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COURT FILE NUMBER	2301-16114
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
	AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF MANTLE MATERIALS GROUP, LTD.
DOCUMENT	BOOK OF AUTHORITIES
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**GOWLING WLG (CANADA) LLP** Suite 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Telephone: 403-298-1938 / 403-298-1018 Fax: 403-263-9193 Email: tom.cumming@gowlingwlg.com / stephen.kroeger@gowlingwlg.com File No.: A171561 **Attention: Tom Cumming / Sam Gabor / Stephen Kroeger**

APPLICATION BEFORE THE HONOURABLE ACJ D.B. NIXON
DECEMBER 18, 2023 AT 2:00 PM ON THE CALGARY COMMERCIAL LIST
VIA WEBEX

TABLE OF AUTHORITIES

Tab	Authority
1.	*Companies Creditors Arrangement Act,* R.S.C., 1985, c. C-36.
2.	*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10.
3.	2019 Annual Review of Insolvency Law - *In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs* - Luc Morin and Arad Mojtehdi.
4.	*Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5.
5.	*Manitok Energy Inc (Re)*, 2022 ABCA 117.
6.	*British Columbia (Workers' Compensation Board) v Figliola,* 2011 SCC 52.
7.	*Toronto (City) v C.U.P.E., Local 79,* 2003 SCC 63.
8.	*R. v. Wilson,* [1983] 2 SCR 594.
9.	*Re Mantle Materials Group, Ltd,* 2023 ABKB 48.
10.	*Otso Gold Corp. (Re)*, 2021 BCSC 2531.
11.	*Rules of Court*, Alta Reg 124/2010, Part 6 Division 4.
12.	*Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.
13.	*Sherman Estate v Donovan*, 2021 SCC 25.
14.	*Walter Energy Canada Holdings, Inc.,* (16, August, 2016), BC Sup Ct, No.S-1510120 (Order (Claims Process Orders))

TAB 1

R.S.C. 1985, c. C-36, s. 11

s 11. General power of court

Currency

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.

Amendment History

1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

Currency

Federal English Statutes reflect amendments current to October 26, 2023

Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

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TAB 2

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, [2020] 1 S.C.R. 521, 1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

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

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

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Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.3 Arrangements
    XIX.3.c Miscellaneous

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Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing terms of proposed financing, supervising judge found it met criteria set out by courts — Finally, supervising judge imposed super-priority charge on debtor's assets in favour of lender — Secured creditor appealed supervising judge's order — Court of Appeal allowed appeal, finding that exercise of judge's discretion was not founded in law nor on proper treatment of facts — Debtor and lender, supported by monitor, appealed to Supreme Court of Canada — Appeal allowed — By seeking authorization to vote on second version of its own plan, secured creditor was attempting to circumvent creditor democracy CCAA protects — By doing so, secured creditor acted contrary to expectation that parties act with due diligence in insolvency proceeding and was properly barred from voting on second plan — Supervising judge considered proposed financing to be fair and reasonable and correctly determined that it was not plan of arrangement — Therefore, supervising judge's order should be reinstated.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers

Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement et a demandé l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur — Après que son premier plan d'arrangement ait été rejeté, la créancière garantie a soumis un deuxième plan et a demandé l'autorisation de voter sur ce plan — Juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie agissait dans un but illégitime — Après en avoir examiné les modalités, le juge surveillant a conclu que le financement proposé respectait le critère établi par les tribunaux — Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés d'une charge super-prioritaire en faveur du prêteur — Créancière garantie a interjeté appel de l'ordonnance du juge surveillant — Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits — Débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — En cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la créancière garantie tentait de contourner la démocratie entre les créanciers que défend la LACC — Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité et a été à juste titre empêchée de voter sur le nouveau plan — Juge surveillant a estimé que le financement proposé était juste et raisonnable et a eu raison de conclure que le financement ne constituait pas un plan d'arrangement — Par conséquent, l'ordonnance du juge surveillant devrait être rétablie.

The debtor manufactured, distributed, installed, and serviced electronic casino gaming machines. The debtor sought financing from a secured creditor, the debt being secured in part by a share pledge agreement. Over the following years, the debtor lost significant amounts of money, and the secured creditor continued to extend credit. Eventually, the debtor sought protection under the Companies' Creditors Arrangement Act (CCAA). In its petition, the debtor alleged that its liquidity issues were the result of the secured creditor taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions in order to deplete the corporation's equity value with a view to owning the debtor's business and, ultimately, selling it. The debtor's petition succeeded, and an initial order was issued. The debtor then entered into an asset purchase agreement with the secured creditor whereby the secured creditor would obtain all of the debtor's assets in exchange for extinguishing almost the entirety of its secured claim against the debtor. The agreement would also permit the debtor to retain claims for damages against the creditor arising from its alleged involvement in the debtor's financial difficulties. The asset purchase agreement was approved by the supervising judge. The debtor brought an application seeking authorization of a proposed third-party litigation funding agreement (LFA) and the placement of a super-priority charge in favour of the lender. The secured creditor submitted a plan of arrangement along with an application seeking the authorization to vote with the unsecured creditors.

The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances, given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect

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of success, the supervising judge declined to submit it to a creditors' vote. The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of the lender. The secured creditor appealed the supervising judge's order.

The Court of Appeal allowed the appeal, finding that the exercise of the judge's discretion was not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention was justified. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): Section 11 of the CCAA empowers a judge to make any order that the judge considers appropriate in the circumstances. A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. One such constraint arises from s. 11 of the CCAA, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the CCAA. Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's CCAA proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan.

Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context. While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. It was apparent that the supervising judge was focused on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait

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que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

Le juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie ne devrait pas être autorisée à voter sur son propre plan puisqu'elle agissait dans un but illégitime. Il a fait remarquer que le premier plan de la créancière garantie avait été rejeté et que cette tentative de voter sur le nouveau plan était une tentative de contourner le résultat du premier vote. Dans les circonstances, étant donné que la conduite de la créancière garantie était contraire à l'opportunité, à la bonne foi et à la diligence requises, lui permettre de voter serait à la fois injuste et déraisonnable. Comme le nouveau plan n'avait aucune possibilité raisonnable de recevoir l'aval des créanciers, le juge surveillant a refusé de le soumettre au vote des créanciers. Le juge surveillant a décidé qu'il n'était pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agissait pas d'un plan d'arrangement. Après en avoir examiné les modalités, le juge surveillant a conclu que l'AFL respectait le critère d'approbation applicable en matière de financement d'un litige par un tiers établi par les tribunaux. Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés de la charge liée au financement du litige en faveur du prêteur. La créancière garantie a interjeté appel de l'ordonnance du juge surveillant.

La Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il était justifié d'intervenir en appel. En particulier, la Cour d'appel a relevé deux erreurs. D'une part, la Cour d'appel a conclu que le juge surveillant a commis une erreur en concluant que la créancière garantie a agi dans un but illégitime en demandant l'autorisation de voter sur son plan. La Cour d'appel s'appuyait grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. D'autre part, la Cour d'appel a conclu que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'était pas lié aux opérations commerciales de la débitrice. À la lumière de ce qu'elle percevait comme une erreur, la Cour d'appel a substitué son opinion selon laquelle l'AFL était un plan d'arrangement et que pour cette raison, il aurait dû être soumis au vote des créanciers. La débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable. Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple, un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer le pouvoir d'empêcher le créancier de voter. En l'espèce, le juge surveillant n'a commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher la créancière garantie de voter sur son plan. Le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à la débitrice et a fait remarquer que, en cherchant à obtenir

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l'autorisation de voter sur la deuxième version de son propre plan, la première ayant été rejetée, la créancière garantie tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la LACC. Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité. Ainsi, la créancière garantie a été à juste titre empêchée de voter sur le nouveau plan.

Le financement temporaire est un outil souple qui peut revêtir différentes formes, et le financement d'un litige par un tiers peut constituer l'une de ces formes. Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le mieux placé pour répondre. En l'espèce, il n'y avait aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs, le juge surveillant a estimé que l'AFL était juste et raisonnable. Bien que le juge surveillant n'ait pas examiné à fond chacun des facteurs énoncés à l'art. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, cela ne constituait pas une erreur en soi. Il était manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Le juge surveillant a eu raison de conclure que l'AFL ne constituait pas un plan d'arrangement puisqu'il ne proposait aucune transaction visant les droits des créanciers. La charge super-prioritaire qu'il a accordée au prêteur ne convertissait pas l'AFL en plan d'arrangement en subordonnant les droits des créanciers. Par conséquent, il n'a pas commis d'erreur dans l'exercice de sa discrétion, aucune intervention n'était justifiée et l'ordonnance du juge surveillant devrait être rétablie.

Table of Authorities

Cases considered by *Wagner C.J.C., Moldaver J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513 (Ont. C.A.) — referred to

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140 (S.C.C.) — referred to

Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) (2018), 2018 QCCS 1040, 2018 CarswellQue 1923 (C.S. Que.) — referred to

BA Energy Inc., Re (2010), 2010 ABQB 507, 2010 CarswellAlta 1598, 70 C.B.R. (5th) 24 (Alta. Q.B.) — referred to

Blackburn Developments Ltd., Re (2011), 2011 BCSC 1671, 2011 CarswellBC 3291, 27 B.C.L.R. (5th) 199 (B.C. S.C.) — referred to

Boutiques San Francisco inc., Re (2003), 2003 CarswellQue 13882 (C.S. Que.) — referred to

Bridging Finance Inc. v. Béton Brunet 2001 inc. (2017), 2017 CarswellQue 328, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.) — referred to

Canada Trustco Mortgage Co. v. R. (2005), 2005 SCC 54, 2005 CarswellNat 3212, 2005 CarswellNat 3213, (sub nom. *Canada Trustco Mortgage Co. v. Canada)* 2005 D.T.C. 5523 (Eng.), (sub nom. *Hypothèques Trustco Canada v. Canada)* 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, (sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.)* 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601 (S.C.C.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

Caterpillar Financial Services Ltd. v. 360networks Corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 61 B.C.L.R. (4th) 334, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 258 B.C.A.C. 187, 434 W.A.C. 187 (B.C. C.A.) — referred to

Crystallex International Corp., Re (2012), 2012 ONSC 2125, 2012 CarswellOnt 4577, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

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Crystallex International Corp., Re (2012), 2012 ONCA 404, 2012 CarswellOnt 7329, 91 C.B.R. (5th) 207, 293 O.A.C. 102, 4 B.L.R. (5th) 1 (Ont. C.A.) — considered

Dugal v. Manulife Financial Corp. (2011), 2011 ONSC 1785, 2011 CarswellOnt 1889, 105 O.R. (3d) 364, 18 C.P.C. (7th) 105 (Ont. S.C.J.) — referred to

Edgewater Casino Inc., Re (2009), 2009 BCCA 40, 2009 CarswellBC 213, 51 C.B.R. (5th) 1, 265 B.C.A.C. 274, 446 W.A.C. 274, (sub nom. *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.)* 308 D.L.R. (4th) 339 (B.C. C.A.) — followed

Ernst & Young Inc. v. Essar Global Fund Limited (2017), 2017 ONCA 1014, 2017 CarswellOnt 20162, 54 C.B.R. (6th) 173, 139 O.R. (3d) 1, 420 D.L.R. (4th) 23, 76 B.L.R. (5th) 171 (Ont. C.A.) — referred to

Fracmaster Ltd., Re (1999), 1999 CarswellAlta 461, 245 A.R. 102, 11 C.B.R. (4th) 204, 1999 ABQB 379 (Alta. Q.B.) — referred to

Grant Forest Products Inc. v. Toronto-Dominion Bank (2015), 2015 ONCA 570, 2015 CarswellOnt 11970, 26 C.B.R. (6th) 218, 20 C.C.P.B. (2nd) 161, 387 D.L.R. (4th) 426, 9 E.T.R. (4th) 205, 2015 C.E.B. & P.G.R. 8139 (headnote only), 337 O.A.C. 237, 26 C.C.E.L. (4th) 176, 4 P.P.S.A.C. (4th) 358 (Ont. C.A.) — referred to

HSBC Bank Canada v. Bear Mountain Master Partnership (2010), 2010 BCSC 1563, 2010 CarswellBC 2962, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]) — referred to

Hayes v. Saint John (City) (2016), 2016 NBBR 125, 2016 NBQB 125, 2016 CarswellNB 253, 2016 CarswellNB 254 (N.B. Q.B.) — referred to

Houle v. St. Jude Medical Inc. (2017), 2017 ONSC 5129, 2017 CarswellOnt 13215, 9 C.P.C. (8th) 321 (Ont. S.C.J.) — referred to

Houle v. St. Jude Medical Inc. (2018), 2018 ONSC 6352, 2018 CarswellOnt 17713, 429 D.L.R. (4th) 739, 29 C.P.C. (8th) 409 (Ont. Div. Ct.) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — referred to

Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — referred to

Langtry v. Dumoulin (1885), 7 O.R. 644 (Ont. Div. Ct.) — referred to

Laserworks Computer Services Inc., Re (1998), 1998 CarswellNS 38, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 165 N.S.R. (2d) 297, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 495 A.P.R. 297, 6 C.B.R. (4th) 69, 37 B.L.R. (2d) 226, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Marcotte c. Banque de Montréal (2015), 2015 QCCS 1915, 2015 CarswellQue 4055 (C.S. Que.) — referred to

McIntyre Estate v. Ontario (Attorney General) (2002), 2002 CarswellOnt 2880, 23 C.P.C. (5th) 59, 218 D.L.R. (4th) 193, 61 O.R. (3d) 257, 164 O.A.C. 37 (Ont. C.A.) — referred to

Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp. (2013), 2013 ONSC 4974, 2013 CarswellOnt 11197, 117 O.R. (3d) 150, 55 C.P.C. (7th) 437, 6 C.C.P.B. (2nd) 82 (Ont. S.C.J.) — referred to

New Skeena Forest Products Inc., Re (2005), 2005 BCCA 192, 2005 CarswellBC 705, 7 M.P.L.R. (4th) 153, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247 (B.C. C.A.) — referred to

Nortel Networks Corp., Re (2015), 2015 ONCA 681, 2015 CarswellOnt 15461, 391 D.L.R. (4th) 283, 127 O.R. (3d) 641, 340 O.A.C. 234, 32 C.B.R. (6th) 21 (Ont. C.A.) — referred to

North American Tungsten Corp. v. Global Tungsten and Powders Corp. (2015), 2015 BCCA 390, 2015 CarswellBC 2629, 76 C.P.C. (7th) 1, 377 B.C.A.C. 6, 648 W.A.C. 6, 32 C.B.R. (6th) 175 (B.C. C.A.) — referred to

Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150 (S.C.C.) — referred to

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Pole Lite ltée c. Banque Nationale du Canada (2006), 2006 CarswellQue 3438, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.) — referred to

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — referred to

Schenk v. Valeant Pharmaceuticals International Inc. (2015), 2015 ONSC 3215, 2015 CarswellOnt 8651, 74 C.P.C. (7th) 332 (Ont. S.C.J.) — referred to

Stanway v. Wyeth Canada Inc. (2013), 2013 BCSC 1585, 2013 CarswellBC 2630, 41 C.P.C. (7th) 209, [2014] 3 W.W.R. 808, 56 B.C.L.R. (5th) 192 (B.C. S.C.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — followed

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 11 P.P.S.A.C. (4th) 11 (Ont. C.A.) — referred to

1078385 Ontario Ltd., Re (2004), 2004 CarswellOnt 8034, 16 C.B.R. (5th) 152, (sub nom. *1078385 Ontario Ltd. (Receivership), Re)* 206 O.A.C. 17 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 4.2 [en. 2019, c. 29, s. 133] — referred to

s. 43(7) — referred to

s. 50(1) — referred to

s. 54(3) — considered

s. 108(3) — referred to

s. 187(9) — considered

Champerty, Act respecting, R.S.O. 1897, c. 327

Generally — referred to

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

Generally — referred to

s. 2(1) "debtor company" — referred to

s. 3(1) — referred to

s. 4 — referred to

s. 5 — referred to

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s. 6 — referred to

s. 6(1) — considered

s. 11 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(2) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(a) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(b) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(c) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(d) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(e) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(f) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(g) [en. 2007, c. 36, s. 65] — considered

s. 11.2(5) [en. 2005, c. 47, s. 128] — considered

s. 11.7 [en. 1997, c. 12, s. 124] — referred to

s. 11.8 [en. 1997, c. 12, s. 124] — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 22(1) — referred to

s. 22(2) — referred to

s. 22(3) — considered

s. 23(1)(d) — referred to

s. 23(1)(i) — referred to

ss. 23-25 — referred to

s. 36 — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

s. 6(1) — referred to

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

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

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

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

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

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

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible,

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those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party's failure to act diligently).

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

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

53 A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426 (Ont. C.A.), at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.), at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338 (B.C. C.A.), at para. 20).

54 This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Edgewater Casino Inc., Re*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (B.C. C.A.) ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

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

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

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

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

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

57 Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into

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classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at §149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.), at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

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

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

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

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

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

61 While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at §33, *Red Cross*; *1078385 Ontario Ltd., Re* (2004), 206 O.A.C. 17 (Ont. C.A.)). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 59; see also *Third Eye Capital Corporation*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

62 Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a

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defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

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

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

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

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

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

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

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

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

68 Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

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

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

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

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

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

74 Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283 (Ont. C.A.), at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks Computer Services Inc.* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

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

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation .... <u>If the *CCAA* is to be interpreted in a purposive way, the</u> <u>courts must be able to recognize when people have conflicting interests and</u> <u>are working actively against the goals of the statute</u>.
>
> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

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TAB 3

2019 ANNREVINSOLV 14

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14 — In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs

In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s

Luc Morin and Arad Mojtahedi [*]

I. — INTRODUCTION

> *"A Jedi uses the Force for knowledge and defence, never for attack."*
>
> *- Master Yoda - The Empire Strikes Back*

The title of this article was not intended to echo the upcoming final chapter of the most recent Star Wars trilogy. In fact, we came up with the title before *The Rise of Skywalker* was announced. But for some reason, we could not help but to think that this was a sign from the force. After all, the very nature of the ethereal powers of a monitor appointed under the *Companies' Creditors Arrangement Act* [1] (*CCAA* or the "Act"), were akin to those bestowed upon any Jedi knight: guardian of the peace guided by selfless morality.

Monitor's powers have been described as being supervisory in nature and its role as being those of a fiduciary towards all stakeholders of an insolvent corporation. A *CCAA* monitor is not the agent of any particular category of stakeholders, let alone a secured creditor. It serves to be the eyes and ears of the court, to monitor the restructuring process of the insolvent corporation and account for all major operations and sometimes missteps, as the case may be, and report same to the court and the overall body of stakeholders. It must maintain an over the crowd attitude aimed at ensuring that the restructuring process is being conducted in accordance with the canonical code of conduct set forth in the *CCAA*, at the behest of a variety of stakeholders.

The roots of the monastic role of the monitor stem from the importance of the ultimate objective of the *CCAA*, which is to favour the restructuring of a struggling business and limit the terrible consequences of a corporate insolvency on its stakeholders. The *CCAA* does not provide for a scheme of distribution, which is the case under the *Bankruptcy and Insolvency Act* [2] (*BIA*). It seems that failure to restructure was never an option contemplated under the *CCAA*'s purview, the legislator leaving this to be dealt with by the *BIA*.

The *CCAA* was historically aimed at *facilitating* a compromise between creditors and an insolvent corporation. *CCAA*'s historical objective is in the very title of the Act. That said, not all insolvent corporations can or should be saved, and to the extent that efforts are made to restructure their business, courts have justifiably concluded that the *CCAA*'s objective would not be thwarted by facilitating the liquidation of the insolvent corporation's assets, property and undertakings. After all, in most cases, such a liquidation would take the form of a transfer of assets allowing for the business of the insolvent corporation to continue, albeit under a new entity or structure. Comfort could be taken in the end result that enables the restructuring of a business, even if it means that this business would have to thrive under a new master and/or a different structure.

It is in this context that one must analyze the recent trend allowing for the *CCAA* process to be initiated by secured creditors while granting extended powers to the *CCAA* monitor akin to those of a *BIA* receiver. To the extent that management of an insolvent corporation fails or neglects to address the restructuring needs of the business, courts have allowed a *CCAA* process to

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be initiated at the request of a secured creditor. Similarly, in the event that management is conflicted, notably with its intention to sponsor or be associated with a bid within a sale and investment solicitation process ("SISP") conducted in the context of a *CCAA* process, courts have allowed the monitor to extend its role, to overstep the supervisory nature of its duties and play an active role in the management of the business while having direct powers over the assets, property and undertakings of an insolvent corporation.

That said, the driving factor in allowing a secured creditor to take control over a typically debtor-driven *CCAA* process and for the monitor to have extended powers is that management of the insolvent corporation is either neglecting/failing to abide by its fiduciary duties or that management was simply not in a position to exercise same in an objective manner. It must be demonstrated that management is acting, be it actively or passively, in a manner that is detrimental not only to the secured creditors' interest but also to all other stakeholders of the corporation, and that the extended powers granted to the monitor at the request of the secured creditor is for the purpose of restructuring the business of the insolvent corporation.

This raises a number of questions. What if the secured creditor has simply lost confidence in the management and wants to appoint a professional to overview an orderly liquidation of the corporation's business, assets, property and undertakings? Can it rely on the *CCAA* to initiate a restructuring process? Is it still management's game? What would be the difference with a *BIA* receivership? Should the monitor be considered an agent of the secured creditor?

All of these questions merit attention. First, the Supreme Court of Canada in *Lemare Lake*[3] appropriately warned insolvency practitioners that the insolvency legislation's purpose may not be set aside lightly. Second, even if from a practical standpoint, a *CCAA* monitor and a *BIA* receiver are actually the same professional, a licensed trustee, the reality is that the role and nature of the duties associated with each of these appointments have historically been very different, and to some extent plainly incompatible. The old saying of "same professional, different hat" might be too simplistic and inappropriate when it comes to separating the *BIA* receiver from the *CCAA* monitor.

This article proposes a review of case law and authorities on the competing roles of a *CCAA* monitor and a *BIA* receiver, with a special focus on the circumstances giving rise to the creditor-driven *CCAA* processes providing for extended powers being granted to a *CCAA* monitor. We argue that the *CCAA*'s historical objective is in line with limiting the monitor's powers, and only extending the same when absolutely necessary. *CCAA* monitor should remain neutral and exercise supervisory powers over the restructuring process, driven by the debtor, unless evidence demonstrating that its management is failing or neglecting to exercise its fiduciary duties appropriately.

The *CCAA* is a debtor-driven process, the secured creditor-driven process being the *BIA* receivership. The line between these two processes should not be blurred by the overarching practicalities that has come to define our Canadian Insolvency practice.

May the force be with you, dear readers.

II. — HISTORICAL PURPOSE AND OBJECTIVES OF THE *CCAA*: PRESERVATION OF GOING CONCERN

The *CCAA* was drafted with little consultation by the Conservative government of RB Bennett at the height of the Great Depression in 1933.[4] It was introduced via Bill 77 by Charles H Cahan, MP, who then stated that the economic circumstances of the time required the government to adopt a law that would allow for compromises between a debtor and its creditors without wholly destroying the company and forcing the wasteful sale of its assets:

> Mr. Speaker, at the present time any company in Canada, whether it be organized under the laws of the Dominion of Canada or under the laws of any of the provinces of Canada, which becomes bankrupt or insolvent is thereby brought under either the Bankruptcy Act or the Winding-up Act. **These acts provide for the liquidation of the company under a trustee in bankruptcy in the one case and under a liquidator in the other, and the almost inevitable result is that the organization of the company is entirely disrupted, its good-will depreciated and ultimately lost, and the balance of the assets sold by the trustees or the liquidator for whatever they will bring.** There is no mode or method under our laws whereby the creditors of a company may be brought

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> into court and permitted by amicable agreement between themselves to arrange for a settlement or compromise of the debts of the company in such a way as to permit the company effectively to continue its business by its reorganization. [...]
>
> At the present time some legal method of making arrangements and compromises between creditors and companies is perhaps more necessary because of the prevailing commercial and industrial depression, and it was thought by the government that we should adopt some method whereby **compromises might be carried into effect under the supervision of the courts without utterly destroying the company or its organization, without loss of good-will and without forcing the improvident sale of its assets**. [5]
>
> [Emphasis added.]

In the Senate, the Right Honourable Arthur Meighen (Conservative) similarly stated that the *CCAA* allows for cooperation and compromises for the greater good, notably by preserving the interests of employees and security holders:

> Honourable senators, the purpose of this Bill is to enable companies which otherwise would be confronted with bankruptcy to arrange compromises by means of conferences among their various classes of security holders. [...] The depression has brought almost innumerable companies to the pass where some such arrangement is necessary in the interest of the company itself, in the interest of its employees -- because the bankruptcy of the company would throw the employees on the street -- and in the interest of the security holders, who may decide that it is much better to make some sacrifice than run the risk of losing all in the general debacle of bankruptcy. [...] As it is, the best result can be attained only by the passage by our legislatures of such co-operative measures as will enable civil rights, and companies within their purview, to be interfered with for the general advantage. [6]

The Act, at merely 20 provisions long and without a preamble or a clear policy statement, was barely debated in the Parliament and was quickly passed into law without objection. [7] Yet, it was soon beset by constitutional controversy, as for the very first time a federal law could bind secured creditors' rights, an area which was then believed to be within the exclusive power of the provincial legislatures. [8]

The reluctance of practitioners at the time to use the *CCAA* or the *Farmers' Creditors Arrangement Act* [9] prompted the Bennett government to refer them to the Supreme Court of Canada in 1934 and 1936, respectively. [10] The Supreme Court held that both laws were *intra vires* of the Parliament of Canada. In essence, the Supreme Court ruled that pursuant to s 91(21) of the *Constitution* [11] the *CCAA* is valid so long as it concerns arrangements between an insolvent debtor and its creditors.

