schedule to meet that date.

100 I may be spoken to regarding the form of an order and as to costs should either be necessary.

Footnotes

1 See. *L'Abbé v. Allen-Vanguard Corp.*, 2011 ONSC 4000 (Ont. Master) & 2011 ONSC 7331 (Ont. Master)

2 The agreement contains the following provision:
(5) The Indemnification Escrow Amount shall be the Purchaser's sole recourse in the event of a successful Claim made by the Purchaser against the Corporation or the Shareholders except in respect of liability of any Shareholder for a Claim based on the absence of, or deficiency in, the title of that Shareholder to its shares, or liability under any Claim attributable to fraud of that Shareholder.

3 There is separate litigation against former vice President Paul Timmis who remained in place at AVTI after the takeover. That litigation does assert breach of duty to the corporation although it also raises many of the same issues as alleged in this litigation. The Timmis matter is not before me at the moment.

4 *Supra @ note 1*

5 *Ansell Canada Inc. v. Ions World Corp.* (1998), 28 C.P.C. (4th) 60 (Ont. Gen. Div.)

6 Rules 29.1 in particular subrules 29.1.03 (3) (a) and (4), 29.1.04 and Sedona Canada Principles 2, 4, 7 & 9

7 In my previous reasons, I referred the parties to the Sedona Co-operation Proclamation.

8 *Solosky v. R.* (1979), [1980] 1 S.C.R. 821 (S.C.C.)

9 *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.); *Blank v. Canada (Department of Justice)*, [2006] 2 S.C.R. 319 (S.C.C.)

10 Sopinka, Lederman, Bryant, *The Law of Evidence in Canada, 3rd edition*, 2009, @ p. 925

11 Sopinka, Lederman, Bryant, supra @ para 14.60, p. 932

12 *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.)

13 Rule 49.06

14 Rule 24.1.15

15 See *TDL Group Ltd. v. Zabco Holdings Inc.*, 2008 MBQB 86, 227 Man. R. (2d) 66 (Man. Q.B.) @ paras 20 - 32

16 *Guelph (City) v. Super Blue Box Recycling Corp.* (2004), 2 C.P.C. (6th) 276 (Ont. S.C.J.) @ para 78 - 80

17 *Guelph (City) v. Super Blue Box Recycling Corp.* supra @ para. 90

18 *Dublin v. Montessori Jewish Day School of Toronto* (2007), 85 O.R. (3d) 511 (Ont. S.C.J.)

19 See Sedona Canada Principle 9

20 *Air Canada v. WestJet Airlines Ltd.* (2006), 81 O.R. (3d) 48 (Ont. S.C.J.)

21 Archibald, Hon. Todd L. et. al., *Regulatory and Corporate Liability: From Due Diligence to Risk Management*, Canada Law Book, 2009 - 2011, p. 4-1

22 *Black's law Dictionary, 9th edition*, p. 523

23 *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1997), 32 O.R. (3d) 575 (Ont. Gen. Div. [Commercial List])

24 *R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.) @ para. 50

25 Besides having nominees on the Board, in the context of the transaction, the offeree shareholders through their counsel had access to the same information as the corporation and Med-Eng management.

26 for example paragraph 6.02 (1) which preserves a right of access to certain documents by the offeree shareholders after closing.

27 See Sopinka, Lederman & Bryant, supra @ para 14.50, p. 928 and cases referred to

28 I believe Ms. Preston continues in this role while also being a partner at McMillan LLP.

29 See *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1997), 32 O.R. (3d) 575 (Ont. Gen. Div. [Commercial List])

30 See *Dublin v. Montessori Jewish Day School of Toronto* (2007), 85 O.R. (3d) 511 (Ont. S.C.J.) @ paras. 66 - 68. See also *Spiral Aviation Training Co. LLC v. Canada (Attorney General)* [2009 CarswellOnt 5823 (Ont. S.C.J.)]

31 Various Schroeder entities ad buyout funds were offeree shareholders

32 *Spiral Aviation Training Co. LLC v. Canada (Attorney General), supra* @ para. 9

33 [2001] O.J. No. 5993 (Ont. S.C.J. [Commercial List])

34 *Whatman v. Selley*, [2000] O.J. No. 3155 (Ont. Master)

35 *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List])and See paragraph 5, Commercial List Practice Direction, Toronto Region.

End of Document

TAB 2

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

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

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

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Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Tax — Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount

held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur 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 modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant

à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur 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 modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded 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. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait

une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur 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 modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention

explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas 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 et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et 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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Quebec (Deputy Minister of Revenue) c. Rainville (1979), (sub nom. *Bourgeault, Re)* 33 C.B.R. (N.S.) 301, (sub nom. *Bourgeault's Estate v. Quebec (Deputy Minister of Revenue))* 30 N.R. 24, (sub nom. *Bourgault, Re)* 105 D.L.R. (3d) 270, 1979 CarswellQue 165, 1979 CarswellQue 266, (sub nom. *Quebec (Deputy Minister of Revenue) v. Bourgeault (Trustee of))* [1980] 1 S.C.R. 35 (S.C.C.) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) — considered

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Skydome Corp., Re (1998), 16 C.B.R. (4th) 118, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]) — referred to

Solid Resources Ltd., Re (2002), [2003] G.S.T.C. 21, 2002 CarswellAlta 1699, 40 C.B.R. (4th) 219 (Alta. Q.B.) — referred to

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Cases considered by *Abella J.* (dissenting):

Canada (Attorney General) v. Canada (Public Service Staff Relations Board) (1977), [1977] 2 F.C. 663, 14 N.R. 257, 74 D.L.R. (3d) 307, 1977 CarswellNat 62, 1977 CarswellNat 62F (Fed. C.A.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City)*) [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville)*) 215 N.R. 81, (sub nom. *Doré v. Verdun (City)*) 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — referred to

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — considered

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Statutes considered by *Deschamps J.*:

Bank Act, S.C. 1991, c. 46
Generally — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

s. 81.2 [en. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27
Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12
s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8
Generally — referred to

s. 23(3) — referred to

s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19
en général — referred to

Code civil du Québec, L.Q. 1991, c. 64
en général — referred to

art. 2930 — referred to

Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3
Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.09 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — referred to

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23
Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Fairness for the Self-Employed Act, S.C. 2009, c. 33
Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

Interpretation Act, R.S.C. 1985, c. I-21
s. 44(f) — considered

Personal Property Security Act, S.A. 1988, c. P-4.05
Generally — referred to

Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30
Generally — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1
Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 67(2) — considered

s. 67(3) — considered

Canada Pension Plan, R.S.C. 1985, c. C-8
Generally — referred to

s. 23 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Employment Insurance Act, S.C. 1996, c. 23
Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Interpretation Act, R.S.C. 1985, c. I-21
s. 2(1)"enactment" — considered

s. 44(f) — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

Deschamps J.:

1 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 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.

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 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). 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 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] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. 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?

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 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 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 Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), 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 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, October 3, 1991, at pp. 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 flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

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

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

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, 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, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy*

Minister of Revenue) c. Rainville (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

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, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

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

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., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). 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 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 am. 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. Bank. 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 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 v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), 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. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), 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").

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, 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.

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 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, [2003] G.S.T.C. 21 (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 c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), 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, 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 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.

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*.

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 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 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.

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" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), 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. Gen. Div. [Commercial List])), 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.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), 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 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., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), 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 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, 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.

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. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999),

12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

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

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

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

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

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 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 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*.

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

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

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA's* objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as 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 lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), 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 to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

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

3.4 Express Trust

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

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

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

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 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.

***Fish J. (concurring)*:**

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*"). 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 (B.C. S.C. [In Chambers])).

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, [2005] G.S.T.C. 1 (Ont. 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.

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:

> **227 (4) Trust for moneys deducted** — 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) Extension of trust** — 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
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> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and 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 being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

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

> **67** (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.

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) the *CCAA* and in s. 67(3) 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) [Deemed] 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 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).
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> ...
>
> **(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 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, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust 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 be subject to no deemed trust or priority in favour of the Crown.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), 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:

> **222 (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
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> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

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

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

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. 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 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 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, at pp. 37-38). 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 *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), 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]

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 derogani*).

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 c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

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:

> [T]he 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 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 *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "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 reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the 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 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.

Appeal allowed.

Pourvoi accueilli.

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 (i);

(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,

(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,

(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, 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 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 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.

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 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*);

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

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

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

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

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

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

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

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

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

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) [Deemed] 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 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

(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

(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

(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.

Footnotes

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.

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

TAB 3

GUIDELINES FOR THE DISCOVERY OF ELECTRONIC DOCUMENTS IN ONTARIO

A. Introduction: Purpose of E-Discovery Guidelines

In its Report, the Task Force on the Discovery Process in Ontario recommended the development of a "best practices" manual to address the discovery of electronic documents. These Guidelines respond to that recommendation.[1]

The preservation, retrieval, exchange and production of documents from electronic sources in electronic form are together referred to as "e-discovery." In these Guidelines, that term also includes the use of automated tools to produce documents in electronic form, whether they originate in hard copy or electronic sources. While documents from hard copy sources can be produced in electronic form, and paper copies of electronic documents can be printed out for production in litigation, these activities would not, in themselves, constitute "e-discovery" as the term is used, generally or in these Guidelines.

The development of best practices for e-discovery is not unique to Ontario. A number of other organizations and jurisdictions have implemented or published similar guidelines that have been instructional in the development of these Guidelines. These are referred to as appropriate in the commentary.

The premise of these Guidelines is that existing Rules already provide a legal foundation for the requirement that parties address issues relating to e-discovery, because the definition of "document" in applicable civil Rules already includes "data and information in electronic form."[2] However, those Rules and the case law to date provide little clear guidance to parties and their counsel on *how* to fulfill that requirement. The suggestions in these Guidelines have been developed to address this issue with respect to production of documents in civil litigation.

E-discovery is already widely used as an integral part of the discovery process in complex cases and, increasingly, in many types of litigation that are less complex. In part, this is because of the inclusive definition of "document" referred to above. In addition, however, as the available technology matures, lawyers have begun to recognize its capacity, in some cases, to manage document production more efficiently, and to support the discovery process more effectively, than traditional paper-based methods permit.

However, many lawyers have yet to fully recognize the impact of this technology on the discovery process. The overall orientation of the profession remains towards printed documents. This, combined with the absence of clear guidelines on the scope and manner of e-discovery, means that many lawyers remain unfamiliar with their clients' obligations to preserve and produce electronic documents, and with the technology available to retrieve, search and produce them in a cost-effective manner.

Accordingly, Section C below sets out a number of principles that are intended to guide lawyers, clients and the judiciary in the e-discovery process. It is hoped that these Guidelines will provide an appropriate framework to address *how* to conduct e-discovery, based on norms that the bench and bar can adopt and develop over time as a matter of practice. They are not intended to be enforceable directly, as are the *Rules*

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[1] The Discovery Task Force wishes to thank the members of the e-Discovery Sub-Committee for their excellent work: Sara Blake, Peg Duncan, Martin Felsky, Michael Fraleigh, Derek Freeman, Karen Groulx, Christopher Leafloor, Daniel Pinnington, Glenn A. Smith, Phil Tunley, Susan Wortzman, and Mohan Sharma.

[2] Rules of Civil Procedure, Rule 1.03

of Civil Procedure, although they may support the enforcement of agreements between parties or provide the basis for court orders. Mandating how e-discovery is conducted through the enactment of detailed rules, at this stage, could be counterproductive, and risk imposing a "one-size fits all" approach that may not be appropriate in different types of litigation or responsive to new technologies as they emerge. It could also add unnecessary complexity to the Rules, and lead to more disputes and related motions.

Rather, the objective of these Guidelines is to educate the legal profession, including the judiciary and the practicing bar, on issues relating to e-discovery and how those issues can be addressed in practice. They are intended to provide practical suggestions for the profession, both on how to fulfill parties' existing obligations respecting the preservation and production of relevant documents from electronic sources, and how to improve the cost effectiveness of the discovery process. They suggest how to reach early agreements in the e-discovery process, in order to minimize the potential for undue cost and delay.

These Guidelines also include some suggestions to take advantage of electronic tools, in order to minimize unnecessary cost and delay. Despite the apparent complexity of some e-discovery issues, technology increasingly offers improved methods of retrieving, reviewing and producing documents electronically. In many circumstances, this can offer significant savings of cost and time compared to paper-based methods.

In order to serve as an educational guide for the profession, it may be necessary for some readers to review the basic concepts and terminology relating to e-discovery. For those readers, Section B following provides this review in a practical context. It outlines the stages in the process of discovery of electronic documents, and some key terminology and concepts that lawyers and judges need to master at each stage.[3] Those readers who are already familiar with this terminology and the e-discovery process may prefer to go directly to Section C.

B. Key Issues and Terminology in the E-Discovery Process

At every stage of the e-discovery process, lawyers are asked to give advice to clients about issues that involve new concepts, and new terminology, that highlight key differences between the discovery of electronic documents and traditional paper-based files. At each stage, disputes may arise about those issues that require court resolution. As a result, to deal effectively and consistently with these issues, both lawyers and the judiciary need to become familiar with new concepts and related terminology in the area of e-discovery.

This section introduces some of the most important ones that arise at each stage of the e-discovery process.

The stages of the e-discovery process do not themselves differ from those involved in traditional hard copy discovery. They are:

(a) **LOCATION** of potential document sources;
(b) **PRESERVATION** of potentially relevant materials;
(c) **REVIEW** of documents for relevance, privilege and other issues; and
(d) **PRODUCTION** to other parties, for use in court proceedings.

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[3] For a detailed glossary of frequently used terms, see The Sedona Conference® Glossary For E-Discovery And Digital Information Management. A Project of The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1) RFP+ Group May, 2005; available on The Sedona Conference website (www.thesedonaconference.org).

Only by understanding the new concepts and terminology that come into play at each of these stages in the case of e-discovery, can lawyers and judges make informed decisions, avoid potential disputes in this area, or resolve them in a manner consistent with the Rules. This includes when and why it may make sense to seek or order production of electronic documents, and how to do so in a manner that remains cost effective to the parties.

(i) The Location of Electronic Documents

The first question that arises is what must be located, within the existing Rules definition of "data and information in electronic form"?

Generally speaking, documents are referred to as "electronic" if they exist in a medium that can only be read through the use of computers, as distinct from documents that can be read without the aid of such devices. It is also generally accepted that this definition includes many familiar types of electronic "documents," such as e-mail, web pages, word processing files, and databases that are stored on computer.[4] However, both the definition and case law suggest that a broader range of electronic "data and information" may also be covered in some cases. The limitations on what may be covered are not to be found so much in technical distinctions, as they are in the familiar criteria of relevance.

The next obvious question is what computer systems the client has, or had at the relevant time, that may contain relevant data or information. Again, depending on the nature of the case, the answer may include enterprise systems or networks, as well as personal computers (desktops, laptops, and even hand-held devices), and even individual components and media relating to them, such as memory chips, magnetic disks (such as computer hard drives or floppy disks), optical disks (such as DVDs or CDs), and magnetic tapes.

The variety of hardware and media involved can pose problems for lawyers, clients and the courts. For example:

- some items may be in use by individual witnesses, others in storage in different areas or departments, and the documents may be in a wide variety of different electronic formats;

- copies of the same document may be stored in multiple locations in the course of normal operations: for example, an e-mail sent from one person to another on a networked system may be saved by each of the sender and recipient on their own computers, and further copies retained by the system for a variety of purposes;

- relevant electronic documents, even those created using systems that were once commonplace, may have become unreadable over time because of the unavailability or obsolescence of key software or hardware components;

- in some cases, the sheer volume of data can be enormous, both because of the expanding use of computer systems and their increasing storage capacity, and also because of the way they affect the behavior of people and organizations: for example, e-mail is not only replacing traditional paper-based communications such as letters and memoranda in many circumstances, it is also replacing many

[4] THE SEDONA PRINCIPLES: Best Practices Recommendations & Principles for Addressing Electronic Document Production. A Project of The Sedona Conference ® Working Group on Best Practices for Electronic Document Retention & Production, published January 2004.

informal exchanges that in the past were not documented fully or at all, such as telephone calls and even casual conversations.

These factors can all make the process of locating and assembling electronic documents for litigation purposes more difficult than for traditional paper-based materials. The involvement of clients' IT staff is often essential to ensure that the assembly process is complete and problem-free.

In order to ensure the completeness of searches, lawyers also need to understand some of the different sources of documents that may exist within a given organization's computer systems, and their different purposes. Here, discussion with IT staff or consultants is essential, and the use of correct terminology can anticipate problems and avoid mistakes. For example, electronic documents familiar both in personal and business usage - such as word processing, spreadsheet, database and e-mail documents - may be found in several different electronic locations and formats. A complete search should consider the following possible sources:

- "**Active data**" is data that is currently used by the parties in their day-to-day operations. This type of data is normally straightforward to identify and access using the current systems. However, because this data is in active use, significant issues may arise for lawyers and courts concerning the need to preserve the integrity of this data for litigation, to design and manage searches to avoid business disruption, and to separate relevant from irrelevant information.

- **"Archival data,"** on the other hand, is data organized and maintained for long-term storage and record keeping purposes. Some systems allow users to retrieve archival data directly, but others require special equipment or software, and the involvement of IT staff.[5]

- "**Backup data**" is similar to archival data, except that this term refers to an exact copy of system data, which serves as a source for recovery in the event of a system problem or disaster. Backup data is generally stored separately from active data, and is distinct from archival data both in the method and structure of storage that reflect its intended uses. It is generally not accessible to ordinary system users, and requires special (and sometimes expensive) intervention before it is "readable."

Archival and backup data both constitute a set of electronic data and information collected for a particular purpose, and perhaps as at a moment in time. That purpose and timeframe may or may not be related to the litigation, and their relevance and completeness need to be assessed in that light.

Lawyers and the judiciary should also be aware that certain electronic sources, such as internet web-pages or database applications, may be under constant revision as new information is published on the site or added to the system. Unless these documents are located promptly, the available active copy may not reflect what the data actually looked like at the point in the past that is relevant to the litigation. Lawyers should be prepared to question their clients, to confirm which of the available versions are the best evidence for litigation purposes.