From 1950 onwards the *CCAA* fell out of favour, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds, and by 1970 it was considered a dead letter law. It took another wave of economic recessions to revive the use of the Act in the 1980s and 1990s.

As a consequence of its ability to grant a broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization, the *CCAA* rose to become the functional equivalent of the American Chapter 11 restructuring. That characterization has since influenced its judicial interpretation. [12] Ever since, the courts have significantly widened the scope of the Act. As noted by one author in this Review, "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." [13]

To this day, and after multiple amendments, the *CCAA* lacks an express purpose clause. Nonetheless, the courts, culminating in the Supreme Court's decision of *Century Services*, have time and again held that the Act has first and foremost a remedial purpose, geared at preserving the value of a company as a going concern:

> [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**

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> **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, practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company. [...]
>
> [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.
>
> [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. 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. 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.** [14]
>
> [References omitted -- Emphasis added.]

In furthering this remedial objective, the *CCAA* provides the supervising judge with wide discretion, which must be exercised with care. As mentioned by the Supreme Court, the court must be cognizant of the interests of *all* stakeholders, which often extend beyond those of the debtor and creditors:

> [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.
>
> [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. [...] **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.** [15]
>
> [References omitted -- Emphasis added.]

Courts and practitioners alike have had a natural tendency to resort to a comparative analysis between the *BIA* and the *CCAA* in trying to justify the objective, purpose and identity of each of those two major pieces of the Canadian insolvency legislation.

In the spirit of such a comparative analysis, one cannot disregard that, as opposed to the *BIA*, the *CCAA* does *not* provide for a scheme of distribution. Despite clear recommendations made by the *Standing Senate Committee on Banking, Trade and Commerce* in this regard, leading to the 2009 amendments to the *BIA* and *CCAA*, [16] the legislator chose not to incorporate a scheme of distribution amongst different stakeholders of a company restructuring its affairs under the *CCAA*. This gives further weight to the consideration given by the legislator to the historical objective of the *CCAA*: to restructure an insolvent

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corporation's business by preserving the continuation of its going concern, thus avoiding, or at least narrowing the negative consequences attached to the pure liquidation of its assets, property and undertakings.

Increasingly the lines between liquidation and restructuring are blurred. [17] This pattern is further intensified by the increasing popularity of liquidating *CCAA*s.

Historically, liquidation was effected via *BIA* receiverships, bankruptcies, or a combination of both. Although such liquidation efforts could result in the continuation of the debtor's business for a time through a receiver or trustee in bankruptcy acting *in lieu* of the management, typically the liquidation conducted under the *BIA* would result in a piecemeal sale of the insolvent corporation's assets, property and undertakings. [18]

Generally speaking, for their fullest implementation, *BIA* processes are more rule-driven and require less discretion than the *CCAA*. The purpose of the *BIA* consists in bringing consistency to the administration and liquidation of bankrupt estates and, if possible, in facilitating restructuring under a proposal. [19] The *BIA* offers two alternatives to the remedial path of the proposal, a debtor-driven restructuring process similar in its objective to what the *CCAA* is:

- <u>The Bankruptcy Regime</u>: A pure liquidation process conducted under the helm of a trustee in bankruptcy having full control over the assets, property and undertakings of the insolvent debtor. Bankruptcy is triggered either voluntary, by a general assignment executed by the debtor's management in favour of the creditors, or forced upon by a creditor through an application for a bankruptcy order. Bankruptcy is used in order to shut down an insolvent debtor's business, liquidate its assets and distribute any proceeds to creditors in accordance with a statutory scheme of distribution. Once effective, management has no longer any powers over the assets, property and undertakings of the insolvent corporation; and

- <u>Receivership</u>: The other alternative made available under the *BIA* is the appointment of a receiver pursuant to section 243 of the *BIA*. The appointment of a receiver is reserved to secured creditors only, who must convince the court that it is "just and convenient" to appoint a licensed trustee to exercise control over the assets, property and undertakings of an insolvent corporation. What circumstances qualify as being "just and convenient" under section 243 of the *BIA* has been the subject of a significant body of case law and is beyond the purview of this article. For the purpose hereto, we will limit ourselves to saying that the appointment of a receiver under section 243 of the *BIA* usually requires a demonstration to the court that the main secured creditor has lost confidence in the management of the insolvent corporation and that there is a tangible risk that management is unjustifiably putting at risk the secured creditor's position.

To the extent that we accept that transferring the assets of an insolvent corporation required to continue the going concern of its business qualifies as restructuring, a *BIA* receivership may serve to effectively restructure a business, similar to what would be achieved under a liquidating *CCAA*. However, as previously mentioned, the major difference is that a *BIA* receivership is a secured creditor-driven process whereas the *CCAA* remains a debtor-driven process.

Receivership was crafted to allow for a secured creditor in specific circumstances to take over the management of an insolvent corporation through the appointment of a licensed trustee that it selects. The role and more specifically the beneficiary of the receiver's duties have yet to be defined by case law and authorities. Since the receiver is chosen/retained by the secured creditor, wherein the *BIA* does not provide for continuing reporting obligations to the court, let alone the debtor's management (as is the case under the *CCAA* regime), one could argue that the receiver appointed under section 243 of the *BIA* is acting as an agent of the secured creditor that has petitioned for its appointment. Undoubtedly, receivership is a secured creditor-driven process which cannot be initiated by the insolvent corporation.

In contrast, in a liquidating *CCAA* the insolvent corporation typically remains in possession and control of its assets, property and business. The monitor, who has continuous reporting obligations to the court and the stakeholders, exerts no specific power over the assets, property and business of the insolvent corporation. Management remains at the forefront of all restructuring efforts. A *CCAA* process is therefore a typically debtor-driven one. We will see from recent case law that courts have allowed

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secured creditors to resort to the *CCAA* to effectuate liquidating *CCAA*s, but always with a view to preserve the going concern operations of the business operated by the insolvent corporation.

Yet this remains the exception to the rule. Even in its liquidating form, a *CCAA* process is to be driven by the insolvent corporation's management. From recent cases, we have identified four scenarios in which courts have allowed a secured creditor to rely on the *CCAA* while extending the powers of the monitor, rather than proceeding with a receivership under section 243 of the *BIA*:

- **Resignation of the management body**: when all directors and officers resign after a *CCAA* process has been initiated, courts have allowed for the continuation of the *CCAA* process by extending powers to the monitor akin to those of a receiver. Commonly referred to as a "super monitor," these powers allow the monitor to have direct powers over the assets, property and undertakings of the insolvent corporation and, for all intents and purposes, to act *in lieu* of management;

- **Unfitness of management to conduct *CCAA* proceedings**: this is trickier because it requires a demonstration that management is not fit to conduct a formal *CCAA* proceedings without causing harm to the stakeholders, akin to a fiduciary duties violation;

- **Management has no plan or their plan is doomed to fail**: this requires an analysis from the Court that management has no germ of a plan or that any potential restructuring plan is doomed to fail; and

- **Management being conflicted**: in the event that management is contemplating sponsoring or being associated with a bid in respect to the company's assets, property and undertaking in the context of a SISP.

The remainder of this article will analyze a recent rise in case law of *CCAA* liquidation processes, largely influenced or driven by creditors. The article will then aim to synthesize when and under what conditions such processes are appropriate.

III. — INCREASING USE OF LIQUIDATING *CCAA*s: A PATH FOR SECURED CREDITORS

Since the 2009 amendments to the *CCAA*, courts across Canada have held that the purpose of the *CCAA* may be met where a restructuring is effected by way of a liquidation. This has facilitated the transfer of assets, property, undertakings of an insolvent corporation related to a business to allow for its going concern operations to be preserved, even if it means that such operations ought to be continued under a new entity and/or structure. Such restructurings have become commonly referred to as liquidating *CCAA*s.

The concept of liquidating *CCAA*s was broadly approached in the recommendations made in the Senate Report, leading to the adoption of section 36 as part of the 2009 *CCAA* amendments:

> During a reorganization, an insolvent company may benefit from an opportunity to sell part of its business in order to generate capital, avoid further diminution in value and/or focus better on the financially solvent aspects of its operations. In some situations, a win-win situation would be created: insolvent companies would be able to increase their chance of survival as they gain capital and focus on their solvent operations, and creditors would avoid further reductions in the value of their claims. These sales would occur outside the normal course of the organization's business. **In some cases, the best situation for stakeholders might involve the sale of the business in its entirety**. [...]
>
> The Committee also believes that there are circumstances where **all stakeholders would benefit from an opportunity for an insolvent company involved in reorganization to divest itself of all or part of its assets**, whether to raise capital, eliminate further loss for creditors or focus on the solvent operations of the business.[20]
>
> [Emphasis added.]

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However, even in the most extreme cases where the debtor is "doomed to fail," the process must have a prospect for the continuation of, among other things, employment for employees, supply relationships between suppliers and trade creditors, and the credit relationships between the debtor business and creditors.[21] It cannot be a liquidation driven process without the prospect of a going concern being preserved and continued. The proper forum for such pure liquidation process being the *BIA*.

Virginia Torrie has argued that the *CCAA* is historically a lender remedy, refuting conventional views of the Act being a debtor remedy inspired by concern for stakeholder groups, such as labour.[22] Accordingly, "if the Act was intended as a lender remedy (rather than to facilitate going-concern reorganizations) there may be less reason to object to liquidating *CCAA*s on normative or policy grounds."[23]

However, and as also noted by Dr Torrie, we respectfully submit that this perspective, taken to its extreme, risks undermining the rule of law. It is generally true that insolvency laws were enacted and amended in response to the needs of major creditors. Dr Torrie notes, regarding the *CCAA*, that the "impetus for this federal statute was to help prevent large bondholders [financial institutions] from failing, by allowing them to restructure debtors (read: restructure losses) and so return these companies (read: investments) to profitability."[24] Having said this, courts should not ignore the very purpose of the *CCAA*, as repeatedly and explicitly mentioned in Parliament and confirmed by the Supreme Court (as well as implicitly acknowledged in the aforementioned quote), which is to preserve the value of the debtor companies as a going concern for the benefit of all of its stakeholders, including employees, and when possible avoid the economic consequences of a liquidation for the society at large by "returning these companies to profitability".

It is a long-standing concern that judicial discretion in insolvency matters is bound by little in terms of procedure, *stare decisis*, or appellate oversight. As noted by David Bish, while this flexibility is of great value and is a cornerstone of Canadian restructuring law, the integrity of our system (as well as the equally important appearance of integrity), depends on the practitioners and the courts following meaningful checks and balances based on the purpose of the Act, unless we (the society at large) are comfortable embracing unfettered judicial discretion:

> If the beauty of our system lies in the unrestrained freedom of judges to drive a desirable commercial outcome, we should embrace it. If, however, we are not comfortable embracing unrestrained judicial discretion, at the very least we ought to find a way to credibly define and impose meaningful limits on that discretion. Either way -- whether transparent unfettered discretion or meaningful checks and balances -- the integrity of our system depends on it.[25]

As previously noted, the *CCAA* does not benefit from a scheme of distribution for debtors' assets and was not subject to parliamentary scrutiny and debate in this regard. Arguably, a *CCAA* court is granted wide discretion because our society expects this discretion to be used in a manner that will benefit the society at large. Given the impossibility to codify and rank the innumerable considerations that could come into play when a court is tasked with maintaining the operations of an insolvent debtor as a going concern, the great flexibility provided by the *CCAA* is entirely warranted in such circumstances.

Large creditors, who often enjoy secured status, are often best placed to evaluate the benefits and consequences of debtors' risk-taking. To allow them to call the shots by freely choosing between *CCAA* liquidation, receivership or bankruptcy will lead to inappropriate risk-taking and could, in theory, aggravate the often discussed inequity between stakeholders by syphoning value from stakeholders at large to their sole advantage.

We will see from the case law that the courts' position has evolved significantly after the 2009 *CCAA* amendments, which led, *inter alia*, to the enactment of section 36.

1. — The Case Law Prior to the 2009 *CCAA* Amendments

Prior to the enactment of the 2009 amendments to the *CCAA*, appellate decisions remained wary of using *CCAA* to effect liquidations.

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In 1990, the British Columbia Court of Appeal explicitly stated that the purpose of the *CCAA* is to facilitate the making of a compromise or arrangement in order to allow the debtor to continue business:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue business. [...] When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. [26]

Similarly, in 1991, Justice LeBel, then of the Quebec Court of Appeal, wrote that what distinguishes the *CCAA* from the *BIA* is that *CCAA* is aimed at helping the debtor company avoid bankruptcy or emerge from its insolvency:

> More so than its liquidation, this *Act* is aimed at the reorganization of the company and its protection during the intermediate period, during which the approval and the realization of the reorganization plan is sought. Conversely, the *Bankruptcy Act* (RSC 1985, chapter B-3) seeks the orderly liquidation of the property of the bankrupt and the distribution of the proceeds of such liquidation among the creditors, in the order of priority defined by the Act. **The *Arrangements Act* responds to a distinct need and purpose, at least according to the interpretation generally given to it since its adoption. We want to either to prevent bankruptcy, or to help the company emerge from this situation.** [27]
>
> [Our translation -- Emphasis added.]

In 1998, Justice Blair of the Ontario Court of Justice held that liquidation orders can be granted under the *CCAA* "if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation." [28]

In 1999, the Alberta Court of Appeal unanimously sided with Justice Paperny of the Alberta Court of Queen's Bench, who ruled in the first instance that the *CCAA* should not be used when the sale of the assets generates liquidity that is insufficient to be distributed to unsecured creditors and where no plan of arrangement was put to the creditors. [29] The Court of Appeal went a step further, by calling into question the use of the *CCAA* to liquidate the assets of insolvent companies:

> [w]hile we do not intend to limit the flexibility of the CCAA, we are concerned about its use to liquidate assets of insolvent companies which are not part of a plan or compromise among creditors and shareholders, resulting in some continuation of a company as a going concern. **Generally, such liquidations are inconsistent with the intent of the CCAA and should not be carried out under its protective umbrella.** [30]
>
> [Emphasis added.]

The notion that *CCAA* process could end in liquidation in exceptional situations was also recognized by the Quebec Superior Court in 2004. In *Papiers Gaspésia*, [31] Papiers Gaspésia Inc. ("Gaspésia") was a limited partnership created by the Fonds de Solidarité FTQ, SGF Rexfor and Tembec. The Chandler paper mill was subject, since 2001, to redevelopment and modernization, and Gaspésia was seeking potential partners to refinance this project.

On 30 January 2004, Gaspésia obtained an order declaring that the company was subject to the provisions of the *CCAA*, that Ernst & Young Inc was appointed as monitor, and also offered certain relief to offer Gaspésia time to prepare a plan of compromise or arrangement. During the process the three directors of Gaspésia resigned, which event changed the role of the monitor. The monitor requested that it be allowed to act in the place of the board of directors for this matter and to represent Gaspésia in litigation before court.

The Superior Court of Quebec held that it is not excluded that proceedings under the *CCAA* can result in the liquidation of the debtor's assets, but this is only possible in exceptional and appropriate circumstances. [32]

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In 2008, the British Columbia Court of Appeal appeared, in *obiter*, to cast further doubt about the possibility of liquidation conducted under the *CCAA* in *Cliffs Over Maple Bay*:

> I need not decide the point on this appeal, but I query whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.[33]

This line of reasoning was picked up by the Supreme Court in the above discussed 2010 decision of *Century Services*,[34] marking the last time the purpose of the Act was directly addressed on appeal.[35] Noteworthy, the *Century Services* decision was rendered on facts that occurred prior to the 2009 *CCAA* amendments and the enactment of section 36.

2. — The Case Law Since the 2009 *CCAA* Amendments

Comprehensive changes made to the *CCAA* in 2009 brought with them the addition of section 36, which now permits the sale of assets outside the ordinary course of business subject to court authorization. As nothing in this section requires the filing of a plan or a continuing entity as a condition for court's approval, courts across the nation ruled that the court has the power to allow the sale of substantially all of the debtors' assets in the absence of a plan. Following the 2009 amendments, the trend towards liquidating *CCAA*s picked up.

In 2010, Alberta's Court of Queen's Bench granted an initial order under the *CCAA* with respect to Fairmont Resort Properties Ltd, Lake Okanagan Resort Vacation (2001) Ltd, Lake Okanagan Resort (2001) Ltd and LL Developments Ltd (the "Fairmont Group").[36] The Fairmont Group's operations were able to continue under *CCAA* protection from the date of the initial by taking certain key measures.

FRPL Finance Ltd ("FRPL") and a related corporation were major secured creditors of the Fairmont Group, and supported the *CCAA* proceedings. FRPL had issued bonds to many individual investors in order to provide capital to the group. The capital raised by FRPL, which amounted to approximately $41.5 million, was loaned to the Fairmont Group between 2005 and 2007.

On 15 April 2010, in proceedings linked to the *CCAA* process, FRPL applied for a final order in respect of a plan of arrangement pursuant to section 193 of the *Business Corporations Act*, RSA 2000, c B-9. At a bondholder meeting, FRPL proposed a reorganization plan which included the options available for recovery of FRPL's loans to the Fairmont Group.

Under the proposed plan, bondholders would exchange their bonds for trust units in the newly established Northwynd REIT. Northwynd REIT would acquire the Fairmont Group loans and security interest through a wholly-owned limited partnership, Northwynd Limited Partnership ("Northwynd"). The limited partnership would then take steps under the security to acquire ownership and control of the Fairmont Group assets.

Roughly 60 to 63% of total bondholders were represented at the meeting and a vast majority of voting bondholders voted in favour of the proposed arrangement. Justice Romaine found that the statutory procedures had been met, the application had been put forward in good faith, the arrangement had a valid business purpose and, on the basis of the strong bondholder support and the lack of opposition, the plan was fair and reasonable.

After being assigned the secured debt amounting to approximately $52 million, Northwynd applied for an order under the *CCAA* proceedings approving the acceptance by Fairmont Group of its offer to purchase all of the assets of the Fairmont Group in consideration for the discharge of the DIP financing and the crediting of $43.8 million against the secured debt owed to FRPL.

The sale of the assets under the *CCAA* proceedings was allowed. Citing *Anvil*,[37] Justice Romaine stated that "Farley, J. noted that the *CCAA* may be used to effect a sale or liquidation of a company in appropriate circumstances, most particularly where to do so would 'maximize the value of the stakeholders' pie'".[38] Justice Romaine also noted that, while the alternative of

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selling the assets through a receivership would be commercially equivalent, approval pursuant to the *CCAA* proceedings would be more efficient. [39]

Northwynd's plan proposed two options to bondholders: either continue under the existing *CCAA* proceedings or through the termination of the proceedings and the appointment of a receiver. Northwynd submitted that the most time-efficient and cost-effective method of proceeding was the sale pursuant to the *CCAA* proceedings. On the contrary, monitor Ernst & Young submitted that "the potential of achieving a sale price for the secured assets greater than the offer was very low and that the costs of a sales process would be significant," thus concluding that neither alternative would improve the return of creditors.

Based on precedents, Justice Romaine affirmed that a sale of substantially all of the assets of a debtor company is permitted in a *CCAA* proceeding pursuant to s 36 of the *CCAA* if certain statutory criteria are met and, in accordance with previous authority, if such a sale is consistent with the purpose and policy of the *CCAA* and in the best interests of creditors generally. [40]

Justice Romaine went on to cite Brenner CJ in *Pope & Talbot*:

> The decision by courts to extend the use of the CCAA to a liquidation is based on a recognition of the wider interests at stake in such a proceeding. **The purpose of a liquidating CCAA where the assets are to be sold on an operating basis, is to fairly have regard for the interests of not only the creditors and the stakeholders of the petitioner, but also the interests of employees, suppliers and others who will be affected by a complete shutdown. So provided that the objective is to dispose of assets on an operating basis, then even though it is a liquidation**, the exercise is not designed to effect a recovery for solely the secured lenders as submitted by Canfor. Clearly a continuation of operation will benefit a wider constituency. [41]
>
> [Emphasis added.]

Justice Romaine, pitting *BIA* receivership against *CCAA* as proper forum to effectuate a liquidation, relied heavily on the fact that the liquidating *CCAA* was aimed at preserving the going concern business of the insolvent corporation, thus finding comfort in the historical objective of the *CCAA*: to preserve going concern business while avoiding the dire impact on a variety of stakeholders resulting from the shutdown and pure liquidation of same.

Noting that s 36 of the *CCAA* does not require that a plan be filed as a condition of court approval or there be a continuing entity after liquidation, Justice Romaine concluded that it made both practical and commercial sense to allow the sale process to take place under the existing *CCAA* proceedings. In the alternative, a bankruptcy would have been less efficient and would have jeopardized the going concern business, to the detriment of all stakeholders. [42]

More recently in *Bloom Lake* (2017), [43] Justice Hamilton, then at the Superior Court of Quebec, recognized once more that liquidating *CCAA* can serve a legitimate purpose but justly ruled that creditors should have analogous entitlements in liquidations under the *CCAA* and the *BIA*. Otherwise, the debtor or creditors can choose liquidation under the *CCAA* in order to avoid their responsibilities under the *BIA*. [44]

In *Bloom Lake*, the debtors, Wabush Iron Co Limited and Wabush Resources lnc and the *mises-en-cause* Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited (collectively the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the *CCAA*. The Wabush CCAA Parties had two pension plans for their employees governed by the *Newfoundland and Labrador Pension Benefit Act* ("NLPBA"). Therein, the monitor filed a motion seeking direction with respect to the priority's order of the debts. The purpose of this decision was to determine the preliminary question of whether the Court must defer to the Supreme Court of Newfoundland and Labrador for the application of certain rules concerning trusts and security interests under the NLPBA. Furthermore, the Court responded to the key issue of whether "the *CCAA* proceedings themselves, or some event within the *CCAA* proceedings, constitute a liquidation, assignment or bankruptcy" of the employer.

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Recognizing its jurisdiction to interpret the provisions of NLPBA in the context of this *CCAA* proceeding, the Court concluded that this was a liquidating *CCAA* at the outset, which triggered the application of the deemed trusts under the federal *Pension Benefits Standards Act* and the NLPBA. To this end, the Court noted:

> • Liquidation regime under Part XVIII of the *Canada Business Corporations Act* is only available to corporations that are solvent. [45]
>
> • The debtor in a *CCAA* proceeding remains in possession of its assets and this is sufficient to meet the requirement of the estate in liquidation, assignment or bankruptcy. [46]
>
> • The employer should not be allowed to avoid the priority of the deemed trust by choosing to liquidate under *CCAA* rather than the *BIA*. [47]

> [160] It is clear in the present matter that the Wabush CCAA parties have liquidated their assets. With the sale of the Wabush mine in June, the Wabush CCAA parties have now sold all or substantially all of their assets. However, they did not institute formal liquidation proceedings. **They proceeded instead under the CCAA with what has come to be known as a "liquidating CCAA" [...]** [48]
>
> [174] **The Court notes that there is nothing in any way pejorative about qualifying the CCAA as a liquidating CCAA. That is a legitimate and increasingly frequent use of CCAA proceedings. However, a liquidating CCAA should be more analogous to a BIA proceeding. One of the consequences is that the deemed trusts should be triggered.** [49]
>
> [References omitted -- Emphasis added.]

In 2014, Justice Dumas in *Lac Mégantic* insisted that the question as to whether liquidations are allowed under the *CCAA* remains an open one, as there has been no recent decision from a court of appeal on this matter in Canada, but concluded that liquidating *CCAA*s were possible, on a case-by-case basis. [50]

More recently in 2019, the same Justice Dumas rendered a decision in the matter of *MPECO Construction* [51] denying a motion seeking extension of the stay of proceedings on the basis that there were no prospect for a plan of arrangement. Justice Dumas did not cast a doubt on the possibility for an insolvent corporation to liquidate its assets under a *CCAA* process. Rather, Justice Dumas questioned whether the *CCAA* was the proper forum to allow for such a liquidation exercise to be conducted to the extent that there were no reasonable grounds suggesting that such a liquidation would lead to the preservation of the going concern and that the proceeds of such an exercise could lead to the filing of a plan of arrangement being submitted to the creditors:

> [34] The objective of the CCAA is embedded in its title.
>
> [35] The objective of the Act is to allow for a struggling company to present a plan of arrangement to its creditors with the ultimate objective to restructure its business. (...)
>
> [44] That a liquidation of a debtor's assets is possible prior to the filing of a plan of arrangement is not in litigation. Courts will exercise their discretion in this regard on a case-by-case basis. **That said, one must keep in mind that the debtor's request and acts under the CCAA should lead to the filing of a plan of arrangement submitted to the creditors**.
>
> [45] Proceedings under the CCAA ought not to be used to short circuit realization process under the Bankruptcy and Insolvency Act. [52]

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[Our translation -- Emphasis added.]