The documents most commonly requested and produced in litigation are those created by word processors, databases, spreadsheets, e-mail, and other familiar programs. These documents are routinely used and exchanged in business and private dealings. As noted above, these documents are normally quite easy to identify and locate. However, in discussions with IT staff involved, lawyers also need to be aware that many other, different kinds of "information and data" can exist in computer systems, in order to assess how and when they may be relevant. These may include less familiar kinds of documents, such as web-pages,

[5] The Sedona Conference® Glossary For E-Discovery And Digital Information Management. A Project of The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1) RFP+ Group May, 2005.

browser history files that track a user's movements between web-sites and pages on the internet, cell-phone logs, and many other kinds of information stored on computer-based devices in their day-to-day operations. Most users may be completely unaware these documents even exist.

In addition, there may be hidden data or information associated or related to electronic documents that should be considered, particularly if there are issues of authorship or authenticity raised with respect to a document. Case law suggests that any data or information that can be readily compiled into viewable form, whether presented on the screen or printed on paper, is potentially within the definition of "document" under Rule 30.01 of the *Rules of Civil Procedure*. Again, some understanding of the concepts, as well as the terminology involved, is essential.

- "**Meta-data**" refers to electronic information that is recorded by the system about a particular document, concerning its format, and how, when, and by whom it was created, saved, assessed, or modified. For example, most word processing software records who created or modified a document, as well as the dates and times of document revisions. Most e-mail software records the dates and times e-mails are created, sent, opened, and saved as well as the names of the originator and all recipients, including those "blind copied." This information may not be seen by users or appear in a print-out of the document in the ordinary course of business. However, meta-data is generally readily available, and can be extracted in searchable or printable form if it is relevant to litigation. Meta-data may be relevant directly to the litigation or it may be relevant to the authenticity and admissibility in evidence of the electronic documents with which it is associated, where this is disputed. Accordingly, its importance should not be underestimated.[6]

- "**Residual data**" refers to any information that remains stored on a computer system after a document has been deleted. The computer does not necessarily "wipe clean" the disk or memory space in which the file was stored, but merely "tags" it as re-usable by the system. The "deleted" data may not become truly unavailable until this space is re-used. Hence, deleted files or fragments of deleted files are often retrievable for some period of time after "deletion." This can provide information about a document, and sometimes about changes made in successive revisions of a document, that would not otherwise be available. This kind of information is only recoverable using special "forensic" methods, and is unlikely to have significance in most litigation.

- "**Replicant data**" is created when a software program, such as a word processor, makes periodic back-up files of an open file (e.g. at five minute intervals) to facilitate retrieval of the document where there is a computer malfunction. Each time the program creates a new back-up file, the previous back-up file is deleted, or tagged for reuse.

Lawyers must understand the different kinds of electronic documents that may exist, and their characteristics, in order to assess whether and how they may be relevant, and where they may be found in a given case. Without some guidance from their lawyers on these issues, parties involved in litigation are unlikely to be able even to identify and locate the various electronic information and data that may have key relevance to their dispute.

(ii) Preservation of Electronically Stored Documents

A party's duty to preserve electronically stored documents that are relevant to contemplated or threatened litigation arises in the same way as for paper documents.

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[6] The Sedona Conference® Glossary For E-Discovery And Digital Information Management. A Project of The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1) RFP+ Group May, 2005.

However, the discussion and terminology reviewed above highlights some special problems that can arise in the preservation of electronic documents, and also suggests how they can be addressed. Specific guidance is offered in Section C below, but the following are some examples of practical problems that arise from the lack of such understanding, and of the solutions that may often be available.

- Electronic documents or media containing them may be considered obsolete by the client in terms of its current business systems, but may nevertheless be recoverable to a readable form by specialized forensic methods. The costs involved, at least for many of the most commonly used methods, have declined to a point that may be cost effective in an increasing range of litigation.

- Relevant meta-data may exist at the time an electronic document or source is located, but may be altered or lost simply in the process of making a copy of the relevant electronic files for litigation purposes. This again is avoidable, as relatively affordable techniques exist, either to make "forensic copies" or "mirror images" that are specifically designed to preserve the integrity of the meta-data, or to capture the relevant meta-data from the original source documents before they are copied.

- Preserving web-site files in electronic form, rather than simply printing them up at a point in time, may enable a party, at minimal cost, to recreate the website electronically in a courtroom, in order to demonstrate dynamically any relevant links, relationships, and special features that characterized the site at the time the litigation arose.

- Formal document retention policies are a relatively recent development, and even today may not be standard except in the very largest and most sophisticated organizations. Moreover, sound business reasons may exist for practices that result in the destruction of relevant electronic documents: for example, routine deletion or omission to back-up e-mail to maintain storage space. For these reasons, early discussion with IT staff is often necessary to prevent continued deletion after litigation is threatened or commenced.

These examples illustrate the point that, in order to understand how to comply with or enforce the obligation to preserve electronic data and information for litigation, parties, lawyers and the courts first need to understand the characteristics of electronic documents and the concepts and terminology of e-discovery discussed above.

(iii) Electronic Document Review

The preceding discussion of the ways electronic documents differ from paper also affects the approaches to the review of available electronic materials for litigation purposes.

Review of electronic documents is essential, first, to separate relevant materials, which should be produced, from irrelevant material, which should not. Over-production of irrelevant electronic documents may be just as damaging to clients' interests and the litigation process as incomplete production.

However, the sheer volume and particular characteristics of electronic documents may be a significant barrier to effective review, for a number of reasons:

- Many institutions and businesses save a copy of their entire system onto back-up tapes periodically, and some retain them for long periods of time. Computer back-up tapes can store huge amounts of data, which may be organized for purposes of disaster recovery, rather than normal usage. It often needs to be converted back to readable form, before it can be searched or printed out to determine relevance. The

volume and organization of archive and backup data, and costs of conversion, can be significant barriers to production, especially as restoration may require processing a complete set of back-up tapes together.

- Depending upon the institution's retention policies, the resulting set of documents (although complete and accurate for the purposes for which they were stored) may be incomplete or may not fully reflect the status of the same documents at the time relevant to the litigation.

- The document set may also contain multiple duplicates. Electronic documents are easily duplicated and, as noted above, copies of the same document may be stored in multiple locations in the course of normal operations. Consequently, although a user may have deleted his/her own copy, others persist in other locations, often without the user's knowledge.

- Earlier versions (including drafts) or later versions may still be retained. Unless clearly marked – or better yet, unless the relevant meta-data has been preserved - it may be impossible to know which version is earlier or later, and which version is relevant to the timeframes and issues raised in the litigation.

- Since even meta-data could, in certain cases, contain or reveal privileged, secret, or other sensitive information, an organization may determine that it too must be separately reviewed before the documents are produced.

Once the files are collected in readable form, manually searching for and retrieving specific files may be cumbersome, time-consuming and prohibitively expensive. Depending on the documents and the technology used, however, automated search tools may offer solutions. E-discovery has been greatly facilitated by new technologies that permit some kinds of electronically created documents to be converted from one digital form into another, in large volumes, often at minimal cost. This means that in some cases the practicing lawyer and client may no longer face prohibitive cost and technology barriers to the review and searching of electronic documents, particularly with respect to many common forms of electronic documents, such as e-mail.

In some cases, however, even the available electronic tools may not permit complete review for production in litigation on a cost-effective or timely basis. Lawyers and the judiciary in such cases need to seek agreements, or arrive at terms for court orders, that target the most relevant data and information.

(iv) Production of Documents in Electronic Form

The question lawyers are increasingly asked to advise on (and courts may be asked to adjudicate) is whether parties may simply print out electronic data such as e-mails, or whether they are obliged to produce them to the opposing party in electronic form. The answer in any given case may involve a balance of competing considerations.[7]

In order to maximize the benefits of e-discovery, the courts and the profession need to gain experience with respect to such issues as: what circumstances call for electronic production as opposed to paper production;

[7] For example, many electronic documents involve more than mere printable text. In a database application, individual pieces of information may be meaningless, unless they are produced within their context or environment, and the ability to manipulate relevant information using the original software application in which it was created may bring added benefits. However, a database may often contain irrelevant, confidential, and even privileged information, together with the relevant information, or the software application may not be available commercially, or at all, to third parties. In such cases, standard or custom "reports" displaying the relevant information with the context in a readable form might be generated, without producing the entire system, and may be sufficient.

how the cost of production should be fairly allocated; how to ensure that electronically produced documents are compatible with courtroom technology to facilitate production at trial; how to provide for the redaction of privileged and irrelevant material in electronic form; and how to ensure appropriate retention of electronic records.

These issues are very much affected by the availability of new technology, and its increasing use by lawyers and courts. Most litigation support software provides for exporting production sets in formats that allow them to be imported by a recipient party into the litigation support tool of their choice. Many of these tools are designed to produce properly redacted versions of documents[8], to permit the creation of special fields for production of relevant meta-data, and to allow the user to select which fields will be exported.

Similarly, large volumes of hard copy documents can be scanned as image files, and exchanged on CDs or via web-based software, often at less cost than would be involved in producing a similar number of photocopy sets. This is especially important in multi-party litigation, and where parties have the opportunity to share the costs of scanning. With the assistance of available software tools, electronically scanned documents can be much easier and more efficient to store, organize, manage and search, than equivalent volumes of paper documents. These developments are rapidly reducing cost and technological barriers to high-volume document cases, even where the client's source documents exist in paper form.

However, the use of these new tools and methods is still limited, and sometimes inconsistent, among lawyers and the judiciary. These Guidelines are intended to promote the efficient use of technology in the discovery process. The control of escalating costs, together with increased effectiveness for lawyers and parties advancing their case through the discovery process, is an important part of the rationale behind these Guidelines.

C. Principles that should Guide the E-Discovery Process

(i) Discovery of Electronic Documents ("E-Discovery")

Principle 1: ***Electronic documents containing relevant data and information are discoverable pursuant to Rule 30.***

Commentary: As soon as litigation is contemplated or threatened, it is essential for parties and their counsel to go beyond paper file searching, and consider what electronic data and information exists that they may need to produce. Parties must take reasonable steps to locate and preserve electronic documents containing data and information that can reasonably be expected to be relevant to litigation. Further, parties should consider what relevant electronic documents other parties may have, that they may want to request be preserved for production in the course of the litigation.

Principle 2: ***The obligations of the parties with respect to e-discovery are subject to balancing, and may vary with (i) the cost, burden and delay that may be imposed on parties; (ii) the nature and scope of the litigation, the importance of the issues, and the amounts at stake; and (iii) the***

[8] Counsel using such tools should ensure that redactions are permanently embedded in the production copy of the document, and cannot be electronically "undone". Counsel should also ensure that, if a full-text or OCR version of the documents is also being produced, this version, as well as the image, should be redacted.

relevance of the available electronic documents, and their importance to the court's adjudication in a given case.

Commentary: This principle is consistent with Rule 1.04(1), and the objective of securing the just, most expeditious, and least expensive disposition of litigation on its merits.

Even where there has been complete production in paper form, electronic versions of the same documents may contain relevant meta-data that may not appear in a printout or scanned version of the document. Meta-data may be directly relevant in the litigation, or it may be relevant where there is an issue as to the authorship or authenticity of a document. In such situations, it may also be necessary to produce the relevant meta-data in some form. Parties should consider whether it may be preferable to produce the entire document, including the meta-data, in electronic form.[9]

The questions to be considered in determining whether to require the use of forensic techniques to recover back-up or obsolete sources include not only the costs involved, and the potential amount, usability, reliability and relevance of the information to be obtained, but also:

- whether the party believes that the materials available from active electronic and paper sources are reasonably complete;
- whether the party has rules for printing up or retaining important documents in electronic form, and whether they are monitored for compliance; and
- the availability and completeness of the back-up or obsolete sources.

Parties should use the most cost-effective methods to locate, preserve, review and produce electronic documents. Electronic documents may be easier to search than printed or scanned copies, and therefore more effective in litigation, and production of documents in electronic form may be more cost-effective than print production.

The costs to be considered may, where appropriate, include the costs of counsel and any necessary consultants, hardware, software or other facilities or services required (i) to recover or make electronic documents available in a readable form; (ii) to search documents in various formats to identify relevant material, and separate irrelevant material; (iii) to review the relevant documents for privilege; (iv) to produce the documents to other parties;

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[9] An example of a case where resort to back-up tapes was ordered by the court is in the U.S. decision of *Zubulake v. UBS Warburg LLC*, 2003 W.L. 21087884 (S.D.N.Y. May 13, 2003) , an action claiming gender discrimination and illegal retaliation, where a request for an order compelling UBS to produce various e-mails now existing only on back-up tapes and other archived media was before the court. Despite the fact that UBS had already produced approximately 100 pages of e-mails, Zubulake believed it had more based on the fact that she herself had produced approximately 450 pages of e-mails. The court determined that UBS should provide tangible evidence of what the backup tapes might have to offer in the from of a sample. UBS was therefore ordered to produce responsive e-mails from any five back-up tapes selected by the plaintiff. UBS was also required to prepare an affidavit detailing the results of its search, as well as the time and money spent. Following the production of relevant e-mails taken from the sample back-up tapes, UBS was ordered to restore its back-up tapes and produce responsive e-mails from these tapes. The case suggests that, where a party on proper evidence convinces a court that documents have not been produced and that such documents are likely stored on a computer hard drive or other electronic storage medium, such as back-up tapes, but the party in possession of the computer asserts it has printed or produced all that it has, then the only solution would be to allow inspection of the storage medium itself or restoration of the documents from back-up tapes.

and (v) to enter them in evidence through discovery or at trial. Consideration of the burden and delay involved should also include the likelihood of disputes at any stage of the process.

Consideration of the relevance and importance of the available electronic documents should include their admissibility and mode of proof as evidence.

Principle 3: ***In most cases, the primary source of electronic documents should be the parties' active data, and any other information that was stored in a manner that anticipated future business use, and that still permits efficient searching and retrieval.***

Commentary: The scope of the searches required for relevant electronic data and documents must be reasonable. It is neither reasonable nor feasible to require that litigants immediately or always canvass all potential sources of electronic documents in the course of locating, preserving, and producing them in the discovery process.[10] Some sources may contain largely duplicate documents or redundant information and data. Others may contain few if any relevant documents, together with massive amounts of data and information that is not relevant to the litigation.

This principle is based on the premise that, for most litigation, the most relevant data and information will be that which is available to or viewed by the computer users, and that which is exchanged between parties, in the ordinary course of business. This is normally the active data, but the principle also includes archival data that is still readily accessible and not obsolete. Litigants must exercise judgment, based on reasonable inquiry in good faith, to identify such active and current archival data locations that may be subject to e-discovery.

However, if a party is aware (or reasonably should be aware) that specific, relevant data or information can only be obtained from a source other than the active and current archival data sources, then that source should at least be preserved and listed appropriately in the party's Affidavit or documents for possible production, absent agreement of the parties or order of the Court.

Principle 4: ***A responding party should not be required to search for, review or produce documents that are deleted or hidden, or residual data such as fragmented or overwritten files, absent agreement or a court order based on demonstrated need and relevance.***

Commentary: Unless residual or replicant data, or other material that is not accessible except through forensic means, is known or should reasonably be known to be available and relevant, it need not be preserved or produced.

If such data is considered relevant, parties should request its preservation as early as possible, in order to avoid inadvertent deletion or claims of deliberate destruction.

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[10] In Dulong v. Consumer Packaging Inc., (2000) O.J. 161 (Q.L.), (January 21, 2000, Ontario Master), the court held that a broad request that the corporate defendant search its entire computer system for e-mail relating to matters in issue in the litigation was properly refused on the grounds that such an undertaking would, "having regard to the extent of the defendant's business operations, be such a massive undertaking as to be oppressive".

(ii) Preservation of Electronic Documents

Principle 5: ***As soon as litigation is contemplated or threatened, parties should immediately take reasonable and good faith steps to preserve relevant electronic documents. However, it is unreasonable to expect parties to take every conceivable step to preserve all documents that may be potentially relevant.***

Commentary: The obligation to preserve relevant electronic documents applies to both parties. Counsel should advise clients with respect to this obligation at the earliest possible time, including the steps that may be prudent or required to implement a "litigation hold".

These may, in appropriate cases, include steps to:

(i) collect all relevant document retention, back-up, archiving, and destruction policies;

(ii) issue appropriate instructions to all staff, or at least to relevant staff, to cease or suspend personal activities and practices that could result in the destruction or modification of relevant electronic documents, such as the deletion of e-mailbox entries or archives;

(iii) create litigation copies of potentially relevant active data sources, for example by means of electronic backup or forensic copying of the documents, so as to preserve potentially relevant meta-data; and

(iv) cease or suspend the overwriting of back-up tapes, and other document retention practices that could result in the destruction or modification of relevant electronic documents in the ordinary course of business.

Where applicable, electronic document retention policies should be shared so that both parties are aware of what electronic documents may exist and what may no longer be accessible. This may include disclosing the procedure and cycle for electronic backup for each system and/or any procedure for archiving electronic documents. Parties should also consider sharing any available lists of electronic records stored off-site or off-system. Sharing this information will assist both parties in identifying the documents that need to be preserved for litigation, and the steps required to do so.

Principle 6: ***Parties should place each other on notice with respect to preserving electronic documents as early in the process as possible, as electronic documents may be lost in the ordinary course of business.***

Commentary: Where parties or counsel anticipate that specific electronic documents do or may exist that are relevant to litigation and that are liable to be deleted or modified in the ordinary course of business, they should immediately notify the client or opposing party of that fact, and request that appropriate steps be taken to preserve the documents.

Counsel should also consider, as early as possible, whether third parties may be in possession of relevant electronic data, and the steps required for its preservation.

Principle 7: ***Parties should discuss the need to preserve or produce meta-data as early as possible. If a party considers meta-data relevant, it should notify the other party immediately.***

Commentary: Depending on the circumstances of the case, particular meta-data may be critical or it may be completely irrelevant. The relevance of meta-data warrants particular consideration, however, because (i) it is readily alterable, either intentionally or inadvertently, for example if non-forensic "copies" of electronic documents are made for litigation purposes; (ii) it may be relevant either directly, to an issue in the litigation, or to any dispute about the authenticity, admissibility and proof of relevant electronic documents with which it is associated; and (iii) sometimes, meta-data can lead to inaccurate conclusions, for example, in a situation where a document is created from a standard "form" which identifies the "author" who created the form, but not the person who drafted the actual or ultimate document produced from it.

The meta-data associated with e-mail documents is relevant, and even necessary to list the documents accurately in an Affidavit of Documents. Parties should ordinarily expect that this type of meta-data be preserved and produced in litigation. For many other types of meta-data, however, this kind of data is technical in nature, and forensic techniques are required for its extraction. The relevance of this type of meta-data is usually confined to particular kinds of litigation, or particular documents: for example, the history of prior revisions to documents may be broadly relevant in a fraud case, or in the case of a particular contract or other document in issue. It is seldom if ever required for routine correspondence to prove any point in contention.