Liquidating *CCAA* is no longer a trend. It is justly considered an efficient tool to facilitate the transfer of businesses on a going concern basis. So long as the liquidation conducted under a *CCAA* process will enhance the prospect of maintaining the going concern of the business(es) operated by an insolvent corporation, even if this going concern may ultimately be continued under a new entity/structure, courts are now relying on section 36 of the *CCAA* to allow such liquidation to proceed. [53] This is in line with the historical purpose and objective of the *CCAA*.

Prime evidence of the fact that liquidating *CCAA*s are now well accepted are Sears Canada Inc's *CCAA* proceedings, which began in 2017. In a span of less than two years, the monitor was capable of monetizing substantially all of the tangible assets of these entities while temporarily maintaining certain operations and allowing for the transfer of certain businesses formally operated under the banner of Sears, hence maximizing chances that going concern preservation is maintained. [54]

On a final note, it is interesting to note that Parliament's recent amendments to the *CCAA* via Bill C-97, which will add section 11.001 to the *CCAA* requiring initial orders to "be limited to relief that is reasonably necessary *for the continued operations of the debtor company in the ordinary course of business during that period*" [emphasis added]. [55] Buried deep within the government's budget, it remains to be seen how this new provision will be interpreted by the courts and if it will serve to reaffirm the primary and historical purpose of the *CCAA*, which is to enable a restructuring of an insolvent corporation's business for the benefit of a variety of stakeholders.

Following the guidance from the above decisions, in recent years liquidations under the *CCAA* have been effected when the maintenance of the debtors' business as a going concern was shown to increase the value for stakeholders and when the complexity of the matter justified the flexibility provided under the *CCAA*, always with a view to preserve the going concern of a business operated by an insolvent corporation. With the objective of avoiding or limiting the negative impact on a variety of stakeholders that the alternative of a liquidation on a piecemeal basis would bring. This is in line with the historical objective and very purpose of the *CCAA*.

That said, who should be at the helm of a liquidating *CCAA*? In coming to accept liquidating *CCAA*s, Courts have insisted on the fact that it was for the benefit of all stakeholders of the insolvent corporation, in some cases plainly shrugging at the idea of a liquidating *CCAA*s that would serve no more than to reimburse the secured creditor. Can the debtor-driven *CCAA* process be continued or even initiated by a secured creditor? This is the question that next section seeks to address.

IV. — CREDITOR-DRIVEN *CCAA*s AND ENHANCED POWERS FOR THE MONITOR

1. — Initiating the *CCAA* Process

The *CCAA* does not prohibit creditors from bringing forth an application for an initial order. Nonetheless, given that the process is typically driven by the debtor, the courts have historically been reluctant to grant an application made by creditors. While multiple cases in recent years have allowed the creditors to initiate the *CCAA* process and enhanced the role of the monitor, *CCAA* remains first and foremost debtor-driven.

In *Crystallex* (2012), a decision which was unanimously confirmed by the Ontario Court of Appeal, Justice Newbould held that when the court is presented with competing *CCAA* applications from the debtor and from a creditor, the key consideration is which application offers the best chance for a fair balancing of the interests of all stakeholders. [56] A creditor should not be able to prevent a debtor company from undertaking restructuring efforts under the *CCAA* to maximize recovery for the benefit of all stakeholders unless it can be shown that the company's efforts are "doomed to fail."

Crystallex is a mining company whose principal focus was the exploration and development of gold projects in Venezuela. In 2004, the company issued nearly $100 million worth of senior unsecured notes due on 23 December 2011. On 22 December 2011, one day prior to the maturity of the notes, Crystallex and the noteholders filed competing *CCAA* applications. The noteholders' application contemplated that all existing common shares would be cancelled, an equity offering would be

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undertaken, and if, or to the extent, the equity proceeds were insufficient to pay out the noteholders, the notes would be converted to equity.

Crystallex concurrently sought authority to file a plan of compromise and arrangement, the authority to continue to pursue an arbitration in Venezuela, and the authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise financing. Crystallex had already received an unsolicited offer of financing from Tenor Capital Management. In coming to the aforementioned conclusions, Justice Newbould wrote:

> [20] The CCAA is intended to provide a structured environment for negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company **realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA**. The benefit to a debtor company could, depending upon the circumstances, mean a benefit to its shareholders.
>
> [21] It is clear that the CCAA serves the interests of a broad constituency of investors, creditors and employees. Thus it is appropriate at this stage to consider the interests of the shareholders of Crystallex. [...]
>
> [26] In my view, what the Noteholders propose at this stage, including the cancellation of the common shares held by the shareholders of Crystallex, is not a fair balancing of the interests of all stakeholders. **To say that they will never vote in favour of any plan unless they are paid out immediately or the current management and board of Crystallex is removed is not reflective of the purposes of the CCAA at this stage.**
>
> [27] The application of Crystallex and the terms of its Initial Order are not prejudicial to the legitimate interests of the Noteholders. The Noteholders are entitled to submit any proposal they wish to the board of Crystallex who will be obliged to consider it along with any other proposals obtained. **The board of directors of Crystallex has a continuing duty to balance stakeholder interests. If the Crystallex board does not choose their proposal, the Noteholders would have their remedies, if appropriate, in the CCAA process. What the Noteholders have sought in their CCAA application is to effectively prevent Crystallex from taking steps under the CCAA to attempt to obtain a resolution for all stakeholders without the benefit of seeing what Crystallex may be able to achieve. It cannot be said at this stage that the efforts of Crystallex are doomed to fail.** [57]
>
> [References omitted -- Emphasis added.]

In *Semi-Tech* (1999), [58] the debtor ("Semi-Tech") was a holding company and its common shares traded on the Toronto Stock Exchange. Enterprise Capital Management Inc ("Enterprise"), on its own behalf and on behalf of funds managed by it, and with the support of other holders of senior secured notes, applied for an initial order under the *CCAA* and sought orders in order to restrain the management and control of Semi-Tech in its operations by, for example, prohibiting Semi-Tech to make any payments to senior officers and directors and altering any material contracts. Agreeing that the Enterprise would be able to establish that Semi-Tech had breached certain covenants under the trust indenture, Justice Ground noted that due to lack of appropriate notices, there had been no event of default as defined in the agreement. [59]

After mentioning the remedial purpose of the *CCAA*, and noting that an application by creditors is a rarity, Justice Ground held that in the absence of any indication that Enterprise proposes a plan which would consist of some compromise or arrangement between Semi-Tech and its creditors and permit the continued operation of Semi-Tech and its subsidiaries, it would be inappropriate to make any order pursuant to the *CCAA*:

> [23] It is usual on initial applications under the *CCAA* for the applicant to submit to the Court at least a general outline of the type of plan of compromise and arrangement between the company and its creditors proposed by the applicant. **The application now before this Court is somewhat of a rarity in that the application is brought by an applicant representing a group of creditors and not by the company itself as is the usual case**. Enterprise

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> has submitted that it is not in a position to submit an outline of a plan to the Court in that it lacks sufficient information and has been unable to obtain such information from Semi-Tech. Enterprise points out that, in the usual case, the application is brought by the company, the company has all the necessary information at hand and has usually had the assistance of a firm which is the proposed monitor and which has worked with the company in preparing an outline of a plan. [...]
>
> [25] **In the absence of any indication that Enterprise proposes a plan which would consist of some compromise or arrangement between Semi-Tech and its creditors and permit the continued operation of Semi-Tech and its subsidiaries in some restructured form, it appears to me that it would be inappropriate to make any order pursuant to the *CCAA*. If the Noteholders intend simply to liquidate the assets of Semi-Tech** and distribute the proceeds, it would appear that **they could do so** by proceeding under the Trust Indenture on the basis of the alleged covenant defaults, accelerating the maturity date of the Notes, realizing on their security in the shares of Singer and recovering any balance due on the Notes **by the appointment of a receiver or otherwise**. [60]
>
> [Emphasis added.]

In *SM Group* (2018), [61] the Court was presented with competing *CCAA* applications from management and secured creditors. The Quebec Superior Court chose to side with the secured creditors given the evidence submitted in respect to the loss of confidence in the management of the insolvent corporation. Serious allegations about the influence of the former president, and current main shareholder, caught in fraudulent criminal accusations and recent payments made to his benefit by management prior to the filing led the Court to side with the secured creditors' arguments that the appointment of a chief restructuring officer with powers akin to a *BIA* receiver was the best alternative to preserve going concern value of the SM Group, for the benefit of all stakeholders, including employees.

In *Taxelco* (2019), [62] the Court was presented with a motion seeking the issuance of an initial order by the main secured creditor, the National Bank of Canada, with a view to implement a SISP and preserve the going concern value of the business, while granting extended powers to the monitor, acting in lieu of management. The Court accepted the Bank's arguments, which focused on the fact that management had refused to file a motion to issue an initial order and that the directors and officers had announced their intention to resign.

In *Sural* (2019), [63] the Court was presented with a motion seeking the issuance of an initial order while granting enhanced powers to the monitor, akin to those of a *BIA* receiver, to allow for the company to implement a SISP on 28 June 2019. The motion was presented by the company and supported by its management.

In *Miniso*, the most recent decision rendered on the subject, the secured creditors of the debtor companies initiated the proceedings under the *CCAA*, and an initial order was granted on 12 July 2019. The British Columbia Supreme Court confirmed the standing for a creditor to commence *CCAA* proceedings while granting enhanced powers to the monitor: [64]

> The **commencement of *CCAA* proceedings is a proper exercise of creditors' rights** where, ideally, the *CCAA* will preserve the going-concern value of the business and allow it to continue for the benefit of the "whole economic community", including the many stakeholders here. This is intended to allow stakeholders to avoid losses that would be suffered in an enforcement and liquidation scenario. [...]
>
> A&M will have **enhanced powers as Monitor** to manage the Canadian operations and negotiate and implement a transaction, in consultation with the Migu Group ... [65]
>
> [Emphasis added.]

That being said, contrary to *Semi-Tech* and *Crystallex* cases, the *Miniso* case proceeded on an uncontested basis and management of the insolvent debtor company did not oppose the initiation of the *CCAA* process by the secured creditor, who was also providing interim financing to allow the corporation to continue its operations and preserve value for all stakeholders:

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> 52 There is no doubt that the Miniso Group has dictated the course forward, for the most part. The Miniso Group holds first ranking security over all of the Migu Group's assets. **The Miniso Group has determined that a *CCAA* process is the best means to ensure the preservation and sale of the Migu Group's business as a going concern and maintain enterprise value for the benefit of all stakeholders**, including the Miniso Group. In addition, as discussed below, the Miniso Group has agreed to provide interim financing during the course of the restructuring in order to allow that process to unfold.
>
> 53 I have no doubt that the Migu Group has asserted its wishes and wants within the context of the past and ongoing negotiations between the two Groups. **However, the Migu Group now grudgingly accepted its fate and did not oppose the relief sought here**. [66]
>
> [Emphasis added.]

Following the guidance from *Crystallex*, removing *ab initio* the management of an insolvent corporation from the driver seat in a restructuring process under *CCAA* in favour of the secured creditors ought to be considered as an extraordinary measure, and to address serious concerns with respect to the incapacity and/or inability of management to conduct such a process. It requires a demonstration that management has no plan or that such a plan is "doomed to fail," or that management has resigned, is unfit or conflicted to conduct such a process for the benefit of all stakeholders.

To the extent that management can demonstrate that it is focusing its efforts on exploring restructuring paths and that such efforts may reasonably lead to the restructuring of the insolvent corporation's business, preserving the going concern value of the business, for the benefit of all stakeholders, including but not limited to the secured creditors, management should not be stripped of its powers and duties lightly. Besides, we must be mindful that the *CCAA* provides at section 11.5 for the proper mechanism to remove a director that "is unreasonably impairing the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances."

We also find comfort in the reasoning in *Semi-Tech*, which reminds us that the *CCAA* is not to be considered as a mechanism which allows a secured creditor to liquidate the assets, unless it can be demonstrated that the proposed restructuring efforts will lead to the going concern value preservation, referring to the *BIA* receivership for such an operation to be conducted. [67] The objective sought pursuant to the *CCAA* proceedings thus remaining to favour restructuring while preserving going concern value for all stakeholders involved.

2. — Continuing the *CCAA* Process and Enhancing the Role of the Monitor

Courts have also allowed *CCAA* process initiated by the company, under certain circumstances, to be continued by the secured creditors by granting extended powers to the monitor, akin to a *BIA* receiver.

In the matter of *BioAmber*, [68] a Quebec-based company operating a succinic acid production facility in Sarnia (Ontario), the Court issued an initial order for the purpose of, *inter alia*, allowing the company to implement a SISP. When it became obvious that the SISP would not lead to the desired transaction and that management was involved/associated with a potential bidder, the Court at the request of secured creditors, issued an order granting additional powers to the monitor, akin to those of a *BIA* receiver.

In *ILTA Grain*, [69] a British Columbia-based grain producer, filed for protection under the *CCAA* on 7 July 2019. It was the company, and its management, that filed for the issuance of the Initial Order.

In its first report, filed merely eight days after the *CCAA* proceedings commenced, the monitor reported that it had become clear that certain members of the company's management did not support the company's current strategy of undertaking a SISP and pursuing transactions that may lead to the sale of the company's business and assets. [70] The Court, at the request of the company,

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and likely pursuant to a strong suggestion from the secured creditors, issued an order to enhance powers of the monitor, but not to the extent of what would be typical of a *BIA* receiver.

Essentially, to ensure that the secured creditors and the monitor have confidence in the company's management, the order granted the monitor with specific recommendation, providing incremental powers while giving control powers over the receipt and disbursements to the monitor. [71]

While the role of the monitor has been expanded in various files, the Quebec Court of Appeal in *Aquadis* [72] recently brought into question the limits of such expanded role in file driven *de facto* by the creditors. Notably, the Court highlighted that enhancing the powers of the monitor must not interfere with its role and neutrality. In that file, the debtor 9323-7055 Québec inc (formerly Aquadis International Inc, "Aquadis") was a wholesale seller of plumbing fixtures. Aquadis, however, suffered serious financial difficulties when hundreds of defective faucets supplied by it failed, causing significant damage to property owners whose insurers ultimately filed subrogated claims against Aquadis. The value of those claims amounted to nearly $22 million and the monitor estimated the value of potential future claims at an additional $25 million.

According to the monitor's first and second reports, Aquadis significantly reduced its operations in 2014, completely liquidated and ceased operations in 2015. As of the date of the initial order, Aquadis had no realizable assets and the near totality of its liabilities were the litigious claims of the insurers.

To maximize the value of Aquadis' assets, in December 2016, the monitor instituted legal proceedings against the Taiwanese manufacturers and distributor and their insurers. At the same time, the monitor was negotiating with the Canadian distributors and retailers. On 20 June 2018, the supervising judge authorized settlements between the monitor and the Taiwanese distributor and its insurers in the total amount of $7.2 million.

The monitor filed a plan of arrangement on 8 January 2019, and amended the plan at the meeting of the creditors on 25 April 2019. According to the amended plan, the monitor was empowered to institute legal proceedings on behalf of Aquadis' creditors against the other persons involved in the manufacture, distribution or sale of the defective faucets. It was approved by the Superior Court on 4 July 2019, over the objections of the retailers that a plan of arrangement cannot provide for the institution of legal proceedings by the monitor, on behalf of the creditors, against third parties in connection with rights that belong to the creditors and not to the debtor company. [73]

On 20 August 2019, Justice Hamilton of the Quebec Court of Appeal granted the retailer's motions for leave to appeal, noting that the matter at hand goes to the serious issue regarding the role and neutrality of the monitor and the scope of the powers that it can obtain:

> [11] The issue is not frivolous. There are a number of *CCAA* cases where the debtor is a party to significant litigation in which there are a number of third parties who may be solidarily liable with the debtor to its creditors. In those cases, in order to reach a global settlement of all of the litigation relating to the debtor, the plan may allow third parties to contribute to a litigation pool with the debtor for the benefit of the creditors and to obtain a release. <u>However, this case goes one step further and authorizes the Monitor to sue, on behalf of the creditors, third parties who decline to contribute to the litigation pool. There does not appear to be any precedent on this issue</u>.
>
> [12] The issue is crucial to the file because the proceedings by the Monitor against the Canadian distributors and retailers, including the Petitioners, are a key feature of the Amended Plan and the validity of those proceedings goes to the acceptance of the plan by the creditors and the approval of the plan by the judge.
>
> [13] <u>**It is also important to the practice because it goes to the serious issue as to the role and neutrality of the monitor in *CCAA* proceedings and the scope of the powers that can be granted to a monitor**</u>. <u>More specifically, the issue of whether the court can approve a plan that provides for the monitor instituting legal proceedings, on behalf of the creditors, against third parties who do not owe anything to the debtor is a novel</u>

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> issue and is of particular relevance in *CCAA* proceedings used to reach a global settlement of significant litigation involving third party co-defendants.[74]
>
> [References omitted -- Emphasis added.]

3. — Filing of a *CCAA* Plan of Arrangement

More rarely, courts have also allowed secured creditors to directly file a plan of arrangement and have same submitted to other creditors.

In 2001, the Superior Court of Ontario in *Anvil* ruled that a plan submitted by the secured creditors through an interim receiver[75] appointed by them as a result of all directors and officers resigning was fair and reasonable even though it offered nothing to unsecured creditors. In coming to that decision the Court insisted on the fact that the value of the company's assets was insufficient to yield any recovery to unsecured creditors and that it is not unreasonable for a court in such circumstances to sanction a plan which is directed solely at secured creditors.[76]

Anvil Range Mining Corporation ("Anvil") was the owner of a lead and zinc mine in the Yukon Territory. In 1990, Anvil applied for and received protection from its creditors under the *CCAA*. In 1998, Deloitte & Touche Inc had been appointed as the Interim Receiver ("IR") as a result of management resigning.

The hearing dealt with the application by the IR for the sanctioning of a plan of arrangement. The plan dealt with a series of complex priority disputes both within creditor classes and among creditor classes, as well as the allocation of funds in the IR's possession. The plan had been unanimously approved by the three groups of creditors in 2001. The unsecured creditors and the major shareholders objected to the plan because they asserted that the secured debt was lower than claimed and that the value of Anvil's assets was higher than suggested.

Justice Farley approved the plan, noting that it complied with all the statutory requirements and it was also fair and reasonable. It was determined that the IR exercised its judgment in a reasoned, practical and functional way.

The mere fact that the opponents of the plan were advocating an alternative did not imply that the IR had lost its neutrality. In fact, the alternatives proposed were unrealistic. Additionally, the plan was deemed fair because the secured claims were far in excess of the value of the assets.

> [11] While it is recognized that the main thrust of the CCAA is geared at a reorganization of the insolvent company -- or enterprise, even if the company does not survive, the CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at p. 104. **Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.**
>
> [12] The CCAA permits a debtor to propose a compromise or arrangement with its secured creditors. A **Plan proposed solely to secured creditors is not unfair where the insolvent's assets are of insufficient value to yield any recovery to unsecured creditors. It is not unreasonable for a court in such circumstances to sanction a plan which is directly solely at secured creditors.** See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), supra at pp. 513-8; *Re Philip Services Corp.*, [1999] O.J. No. 4232 (Ont. S.C.J. [Commercial List]) at paras. 20-1. That the plan does not include any agreement with a class a creditors does not, by virtue solely of that omission, make it unfair where that class is not being legally affected. Nothing is being imposed upon the unsecureds; none of their rights are being confiscated. See *Re Olympia & York* (1993), *supra* at pp. 508, 517-8. [...]

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> [18] In my view, the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship. [...]
>
> [20] Mr. Aalto referred to *Royal Bank v. Fracmaster Ltd*., [1999] A.J. No. 675 (Alta. C.A.) at para. 16 with respect to the CCAA not being used to provide for a liquidation in a guise of a CCAA reorganization. But see my views above. **In any event, the IR has sought alternative relief allowing it to sell the assets, which sale would be on a commercially equivalent basis as the Plan under the CCAA contemplates. Given that the Plan would operate more efficiently in that respect, I see no reason to provide that this proceed as a sale by the IR**. [77]
>
> [Emphasis added.]

The reasoning of Justice Farley was soon reaffirmed by the Ontario Court of Appeal in *Bob-Lo Island*. [78] On 25 June 2004, an initial order was authorized against the debtor companies and on 22 November 2004, the plan of arrangement under the *CCAA* was sanctioned by the Court. Mr Randy Oram, a shareholder of one of the debtor companies and also an unsecured creditor, requested a leave to appeal of the sanctioned order. His main objection was that "the plan of arrangement is a secured-creditor-led plan that excludes the unsecured creditors from any realistic prospect of recovery, without requiring the secured creditors to go through the formal process of enforcing their security and without exposing the secured assets to the market." [79] Accordingly, the assets of the debtor company were to be disposed and the debtor company would not continue as a going concern.

The Ontario Court of Appeal dismissed the motion for leave to appeal. Concluding that Mr Oram had failed to establish an economic interest in the assets, the Court also noted that while there may be merit to the issue that the plan was contrary to the purposes of *CCAA*, Mr Oram had also failed to demonstrate that there is sufficient merit in that issue to justify granting leave to appeal in the circumstances of this case:

> [27] In this case, Randy Oram submits that there are serious and arguable grounds for suggesting that, by sanctioning Amico's Plan and granting a vesting order to a non-arm's length purchaser, the motion judge erred in the application of the legal principles for determining if a *CCAA* plan is fair and reasonable. In particular, the Randy Oram contends that the plan:
>
> **i)** is contrary to the broad, remedial purpose of the *CCAA*, namely to give debtor companies an opportunity to find a way out of financial difficulties short of other drastic remedies;
>
> **ii)** is a proposal by the secured creditors for the exclusive benefit of the secured creditors, designed to liquidate the property of the debtor companies **without regard to the interests** of the debtor companies, their lien claimants, **unsecured creditors** or shareholders;
>
> **iii)** does not provide for the continued operation of the debtor companies as going concerns;
>
> **iv)** does not provide for the marketing and sale of the property to maximize its value for all of the debtor companies' stakeholders;
>
> **v)** **rather than leaving unsecured creditors as an unaffected class, releases their claims against the property, the debtor companies, Amico, and the purchaser...**
>
> [30] [T]his is not the first time a secured-creditor-led plan, which operates exclusively for the benefit of secured creditors and under which the assets of the debtor company will be disposed of and the debtor company will not continue as a going concern, has received court approval: see *Re Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), aff'd on other grounds [2002] O.J. No. 2606 (C.A.). (See also the discussion of the purposes of the *CCAA* in the cases referred to in *Re Anvil Range Mining Corp., supra* at para. 11 (S.C.J.)).

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> [31] **Moreover, the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement**: *Re Anvil Range Mining Corp., supra* at para. 31 (C.A.).[80]
>
> [Emphasis added.]

Bob-Lo Island and *Anvil*, while cautious in their approach, represented an arguably controversial shift in the evolution of the role of secured creditors under the *CCAA* and the use of the statute as a flexible and advantageous restructuring tool for secured creditors.[81]

V. — CONCLUSION

We can appreciate from the case law that the *CCAA* remains largely a debtor-driven process and that the monitor is to be considered, in the vast majority of cases, as the supervisory agent safeguarding the interest of a variety of stakeholders. This is in line with the historical, and dare we say, societal objective pursued by the legislator in enacting the *CCAA*.

The *CCAA* was enacted to offer an alternative to the liquidation path offered by the *BIA*; to counter the devastating consequences on a variety of stakeholders when a corporation fails and ceases its operations; and to preserve the going concern value of a business for the good of the greater pool of stakeholders. Although we have come to accept "liquidating *CCAA*s," the end result is usually a transfer of the assets required for a business to be continued, albeit under a new structure. Arguably, this is also in line with the *CCAA*'s objective, which is focused on preserving going concern operations of a struggling corporation.

To remove management from the helm of this restructuring process and extend the powers of the monitor accordingly is a measure that courts have cautiously limited to exceptional circumstances. In addition to adducing evidence that the *CCAA* process is likely to preserve going concern value of the business, it must be demonstrated to the court that either (i) management has resigned, leaving no directors and officers in place, (ii) management is unfit to conduct a restructuring process in a manner that would be in the best interest of all stakeholders, (iii) any potential restructuring path available would be doomed to fail, and/or that (iv) management is conflicted, notably because it is participating in the SISP under a *CCAA*.

Under those circumstances, courts have allowed the secured creditors to play a more active role in the restructuring process under a *CCAA*, be it through the appointment of a Chief Restructuring Officer, an interim receiver, or by the enhancement of the monitor's power to equate those of a *BIA* receiver.

As we have stated, the monitor's traditional role was not intended to exceed supervisory powers. This is also consistent with the fact that the monitor does not possess the required skill set to run a business on a long term basis -- management does. This is why we believe that courts have and continue to exercise caution in all such cases in order to ensure that the powers afforded to the monitor are absolutely necessary and justified by specific and special circumstances.