In general, it is only where the producing party knows or should reasonably know that particular meta-data is relevant to the dispute, that it should be preserved. However, litigants need to scrutinize claims and defences before determining how to handle meta-data. Organizations should not automatically discount the potential benefits of retaining meta-data to ensure the documents are authentic and to preclude the fraudulent creation of evidence. [11] Parties and their counsel should consider at the outset of litigation the need to preserve and produce meta-data, and be prepared to discuss this with opposing parties and counsel.

(iii) Pre-Discovery Discussions between Counsel: Defining the Scope of E-Discovery Obligations

Principle 8: ***Counsel should meet and confer, as soon as practicable and on an ongoing basis, regarding the location, preservation, review and production of electronic documents, and should seek to agree on the scope of each party's rights and obligations with respect to e-discovery, and a process for dealing with them.***

[11] Notwithstanding this, the routine preservation of meta-data may be beneficial in a number of ways. First, it avoids any risk of allegations of inadvertent or deliberate modification of evidence. Second, simply preserving documents in their native electronic format usually preserves the associated meta-data, without incurring any additional steps or costs. Third, the failure to preserve and produce metadata may deprive the producing party of the opportunity to later prove or contest the authenticity of the document, if the meta-data would be material to that determination. Finally, systematic removal or deletion of some meta-data may involve significant additional costs that are not justified by any tangible benefit, while the cost of preserving it in many cases may be practically nil.

Commentary: By early discussion of e-discovery issues, litigants can identify and attempt to resolve disputes before they create collateral litigation. The issues commonly requiring early discussion include (i) the relevant time period, (ii) the identity of individuals likely to have created or received relevant electronic documents in the period; (iii) which computer systems or media existed and are available relating to that period, (iv) which electronic documents can and should be preserved; (v) which electronic documents can be made accessible and searched on a cost effective basis; (vi) what searches should be conducted to identify relevant materials, including the "key words" to be used to perform these searches; and (vii) in what form should the relevant materials be produced. Particular cases may, however, raise additional or different issues.

Creating checklists of the key issues to consider during an e-discovery conference can guide the parties and minimize the likelihood of disputes or inadvertent alteration or destruction of electronic documents. Counsel should also be prepared to discuss e-discovery issues with the court at an early stage, whenever case management or other rules provide an opportunity to do so before disputes arise.

Parties will benefit if counsel are able to agree on an e-discovery plan. Since electronic documents are not tangible, there are options for delivering the data. These will need to be discussed by the parties and possibly the court. Counsel need to decide how electronic documents should be produced, and reach agreements as to format, document numbering and other important housekeeping issues. Counsel may also wish to address substantive issues of admissibility, proof, redaction and the removal of privileged material.

The requesting party should prepare a detailed specification of what information is being sought, from what sources, and how the information should be formatted and delivered. Where "native format" information is being sought, the requesting party should identify the properties that must be preserved. To reduce the possibility of miscommunication, counsel may want to exchange sample data, or exchange limited amounts of data, to assure that both parties are receiving what they anticipated before the costs of full production are incurred.

The producing party should be in a position to produce an affidavit or other documentation detailing the data acquisition process and describing the pre-production processing of the data. For example, a party may decide to pre-screen e-mail to remove information that is personal, non-responsive, or duplicative. Although such a process can be entirely appropriate, requesting parties need to know what standards were used for the pre-screening process. For example, are identical e-mails delivered to different mailboxes considered duplicates?[12]

Parties and counsel should also provide early notice of any problems reasonably anticipated to arise in connection with their respective rights and obligations, or the process relating to e-discovery. This should include (i) the identification of potentially relevant data that is likely to be destroyed or altered in the normal course of operations or pursuant to the party's document retention policy, (ii) any limitations on the search efforts they propose to undertake, (iii) any requests from the opposing party or counsel they consider to be burdensome, oppressive, or unreasonably expensive, and (iv) their position with respect to any proposed change to the normal allocation of costs.

[12] "A Practical Guide to Electronic Discovery in Construction Disputes", Howard W. Ashcraft, Jr., Hanson, Bridgett, Marcus, Vlahos & Rudy, San Francisco, U.S.A.

Relevant electronic documents or sources that are known to be no longer available should be listed in Schedule C to the party's Affidavit of Documents.

Principle 9: ***The scope of e-discovery should be defined by parties and their counsel before commencing oral examinations for discovery. This can best be achieved if parties' requests for preservation of electronic documents, and pre-discovery meetings between counsel, are as specific as possible in identifying what is requested, what is being produced, and what is not being produced, and the reasons for any refusals.***

Commentary: Unnecessary controversy over peripheral discovery issues can often be avoided at the outset by discussion between the parties regarding the potential scope and related costs of preserving and producing relevant electronic documents.

In many United States jurisdictions, issues relating to the scope of e-discovery are managed through a process of written requests for production, and responses, before pre-trial examinations commence. This has many benefits, and can avoid many problems, if the requests and responses are sufficiently detailed and specific. These same benefits can be obtained within Ontario practice, if the issues are addressed in similar detail through early requests for preservation of electronic documents, and pre-discovery discussions between counsel, before commencing oral examination for discovery.

These requests and discussions should avoid boilerplate approaches, which often seek all e-mail, databases, word processing files, or whatever other electronic documents the requesting party can describe by category. Instead, counsel should target particular electronic sources, documents or timeframes that they contend are truly important to resolve the case. By identifying particular relevant electronic documents, and understanding when and why printed or scanned versions are inadequate in the particular case, parties can avoid the sort of blanket, burdensome requests for electronic documents that invite blanket objections and judicial intervention.

Parties should also identify the form in which they wish electronic documents to be produced.

Parties should generally not require production of hardware media such as computer hard drives. These are media on which data is stored, and may be thought of as an electronic filing cabinet. However, in exceptional circumstances, parties may need to inspect hardware media. For example, where a party has reasonable grounds to believe that documents (or meta-data associated with documents) have not been produced, and are likely still stored on a computer hard drive or other electronic storage medium, but this is disputed, then the only solution may be inspection of the storage medium itself, with proper safeguards.[13]

Principle 10: ***A party may satisfy its obligation to produce relevant electronic documents in good faith by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify the documents that are most likely to contain relevant data or information.***

[13] This type of relief, if opposed and not consented to, is normally available only by order under s. 101 of the *Courts of Justice Act*, as a form of injunction akin to an Anton Pillar order.

Commentary: Particularly where searches for relevant electronic documents must be undertaken on large computer systems, containing vast amounts of information, including materials that are likely to be irrelevant, it may be impractical or prohibitively expensive to review all that information for relevance and privilege. In such circumstances, it is reasonable for parties to use electronic techniques to search within electronic document sources, in collecting the materials that will be subject to detailed review for relevance and privilege. The objective should be to identify a subset or subsets of the available electronic documents for detailed review, that are most likely to be relevant.

Where possible, parties and counsel should agree in advance on the search methods, and selection criteria or search terms, that will be used. Absent such agreement, however, parties should record and be prepared to disclose any limits on the searches they have undertaken, and to outline the scope of what they are producing, and what potential sources or documents have not been searched.

(iv) Production of Electronic Documents

Principle 11: ***Parties should agree early in the litigation process on the format in which electronic documents will be produced. Such documents may be producible in electronic form where this would (i) provide more complete relevant information, (ii) facilitate access to the information in the document, by means of electronic techniques to review, search, or otherwise use the documents in the litigation process, (iii) minimize the costs to the producing party, or (iv) preserve the integrity and security of the data.***

Commentary: Parties must produce a document in electronic form if, for any reason related to the litigation, it is not sufficient to produce a printout or scanned version of the document.

Parties and their counsel should consider agreeing to the production of documents electronically, rather than in print, where this can result in savings in costs to the parties.

Production of voluminous documentation in a form that does not provide meaningful access should be avoided. Electronic documents should not be converted to another form for production purposes, including creating printouts or scanned versions, if this has the effect of denying meaningful access to those documents. Where one party has documents in a searchable form, such as an electronic database, the searchable format should ordinarily be produced to other parties where possible. However, the use of printouts or reports may be justified in the case of documents containing both relevant and irrelevant information, if the relevant information cannot be segregated in a searchable format.

In cases involving voluminous documentation, where digitizing documents may be appropriate or where documents need to be organized in a common, indexed fashion, parties should attempt to agree upon a protocol to address these issues, and for the sharing of the costs involved. However, the format in which this is done should be carefully controlled to avoid loss of privilege or the production of irrelevant materials. As noted, most litigation support software provides for exporting production sets, in formats that allow them to be imported by a recipient party into the litigation support tool of their choice, and many of these tools are designed to enable counsel to produce only the relevant fields, together with properly redacted images of the documents.

(v) Privilege

Principle 12: ***Where appropriate during the discovery process, parties should agree to measures to protect privileges and other objections to production of electronic documents.***

Commentary: E-discovery does, in some circumstances, involve a heightened or special risk of inadvertent or unintended disclosure of privileged information. Examples cited in the literature and anecdotally include:

- production of large volumes of electronic documents, for electronic searching, such as a computer hard-drive or back-up tape; and
- an Anton Pillar injunction, search warrant, or other order for immediate production of documents to an adverse party, without prior review for privilege.

Again, however, as these examples suggest, the problems of inadvertent or unintended disclosure of privileged information are not necessarily different in kind for e-discovery as opposed to production of hard copies. Rather, the risk of occurrence may be greater in an e-discovery context, simply due to the volume of information involved, or to the difficulty and potential delay in identifying the privileged subject matter (where for example it takes the form of privileged meta-data or attachments associated with an otherwise non-privileged document.) That increased risk is significant, because the consequences of inadvertent or unintended disclosure are serious, potentially for both parties, including disqualification of counsel.

Counsel should discuss how to protect privileged documents at the outset of litigation.

Counsel should also recognize that, given a large volume of electronic documents, review for privilege will take time. Counsel should agree on measures to prioritize review, and streamline production of non-privileged material, without loss of privilege.

Special issues may arise with any request to inspect hardware media such as computer hard drives. Parties should consider how to guard against any release of proprietary, confidential information and protected personal data if such media are to be inspected.

(vi) Costs

Principle 13: ***In general, consistent with the rules regarding production of paper documents, pending any final disposition of the proceeding, the interim costs of preservation, retrieval, review, and production of electronic documents will be borne by the party producing them. The other party will, similarly, be required to incur the cost of making a copy, for its own use, of the resulting productions. However, in special circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by agreement or court order.***

Commentary: In Ontario, the traditional presumption is that the producing party is responsible for its own costs of meeting its obligations in the discovery process. However, once the documents are

ready to be produced, the opposing party is responsible for the immediate costs of the production of documents to them, such as copying, binding and delivery costs. Any other cost-shifting occurs at the end of the litigation, at which time the unsuccessful party may be required to contribute, in whole or in part, towards the costs (fees and disbursements) of the successful party. In the United States, to the contrary, the litigation process usually does not involve cost-shifting at the end of the litigation, and places more emphasis on interlocutory cost-shifting. Hence, case law and commentary dealing with costs in those jurisdictions should be applied with caution, if at all, in Ontario.

E-discovery may involve significant internal client costs, as well as counsel fees and disbursements for out-sourced services, at both the stage of locating and reviewing electronic documents and at the production stage. As such, there may be a need for the costs rules to be clarified so that internal discovery costs may be regarded as a recoverable disbursement in appropriate cases.

As the e-discovery costs borne initially by producing parties may be significant, such parties may wish to adopt strategies so as to control the costs of e-discovery. For example, a producing party may wish to limit, either through negotiation, appropriate admissions, or motions, the extent and scope of their e-discovery obligations. They may also wish to consider whether the costs should be partially or completely shifted to the requesting party. As well, a producing party may wish to serve on the requesting party a Rule 49 Offer to Settle, or to seek security for costs, to enhance its chances of recovery if it is ultimately successful in the proceeding.

However, given the potential for interim costs awards in an e-discovery context, the parties seeking production of electronic documents should also carefully consider the cost-implications of these claims. At a minimum, if they are ultimately unsuccessful, these parties may then be responsible for a significant portion of these e-discovery costs.

Conclusion: The Need for Ongoing Refinement of these Guidelines

As noted in the introduction, it is intended that these Guidelines will be developed over time as technology develops, and as the bench and bar gain experience with e-discovery in practice. It is expected that refinements to the Guidelines together with reference material will be available through the internet in due course.

This process of development will be ongoing. Members of the bar and interested groups are expected to take a leadership role. Input from practice groups involved in personal injury, commercial, intellectual property and other specialized types of litigation, will be particularly important. The judiciary is also encouraged to participate, for example, by providing additional sample orders and agreements that would not otherwise be widely reported or available, to illustrate and flesh out specific issues and practices.

APPENDIX A
Sedona Principles for Electronic Discovery

1. Electronic data and documents are potentially discoverable under Fed. R. Civ. P. 34 or its state law equivalents. Organizations must properly preserve electronic data and documents that can reasonably be anticipated to be relevant to litigation.

2. When balancing the cost, burden and need for electronic data and documents, courts and parties should apply the balancing standard embodied in Fed. R. Civ. P. 26(b)(2) and its state-law equivalents, which require considering the technological feasibility and realistic costs of preserving, retrieving, producing and reviewing electronic data, as well as the nature of the litigation and the amount in controversy.

3. Parties should confer early in discovery regarding the preservation and production of electronic data and documents when these matters are at issue in the litigation, and seek to agree on the scope of each party's rights and responsibilities.

4. Discovery requests should make as clear as possible what electronic documents and data are being asked for, while responses and objections to discovery should disclose the scope and limits of what is being produced.

5. The obligation to preserve electronic data and documents requires reasonable and good-faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.

6. Responding parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving and producing their own electronic data and documents.

7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronic data and documents were inadequate.

8. The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden and disruption of retrieving and processing the data from such sources.

9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review or produce deleted, shadowed, fragmented or residual data or documents.

10. A responding party should follow reasonable procedures to protect privileges and objections to production of electronic data and documents.

11. A responding party may satisfy its good-faith obligation to preserve and produce potentially responsive electronic data and documents by using electronic tools and processes, such as data sampling, searching or the use of selection criteria, to identify data most likely to contain responsive information.

12. Unless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.

13. Absent a specific objection, agreement of the parties or order of the court, the reasonable costs of retrieving and reviewing electronic information for production should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party.

14. Sanctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, the court finds that there was an intentional or reckless failure to preserve and produce relevant electronic data and that there is a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.

TAB 4

2011 ONSC 5474
Ontario Superior Court of Justice [Commercial List]

Harris v. Leikin Group Inc.

2011 CarswellOnt 9491, 2011 ONSC 5474, 207 A.C.W.S. (3d) 26

Adam Leikin Harris, Naomi Sara (Harris) Stanton, Sheira Rachel Harris, Zena Leah Harris, Hilliard Brian (Rick) Kesler and David Joseph Spieler (Plaintiffs) and Leikin Group Inc., Barbara Linda Farber, David Lawrence Katz, Andrew Mark Katz, Grant Jameson, Geoffrey Gilbert, Ogilvy Renault LLP, Ingrid Levitz, in her capacity as estate trustee with a will of the Estate of Gerald Levitz, Patricia Day, Ginsburg Gluzman Fage & Levitz LLP and First Capital Realty Inc. (Defendants)

D.M. Brown J.

Heard: January 17-20, 2011
Judgment: September 21, 2011
Docket: 08-CL-7482

Proceedings: additional reasons to *Harris v. Leikin Group Inc.* (2011), 2011 ONSC 3556, 2011 CarswellOnt 4794 (Ont. S.C.J.)

Counsel: R. Bennett, S. Erskine, for Plaintiffs
S. Victor, Q.C., D. Cutler, for Defendants, Barbara Linda Farber, David Lawrence Katz and Andrew Mark Katz
D. Scott, Q.C., for Defendant, Leikin Group Inc.
B. Zarnett, J. Kimmel, K. Murdock, for Defendants, Ogilvy Renault LLP, Grant Jameson and Geoffrey Gilbert
A. D'Silva, L. Mercer, for Defendants, Gerald Levitz, Patricia Day, and Ginsburg Gluzman Fage & Levitz LLP
C. Smith, S. Perri, for Defendant, First Capital Realty Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Property; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Civil practice and procedure --- Costs — Costs of particular proceedings — Motion for judgment

Defendant realtor won summary judgment motion dismissing claim against it by plaintiff investors — Realtor claimed substantial indemnity costs of summary judgment motion based on relief sought by realtor and pleading of intentional tort by investors — Investors conceded that substantial indemnity costs should be awarded but claimed that quantum of costs was too high — Submissions on costs were made — Costs were awarded — Realtors had to participate in summary judgment motions brought unsuccessfully against other defendants due to complex facts — Realtors were entitled to costs accordingly despite lack of success of co-defendants as investors could expect greater costs by bringing in multiple defendants — Realtors' bill of costs was reduced slightly to remove costs for attendance of non-party witnesses although party witnesses' attendance was still billed — Investors could reasonably expect that major Toronto law firms would be retained for complex commercial litigation and so majority of legal fees were allowed — Claimed rates of junior counsel were slightly reduced based on experience levels — Costs were also reduced based on principle of proportionality — Disbursements for electronic discovery process were also awarded as these documents were necessary in complex proceedings — Costs were awarded in total amount of $384,465.78.