Footnotes

* Luc Morin is a partner in the Corporate Insolvency and Restructuring Group at Norton Rose Fulbright Canada LLP in Montreal and Arad Mojtahedi is an associate in that same group. The authors would like to thank Mareine Gervais Cloutier without whose invaluable help this article would not have been possible.

1 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

2 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

3 *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53, [2015] 3 SCR 419, 2015 CSC 53, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 CBR (6th) 1, 391 DLR (4th) 383, [2016] 1 WWR 423, 477 NR 26, 467 Sask R 1, 651 WAC 1 (SCC) [*Lemare Lake*]. In *Lemare Lake*, the Supreme Court stated that delays to exercise secured rights provided by a provincial statute cannot be disregarded when appointing a receiver. The evidence showed a narrow purpose for s 243 of the *BIA*. It was determined

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that a secured creditor, wishing to enforce its security against farm land, needed to wait 150 days under the provincial law, rather than the ten days imposed by the federal law: "General considerations of promptness and timeliness, no doubt a valid concern in any bankruptcy or receivership process, cannot be used to trump the specific purpose of s 243 and to artificially extend the provision's purpose to create a conflict with provincial legislation": *Lemare Lake* at para 68.

4 *Companies' Creditors Arrangement Act*, SC 1933, c 36.

5 *House of Commons Debates*, 17-4 (20 April 1933) at 4090-4091 (Hon CH Cahan).

6 *Senate Debates*, 17-4 (9 May 1933) at 474 (Rt Hon A Meighen).

7 Virginia Erica Torrie, *Protagonists of company reorganization: A history of Companies' Creditors Arrangement Act (Canada) and the role of large secured creditors* (PhD Thesis, University of Kent Law School, 2015) at 1.

8 *Ibid*.

9 *Farmers' Creditors Arrangement Act*, SC 1934, c 53.

10 *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] SCR 659, [1934] 4 DLR 75, 1934 CarswellNat 1, 16 CBR 1 (SCC); *British Columbia (Attorney General) v Canada (Attorney General)*, [1936] SCR 384, 17 CBR 359, 1936 CarswellNat 1, [1936] 3 DLR 610 (SCC), affirmed [1937] AC 391, [1937] 1 DLR 695, 1937 CarswellNat 1, 18 CBR 217, [1937] 1 WWR 320 (Jud Com of Privy Coun).

11 *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution*].

12 Torrie, *supra* note 7 at 2-3.

13 Richard B Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2005* (Toronto: Carswell 2006) at 481.

14 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, [2010] 3 SCR 379, 12 BCLR (5th) 1, 72 CBR (5th) 170, 326 DLR (4th) 577, [2011] 2 WWR 383, 296 BCAC 1, 2011 DTC 5006 (Eng), [2010] GSTC 186, 2011 GTC 2006 (Eng), 409 NR 201, 503 WAC 1, [2010] SCJ No 60 (SCC) at paras 15-18 [*Century Services*]; see also *Chef Ready Foods Ltd v HongKong Bank of Canada* (1990), 51 BCLR (2d) 84, 1990 CarswellBC 394, 4 CBR (3d) 311, [1991] 2 WWR 136, [1990] BCJ No 2384 (BCCA) at paras 10, 22 [*Hongkong Bank*]: "The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business": *Hongkong Bank* at para 10.

15 *Century Services*, *ibid* at paras 59-60.

16 Senate, Standing Senate Committee on Banking, Trade and Commerce, *Debtors And Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: Hon Richard H Kroft) [Senate Report]: "From the perspective of fairness, the Committee too believes that the same priority rules should govern the distribution of the proceeds of realization of the debtor's assets, regardless of the insolvency legislation under which proceedings are occurring. For this reason, the Committee recommends that: The *Companies' Creditors Arrangement Act* be amended to incorporate the priority rules in the *Bankruptcy and Insolvency Act*" at 153.

17 Janis Sarra, "Reflections on a Decade of Financing Insolvency Restructurings", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013) at 63.

18 For an in-depth comparison of liquidations under the *CCAA* and *BIA*, see Michelle Grant & Tevia R M Jeffries, "Having Jumped Off the Cliffs, When Liquidating Why Choose CCAA over Receivership (or vice versa)?", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2013* (Toronto: Carswell, 2014).

19 Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 9; *Lemare Lake*, *supra* note 3.

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20 Senate Report, *supra* note 16, at 176-177.

21 Bill Kaplan, "Liquidating *CCAA*s: Discretion Gone Awry?", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Carswell, 2009) at 88.

22 Torrie, *supra* note 7 at 313, 315.

23 *Ibid* at 288.

24 *Ibid* at 5.

25 David Bish, "Judicial Discretion in Insolvency Law" (2018) 7 *J Insolvency Inst Canada* 9.

26 *Hongkong Bank*, *supra* note 14 at para 10.

27 *Banque Laurentienne du Canada c Groupe Bovac Ltée*, EYB 1991-63766, 1991 CarswellQue 39, 9 CBR (3d) 248, 44 QAC 19, [1991] RL 593, [1991] JQ No 2509 (CA Que) at para 26.

28 *Re Canadian Red Cross Society* (1998), 5 CBR (4th) 299, 1998 CarswellOnt 3346, 72 OTC 99, [1998] OJ No 3306 (Ont Gen Div [Commercial List]) at para 45, leave to appeal to ONCA refused (1998), 32 CBR (4th) 21, 1998 CarswellOnt 5967, [1998] OJ No 6562 (Ont CA).

29 *Re Fracmaster Ltd*, 1999 ABQB 379, 11 CBR (4th) 204, 1999 CarswellAlta 461, 245 AR 102, [1999] AJ No 566 (Alta QB), affirmed 1999 ABCA 178, 1999 CarswellAlta 539, 244 AR 93, 11 CBR (4th) 230, 209 WAC 93, [1999] AJ No 675 (Alta CA) at paras 40-43.

30 *Royal Bank v Fracmaster Ltd*, 1999 ABCA 178, 1999 CarswellAlta 539, 244 AR 93, 11 CBR (4th) 230, 209 WAC 93, [1999] AJ No 675 (Alta CA) at para 16.

31 *Re Papiers Gaspésia Inc (Faillite)*, 2004 CanLII 41522, 2004 CarswellQue 4113, REJB 2004-80394 (CS Que), leave to appeal refused 2004 CarswellQue 10014, REJB 2004-81503, 9 CBR (5th) 103, 42 CLR (3d) 137, [2004] JQ No 13392 (CA Que) [*Papiers Gaspésia*].

32 *Ibid* at paras 50-54.

33 *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327, 2008 CarswellBC 1758, 83 BCLR (4th) 214, 46 CBR (5th) 7, 296 DLR (4th) 577, [2008] 10 WWR 575, 258 BCAC 187, 434 WAC 187, [2008] BCJ No 1587 (BCCA) at para 32.

34 *Century Services*, *supra* note 14.

35 As noted in *Montreal, Maine & Atlantic City Canada Co. (Arrangement relatif à)*, 2014 QCCS 737, 2014 CarswellQue 1559, EYB 2014-233970 (Que Bktcy) [*Lac Mégantic*].

36 *Re Fairmont Resort Properties Ltd*, 2012 ABQB 39, 532 AR 209 (Alta QB) at para 26 [*Fairmont*].

37 *Re Anvil Range Mining Corp*, 2001 CarswellOnt 1325, [2001] OJ No 1453, 25 CBR (4th) 1 (Ont SCJ [Commercial List]), affirmed on other grounds 2002 CarswellOnt 2254, [2002] OJ No 2606, 34 CBR (4th) 157 (Ont CA), additional reasons 2002 CarswellOnt 3687, 38 CBR (4th) 5, [2002] OJ No 4176 (Ont CA), leave to appeal refused 2003 CarswellOnt 730, 2003 CarswellOnt 731, 310 NR 200 (note), 180 OAC 399 (note) (SCC) [*Anvil*].

38 *Fairmont*, *supra* note 36 at para 17, citing *ibid* at para 11.

39 *Ibid* at para 20.

40 *Ibid* at para 26.

41 *Ibid* at para 22.

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42 *Ibid* at para 30.

43 *Arrangement relatif à Bloom Lake*, 2017 QCCS 4057, 2017 CarswellQue 7483, EYB 2017-284304, 52 CBR (6th) 45, 35 CCPB (2nd) 220 (CS Que), varied 2017 QCCA 1828, 2017 CarswellQue 10159, EYB 2017-287116, 54 CBR (6th) 255, 38 CCPB (2nd) 1 (CA Que), application/notice of appeal 2018 CarswellQue 1574 (SCC) [*Bloom Lake*].

44 *Ibid* at para 164.

45 *Ibid* at para 162.

46 *Ibid* at para 163.

47 *Ibid* at para 164.

48 *Ibid* at para 160.

49 *Ibid* at para 174.

50 *Lac Mégantic*, *supra* note 35 at paras 71, 104: "Bien que le soussigné aurait été porté à privilégier la thèse que la LACC et la LFI sont deux régimes distincts qui s'appliquent à deux types de situations distinctes et qui servent des objectifs distincts, les amendements apportés à la LACC et le cas particulier du présent dossier militent pour la possibilité de permettre la liquidation des actifs sous la LACC" at para 104.

51 *Arrangement de MPECO Construction Inc*, 2019 QCCS 297, 2019 CarswellQue 730, EYB 2019-306949, 67 CBR (6th) 87 (Que Bktcy) [*MPECO Construction*].

52 *Ibid* at paras 34-35, 44-45.

53 *Third Eye Capital Corporation v Ressources Dianor Inc*, 2019 ONCA 508, 2019 CarswellOnt 9683, 70 CBR (6th) 181, 435 DLR (4th) 416, 3 RPR (6th) 175 (Ont CA), additional reasons 2019 ONCA 667, 2019 CarswellOnt 13563 (Ont CA) at para 71.

54 *Re Sears Canada Inc*, Toronto, Ont SCJ [Commercial List] CV-17-11846-00CL.

55 Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on 19 March 2019 and other measures,* 1st Sess, 42nd Parl (assented to 21 June 2019), SC 2019, c 29.

56 *Re Crystallex International Corp*, 2011 ONSC 7701, 2011 CarswellOnt 15034, 89 CBR (5th) 313 (Ont SCJ [Commercial List]) at para 26, affirmed 2012 ONCA 404, 2012 CarswellOnt 7329, 4 BLR (5th) 1, 91 CBR (5th) 207, 293 OAC 102 (Ont CA), additional reasons 2012 ONCA 527, 2012 CarswellOnt 9479 (Ont CA), leave to appeal refused 2012 CarswellOnt 11931, 2012 CarswellOnt 11932, 440 NR 395 (note), 303 OAC 398 (note), [2012] SCCA No. 254 (SCC) [*Crystallex*].

57 *Ibid* at paras 20-21, 26-27.

58 *Enterprise Capital Management Inc v Semi-Tech Corp*, [1999] OJ No 5865, 1999 CarswellOnt 2213, 10 CBR (4th) 133 (Ont SCJ [Commercial List]) [*Semi-Tech*].

59 *Ibid* at para 6.

60 *Ibid* at paras 23, 25.

61 *Re Le Groupe SMI Inc, et al* (24 August 2018), Montreal, Que SC 500-11-055122-184 [*SM Group*].

62 *Re Taxelco Inc, et al* (1 February 2019), Montreal, Que SC 500-11-055956-193 [*Taxelco*].

63 *Re Sural Inc, et al* (11 February 2019), Montreal, Que SC 500-11-056018-191 [*Sural*].

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64 *Miniso International Hong Kong Limited v Migu Investments Inc*, 2019 BCSC 1234, 2019 CarswellBC 2208, 71 CBR (6th) 250 (BCSC) at para 45 [*Miniso*].

65 *Ibid* at paras 47, 102.

66 *Ibid* at paras 52-53.

67 *Semi-Tech, supra* note 58 at para 25.

68 *Re BioAmber Canada Inc, et al* (31 July 2018), Montreal, Que SC 500-11-054564-188 [*BioAmber*].

69 *Re ILTA Grain Inc* (8 July 2019), Vancouver, BC SC S-197582 [*ILTA Grain*].

70 *Ibid* (16 July 2019) (Monitor's First Report).

71 *Ibid* (18 July 2019) (Order Made After Application).

72 *Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)* (4 July 2019), Montreal, Que SC 500-11-049838-150, leave to appeal to QCCA granted (20 August 2019), Montreal, Que CA 500-09-028436-194, 500-09-028474-195, 500-09-028476-190 [*Aquadis*].

73 *Ibid* at paras 11-13.

74 *Ibid* at paras 11-13.

75 *Anvil, supra* note 37: "I would further point out that while secured creditors had the opportunity of filing a Plan, they did not so but rather they agreed amongst themselves that the authorized alternate, the IR, do so" at para 9.

76 *Ibid*.

77 *Ibid* at paras 11,12, 18, 20.