Civil practice and procedure --- Costs — Scale and quantum of costs — Bill of costs — General principles

Defendant realtor won summary judgment motion dismissing claim against it by plaintiff investors — Realtor claimed substantial indemnity costs of summary judgment motion based on relief sought by realtor and pleading of intentional tort by investors — Investors conceded that substantial indemnity costs should be awarded but claimed that quantum of costs was too high — Submissions on costs were made — Costs were awarded — Realtors had to participate in summary judgment motions brought unsuccessfully against other defendants due to complex facts — Realtors were entitled to costs accordingly despite lack of success of co-defendants as investors could expect greater costs by bringing in multiple defendants — Realtors' bill of costs was reduced slightly to remove costs for attendance of non-party witnesses although party witnesses' attendance was still billed — Investors could reasonably expect that major Toronto law firms would be retained for complex commercial litigation and so majority of legal fees were allowed — Claimed rates of junior counsel were slightly reduced based on experience levels — Costs were also reduced based on principle of proportionality — Disbursements for electronic discovery process were also awarded as these documents were necessary in complex proceedings — Costs were awarded in total amount of $384,465.78.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Bakhtiari v. Axes Investments Inc. (2003), 66 O.R. (3d) 284, 2003 CarswellOnt 2951 (Ont. S.C.J.) — considered

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, 71 O.R. (3d) 291 (Ont. C.A.) — followed

Davies v. Clarington (Municipality) (2009), (sub nom. *Davies v. Clarington (Municipality)*) 312 D.L.R. (4th) 278, 100 O.R. (3d) 66, 2009 ONCA 722, 2009 CarswellOnt 6185, 77 C.P.C. (6th) 1, 254 O.A.C. 356 (Ont. C.A.) — followed

Forbes & Manhattan Inc. v. USRA Major Minerals Inc. (2011), 2011 ONSC 3911, 2011 CarswellOnt 5634 (Ont. S.C.J. [Commercial List]) — considered

Kaymar Rehabilitation Inc. v. Champlain Community Care Access Centre (2010), 2010 ONSC 6614, 2010 CarswellOnt 9580 (Ont. S.C.J.) — considered

Russett v. Bujold (2004), 2004 CarswellOnt 2386 (Ont. S.C.J.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 1.04(1) — referred to

R. 29.1.03(4) [en. O. Reg. 438/08] — considered

R. 39.03 — considered

R. 57 — considered

R. 57.01 — considered

Tariffs considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Tariff A, Pt. II — referred to

Tariff A, Pt. II, item 35 — referred to

ADDITIONAL REASONS to judgment reported at *Harris v. Leikin Group Inc.* (2011), 2011 ONSC 3556, 2011 CarswellOnt 4794 (Ont. S.C.J.), dealing with issue of costs.

D.M. Brown J.:

I. Cost claim for First Capital Realty motion for summary judgment

1 Further to my Reasons released June 13, 2011 [*Harris v. Leikin Group Inc.*, 2011 CarswellOnt 4794 (Ont. S.C.J.)], and directions given August 2, 2011, the parties have now completed their written submissions on costs in respect of my granting summary judgment in favour of the defendant, First Capital Realty Ltd., thereby dismissing the action against it.

2 First Capital seeks an award of costs for its motion and for the action on a substantial indemnity basis in the amount of $437,000.51, consisting of fees in the amount of $333,159.00 and disbursements of $62,174.71, plus applicable taxes.

3 The plaintiffs accept that the appropriate scale for an award of costs to First Capital is the substantial indemnity one by reason of their pleading of an intentional tort against that defendant. However, the plaintiffs submit that the quantum of costs claimed by First Capital is not fair and reasonable in light of the factors set out in Rule 57.01 of the *Rules of Civil Procedure*. The plaintiffs submit a fair and reasonable award of costs would be $200,000.00 for fees, inclusive of taxes, plus disbursements.

II. Findings on motion for summary judgment

4 In my Reasons released June 13, 2011, granting summary judgment in favour of the defendant, First Capital Realty Inc., I wrote:

> [309] The evidence disclosed that no basis exists for a claim by the plaintiffs against First Capital. As I found above, First Capital did not make an offer to purchase an interest in College Square until after the shareholders had executed the LOI on April 18, 2005 and after RBC Capital had run its bid process and made its recommendation to the Leikin Group concerning the bid submitted by First Capital. RBC Capital put together a Confidential Information Memorandum and solicited bids. Four were received, three of which were based on a value for College Square of greater than $70 million. Following the close of bids, RBC Capital made its recommendations to the Non-Selling Shareholders. Whatever feelings Josephine Harris might have on the issue, there is no evidence to support her assertion that the RBC Capital bid process was a sham. Why go through the time, effort, and expense of a third-party administered bid process if one already had a deal in one's back pocket, as intimated by the plaintiffs? The answer is simple: one doesn't. There was no foundation to the plaintiffs' speculations about a "bought deal" or "back pocket deal".
>
> [310] Only after RBC Capital had completed its reviews of the bids did First Capital make an offer to purchase an interest in College Square. The Leikin Group (or its designated entity) accepted the offer and the deal was concluded. First Capital paid real money for its purchase.

[311] The plaintiffs alleged and argued that some sort of deal existed with First Capital before negotiations on the LOI started in the fall of 2004 and before the LOI was executed. No evidence supported that allegation. Certainly First Capital expressed an interest in College Square to David Katz in early 2004, and the parties pursued their discussions in the late summer of 2004. But that is all they were-discussions. No agreement was reached; no commitment was made by First Capital.

[312] Certainly Sylvie Lachance was aware that the shareholders of the Leikin Group had to reach some sort of internal arrangement before any interest in College Square could be sold. That was the reason discussions with David Katz came to an end in October, 2004. But both Ms. Lachance and her transaction counsel, Ms. De Santis, testified that they did not know the details of any arrangement amongst the Leikin Group shareholders nor did they know the price at which any such arrangement was struck. No documentary evidence called into question that evidence which they gave on their examinations. Nor is there any evidence that FCR possessed any detailed knowledge about the internal structure of the Leikin Group. Nor could the plaintiffs point to any other evidence, documentary or otherwise, to support their allegations against First Capital. As Mr. Kesler and Ms. Harris stated on their cross-examinations, the plaintiffs were relying solely on the productions of other parties to support their claims against First Caapital. No such evidence exists.

[313] As to Mr. Kesler's claim that he thought FCR should have told the Selling Shareholders in September, 2004 what was going on regarding College Square, I am surprised that an experienced corporate lawyer who once practised at one of Toronto's largest firms could seriously advance such an assertion. Ms. Lachance testified that she understood that David Katz was acting as the representative of the owners of College Square. She had no reason to think otherwise. To suggest that she was under some obligation to reach behind the owners' representative and deal directly with each individual shareholder manifests a clear lack of understanding of the law. The evidence revealed that Ms. Lachance dealt quite properly with the Leikin Group during her negotiations. The plaintiffs have no legal or evidentiary basis to complain against First Capital.

[314] I wish to add that I am surprised the plaintiffs would resist the motion for summary judgment brought by First Capital in light of the absence of any evidence to support their allegations against that defendant. I will deal with that conduct of the plaintiffs on the issue of costs.

III. The Appropriate Scale

5 In light of the plaintiffs' submission on the appropriate cost scale, I will award First Capital costs calculated on a substantial indemnity basis. I turn now to consider the issues raised by the plaintiffs about the appropriate quantum of those costs.

IV. Quantum of substantial indemnity costs

6 The plaintiffs advanced the following criticisms of the amount of costs claimed by First Capital:

(i) First Capital is not entitled to its costs of participating in the four unsuccessful summary judgment motions brought by the other defendants. The plaintiffs submit that it was not necessary for counsel for First Capital to have attended most of the cross-examinations because the issues canvassed on those examinations did not touch upon the plaintiffs' claim against First Capital;

(ii) The hourly rates claimed by counsel for First Capital are excessive;

(iii) The time spent by counsel for First Capital on certain steps in the proceeding was excessive; and,

(iv) The costs claimed by First Capital violate the principle of proportionality because they would amount to over 50% of the substantial indemnity costs of $708,738.07 incurred by the plaintiffs in defending all five summary judgment motions.

Let me deal with each submission in turn.

A. FCR's Costs of Participating in the Other Summary Judgment Motions

7 Given the factual denseness of the plaintiffs' claims and the consequent factual complexity of the five motions for summary judgment brought by the defendants, the motions were case managed together on the Commercial List and heard at the same time before me over the span of four days. This joint management and conduct of the five summary judgment motions was necessary and appropriate.

8 As to the extent of First Capital's participation in the other summary judgment motions, the plaintiffs made the following submissions:

> Traditionally, a party that has participated in another party's unsuccessful motion for summary judgment is liable to the successful party for the costs of its participation. It is not rewarded for its participation in a losing cause by receiving its costs of participation. As set out in *Kaymar Rehabilitation Inc. v. Champlain Community Care Access Centre* 2010 ONSC 6614, the same principle still applies even where the participating party has been successful on its own motion for summary judgment. It is still liable for the costs of its participation in another party's unsuccessful motion.

And later:

> In circumstances similar to this case, where multiple parties have brought separate summary judgment motions, the court has held that the party that is successful in defending a motion is entitled to costs from all parties that participated in the unsuccessful motion. This includes recovering costs from a party that was wholly successful in bring its own summary judgment motion.

Again, the plaintiffs cited the *Kaymar Rehabilitation Inc. v. Champlain Community Care Access Centre* [2010 CarswellOnt 9580 (Ont. S.C.J.)] case in support of this assertion.

9 I do not see the decision in *Kaymar Rehabilitation* as standing for the broad propositions advanced by the plaintiffs. In that case Polowin J. conducted a careful examination of the roles of several parties on separate motions for summary judgment and dismissal and reached her conclusion based upon her application of the Rule 57.01 factors to the specific circumstances of those particular motions. I see no principles of general application emerging from that case beyond the standard ones that any award of costs must be fair and reasonable in the circumstances and must consider the factors enumerated in Rule 57.01.

10 As noted in my June Reasons, in the present case the plaintiffs advanced a factually broad claim against First Capital:

> [304] The plaintiffs' claim against FCR was that it knowingly assisted the Non-Selling Shareholders in breaching their fiduciary duties to the plaintiffs and the corporation. The particulars of the plaintiffs' claim were set out in the following portions of their Statement of Claim:
>
> > 51. Prior to entering into the transaction with the Leikin Group Inc. for an interest in the College Square property, FCR had explored a business alliance with the predecessor corporations when David Katz was the president. In fact, David Katz had delivered a presentation to the Board of Directors regarding a strategic alliance with FCR in or about April, 2004.
> >
> > 52. FCR was, at all material times, aware of the structure of Leikin Group Inc. and knew that the Non-Selling Shareholders were either directors, officers and/or former officers of Leikin Group Inc.
> >
> > 53. FCE knew that the share redemption transaction involving the Selling Shareholders was being conducted, as far as the Selling Shareholders knew, at a "fair market value" of $60,000,000.00 for College Square but FCR also knew that College Square had a far higher fair market value.
> >
> > 54. FCR knew that the Non-Selling Shareholders owed fiduciary duties to the Selling Shareholders and Leikin Group Inc.

> 55. FCR knew that the actions of the Non-Selling Shareholders constituted a breach of the duties of the Non-Selling Shareholders.
>
> [305] Ms. Harris put the matter more succinctly on her cross-examination: in her view there had been a deal with First Capital for an interest in College Square long before the LOI was executed. In her opinion the RBC Capital-supervised bidding process which resulted in the selection of First Capital as the negotiating candidate was "a sham".

11 The breadth of that claim required First Capital to defend allegations of fact which spanned virtually the same period of time as that covered by the plaintiffs' allegations against the other defendants-i.e. from early 2004 until the closing of the sale transaction in the early fall of 2005. The plea of "knowing assistance" necessitated First Capital addressing its knowledge, or lack of knowledge, of the defendants' activities over that period of time. This is not a case where the claim against one defendant was temporally limited or minimally related to the claims advanced against the other defendants.

12 As a result, it was necessary and reasonable for First Capital to concern itself with the development of the evidentiary record involved in the claims by the plaintiffs against the other defendants. Consequently, I do not accept the plaintiffs' submission that awarding First Capital some costs for its work in respect of the factual record involving the other defendants would reward it for participating in the "losing causes" of the other defendants' motions for summary judgment. Of necessity First Capital had to participate to some degree in the development of the evidentiary record in respect of the breach of fiduciary claims against the other defendants so that it could understand the allegations of breach of fiduciary duty of which it was alleged to have knowledge and in which it was alleged to have assisted.

13 That said, I accept the plaintiffs' submissions that *the extent to which* First Capital participated in the development of such an evidentiary record went beyond the bounds of reasonable necessity and was slightly excessive. First Capital's Bill of Costs disclosed that it was claiming time for attendances on the examinations of several groups of witnesses: Group 1 -the plaintiffs; Group 2 - the plaintiffs' transaction counsel; Group 3 - other defendants or their representatives; and Group 4 - other witnesses who played some role in the restructuring and sale processes-i.e. Antonio Boggia, Eric Desrosiers, Grant Edwardh, James Brooks and Richard Cyr. The plaintiffs took the position that it was unreasonable for First Capital's counsel to attend any examinations other than those of David Katz, his counsel Fred Carsley, and Rita de Santis.

14 I think the plaintiffs have cast the scope of permissible attendances too narrowly. A party defendant should be entitled to recover the reasonable costs of its counsel's attendance at the examination of any plaintiff and, in a case where a claim of knowing assistance is asserted, at the examination of any defendant in respect of whose conduct the claim of knowing assistance is linked. In the present case, given the way the case was pleaded, that would encompass all the defendants.

15 But non-party witnesses fall into another category, at least for the purpose of ascertaining the necessity and reasonableness of the attendance by a party's counsel at their examinations. In respect of those witnesses-whom I have classified as falling into Group 4 - I accept the plaintiffs' submission that First Capital should not recover its costs of its counsel's attendance on those cross-examinations or Rule 39.03 examinations where its counsel simply maintained a "watching brief", in the sense that counsel observed the examinations, but did not ask any questions. In such circumstances I think it is reasonable for an "observing party" to recover the costs of ordering a copy of the transcript, as well as some time for their counsel to review the transcript, but not to recover the full costs of attending the examinations.

16 First Capital's Bill of Costs does not break-down the cost of attendance at each examination and, in any event, in considering an award of costs on a motion I am not required to engage in a line-by-line examination of the costs. In Schedule A to my June Reasons I summarized the time spent by all parties on the examinations of all affiants or Rule 39.03 witnesses. The examinations for the witness whom I have placed in Group 4 took no more than 1.5 days to conduct. Allowing for some preparation time spent by First Capital's counsel, I think a reduction of 10% in the costs claimed in the "Cross-examinations and Non-Party Examinations" potion of the Bill of Costs would be reasonable in the circumstances. That would reduce First Capital's claimed costs by $10,672.20 in fees.

B. The hourly rates claimed for First Capital's counsel are excessive

17 The plaintiffs make two complaints about the hourly rates used in First Capital's Bill of Costs. First, the plaintiffs take the position that the "baseline" partial indemnity rates used for Mr. Smith (1999 call - $280), Ms. Perri (2005 call - $200), Ms. Dingle (2005 call - $200) and Ms. Reynolds (2009 call - $160) are too high, standing at the high end of the "maximum rate when fixing partial indemnity" costs. Second, the plaintiffs submit that it is not appropriate for First Capital to use the same hourly rate for each lawyer over the course of the four years of this proceeding; instead, the hourly rates should be reduced for the earlier years of the proceeding, reflecting the more junior status of each lawyer at that time.

18 As the Court of Appeal observed in *Davies v. Clarington (Municipality)*, at the present time no costs grid for partial indemnity costs exists under the *Rules of Civil Procedure*:

> "Substantial indemnity costs" is defined in rule 1.03 as "costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A". *This part of Tariff A was once the prescribed grid for "partial indemnity costs", but is no longer in effect.* "Full indemnity costs" is not a defined term but is generally considered to be complete reimbursement of all amounts a client has had to pay to his or her lawyer in relation to the litigation: see M. Orkin, *The Law of Costs*, looseleaf, 2nd ed. (Aurora, Ont.: Canada Law Book, 1993) at para. 219.05.
>
> (emphasis added) [1]

19 As I wrote recently in *Forbes & Manhattan Inc. v. USRA Major Minerals Inc.*:

> Rule 57 does not cap lawyers' hourly rates. The old grid no longer is in force. Rule 57.01(3) requires a court to fix costs in accordance with Rule 57.01(1) and the Tariffs, but the current Tariff A simply refers back to Rule 57.01(1) for the principles to guide the fixing of lawyers' fees. The reference to lawyers' fees in Rule 57.01(1) is found in subrule 57.01(1)(0.a) which identifies, as one factor to take into account when fixing costs, "the principle of indemnity, including where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer." I take from that language that a court must assess the reasonableness of claimed legal fees on a case-by-case basis, not in accordance with some notional grid.
>
> The reasonableness of the legal fees recoverable in costs must be informed by the fact that in the present case all parties retained major downtown Toronto law firms: Blakes, for the applicants, and Norton Rose OR LLP and Stikeman Elliott for the respondents. All parties operated under a reasonable expectation that the legal fees incurred by their opposite numbers would be high, based as they would be on hourly rates at the high end of the market. Rule 57.01(1) does not require courts to assess the reasonableness of legal fees based on some notion of the average mid-town Ontario litigator. The reasonableness of legal fees will vary from case to case, depending upon the counsel involved. In the present case, the hourly rates shown for respondents' counsel on their bills of costs fall within the range of prevailing Bay Street litigation rates, and I see no reason not to accept them to determine a reasonable award of substantial indemnity costs.

2

20 Consequently, a review of the appropriateness of the partial indemnity rates claimed by a party falls to be determined not by reference to a grid, as suggested by the plaintiffs, but by reference to the overarching principles of fairness and reasonableness as articulated by the Court of Appeal in its decisions, including *Boucher v. Public Accountants Council (Ontario)* [3] and *Davies*.

21 In assessing the reasonableness of the hourly rates claimed by First Capital I would start by observing that since the plaintiffs retained a downtown Toronto law firm to represent them in this action, it certainly fell within the realm of their reasonable expectations that some of the defendants would retain downtown Toronto counsel. Three sets of defendants did, including First Capital.

22 Turning to the specific rates claimed, Mr. Smith is a 1999 call, a partner at Torys LLP, and billed at an actual rate of between $585/hour and $700/hour during the course of this proceeding. First Capital claims a substantial indemnity rate for him of $420/hour, based upon a partial indemnity rate of $280/hour. The Bill of Costs revealed an appropriate delegation of

work by Mr. Smith to more junior counsel at each stage of the litigation. This was a factually complex piece of litigation and, as I noted above, the way in which the plaintiffs pleaded against First Capital required that defendant to deal with events during the entirety of the period in dispute. In light of those circumstances, I conclude that a substantial indemnity hourly rate for Mr. Smith of $420 is a fair and reasonable one in the circumstances.

23 Ms. Perri is a 2005 call who was billed out at actual rates ranging from $385/hour to $540/hour. First Capital seeks a substantial indemnity rate for her of $300/hour, based on a partial indemnity rate of $200. They seek the same amount for another associate, Ms. Dingle, who also is a 2005 call. The court's approval of partial and substantial indemnity rates of necessity imports some judicial view of what general levels of partial or substantial indemnity costs are fair and reasonable in the various regions of Ontario. This policy aspect of the court's award of costs is driven in large part by the requirement that the overall objective of fixing costs is to set an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant.

24 I think a partial indemnity rate of $200/hour for a 6 year call in a downtown Toronto firm is too high, especially in this case where it is only $80/hour less than the senior lawyer who has twice the experience. I conclude that a fair and reasonable hourly rate for the work done by Ms. Perri and Ms. Dingle is $175/hour, resulting in a substantial indemnity rate of $260/hour. Applying that hourly rate to the work performed by those two lawyers results in a reduction of claimed fees in the amount of $22,132.00. [4]

25 Ms. Reynolds is a 2009 call, billed out at an actual rate ranging from $310/hour to $355/hour. First Capital sought a substantial indemnity rate for her work of $240/hour, based on a partial indemnity rate of $160/hour. I conclude that a fair and reasonable partial indemnity rate for a two year call working in a downtown Toronto firm is $125/hour, resulting in a substantial indemnity rate of $185/hour. This would result in a reduction of $55/hour of recoverable fees for the work she performed, or a total reduction of $18,155.50. [5]

26 Given those reductions and the case management history of the motion-these motions originally were scheduled to be heard in early 2009, not 2011 [6] - I do not think it would be either fair or reasonable to further reduce the hourly rates claimed by First Capital to reflect the four year period of time spanned by these motions. I am satisfied that in the circumstances of this case applying the hourly rates which I have approved to the work performed in each year renders a fair and reasonable result.

C. The time spent by counsel for First Capital for certain steps in the proceeding was excessive

27 The plaintiffs submit that the time claimed by First Capital for the preparation of its factum and the attendance at the hearing of the motions should be reduced by 30% based on the emphasis placed by First Capital on the issue of knowing assistance, rather than on the underlying claims of breach of fiduciary duties against the defendants.

28 I see no merit in this submission. The factum filed by First Capital and the oral argument by its counsel at the four-day hearing reflected a division of labour amongst counsel for the various defendants in respect of the various issues pleaded by the plaintiffs. Such a division of labour for the hearing was consistent with the legal positions of the various groups of defendants, and constituted an advocacy practice which courts should encourage, not punish by a reduction of costs. In my view the time recorded in the "Factums and Hearing of Summary Judgment Motions" portion of First Capital's Bill of Costs is more than fair and reasonable in the circumstances, and I see no need to adjust it.

D. The costs claimed by First Capital violate the principle of proportionality

29 The plaintiffs submit that the costs claimed by First Capital would amount to over 50% of their substantial indemnity costs of $708,738.07 ($628,629.06, plus disbursements of $80,109.01, and taxes) in defending all five summary judgment motions.

30 I have made the following reductions to the fees claimed by First Capital for the summary judgment motion and action:

ITEM	REDUCTION
Attendance at examinations	$10,672.20

Hourly rates for Ms. Perri and Ms. Dingle	$22,132.00
Hourly rates for Ms. Reynolds	$18,155.50
Total reductions	**$50,959.70**

With those reductions one arrives at total recoverable substantial indemnity fees of $282,199.30, or roughly 45% of the substantial indemnity fees the plaintiffs claim they have incurred.

31 The plaintiffs seem to suggest that where five separate motions for summary judgment are brought against it, an unsuccessful plaintiff should not be responsible for more than one-fifth of its own substantial indemnity costs to any one successful party. I see no merit to that claim. That is not the way litigation works. A plaintiff must reasonably expect that the greater the number of defendants it brings into a lawsuit, the more likely it will be that the resulting costs of all defendants will exceed significantly the costs incurred by the plaintiff. That is especially true in an action such as this where the plaintiffs pleaded their case in a way requiring all defendants to deal with events during the entire period of time in dispute. So, the reasonable expectation of a plaintiff in such circumstances should not be that the costs incurred by each of the five sets of defendants would only amount to one-fifth of its own costs. The more reasonable expectation is that the costs incurred by those five sets of defendants would come closer to approximating five times the costs incurred by the plaintiff. That is why a plaintiff should consider, with great care, which persons it wishes to bring into its lawsuit-how wide a net a plaintiff casts has concrete cost consequences.

E. Disbursements: electronic document production and database management

E.1 Background

32 In their initial cost submissions the plaintiffs offered no comment on the disbursements claimed by First Capital - $62,174.71. Of that amount, $30,373.36 related to "electronic document production and database management". Given the significant amount of that line item disbursement, I called for further submissions from the plaintiffs and First Capital Realty on the recoverability of such disbursements under Part II of Tariff A to the *Rules of Civil Procedure*.

33 C. Campbell J. case managed these summary judgment motions. The defendants had agreed that they would produce their documents in electronic, summation-loadable, OCR-searchable format. By an April, 2009 order C. Campbell J. ordered the plaintiffs to produce their documents in a similar format and further ordered that "the parties shall bear their own costs of producing their documents in summation format, with all parties reserving their right to seek their costs of producing their documents in summation format".

34 First Capital's counsel has confirmed that the $30,373.36 for electronic document production for which cost recovery is claimed was an expense billed by counsel to First Capital.

35 The plaintiffs submit that in light of the production order of C. Campbell J. and the billing of the amount claimed by counsel to the client, they accept that this disbursement was reasonably necessary for the conduct of this litigation and do not oppose its recovery.

E.3 Analysis

36 Part II of Tariff A of the *Rules of Civil Procedure* lists recoverable disbursements. The Tariff does not contain a specific line item for disbursements incurred for electronic document management. Previous cases of this court have commented that omissions of numerous items from the tariff "illustrate the degree to which the tariff of disbursements has lost touch with modern legal practice". [7] That is one way of viewing the matter. But, at the same time, the courts who have adopted that perspective ended up using Tariff Item 35 to fill the gap and approve more "modern disbursements". Item 35 provides:

> Where ordered by the presiding judge or officer, for any other disbursement reasonably necessary for the conduct of the proceeding, a reasonable amount in the discretion of the assessment officer.

37 In my view, disbursements made to a third party, or billed to a client, for electronic document management should now be regarded as a standard "disbursement reasonably necessary for the conduct of the proceeding" and, as a matter of course, a party should be entitled to recover a reasonable amount for such a disbursement when receiving an award of costs. I say this for several reasons.

38 First, today the overwhelming majority of documents are created, stored and retrieved electronically. The efficient conduct of litigation involving large numbers of documents requires the use of electronic document management systems. Our *Rules of Civil Procedure* recognize this reality. Our discovery plan rule-Rule 29.1.03(4)-requires all parties, when preparing their discovery plan, to "consult and have regard to the document titled 'The Sedona Canada Principles Addressing Electronic Discovery' developed by and available from The Sedona Conference."

39 Judges of the Toronto Region have reiterated the need for parties to adhere to the *Sedona Canada Principles* in our *Best Practices for Civil Applications and Motions*, section V of which reads as follows:

> **V. Electronic document disclosure**
>
> [6] Parties are reminded of their obligation under Rule 29.1.03(4) to consult and have regard to the document titled *The Sedona Canada Principles Addressing Electronic Discovery* developed and available from The Sedona Conference. Adherence to this obligation is particularly important in complex applications or motions which may involve significant documentary disclosure. The *Sedona Canada Principles Addressing Electronic Discovery* may be found at: http://www.thesedonaconference.org/dltForm?did=canada_pincpls_FINAL_108.pdf

40 I regard the references to *The Sedona Canada Principles Addressing Electronic Discovery* in the *Rules of Civil Procedure* and the Toronto Region's *Best Practices for Civil Applications and Motions* not as mere suggestions to counsel to consult that resource when conducting their cases, but as indicating to counsel that the expectations, obligations, requirements and procedures contained within those principles now form part of our *Rules of Civil Procedure*. I think I stand on solid ground when I say that the judges of the Superior Court of Justice of Ontario expect parties to use and comply with the requirements and procedures of *The Sedona Canada Principles Addressing Electronic Discovery* and that a party's failure to do so will be regarded as non-compliance by that party with the obligations imposed upon it by the *Rules*.

41 Principle 12 of *The Sedona Canada Principles Addressing Electronic Discovery* provides as follows:

> **The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.**
>
> In most Canadian provinces and territories, the costs of discovery are traditionally borne by the producing party. The issue of cost allocation of electronically stored information has not been resolved in Canada. However, when documents are produced, the opposing party is responsible for the immediate costs of the production, such as copying, binding and delivery costs. *Any other cost-shifting generally occurs at the end of the litigation, at which time the unsuccessful party may be required to contribute, in whole or in part, towards the costs (fees and disbursements) of the successful party.*
>
> (emphasis added)

42 The Ontario Discovery Task Force, as part of its excellent and on-going work on e-discovery issues, has published *Guidelines For The Discovery Of Electronic Documents In Ontario*, which is available in the E-Discovery section of the website of the Ontario Bar Association. Principle 13 of those *Guidelines* reflects the approach to costs set out in the *Sedona Canada Principles*. The commentary to Principle 13 reads, in part:

> In Ontario, the traditional presumption is that the producing party is responsible for its own costs of meeting its obligations in the discovery process. However, once the documents are ready to be produced, the opposing party is responsible for the immediate costs of the production of documents to them, such as copying, binding and delivery costs. *Any other cost-shifting occurs at the end of the litigation, at which time the unsuccessful party may be required to contribute, in whole or in part, towards the costs (fees and disbursements) of the successful party...*
>
> E-discovery may involve significant internal client costs, as well as counsel fees and disbursements for out-sourced services, at both the stage of locating and reviewing electronic documents and at the production stage. As such, there may be a need for the costs rules to be clarified so that internal discovery costs may be regarded as a recoverable disbursement in appropriate cases.
>
> As the e-discovery costs borne initially by producing parties may be significant, such parties may wish to adopt strategies so as to control the costs of e-discovery. For example, a producing party may wish to limit, either through negotiation, appropriate admissions, or motions, the extent and scope of their e-discovery obligations. They may also wish to consider whether the costs should be partially or completely shifted to the requesting party.
>
> As well, a producing party may wish to serve on the requesting party a Rule 49 Offer to Settle, or to seek security for costs, to enhance its chances of recovery if it is ultimately successful in the proceeding.

43 I think that the principles and approaches articulated in Principle 12 of *The Sedona Canada Principles Addressing Electronic Discovery* and Principle 13 of the *Guidelines For The Discovery Of Electronic Documents in Ontario* express a sensible and reasonable approach to the treatment of the costs of using the necessary tool of electronic document management to conduct civil litigation in this day and age. Parties should now litigate knowing that, as part of any cost award, they reasonably should expect to be called upon to indemnify an opposite party for its reasonable electronic document management disbursements.

44 Of course, as both the *Sedona Canada Principles* and the *Ontario Guidelines* point out, parties should discuss the scope and the recoverability of the costs of electronic document management as part of their development of the mandatory Rule 29.1 Discovery Plan. In exceptional cases the parties might wish to resort to the court to obtain an order clarifying cost responsibility for electronic document management disbursements. But I do not encourage such a practice. The *Sedona Canada Principles* and the *Ontario Guidelines* offer counsel ample resources and guidance with which they should be able to negotiate a reasonable cost allocation agreement without involving the court in a basic file-management issue.

45 Turning to the present case, I accept the parties' submissions that the electronic document management disbursements incurred by First Capital constitute a "disbursement reasonably necessary for the conduct of the proceeding" within the meaning of Item 35 of Part II of Tariff A to the *Rules of Civil Procedure*, and I allow their recovery. Since no objection was taken by the plaintiffs to the other disbursements claimed by First Capital, I award it disbursements of $62,174.71.

46 Before concluding, I am struck by the irony involved in a judicial discussion of the recoverability of disbursements for electronic document management. Over the past decade in Ontario we have spent considerable time and energy revising our *Rules of Civil Procedure* and developing guidelines and precedents to incorporate the best practices for e-discovery. At conference after conference judges and masters of this court exhort counsel to educate themselves in the *Sedona Canada Principles*. Yet, can we as a court accept the work product derived from parties nicely organizing and exchanging their litigation-related documents in electronic format? We cannot. As I have stated in previous decisions, the Superior Court of Justice of Ontario labours in the Dark Ages of document management. Our court is unable to accept electronically the documents created and used by the parties who litigate before us unless, in exceptional cases, the parties are willing to bear the costs of running parallel document filing systems, such as those used in many receiverships and *CCAA* proceedings.

47 A most dangerous disconnect exists between what we as a court are telling litigants to do in managing their electronic litigation documents and what we as a court can accept from those who litigate before us. Earlier this year, in a paper presented at a Law Society of Upper Canada conference, I wrote:

> The absence in the Superior Court of Justice of a modern information technology system to accept and manage court documents, and to track and schedule court cases, is both an embarrassment and a scandal.
>
> . . . . .
>
> Without moving away from the court's current "paper culture" to one using electronic documents and without providing the judiciary with a modern IT case management system to track and schedule cases, I have difficulty seeing how tangible improvements in Ontario's civil justice system can occur in the face of fixed judicial resources. [8]

It is now apparent that those who manage this court's document intake system do not intend to introduce e-filing in the foreseeable future. In my view, that is unacceptable. In an age when those who use our courts create electronically the documents by which they conduct their business and personal affairs, for a court such as ours to continue in its inability to communicate with its users by electronic means risks creating a serious gap between the public and their courts, thereby endangering the legitimacy of our court system. I think the judges of our court must continue to point out this most serious problem until such time as those who administer this Court take the necessary steps to fix it.

V. Conclusion

48 I have addressed above the specific criticisms which the plaintiffs made about First Capital's Bill of Costs. In addition, I have considered the factors enumerated under Rule 57, including the time spent, the result achieved, and the complexity of the matter, as well as the application of the principle of proportionality: Rule 1.04(1). I also have taken into account the principles set forth by the Court of Appeal in *Boucher* and *Davies*, specifically that the overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant. Having done so, I award First Capital substantial indemnity costs of its successful summary judgment motion and of the action. I fix its fees at $282,199.30. I allow H.S.T. on those fees in the amount of $35,000. I appreciate that does not represent precisely the taxes payable because this litigation straddled the G.S.T. and H.S.T. regimes, but I conclude that amount comes close enough to be fair and reasonable. I allow First Capital disbursements of $62,174.71, together with G.S.T/H.S.T. of $5,091.77.

49 That results in a total award of costs in favour of First Capital in the amount of $384, 465.78 which I order the plaintiffs to pay to that defendant within 30 days of the date of this order.

Costs awarded.

Footnotes

1 (2009), 100 O.R. (3d) 66 (Ont. C.A.), para. 15.

2 2011 ONSC 3911 (Ont. S.C.J. [Commercial List]), paras. 29 and 30.

3 (2004), 71 O.R. (3d) 291 (Ont. C.A.).

4 To take into account my previous reduction of 10% on the costs incurred on examinations, I adjusted the recorded 240.9 hours of time for examinations for Ms. Perri to 216.8 hours, then added the rest of her time, for a total of 547.9 hours. Ms. Dingle's time totalled 5.4 hours. Together their time amounted to 553.3 hours. When reduced by $40/hour ($300/hour - $260/hour), the resulting adjustment amounted to $22,132.00.

5 That is, a total of 330.1 hours reduced by $55/hour.

6 In paragraphs 16 and 17 of its submissions First Capital noted that much of the delay was caused by the plaintiffs' insistence on examining a large number of non-party witnesses and making document requests at late stages of the motions' schedules.

7 *Bakhtiari v. Axes Investments Inc.* (2003), 66 O.R. (3d) 284 (Ont. S.C.J.), para. 52; *Russett v. Bujold*, 2004 CarswellOnt 2386 (Ont. S.C.J.), para. 48.

8 *"Sacred Cows and Stumbling Blocks: Whither Civil Procedure Reform?"*, Law Society of Upper Canada, Our Civil Justice System: Reflecting on Recent Reforms, Toronto, May 31, 2011.

TAB 5

2009 FC 151, 2009 CF 151
Federal Court

Universal Sales Ltd. v. Edinburgh Assurance Co.

2009 CarswellNat 347, 2009 CarswellNat 4927, 2009 FC 151, 2009 CF 151, [2009] F.C.J. No. 196, 175 A.C.W.S. (3d) 146, 341 F.T.R. 185 (Eng.)

Universal Sales, Limited Atlantic Towing Limited J.D. Irving, Limited Irving Oil Company, Limited Irving Oil Limited, Plaintiffs and Edinburgh Assurance Co. Ltd. Orion Insurance Co. Ltd British Law Insurance Co. Ltd. English & American Ins. Co. Ltd. Economic Insurance Co. Ltd. Andrew Weir Ins. Co. Ltd. Insurance Co. of North America London & Edinburgh General Ins. Co. Ltd. Ocean Marine Ins. Co. Ltd. Royal Exchange Assurance Sun Insurance Officer Ltd. Sphere Insurance Co. Ltd. Drake Insurance Co. Ltd. Eagle Star Insurance Co. Ltd. Stephen Roy Merritt, as Representative of Underwriters Subscribing to Lloyd's Policy No. 614/B94656-A/1582, Defendants

J. Russell J.

Heard: December 17, 2008
Judgment: February 12, 2009
Docket: T-1148-01

Proceedings: affirming *Universal Sales Ltd. v. Edinburgh Assurance Co.* (2008), 2008 CarswellNat 5331 (F.C.)

Counsel: Laura K. Fric, Jennifer Fairfax, for Plaintiffs
Matthew Liben, for Respondents

Subject: Civil Practice and Procedure; Evidence; Insurance

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Civil practice and procedure — Discovery — Examination for discovery — Range of examination — Privilege — Solicitor-client

Proceedings involved insurance claim dispute between plaintiff insureds and defendant insurers over coverage for certain expenses incurred by plaintiffs related to sinking and raising of ship — Ship sank in 1970 with cargo of fuel oil and was raised by federal government in 1996 — Federal government took legal action against plaintiffs that concluded in settlement in 2000 — As part of settlement, plaintiffs agreed to pay government $5 million dollars without admission of liability — Plaintiffs then sought indemnity from defendants for amount paid to federal government, as well as legal costs incurred in government action — Defendants denied insurance claim and plaintiffs then commenced present proceedings in 2001 for indemnity under relevant insurance policies — Dispute arose between parties as to who was responsible for legal fees incurred by law firm that represented plaintiffs in government claim — Transcript of telephone conversation between plaintiffs' representative and lawyer at law firm who represented plaintiffs in government action was disclosed to defendants as part of larger production of documents — Prothonotary concluded that, although transcript had been disclosed to defendants, it nevertheless remained privileged and should not be used or relied upon by them in these proceedings — Defendants brought motion pursuant to R. 51, 97 and 232 of Federal Courts Rules, to appeal and reverse prothonotary's order as it related to transcript — Motion dismissed — There was nothing clearly wrong about

prothonotary's conclusion that, on its face, transcript was confidential record of communication between lawyer and her client for purpose of seeking legal advice, and prima facie covered by solicitor-client privilege — Same conclusion would be reached even if standard of correctness was applied and matter considered de novo — Transcript showed representative was seeking advice from his lawyer in government action on matter related to specific paragraph in statement of defence filed in present proceedings — Transcript was clearly record of discussion about issue that arose in present proceedings and clearly involved communication of information and advice on that issue — Communication at issue did not involve neutral facts where lawyer is not really acting as lawyer — Furthermore, prothonotary was clearly correct in his conclusion that inadvertent disclosure that occurred in this case did not constitute waiver — Uncontradicted evidence established inadvertent disclosure in context of large production, and clear intention not to waive privilege that was manifested as soon as disclosure was revealed to plaintiffs — No waiver on these facts.

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Solicitor-client privilege

Proceedings involved insurance claim dispute between plaintiff insureds and defendant insurers over coverage for certain expenses incurred by plaintiffs related to sinking and raising of ship — Ship sank in 1970 with cargo of fuel oil and was raised by federal government in 1996 — Federal government took legal action against plaintiffs that concluded in settlement in 2000 — As part of settlement, plaintiffs agreed to pay government $5 million dollars without admission of liability — Plaintiffs then sought indemnity from defendants for amount paid to federal government, as well as legal costs incurred in government action — Defendants denied insurance claim and plaintiffs then commenced present proceedings in 2001 for indemnity under relevant insurance policies — Dispute arose between parties as to who was responsible for legal fees incurred by law firm that represented plaintiffs in government claim — Transcript of telephone conversation between plaintiffs' representative and lawyer at law firm who represented plaintiffs in government action was disclosed to defendants as part of larger production of documents — Prothonotary concluded that, although transcript had been disclosed to defendants, it nevertheless remained privileged and should not be used or relied upon by them in these proceedings — Defendants brought motion pursuant to R. 51, 97 and 232 of Federal Courts Rules, to appeal and reverse prothonotary's order as it related to transcript — Motion dismissed — There was nothing clearly wrong about prothonotary's conclusion that, on its face, transcript was confidential record of communication between lawyer and her client for purpose of seeking legal advice, and prima facie covered by solicitor-client privilege — Same conclusion would be reached even if standard of correctness was applied and matter considered de novo — Transcript showed representative was seeking advice from his lawyer in government action on matter related to specific paragraph in statement of defence filed in present proceedings — Transcript was clearly record of discussion about issue that arose in present proceedings and clearly involved communication of information and advice on that issue — Communication at issue did not involve neutral facts where lawyer is not really acting as lawyer — Furthermore, prothonotary was clearly correct in his conclusion that inadvertent disclosure that occurred in this case did not constitute waiver — Uncontradicted evidence established inadvertent disclosure in context of large production, and clear intention not to waive privilege that was manifested as soon as disclosure was revealed to plaintiffs — No waiver on these facts.

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Waiver of privilege

Proceedings involved insurance claim dispute between plaintiff insureds and defendant insurers over coverage for certain expenses incurred by plaintiffs related to sinking and raising of ship — Ship sank in 1970 with cargo of fuel oil and was raised by federal government in 1996 — Federal government took legal action against plaintiffs that concluded in settlement in 2000 — As part of settlement, plaintiffs agreed to pay government $5 million dollars without admission of liability — Plaintiffs then sought indemnity from defendants for amount paid to federal government, as well as legal costs incurred in government action — Defendants denied insurance claim and plaintiffs then commenced present proceedings in 2001 for indemnity under relevant insurance policies — Dispute arose between parties as to who was responsible for legal fees incurred by law firm that represented plaintiffs in government claim — Transcript of telephone conversation between plaintiffs' representative and lawyer at law firm who represented plaintiffs in government action was disclosed to defendants as part of larger production of documents — Prothonotary concluded that, although transcript had been disclosed to defendants, it nevertheless remained privileged and should not be used or relied upon by them in

these proceedings — Defendants brought motion pursuant to R. 51, 97 and 232 of Federal Courts Rules, to appeal and reverse prothonotary's order as it related to transcript — Motion dismissed — There was nothing clearly wrong about prothonotary's conclusion that, on its face, transcript was confidential record of communication between lawyer and her client for purpose of seeking legal advice, and prima facie covered by solicitor-client privilege — Same conclusion would be reached even if standard of correctness was applied and matter considered de novo — Transcript showed representative was seeking advice from his lawyer in government action on matter related to specific paragraph in statement of defence filed in present proceedings — Transcript was clearly record of discussion about issue that arose in present proceedings and clearly involved communication of information and advice on that issue — Communication at issue did not involve neutral facts where lawyer is not really acting as lawyer — Furthermore, prothonotary was clearly correct in his conclusion that inadvertent disclosure that occurred in this case did not constitute waiver — Uncontradicted evidence established inadvertent disclosure in context of large production, and clear intention not to waive privilege that was manifested as soon as disclosure was revealed to plaintiffs — No waiver on these facts.

Evidence --- Documentary evidence — Privilege as to documents — Solicitor and client privilege — Waiver

Proceedings involved insurance claim dispute between plaintiff insureds and defendant insurers over coverage for certain expenses incurred by plaintiffs related to sinking and raising of ship — Ship sank in 1970 with cargo of fuel oil and was raised by federal government in 1996 — Federal government took legal action against plaintiffs that concluded in settlement in 2000 — As part of settlement, plaintiffs agreed to pay government $5 million dollars without admission of liability — Plaintiffs then sought indemnity from defendants for amount paid to federal government, as well as legal costs incurred in government action — Defendants denied insurance claim and plaintiffs then commenced present proceedings in 2001 for indemnity under relevant insurance policies — Dispute arose between parties as to who was responsible for legal fees incurred by law firm that represented plaintiffs in government claim — Transcript of telephone conversation between plaintiffs' representative and lawyer at law firm who represented plaintiffs in government action was disclosed to defendants as part of larger production of documents — Prothonotary concluded that, although transcript had been disclosed to defendants, it nevertheless remained privileged and should not be used or relied upon by them in these proceedings — Defendants brought motion pursuant to R. 51, 97 and 232 of Federal Courts Rules, to appeal and reverse prothonotary's order as it related to transcript — Motion dismissed — There was nothing clearly wrong about prothonotary's conclusion that, on its face, transcript was confidential record of communication between lawyer and her client for purpose of seeking legal advice, and prima facie covered by solicitor-client privilege — Same conclusion would be reached even if standard of correctness was applied and matter considered de novo — Transcript showed representative was seeking advice from his lawyer in government action on matter related to specific paragraph in statement of defence filed in present proceedings — Transcript was clearly record of discussion about issue that arose in present proceedings and clearly involved communication of information and advice on that issue — Communication at issue did not involve neutral facts where lawyer is not really acting as lawyer — Furthermore, prothonotary was clearly correct in his conclusion that inadvertent disclosure that occurred in this case did not constitute waiver — Uncontradicted evidence established inadvertent disclosure in context of large production, and clear intention not to waive privilege that was manifested as soon as disclosure was revealed to plaintiffs — No waiver on these facts.

Table of Authorities

Cases considered by *J. Russell J.*:

B. (A.) v. Home of the Guardian Angel (2008), 2008 CarswellNS 35, 2008 NSSC 9, 261 N.S.R. (2d) 198, 835 A.P.R. 198 (N.S. S.C.) — considered

Blood Tribe Department of Health v. Canada (Privacy Commissioner) (2008), (sub nom. *Privacy Commissioner of Canada v. Blood Tribe Department of Health)* 2008 C.L.L.C. 210-030, 74 Admin. L.R. (4th) 38, 376 N.R. 327, 294 D.L.R. (4th) 385, 67 C.P.R. (4th) 1, (sub nom. *Canada (Privacy Commissioner) v. Blood Tribe Department of Health)* [2008] 2 S.C.R. 574, 2008 CarswellNat 2244, 2008 CarswellNat 2245, 2008 SCC 44 (S.C.C.) — followed

Buffalo v. Canada (1995), (sub nom. *Samson Indian Nation & Band v. Canada)* [1995] 2 F.C. 762, 1995 CarswellNat 675, 96 F.T.R. 239 (note), (sub nom. *Nation et Bande des Indiens Samson v. Canada)* 1995 CarswellNat 675F, (sub nom. *Samson Indian Band & Nation v. Canada)* 125 D.L.R. (4th) 294, [1995] 3 C.N.L.R. 18, (sub nom. *Buffalo v. Canada (Minister of Indian Affairs & Northern Development))* 184 N.R. 139 (Fed. C.A.) — followed

Groupe Tremca Inc. v. Techno-Bloc Inc. (1998), 1998 CarswellNat 2765, (sub nom. *Groupe Tremca Inc. v. Techo-Bloc Inc.)* 159 F.T.R. 1 (Fed. T.D.) — referred to

Maranda c. Québec (Juge de la Cour du Québec) (2003), 178 C.C.C. (3d) 321, (sub nom. *Maranda v. Richer)* 232 D.L.R. (4th) 14, 15 C.R. (6th) 1, (sub nom. *Maranda v. Richer)* [2003] 3 S.C.R. 193, 2003 SCC 67, 2003 CarswellQue 2477, 2003 CarswellQue 2478, (sub nom. *Maranda v. Leblanc)* 311 N.R. 357, 113 C.R.R. (2d) 76 (S.C.C.) — followed

Merck & Co. v. Apotex Inc. (2003), 2003 FCA 488, 2003 CarswellNat 4080, 30 C.P.R. (4th) 40, 315 N.R. 175, [2004] 2 F.C.R. 459, 246 F.T.R. 319 (note), 2003 CarswellNat 4501, 2003 CAF 488 (F.C.A.) — followed

Metcalfe v. Metcalfe (2001), 5 C.P.C. (5th) 68, [2001] 6 W.W.R. 244, 17 R.F.L. (5th) 390, 2001 MBCA 35, 2001 CarswellMan 104, 198 D.L.R. (4th) 318, 153 Man. R. (2d) 207, 238 W.A.C. 207 (Man. C.A.) — followed

R. v. Aqua-Gem Investments Ltd. (1993), 93 D.T.C. 5080, (sub nom. *Canada v. Aqua-Gem Investments Ltd.)* [1993] 2 F.C. 425, (sub nom. *Canada v. Aqua-Gem Investments Ltd.)* 149 N.R. 273, (sub nom. *Aqua-Gem Investments Ltd. v. Minister of National Revenue)* [1993] 1 C.T.C. 186, (sub nom. *Canada v. Aqua-Gem Investments Ltd.)* 61 F.T.R. 44 (note), 1993 CarswellNat 1313, 1993 CarswellNat 855 (Fed. C.A.) — followed

Rules considered:

Federal Courts Rules, SOR/98-106
R. 51 — pursuant to

R. 97 — pursuant to

R. 232 — pursuant to

MOTION by defendants to appeal judgment reported at *Universal Sales Ltd. v. Edinburgh Assurance Co.* (2008), 2008 CarswellNat 5331 (F.C.), finding that transcript of telephone conversation was protected by solicitor-client privilege.

***J. Russell J.*:**

1 This motion by the Pleading Defendants (Defendants) is brought under Rules 51, 97 and 232 of the *Federal Courts Rules, 1988* to appeal and reverse in part an order of Prothonotary Lafrenière dated August 6, 2008.

2 The Defendants think that Prothonotary Lafrenière was clearly wrong to conclude that the document marked as Exhibit "A1" to the examination for discovery of Mr. W. David Jamieson, which took place on December 20, 2007, was privileged, and they want the Court to reverse those aspects of his order based upon that conclusion, and to order Mr. Jamieson to re-appear and submit to further examination with regard to Exhibit "A1."

Background

3 These proceedings involve an insurance claim dispute between the Plaintiffs (the insureds) and the Defendants (the insurers) over coverage for certain expenses incurred by the Plaintiffs related to the sinking and raising of the Irving Whale. The ship

sank in the Gulf of St. Lawrence on September 7, 1970 with a cargo of fuel oil and was raised by the Federal Government on July 31, 1996.

4 The Federal Government took legal action against the Plaintiffs that concluded in a settlement on or about July 13, 2000. As part of the settlement the Plaintiffs agreed to pay the government $5 million dollars without admission of liability.

5 The Plaintiffs then sought indemnity from the Defendants for the amount paid to the Federal Government, as well as legal costs incurred in the government action. The Defendants denied the insurance claim and the Plaintiffs then commenced the present proceedings in June 2001 for indemnity under the relevant insurance policies.

6 The interest in Exhibit "A1" and in having Mr. Jamieson answer questions about that document arises from that part of the dispute between the parties over who is responsible for the legal fees incurred by Ogilvy Renault, who represented the Plaintiffs in the government claim. The document in question is a transcript of a telephone conversation between Mr. W. David Jamieson (a representative of the Plaintiffs) and the lawyer at Ogilvy Renault who represented the Plaintiffs in the government action.

Decision of Prothonotary

7 In his decision, Prothonotary Lafrenière concluded that, although Exhibit "A1" had been disclosed to the Defendants as part of a larger production of documents, it nevertheless remained privileged and should not be used or relied upon by the Defendants in these proceedings:

> Based on the uncontradicted evidence of John A. MacDonald, I conclude the Plaintiffs inadvertently disclosed the documents identified as Exhibit "A1" to the examination for discovery of Mr. W. David Jamieson. On its face, the document is a confidential record of communication between a lawyer and her client for the purpose of seeking legal advice, and *prima facie* covered by solicitor client privilege. The Plaintiffs immediately asserted solicitor-client privilege over the document once they became aware that it had been included as part of a larger production. The fact that the privileged document contains relevant information is not germane in the circumstances.

8 Prothonotary Lafrenière ordered the Defendants to return the document and any copies to the Plaintiffs and not to use the document as evidence in these proceedings.

9 The Defendants say that Prothonotary Lafrenière was clearly wrong to come to these conclusions because Exhibit "A1" does not record a communication between "a lawyer and her client" (the government action had been settled and Ogilvy Renault was no longer acting for the Plaintiffs), and because the communication was not, on its face, "for the purpose of seeking legal advice" (the conversation relates purely to facts, and there is no discussion of a legal nature).

10 The Defendants say that the transcript of the conversation (Exhibit "A1") does not contain, on its face, any solicitor-client privileged information or communication.

Standard of Review

11 The Defendants rely upon the decision of Justice Blais in *Groupe Tremca Inc. v. Techno-Bloc Inc.*, [1998] F.C.J. No. 1458 (Fed. T.D.) for the proposition that an error as to the existence of privileged and/or confidential information or communications constitutes a misapprehension of the facts for the purpose of the test in *R. v. Aqua-Gem Investments Ltd.*, [1993] F.C.J. No. 103 (Fed. C.A.), so that they are entitled to a hearing *de novo* on this matter.

12 The Plaintiffs say that if the Prothonotary's conclusion on solicitor-client privilege is one of law, then the standard of review should be correctness but that the result is the same regardless of whether the Court uses correctness on the *Aqua-Gem* test because the decision in this case was not clearly wrong. They say that Prothonotary Lafrenière did not misapprehend the facts before him and his decision is consistent with the relevant jurisprudence which stresses the sanctity of solicitor/client communications.

13 I am of the view that, in accordance with *Merck & Co. v. Apotex Inc.* (2003), 30 C.P.R. (4th) 40 (F.C.A.) at paragraphs 17-19 and *Aqua-Gem*, the issue before me is whether Prothonotary Lafrenière's decision regarding the privileged nature of Exhibit "A1" was clearly wrong as being based upon a wrong principle of law or upon a misapprehension of the facts.

Analysis

14 The Defendants say that Exhibit "A1" does not contain any privileged information and, even if it did, such privilege was waived when the transcript was provided to the Plaintiffs' lawyers.

15 As regards legal advice privilege, the Defendants say that, under Canadian law, although communications between a solicitor and a client relating to legal advice benefit from the protection of privilege, communications of pure fact do not. The Defendants rely upon the decision of Justice Scaravelli of the Nova Scotia Supreme Court in *B. (A.) v. Home of the Guardian Angel*, 2008 NSSC 9 (N.S. S.C.) for this distinction. In that case, Justice Scaravelli had the following to say at paragraphs 11-12:

> 11 Not everything communicated between solicitor and client is subject to privilege. In *Maranda c. Québec*, [2003] 3 S.C.R. 193, Deschamps J. reviewed the scope of privilege at paragraph 42:
>
> > Not all communications with a lawyer will be protected by privilege. In other words, it is not the capacity in which the person is party to the communication that gives rise to the privilege. Accordingly, a commercial lawyer who works in an advertising agency and whose time is spent exclusively on developing products for his or her client will not be able to claim privilege for promotional work done. Similarly, the mere fact that a client considers certain information to be confidential will not suffice for it to be protected by solicitor-client privilege. I mention these examples as a reminder that the three prerequisites for privilege to attach, as laid down by Dickson. (as he then was) in *Solosky v. Canada* (1979), [1980] 1 S.C.R. 82 (S.C.C.), at p. 837, still apply:
> >
> > (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential between the parties.
>
> 12 There is a distinction between communications for the purposes of obtaining legal advice and communications of matters of pure fact as well as acts. Manes and Silver at page 127:
>
> > **Legal Advice v. Fact**
> >
> > 1.01 There is a distinction between a privileged communication and a communication regarding a matter of fact. Where a communication to a solicitor is made for the purpose of conveying or receiving information on matters of fact, the communication is not privileged.

16 It is not entirely clear to me from the *B. (A.)* case what is meant by a distinction between legal advice and "matters of pure fact."

17 In the present case, however, no such distinction can be made. The transcript shows clearly that Mr. Jamieson is seeking advice from his lawyer in the government action on the matter related to paragraph 28 of the Statement of Defence filed in the present proceedings. Paragraph 28 of the Statement of Defence reads as follows:

> On or about January 15, 1998, via an agreement concluded between the Plaintiffs and the Pleading Defendants through their respective counsels, it was agreed that the Plaintiffs would be entirely responsible for the legal fees incurred by Ogilvy Renault in defending the Government of Canada's claim, to the exclusion of the Pleading Defendants.

18 A discussion concerning the existence of such an agreement cannot, in my view, be characterized as a discussion about "pure fact," whatever meaning that term might have in other contexts. Exhibit "A1" is clearly a record of a discussion about an issue that arises in the present proceedings and it clearly involves the communication of information and advice on that issue.

19 My review of the case law suggests that the Plaintiffs are correct to stress the broad scope of solicitor-client privilege and its application to Exhibit "A1." As the Supreme Court of Canada recently held in *Blood Tribe Department of Health v. Canada (Privacy Commissioner)* (2008), 294 D.L.R. (4th) 385 (S.C.C.) at pages 393-394, solicitor-client privilege "is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counselor or in some other non-legal capacity."

20 In *Maranda c. Québec (Juge de la Cour du Québec)*, [2003] 3 S.C.R. 193 (S.C.C.) the Supreme Court of Canada made it clear that "the scope of the privilege is broad" and "courts should exercise great caution before trying to circumscribe or create exceptions to that privilege ..." (p. 209).

21 The privilege attaches to all communications made within the framework of the solicitor-client relationship. The Supreme Court of Canada in *Maranda* at page 213 specifically dealt with the dangers of attempting to make the kind of distinction between facts and other communications that the Defendants are attempting to make in the present case:

> The protection conferred by the privilege covers primarily acts of communication engaged in for the purpose of enabling the client to communicate and obtain the necessary information or advice in relation to his or her conduct, decisions or representation in the courts. The distinction is made in an effort to avoid facts that have an independent existence being inadmissible in evidence (*Stevens*, *supra*, at para. 25). It recognizes that not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication, as has been held in cases where it was found that counsel was acting not in that capacity but simply as a conduct for transfers of funds ...".
>
> *Sopinka, Lederman and Bryant*, *supra*, highlighted the fineness of that distinction and the risk of eroding privilege that is inherent in using it (at p. 734, 14.53):
>
> > The distinction between "fact" and "communication" is often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated.

22 In the present case, the communication involved a client seeking information from the client's lawyer for the purpose of dealing with paragraph 28 of the Statement of Defence filed by the Defendants. It does not involve neutral facts where a lawyer is not really acting as a lawyer. As the Federal Court of Appeal pointed out in *Buffalo v. Canada*, [1995] 2 F.C. 762 (Fed. C.A.) at page 769, "it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context."

23 The communication in Exhibit "A1" is constrained in nature because of the "Chinese wall" arrangements devised by the parties in this case, but it remains part of a continuum within which a solicitor tenders advice to his or her client. It is not about some neutral fact that can be severed from the solicitor-client relationship.

24 In my view, then, there is nothing clearly wrong about Prothonotary Lafrenière's conclusion that "[o]n its face, the document is a confidential record of communication between a lawyer and her client for the purpose of seeking legal advice, and *prima facie* covered by solicitor-client privilege." Even if I apply a standard of correctness and consider this matter *de novo*, my decision would still be that Prothonotary Lafrenière was entirely correct to reach this conclusion. It is the same conclusion that I come to after a review of Exhibit "A1" in the context of the record placed before me in this motion.

25 Having reached this conclusion it is unnecessary for me to consider whether, in the context of these proceedings, Exhibit "A1" also attracts litigation privilege. The only remaining issue is whether the Plaintiffs waived privilege.

26 Once again, on this issue, I have to conclude that Prothonotary Lafrenière was not clearly wrong, and was in my view clearly correct, in his conclusion that the inadvertent disclosure that occurred in this case does not constitute waiver: "The

Plaintiffs immediately asserted solicitor-client privilege over the document once they became aware that it had been included as part of a larger production."

27 The uncontradicted evidence of Mr. MacDonald makes it clear that the Plaintiffs never intended to waive privilege over the communication contained in Exhibit "A1." The Plaintiffs and their counsel were simply not aware of the existence of the transcript on the CD when the large production was disclosed. Immediately upon learning of the existence of the transcript in the production, Plaintiffs' counsel repeatedly asserted privilege over the document.

28 As the Plaintiffs point out, the mere physical loss of custody of a privileged document does not automatically end privilege, especially in the context of modern litigation where large quantities of documents, such as the electronic production of a CD in this case, are exchanged between counsel and accidental disclosure is bound to occur from time to time.

29 In this case, there was neither knowledge on the part of the Plaintiffs when the CD was produced to the Defendants, nor any silence when the Plaintiffs learned of the inadvertent disclosure at the discovery.

30 As the Manitoba Court of Appeal pointed out in *Metcalfe v. Metcalfe* (2001), 198 D.L.R. (4th) 318 (Man. C.A.), at paragraphs 13 and 14:

> **13** The privilege arising out of the solicitor-client relationship belongs to the client, not the solicitor .... Thus, it is only the client or the client's agent or successor who can waive the solicitor-client privilege.... It has been said that waiver of privilege will only occur where the holder of the privilege knows of the existence of the privilege and demonstrates a clear intention of waiving the privilege
>
> . . .
>
> **14** Thus, where there is an inadvertent disclosure of a document covered by solicitor-client privilege, and it is clear that there is no intention of waiver, the case law has generally upheld the privilege over the document itself ....

31 In the present case, the uncontradicted evidence of Mr. MacDonald establishes inadvertent disclosure in the context of a large production, and a clear intention not to waive privilege that was manifested as soon as the disclosure was revealed to the Plaintiffs. There is no waiver on these facts.

Judgment

THIS COURT ORDERS AND ADJUDGES that

1. The Defendants' motion is dismissed.

2. The Plaintiffs shall have their costs of this motion (but not on a solicitor-client basis as requested) payable forthwith within 30 days and in any event of the cause.

Motion dismissed.

End of Document

TAB 6

2014 ONSC 2682
Ontario Superior Court of Justice

White v. 123627 Canada Inc.

2014 CarswellOnt 6976, 2014 ONSC 2682, [2014] O.J. No. 2494, 241 A.C.W.S. (3d) 74

Carrie White, Plaintiff and 123627 Canada Inc., carrying on business as Algonquin Petro Canada, Breault Inc., and Pine Creek Enterprises Inc., Defendants

Ellies J.

Heard: April 24, 2014
Judgment: May 26, 2014
Docket: CV-11-5283

Counsel: Patrick J. Poupore, for Plaintiff
Avi Cole, for Defendants, 123627 Canada Inc., carrying on business as Algonquin Petro Canada, and Breault Inc.

Subject: Civil Practice and Procedure; Evidence; Public; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Civil practice and procedure --- Practice on interlocutory motions and applications — Miscellaneous

Plaintiff brought action in 2011 for damages allegedly suffered in fall — During documentary discovery, counsel for defendants inadvertently sent plaintiff's counsel copy of statement by defendant B Inc.'s principal B to insurance adjuster — Defendants had claimed litigation privilege over document, and did not become aware of disclosure until plaintiff's counsel confronted B with alleged inconsistency between discovery evidence and statement — Plaintiff's counsel refused to return document — Defendants brought motion for orders including removal of counsel; Plaintiff sought leave to bring motion requesting summary of statement and any other witness statements — Motion granted; Leave denied — As plaintiff had set action down for trial, she required leave to bring motion for production of witness statements — There had been no significant or unexpected change in circumstances such that refusal to allow motion would be manifestly unjust — Plaintiff's motion appeared to be tactical response to defendants' motion.

Professions and occupations --- Barristers and solicitors — Employment of lawyer — Representation by solicitor — Application for removal as solicitor of record

Plaintiff brought action in 2011 for damages allegedly suffered in fall — During documentary discovery, counsel for defendants inadvertently sent plaintiff's counsel copy of statement by defendant B Inc.'s principal B to insurance adjuster — Defendants had claimed litigation privilege over document, and did not become aware of disclosure until plaintiff's counsel confronted B with alleged inconsistency between discovery evidence and statement — Plaintiff's counsel refused to return document — Defendants brought motion for orders including removal of counsel as solicitor of record; Plaintiff sought leave to bring motion requesting summary of statement and any other witness statements — Motion granted; Leave denied — Counsel played no part in disclosure of document, but conduct after disclosure fell significantly short of duty to immediately advise defendants of mistake and return document without copying or using — Counsel failed to investigate obvious discrepancy between claim of privilege in affidavit of documents and production of document, instead using it as part of plaintiff's litigation strategy — Contents of statement were not discoverable in this case, as what plaintiff wanted was not B's evidence as to facts and events of fall but rather what B told his insurance adjuster about those facts and events

— Plaintiff failed to rebut presumption of prejudice from disclosure of document and evidence disclosed actual prejudice arising from plaintiff's use of statement — As plaintiff's counsel took no steps to contain prejudicial effect of inadvertent disclosure, there could be no alternative but to order removal.

Table of Authorities

Cases considered by *Ellies J.*:

Aviaco International Leasing Inc. v. Boeing Canada Inc. (2000), 48 C.P.C. (4th) 44, 9 B.L.R. (3d) 99, 2000 CarswellOnt 2194 (Ont. S.C.J.) — referred to

Blank v. Canada (Department of Justice) (2006), 2006 CarswellNat 2704, 2006 CarswellNat 2705, 47 Admin. L.R. (4th) 84, 40 C.R. (6th) 1, 2006 SCC 39, (sub nom. *Blank v. Canada (Minister of Justice)*) 352 N.R. 201, 270 D.L.R. (4th) 257, 51 C.P.R. (4th) 1, (sub nom. *Blank v. Canada (Minister of Justice)*) [2006] 2 S.C.R. 319 (S.C.C.) — referred to

Celanese Canada Inc. v. Murray Demolition Corp. (2006), 215 O.A.C. 266, 2006 CarswellOnt 4623, 2006 CarswellOnt 4624, 2006 SCC 36, 50 C.P.R. (4th) 241, 269 D.L.R. (4th) 193, 30 C.P.C. (6th) 193, 352 N.R. 1, [2006] 2 S.C.R. 189 (S.C.C.) — considered

Chan v. Dynasty Executive Suites Ltd. (2006), 2006 CarswellOnt 4318, 30 C.P.C. (6th) 270 (Ont. S.C.J.) — referred to

Dionisopoulos v. Provias (1990), 1990 CarswellOnt 405, 71 O.R. (2d) 547, 45 C.P.C. (2d) 116 (Ont. H.C.) — considered

General Accident Assurance Co. v. Chrusz (1999), 180 D.L.R. (4th) 241, 124 O.A.C. 356, 45 O.R. (3d) 321, 38 C.P.C. (4th) 203, 1999 CarswellOnt 2898 (Ont. C.A.) — considered

Greco v. Thornhill (1993), 1993 CarswellOnt 1150, 65 O.A.C. 71 (Ont. Div. Ct.) — referred to

Heasley v. Labelle (2013), 2013 ONSC 7606, 2013 CarswellOnt 17572 (Ont. S.C.J.) — referred to

Hill v. Ortho Pharmaceutical (Canada) Ltd. (1992), 11 C.P.C. (3d) 236, 1992 CarswellOnt 351 (Ont. Gen. Div.) — considered

Kennedy v. McKenzie (2005), 2005 CarswellOnt 2109, 17 C.P.C. (6th) 229, [2005] O.T.C. 385 (Ont. S.C.J.) — considered

Sacrey v. Berdan (1986), 1986 CarswellOnt 353, 10 C.P.C. (2d) 15 (Ont. Dist. Ct.) — considered

Sangaralingam v. Sinnathurai (2011), 9 M.V.R. (6th) 311, 94 C.C.L.I. (4th) 14, 105 O.R. (3d) 714, 14 C.P.C. (7th) 378, 280 O.A.C. 146, 2011 ONSC 1618, 2011 CarswellOnt 1818 (Ont. Div. Ct.) — considered

Tiller (Litigation Guardian of) v. St. Andrew's College (2009), 2009 CarswellOnt 3653 (Ont. S.C.J.) — distinguished

2000768 Ontario Inc. v. 514052 Ontario Ltd. (2006), 2006 CarswellOnt 6891 (Ont. S.C.J.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 31.06(1)(b) — referred to

R. 48.04 — considered

APPLICATION by defendants for orders including removal of plaintiff's counsel as solicitor of record; REQUEST by plaintiff for leave to bring motion requesting production of summary of inadvertently disclosed privileged statement.

Ellies J.:

Introduction

1 The inadvertent disclosure of a privileged document by one side of a legal dispute to another is not unlike the transmission of an infection: the more quickly it is contained, the easier it may be to eradicate its harmful effect.

2 Where nothing is done to deal with the problem, however, the prejudicial effect of the inadvertent disclosure of a privileged document on the adjudication of the dispute between the parties, in particular, and the integrity of the legal system, in general, can spread to the point where there is no alternative but to isolate the affected party, as I have reluctantly concluded I must do in this case.

Facts

3 The plaintiff commenced an action in 2011 for damages she allegedly suffered in a fall which occurred in November 2010 at a service station in North Bay. During the documentary discovery process, counsel for 123627 Canada Inc. and Breault Inc. (collectively, "Algonquin") inadvertently sent plaintiff's counsel a copy of a transcribed interview (which the parties refer to as a "statement") between Tony Breault, the principal of Breault Inc., and an adjuster acting on behalf of his insurer, over which Algonquin claimed litigation privilege and which had been listed in Schedule B of Algonquin's affidavit of documents.

4 Algonquin's counsel did not become aware of the inadvertent disclosure until the examination for discovery of Breault in October of 2012, when plaintiff's counsel (not counsel appearing on this motion) confronted the witness with what he alleged was an inconsistency between the witness's discovery evidence and the statement. When Algonquin's counsel became aware of the error, she immediately requested that the document be returned and refused to allow the witness to answer any questions related to it. Plaintiff's counsel refused to return the document at the time and continued to refuse repeated requests to do so until January of this year.

5 In this motion, Algonquin asks for a number of orders relating to the inadvertent disclosure of the statement and the refusal of plaintiff's counsel to return it in a timely way, including the removal of Wallbridge, Wallbridge ("Wallbridge") as counsel for the plaintiff. The plaintiff opposes the request that Wallbridge be removed. On her behalf, counsel argues that Algonquin could suffer no prejudice as a result of the inadvertent disclosure of the document and the use to which plaintiff's counsel put it because the contents of the statement are discoverable. Therefore, she brings her own motion requesting a summary of the statement and of any other witness statements in Breault Inc.'s possession. In addition to disputing the validity of the plaintiff's argument, Algonquin objects to the motion being brought on the basis that the plaintiff set the action down for trial.

Issues

6 There is no issue between the parties that the statement is subject to litigation privilege, that disclosure of the statement was inadvertent, and that there was no waiver of the privilege by virtue of the inadvertent disclosure. Further, no objection is taken by the plaintiff to the orders being requested which are directed to preserving the privileged nature of the statement and to preventing further use of it.

7 Therefore, the issues are:

(1) Should the plaintiff be granted leave to bring her motion and, if so, should production of summaries of the evidence of the witnesses, including a summary of the statement at issue, be ordered?

(2) Should Wallbridge be removed as counsel?

Should The Plaintiff be Granted Leave?

8 Rule 48.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, precludes a party who has set an action down for trial and any party who has consented to the action being placed on a trial list from initiating or continuing any motion or form of discovery without leave of the court. This action was set down for trial by the plaintiff. Therefore, she requires leave to bring her motion for production of the witness's statements.

9 In order to obtain leave, the plaintiff must demonstrate that there has been a significant or unexpected change in circumstances such that a refusal to allow the motion under Rule 48.04 would be manifestly unjust: *Hill v. Ortho Pharmaceutical (Canada) Ltd.* (1992), 11 C.P.C. (3d) 236 (Ont. Gen. Div.), at para. 10. It was not seriously urged upon me by counsel for the plaintiff in the motion that either of these things has occurred. Indeed, the only evidence of any change since the action was set down for trial is the bringing of Algonquin's motion, to which the plaintiff's motion appears to be a tactical response. This is not the type of change contemplated in *Hill*. Leave, therefore, is denied.

Should Wallbridge be Removed as Counsel?

10 Our law has long protected documents created for the purpose of litigation from disclosure to opposing parties during the course of that litigation. Litigation privilege is based upon the need for a "protected area" within which to facilitate investigation in the preparation of a case for trial by the advocate, free from adversarial interference and without fear of premature disclosure: *Blank v. Canada (Department of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 (S.C.C.), at paras. 27-28, adopting the academic writings of Sharpe J.A. in "Claiming Privilege in the Discovery Process," *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65.

11 Allowing a litigant to fully investigate the facts surrounding a matter free from fear that the results will be disclosed unnecessarily benefits our adversarial system of justice in a number of ways. Among them is the early resolution of claims which, once fully investigated, may not warrant a trial. Where matters are not resolved, the truth-finding function of the trial is facilitated by the degree to which the parties have been free to prepare within the protected area of litigation privilege.

12 Where a privileged document finds its way to an opposing party, unfairness is often the result. The shield behind which the information contained in the document came into being may be turned into a sword in the hands of an opponent. The more often that is allowed to occur without court intervention, the more often the incentive will arise not to properly investigate a matter, or to improperly hide the results of it. For that reason, courts should not easily sweep away the protection afforded by litigation privilege and should, where necessary, take steps to enforce it, including removing opposing counsel who have inadvertently been granted access to privileged documents.

13 Where inadvertent disclosure has occurred, as it has in this case, there arises a tension between the need to fortify the protection granted to documents prepared for the purpose of litigation and the right of the "innocent" party to counsel of choice. In *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189 (S.C.C.), a case in which solicitor-client privileged documents fell into the wrong hands, Binnie J. highlighted (at para. 56) the right of a plaintiff to continue to be represented by counsel of choice as an important element of our adversarial system of litigation, holding "that if a remedy short of removing the ... solicitors will cure the problem, it should be considered." Binnie J. set out a number of factors to be considered in determining whether counsel should be removed as a result of a breach of solicitor-client privilege (para. 59). These factors include:

(1) the manner in which the documents came into possession of the party or its counsel;

(2) what the party and his counsel did upon recognition that the documents were potentially privileged;

(3) the extent of any review made of the privileged material;

(4) the contents of the privileged documents and the degree to which they are prejudicial;

(5) the stage to which the litigation has progressed; and

(6) the potential effectiveness of precautionary steps taken to avoid the effect of the breach of the privilege.

14 I believe that these factors are just as applicable in a case where litigation privilege is breached as they are in a case where the breach relates to solicitor-client privilege. Although the basis for the two classes of privilege differs, where the privileged document relates to ongoing litigation, the potential harm is usually the same. For this reason, I propose to analyze these factors as they relate to the facts of this case.

(1) How the Documents Came into the Possession of Plaintiff's Counsel

15 Wallbridge played no part in the disclosure of the document. However, the conduct of plaintiff's counsel after that disclosure falls significantly short of what was expected.

(2) The Conduct of Counsel after Recognizing the Privileged Nature of the Statement

16 The duty of counsel upon discovering that documents inadvertently provided to him are the subject of a claim of privilege by an opposing party is clear. He is obliged to advise opposing counsel of the mistake, return the documents without keeping any copies of them or, if he reasonably believes that there is an issue as to the propriety of the claim of privilege, the document should be sealed and a court ruling on the issue obtained immediately: *Aviaco International Leasing Inc. v. Boeing Canada Inc.*, [2000] O.J. No. 2420, 48 C.P.C. (4th) 44 (Ont. S.C.J.), at para. 11; *Chan v. Dynasty Executive Suites Ltd.*, [2006] O.J. No. 2877, 30 C.P.C. (6th) 270 (Ont. S.C.J.), at para 74; *2000768 Ontario Inc. v. 514052 Ontario Ltd.*, [2006] O.J. No. 4383, 152 A.C.W.S. (3d) 781 (Ont. S.C.J.), at para. 39; *Heasley v. Labelle*, 2013 ONSC 7606 (Ont. S.C.J.), at para. 8.

17 In this case, plaintiff's counsel testified during cross-examination on his affidavit that, although he was aware that the statement had been listed in Schedule B of the defendant's affidavit of documents, he believed that it had been intentionally produced. Schedule B begins with the words, "Documents ... that I object to producing on the grounds of privilege." Plaintiff's counsel did nothing to investigate the obvious discrepancy between the claim of privilege and the production of the document. Instead, he attempted to use the privileged document for the purpose of cross-examining the witness during his examination for discovery. Not only did he fail to immediately return the document without copying or using it, he refused repeated requests to do so.

18 Counsel should be presumed to know the proper course to follow when provided with a document over which privilege has been claimed and concerning which no express waiver has been given. While an order removing counsel is not to be issued as an instrument by which to penalize counsel for failing to follow the proper course (*Celanese*, at para. 54), where counsel proceeds otherwise, he assumes the risk that such an order will be made (*Heasley*, at para. 8).

(3) The Extent of the Review of the Privileged Document

19 The statement at issue here was extensively reviewed. It was used for the purposes of cross-examining the witness at his examination for discovery. It was also referred to in the textual portion of the plaintiff's pre-trial conference memorandum and a copy of the statement was appended to it. Clearly, it became part of the plaintiff's litigation strategy.

(4) Contents of the Statement and Prejudice

20 The prejudice which arises from a breach of solicitor-client privilege is presumed: *Celanese*, at para. 42; *2000768 Ontario Inc. v. 514052 Ontario Ltd.*, [2006] O.J. No. 4383, 152 A.C.W.S. (3d) 781 (Ont. S.C.J.), at paras. 47-48. In my view, it makes good sense to adopt a similar rule with respect to a breach of litigation privilege. Through reliance on the existence of the privilege and the expectation that it will be respected, litigants are encouraged to fully explore the facts of a case, even though they may find facts favouring an opposing party in the course of doing so. Thus, unlike solicitor-client communications, which need not be relevant to the litigation to enjoy the robust protection from disclosure afforded to them in law (*Blank*, at para. 24), documents created for the dominant purpose of litigation will usually be relevant to the dispute and contain information that is of use to an opposing party, one way or another. Requiring the party claiming privilege to prove prejudice will frequently only compound the harmful effects of disclosure of such a document. For this reason, although the presumption of prejudice may be rebutted, only clear and convincing evidence will serve to do so: *Celanese*, at para. 42.

21 The plaintiff argues that no prejudice can arise because the contents of the statement are discoverable. I am unable to accept that assertion as a general proposition when it comes to privileged statements obtained from a party to the litigation. In my view, this submission confuses the distinction between the contents of the statement and the subject matter. The latter is discoverable, the former are not. It also confuses the law regarding the discoverability of the contents of statements obtained from parties to the litigation with that governing the discoverability of the contents of statements obtained from non-parties.

(a) Statements from Parties

22 The discoverability of the contents of a statement obtained from a party to the litigation was dealt with by Ducharme J. in *Kennedy v. McKenzie* (2005), 17 C.P.C. (6th) 229, 139 A.C.W.S. (3d) 843 (Ont. S.C.J.). In *Kennedy*, it was plaintiff's counsel who had inadvertently disclosed a statement given to his insurer in a case in which the plaintiff also faced liability as a defendant. Unlike this case, however, opposing counsel, although disputing the claim of litigation privilege, did not review the document, did not make any copies of it, sealed the document, and did not discuss the contents or provide any information about it to anyone after learning of the claim.

23 The plaintiff in *Kennedy* appealed the decision of a Master who had rejected the claim of litigation privilege. The Master had ordered the statement to be produced on the basis that it was not protected by litigation privilege and on the alternative basis that the statement appeared to be the "only record of the plaintiff's recollection reasonably contemporaneous with the events" (para. 13). Ducharme J. allowed the appeal. He reviewed the jurisprudence in which courts have sought to strike a balance between the need to prepare for litigation without fear of disclosure, on one hand, and the need for full discoverability in the truth-finding process of a trial, on the other. He held that the statement in question was protected by litigation privilege and that the contents of the statement were not discoverable. In the course of doing so, he recognized (at para. 47) that "the fact that the statement itself is protected by litigation privilege only precludes questions about the contents of the statement, it does not preclude questions about the factual circumstances discussed in the statement." There is, therefore, a distinction to be drawn between the facts and events forming the subject matter of a statement obtained from a party, which are discoverable, and the contents of the statement, which are not.

24 To overcome a claim of litigation privilege over a statement given by a party to the litigation, Ducharme J. held (at para. 47) that:

> ...the party challenging the litigation privilege must demonstrate that the materials being sought are relevant to the proof of an issue important to the outcome of the case and that there is no reasonable alternative form of evidence that can serve the same purpose.

25 Because a party to the litigation may be examined for discovery under the *Rules of Civil Procedure*, it will usually be difficult for the party challenging the privilege to demonstrate that there is no other reasonable way to obtain the evidence than to get at the contents of a statement protected by litigation privilege.

26 This reasoning was followed in *Sangaralingam v. Sinnathurai*, 2011 ONSC 1618, 105 O.R. (3d) 714 (Ont. Div. Ct.), in which the court restored a Master's decision to deny production of a statement, and the information therein, given by a witness

to his insurer. Pointing out that the moving party had availed itself of the opportunity to examine the witness for discovery, Herman J. noted on behalf of the court that there was no suggestion that the witness had difficulty remembering what had occurred. As to the suggestion that the contents of the statement were discoverable, he wrote (at para. 25):

> The motion judge distinguished *Kennedy* on the basis that in *Kennedy*, the judge was dealing with challenges to privilege while in the case before her, the respondent did not dispute that the statement itself was protected by privilege. I am unable to see a distinction between providing the contents of the statement and providing the statement itself. In both cases, the opposing party wanted to find out what the witness told the insurer. In both cases, there was an opportunity for the opposing party to question the witness about the matters in issue.

27 The plaintiff in this case seeks to distinguish *Sangaralingam* on the basis that Mr. Breault did suffer from a "poor memory" during his examination for discovery. However, this is not borne out by the transcript. Mr. Breault admitted that the statement was "possibly" more accurate than his memory at the time of the discovery, but I have not been taken to any portions of the transcript in which he demonstrated difficulty remembering the events.

28 The plaintiff also relies upon the decision in *Tiller (Litigation Guardian of) v. St. Andrew's College*, [2009] O.J. No. 2634, 178 A.C.W.S. (3d) 330 (Ont. S.C.J.), in which production of a summary of a privileged statement was ordered even though the maker of the statement had been examined for discovery and where there was no suggestion that the witness had memory difficulties. In my view, *Tiller* is distinguishable because the motion judge in that case found that the summary of the statement was not sought solely for the purpose of impugning the witness' credibility (para. 12). In the present case, the plaintiff has already discovered Breault with respect to the facts and events forming the subject matter of the statement. What the plaintiff now wants to know is not Breault's evidence with respect to the facts and events that are the subject of the statement, but what Breault told his insurance adjuster about those facts and events. That is not permitted under the rules relating to discovery: Rule 31.06(1)(b); *Greco v. Thornhill* (1993), 40 A.C.W.S. (3d) 1092, 65 O.A.C. 71 (Ont. Div. Ct.), at para. 3.

29 To the extent that *Tiller* stands for the proposition that the contents of a statement protected by litigation privilege are discoverable simply because the statement was taken more closely in time to the events in issue, I respectfully decline to follow it. A fading memory is not sufficient to overcome litigation privilege unless, for example, a witness's recollection is so poor that the privileged statement becomes the witness's past recollection recorded. In such a case, it would not be possible to obtain the witness' evidence in any other way. That is not the situation here. The contents of the statement are not discoverable in this case.

30 Despite the fact that the contents of the statement are not discoverable, counsel for Algonquin undertook during Breault's discovery to review the statement and to advise whether there were any differences between what Breault told the adjuster and the evidence he had given during the examination. This undertaking was given prior to counsel for Algonquin learning about the inadvertent disclosure and it could not be said, therefore, that it was given as a result of that disclosure. In effect, this was an undertaking to disclose the contents of the statement. The undertaking need not have been given, in my view. The fact that it was given may illustrate the difficulty in distinguishing between the discoverability of the contents of a statement obtained from a party as opposed to a non-party, a subject to which I now turn.

(b) Statements from Non-parties

31 The contents of statements obtained from non-parties, while also protected by litigation privilege, are discoverable. The difference in treatment of such statements from those obtained from parties arises from the *Rules of Civil Procedure*.

32 In *Kennedy*, Ducharme J. canvassed the various ways in which a claim of litigation privilege may be set aside. Among them was the possibility of changes to the *Rules of Civil Procedure*. At para. 45 of his decision, he quoted from the decision of Carthy J.A. in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.), at p. 331, where he wrote about litigation privilege:

> The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. In effect, litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met.

. . . . .

> Our modern rules certainly have truncated what would previously have been protected from disclosure.
>
> . . . . .
>
> In a very real sense, litigation privilege is being defined by the rules as they are amended from time to time. Judicial decisions should be consonant with those changes and should be driven more by the modern realities of the conduct of litigation and perceptions of discoverability than by historic precedents born in a very different context.

33 One such judicial decision was that of Borins, J. (as he then was) in *Sacrey v. Berdan* (1986), 10 C.P.C. (2d) 15, [1986] O.J. No. 2575 (Ont. Dist. Ct.), in which he was called upon to determine whether the new *Rules* required a defendant to disclose the observations made of a plaintiff during surveillance. In deciding that they did, he wrote (at paras. 9-10, O.J.):

> ...I agree with the submissions of counsel for the plaintiff that r. 31.06(1) has effected a change in the law pertaining to examinations for discovery.
>
> Subrules 31.06(1) to (3) have significantly broadened the scope of examination for discovery. Information which prior to the introduction of the Rules of Civil Procedure parties were permitted to withhold must now be disclosed. As Mr. Justice Morden has pointed out in his article, An Overview of the Rules of Civil Procedure of Ontario (1984-5), Advocates' Q. 257-330 at p. 260, the general interpretation policy of the Rules of Civil Procedure set forth in r. 1.04(1):
>
> > probably finds its most extensive application in the discovery rules (Rule 30 to 33) and in the offer to settle rule (Rule 49) and involves, at many places, compromises between, on the one hand, providing effective mechanisms for ascertaining the truth and, on the other, not making litigation too cumbersome or expensive.

34 In the subsequent case of *Dionisopoulos v. Provias* (1990), 71 O.R. (2d) 547 (Ont. H.C.), Granger J. reviewed the relevant authorities, including *Sacrey*, and articulated the following rule (at para. 16, O.J.):

> To summarize, a party being examined for discovery is required under rule 31.06 to provide the names and addresses of persons who might reasonably be expected to have knowledge of the matters in issue, but are (*sic*) not required to provide a list of trial witnesses. A summary of the substance of the evidence of those persons who might reasonably be expected to have knowledge of the matters in issue, must be provided if requested. Rule 31.06(1) requires a person being examined to answer "any proper question relating to any matter in issue" or "any matter made discoverable by subrules (2) to (4)" and questions may not be objected to on the ground that "the information sought is evidence". If the "names and addresses of persons having knowledge" is discoverable, then it would seem to me that a proper question relating to that is "what is the substance of their knowledge?" This is so even if the information to be disclosed is evidence.

35 Therefore, a party may be required to disclose the "contents" of a statement taken from a witness that would otherwise be protected from disclosure by litigation privilege. It may be difficult to reconcile this requirement with the principle that the contents of a statement obtained from a party for the dominant purpose of litigation are *not* discoverable. However, it is not impossible.

36 It helps to remember that a party may be examined for discovery; however, absent a court order, a witness may not. While there is no property in a witness and, therefore, nothing preventing an opposing party from obtaining a statement from a witness outside of the formal discovery process, there is also no obligation on a witness to cooperate. In a case where witnesses may be aligned with one side of a dispute - for example, where they are employees of a party - they may well refuse to provide such information to an opposing party. The rule articulated in *Dionisopoulos*, therefore, overcomes the litigation privilege that protects the contents of a statement obtained from a witness where there may be "no reasonable alternative form of evidence," to borrow the words of Ducharme J. in *Kennedy*.

37 I return now to the undertaking given in this case. The plaintiff does not rely on this undertaking to demonstrate any waiver of privilege over the statement. Nonetheless, the fulfillment of the undertaking brings into question the issue of precisely how much prejudice was caused by the initial inadvertent disclosure of the statement, as opposed to the fulfillment of the undertaking.

38 In answer to the undertaking, counsel for the defendant advised that the statement is "consistent" with Breault's discovery evidence, with one exception, namely that Breault elected to draw an inference in the statement as to where the plaintiff fell, whereas he was not prepared to do so during the examination. Plaintiff's counsel alleges in his affidavit that there is, in fact, an inconsistency between the statement and the witness' discovery evidence. He alleges that Breault testified that the plaintiff fell in an area that was sanded and salted, whereas he told the adjuster that the area in which she fell was not.

39 The problem is that plaintiff's counsel is only able to make this argument because of the advantage he took of the inadvertent disclosure of the statement, and not because of the fulfillment of the undertaking. It is only because he had the statement that plaintiff's counsel is in a position to dispute the interpretation given by counsel for Algonquin. For that reason, I find that the fulfillment of the undertaking has not nullified the prejudice caused by the inadvertent disclosure of the statement.

40 In my view, Wallbridge has failed to rebut the presumption of prejudice that arises from the inadvertent disclosure of the statement. Moreover, the evidence in this case discloses actual prejudice. The statement was used for the purposes of cross-examining the witness at his examination for discovery. It has also formed part of the plaintiff's litigation strategy inasmuch as it was referred to in the textual portion of the plaintiff's pre-trial conference memorandum and a copy of the statement was appended to it.

(5) The Stage of the Litigation

41 A trial date has been set in this case for November of this year. If the plaintiff is required to retain new counsel, that date is at risk. However, it must be borne in mind that counsel for Algonquin had originally scheduled this motion for October 21, 2013, before the matter was set down for trial by the plaintiff, who must be taken to have known of the potential that new counsel might be necessary.

(6) Steps Taken to Avoid the Effect of the Breach of the Privilege

42 The plaintiff has introduced no evidence in this motion concerning the degree to which the prejudicial effect of the production has been contained. There is no evidence in the affidavit of plaintiff's counsel identifying the extent to which the document was disseminated or relied upon by other members of his firm or what steps have been taken to prevent the further dissemination and use of it. The only information provided by him in this respect is that his firm has not kept any copies of the privileged documents.

43 In the presence of evidence as to the significant degree to which plaintiff's counsel has already utilized the privileged document, and absent evidence that the prejudicial effect of inadvertent disclosure of the privileged document has been contained, there can be no alternative but to remove the Wallbridge firm from the record, in my view.

Conclusion

44 Leave to bring the plaintiff's motion is denied. Algonquin's motion is granted. However, the information *advertently* provided by counsel for Algonquin must also be reflected in the scope of any order made regarding the information inadvertently disclosed. Therefore, an order shall issue as follows:

(1) The documents listed as documents number 1 and 2 of Schedule "B" to the affidavit of documents of 123627 Canada Inc. are hereby declared to be subject to litigation privilege;

(2) Wallbridge, Wallbridge shall be removed as the lawyers of record for the plaintiff;

(3) Wallbridge, Wallbridge shall destroy all copies of the privileged documents, whether hard copy or electronic copy and shall retrieve the same from any other persons to whom they have provided copies of the said documents and destroy the same forthwith;

(4) Wallbridge, Wallbridge shall destroy forthwith any and all work product which may have been generated in any way related to the information contained in the privileged documents, except to the extent that the information has been advertently disclosed by counsel for 123627 Canada Inc.;

(5) Wallbridge, Wallbridge and the plaintiff are hereby enjoined from discussing with anyone else the contents of the privileged documents or in any fashion communicating the contents of those documents to others, except to the extent that they have been advertently disclosed by counsel for 123627 Canada Inc.;

(6) Wallbridge, Wallbridge and the plaintiff are hereby enjoined from making any use of the privileged documents or any information contained or derived from the said documents in the trial of this action or in any proceeding related to this action, except to the extent that they have been advertently disclosed by counsel for 123627 Canada Inc.;

(7) The transcript of the examination for discovery of Anthony Breault, held on the 17th day of October, 2012 shall be amended by expunging question 429, commencing from the words, "MR. DENTON: O.K. 'Cause I'm just looking at the transcript..." to the end of that question; and

(8) Wallbridge, Wallbridge shall confirm in writing to this court that the steps required above have been undertaken by them.

45 If the parties are unable to agree on the issue of costs, written submissions may be made with respect that issue as follows:

(1) Algonquin shall have 30 days from the date of the release of these reasons to deliver written submissions, restricted to five pages, excluding attachments;

(2) Wallbridge, Wallbridge shall have 20 days following receipt of Algonquin's submissions within which to do likewise; and

(3) Algonquin shall have 10 days following receipt of Wallbridge, Wallbridge's submissions within which to deliver any reply.

Application granted; leave denied.

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

Court File No: CV-14-10518-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1511419 ONTARIO INC., FORMERLY KNOWN AS THE CASH STORE FINANCIAL SERVICES INC., 1545688 ALBERTA INC., FORMERLY KNOWN AS THE CASH STORE INC., 986301 ALBERTA INC., FORMERLY KNOWN AS TCS CASH STORE INC., 1152919 ALBERTA INC., FORMERLY KNOWN AS INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANTS

(Amended ASC Privilege Protocol)

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