78 *Re 1078385 Ontario Ltd*, [2004] OJ No 6050, 2004 CarswellOnt 8034, 16 CBR (5th) 152, 206 OAC 17 (Ont CA) [*Bob-Lo Island*].

79 *Ibid* at para 3.

80 *Ibid* at paras 27, 30-31, 42.

81 *Caterpillar Financial Services v 360networks corporation et al*, 2007 BCCA 14, 2007 CarswellBC 29, 61 BCLR (4th) 334, 27 CBR (5th) 115, 279 DLR (4th) 701, 28 ETR (3d) 186, 235 BCAC 95, 10 PPSAC (3d) 311, 388 WAC 95, [2007] BCJ No 22 (BCCA) at para 46.

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TAB 4

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

2019 CarswellAlta 141, 2019 CarswellAlta 142, 2019 SCC 5, 2019 CSC 5, [2019] 1 S.C.R. 150, [2019] 1 R.C.S. 150, [2019] 3 W.W.R. 1, [2019] A.W.L.D. 879, [2019] A.W.L.D. 880, [2019] A.W.L.D. 881, [2019] A.W.L.D. 941, [2019] A.W.L.D. 942, [2019] S.C.J. No. 5, 22 C.E.L.R. (4th) 121, 301 A.C.W.S. (3d) 183, 430 D.L.R. (4th) 1, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, 9 P.P.S.A.C. (4th) 293

Orphan Well Association and Alberta Energy Regulator (Appellants) and Grant Thornton Limited and ATB Financial (formerly known as AlbertaTreasury Branches) (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown JJ.

Heard: February 15, 2018
Judgment: January 31, 2019
Docket: 37627

Proceedings: reversing *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171, 2017 CarswellAlta 695, 2017 ABCA 124, Frans Slatter J.A., Frederica Schutz J.A., Sheilah Martin J.A. (Alta. C.A.); affirming *Grant Thornton Ltd. v. Alberta Energy Regulator* (2016), 33 Alta. L.R. (6th) 221, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 2016 CarswellAlta 994, 2016 ABQB 278, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

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Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
  X.7 Unsecured claims
Bankruptcy and insolvency
XIV Administration of estate

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XIV.2 Trustees
XIV.2.e Miscellaneous
Bankruptcy and insolvency
XIV Administration of estate
XIV.3 Trustee's possession of assets
Natural resources
III Oil and gas
III.3 Constitutional issues
III.3.c Miscellaneous
Natural resources
III Oil and gas
III.8 Statutory regulation
III.8.a General principles

Headnote

Bankruptcy and insolvency --- Priorities of claims — Unsecured claims — Priority with respect to secured creditors

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — "Disclaimer" did not empower trustee to simply walk away from "disclaimed" assets when bankrupt estate had been ordered to remedy any environmental condition or damage — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 14.06.

Bankruptcy and insolvency --- Administration of estate — Trustees — Miscellaneous

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Bankruptcy and insolvency --- Administration of estate — Trustee's possession of assets — Miscellaneous

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Natural resources --- Oil and gas — Constitutional issues — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — Under either branch of paramountcy analysis, Alberta legislation authorizing Regulator's use of its disputed powers would be inoperative to extent that use of those powers during bankruptcy altered or reordered priorities established by BIA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.

Natural resources --- Oil and gas — Statutory regulation — General principles

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Faillite et insolvabilité --- Priorité des créances — Réclamations non garanties — Priorité par rapport aux créanciers garantis

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI —

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Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Faillite et insolvabilité --- Administration de l'actif — Syndics — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Faillite et insolvabilité --- Administration de l'actif — Possession de l'actif par le syndic — Divers

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Ressources naturelles --- Pétrole et gaz — Questions d'ordre constitutionnel — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et

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Ressources naturelles --- Pétrole et gaz — Réglementation statutaire — Principes généraux

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.

In order to exploit oil and gas resources in Alberta, a company needs a property interest in the oil or gas, surface rights and a licence issued by the Alberta Energy Regulator. The Regulator administers the licensing scheme and enforces the abandonment and reclamation obligations of the licensees. The Regulator has delegated to the Orphan Wells Association (OWA) the authority to abandon and reclaim "orphans". On application by a creditor, G Ltd. was appointed receiver for R Corp. G Ltd. informed the Regulator that it was taking possession and control only of R Corp.'s 17 most productive wells, three associated facilities and 12 associated pipelines, and that it was not taking possession or control of any of R Corp.'s other licensed assets. The Regulator issued an order under the Oil and Gas Conservation Act (OGCA) and the Pipeline Act (PA) requiring R Corp. to suspend and abandon the renounced assets. The Regulator and the OWA filed an application for a declaration that G Ltd.'s renunciation of the renounced assets was void, an order requiring G Ltd. to comply with the abandonment orders and an order requiring G Ltd. to fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation of all of R Corp.'s licensed properties. G Ltd. brought a cross-application seeking approval to pursue a sales process excluding the renounced assets. A bankruptcy order was issued for R Corp. and G Ltd. was appointed as trustee. G Ltd. sent another letter to the Regulator invoking s. 14.06(4)(a)(ii) of the Bankruptcy and Insolvency Act (BIA) in relation to the renounced assets.

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The chambers judge found an operational conflict between s. 14.06 of the BIA and the definition of "licensee" in the OGCA and the PA, and approved the proposed sale procedure. Appeals by the Regulator and the OWA were dismissed. The majority of the court stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the BIA. Section 14.06 of the BIA did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7). Section 14.06(4) of the BIA did not limit the power of the trustee to renounce properties to those circumstances where it might be exposed to personal liability. In terms of constitutional analysis, the majority concluded that the role of G Ltd. as a "licensee" under the OGCA and the PA was in operational conflict with the provisions of the BIA that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims. The dissenting judge would have allowed the appeal on the basis that there was no conflict between Alberta's environmental legislation and the BIA. The dissenting judge was of the view that s. 14.06 of the BIA did not operate to relieve G Ltd. of R Corp.'s obligations with respect to its licensed assets and that the Regulator was not asserting any provable claims, so the priority scheme in the BIA was not upended. The Regulator and the OWA appealed.

Held: The appeal was allowed.

Per Wagner C.J.C. (Abella, Karakatsanis, Gascon, Brown JJ. concurring): There is no conflict between Alberta's regulatory regime and the BIA requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although G Ltd. remained fully protected from personal liability by federal law, it could not walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4) of the BIA. Section 14.06(4) of the BIA was clear and unambiguous when read on its own. There was no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) of the BIA as encompassing the liability of the bankrupt estate. "Disclaimer" did not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate had been ordered to remedy any environmental condition or damage. The operational conflicts between the BIA and the Alberta legislation alleged by G Ltd. arose from its status as a "licensee" under the OGCA and the PA. In light of the proper interpretation of s. 14.06(4) of the BIA, no operational conflict was caused by the fact that, under Alberta law, G Ltd. as "licensee" remained responsible for abandoning the renounced assets utilizing the remaining assets of the estate. The burden was on G Ltd. to establish the specific purposes of ss. 14.06(2) and 14.06(4) of the BIA if it wished to demonstrate a conflict. Based on the plain wording of the sections and the Hansard evidence, it was evident that the purpose of these provisions was to protect trustees from personal liability in respect of environmental matters affecting the estates they were administering. This purpose was not frustrated by the inclusion of trustees in the definition of "licensee" in the OGCA and the PA.

Under either branch of the paramountcy analysis, the Alberta legislation authorizing the Regulator's use of its disputed powers would be inoperative to the extent that the use of those powers during bankruptcy altered or reordered the priorities established by the BIA. Only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In the test set out in a 2012 Supreme Court case, the court clearly stated that not all environmental obligations enforced by a regulator would be claims provable in bankruptcy. On a proper understanding of the "creditor" step, it was clear that the Regulator acted in the public interest and for the public good and that it was not a creditor of R Corp. No fairness concerns were raised by disregarding the Regulator's concession. The end-of-life obligations binding on G Ltd. were not claims provable in the R Corp. bankruptcy, so they did not conflict with the general priority scheme in the BIA. Requiring R Corp. to pay for abandonment before distributing value to creditors did not disrupt the priority scheme of the BIA. In crafting the priority scheme set out in the BIA, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation. Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Per Côté J. (dissenting) (Moldaver J. concurring): The appeal should be dismissed. Two aspects of Alberta's regulatory regime conflict with the BIA. First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition was that insolvency professionals were subject to the same obligations and liabilities as R Corp. itself, including the obligation to comply with the abandonment orders and the risk of personal liability for failing to do so. G Ltd. validly disclaimed the non-producing assets and the result was that it was no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime did not recognize these disclaimers as lawful, there was an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should be held inoperable to the extent that it did not recognize the legal effect of G Ltd.'s disclaimers. Section 14.06 of the BIA, when read as a whole, indicated that s. 14.06(4) did more than merely protect trustees from personal

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liability. Parliament did not make the disclaimer power in s. 14.06(4) of the BIA conditional on the availability of the Crown's super priority. There was an operational conflict to the extent that Alberta's statutory regime held receivers and trustees liable as "licensees" in relation to disclaimed assets.

Second, the Regulator has required that G Ltd. satisfy R Corp.'s environmental liabilities ahead of the estate's other debts, which contravened the BIA's priority scheme. Because the abandonment orders were "claims provable in bankruptcy" under the three-part test outlined in the 2012 Supreme Court of Canada case, the Regulator could not assert those claims outside of the bankruptcy process. To do so would frustrate an essential purpose of the BIA of distributing the estate's value in accordance with the statutory priority scheme. Nor could the Regulator achieve the same result indirectly by imposing conditions on the sale of R Corp.'s valuable assets. The province's licensing scheme effectively operated as a debt collection mechanism in relation to a bankrupt company. It should be held inoperative as applied to R Corp. under the second prong of the paramountcy test, frustration of purpose. G Ltd. and the creditor had satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. The Court should continue to apply the "creditor" prong of the test as it was clearly articulated in the 2012 Supreme Court of Canada decision. Under that standard, the Regulator plainly acted as a creditor with respect to the R Corp. estate. It was sufficiently certain that either the Regulator or the OWA would ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement.

Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin d'un intérêt de propriété sur le pétrole ou le gaz, des droits de surface et d'un permis délivré par un organisme de réglementation, l'Alberta Energy Regulator. Cet organisme administre le régime de délivrance de permis et s'assure du respect des engagements d'abandon et de remise en état des titulaires de permis. L'organisme a délégué une association de puits orphelins, l'Orphan Wells Association, le pouvoir d'abandonner et de remettre en état les « orphelins ». À la demande d'un créancier, G Ltd. a été nommé séquestre de R Corp. G Ltd. a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de R Corp., ainsi que de trois installations et de 12 pipelines connexes, et qu'il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de R Corp. visés par des permis. L'organisme de réglementation a rendu une ordonnance en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) enjoignant à R Corp. de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner. L'organisme de réglementation et l'association ont déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par G Ltd. des biens faisant l'objet de la renonciation était nul, une ordonnance obligeant G Ltd. à se conformer aux ordonnances d'abandon, de même qu'une ordonnance enjoignant à G Ltd. de remplir les obligations légales en tant que titulaire de permis concernant l'abandon, la remise en état et la décontamination de tous les biens de R Corp. visés par des permis. G Ltd. a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation. Une ordonnance de faillite a été rendue à l'égard de R Corp., et G Ltd. a été nommé syndic. G Ltd. a envoyé une autre lettre à l'organisme de réglementation dans laquelle il invoquait l'art. 14.06(4)a)(ii) de la Loi sur la faillite et l'insolvabilité (LFI) à l'égard des biens faisant l'objet de la renonciation.

Le juge siégeant en son cabinet a conclu à un conflit d'application entre l'art. 14.06 de la LFI et la définition de « titulaire de permis » que l'on trouve dans l'OGCA et la PA et a approuvé la procédure de vente proposée. Les appels interjetés par l'organisme de réglementation et l'association ont été rejetés. Les juges majoritaires de la cour ont déclaré que les questions constitutionnelles soulevées dans les appels étaient complémentaires à la question principale, soit l'interprétation de la LFI. L'article 14.06 de la LFI n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7). L'article 14.06(4) de la LFI n'a pas limité le pouvoir du syndic de renoncer aux biens dans des circonstances où il pourrait s'exposer à une responsabilité personnelle. Sur le plan de l'analyse constitutionnelle, les juges majoritaires ont conclu que le rôle de G Ltd. en tant que « titulaire de permis » au sens de l'OGCA et de la PA était en conflit d'application avec les dispositions de la LFI qui dégageaient les syndics de toute responsabilité personnelle, qui leur permettaient de renoncer à des biens et qui établissaient la priorité des réclamations environnementales. La juge dissidente aurait accueilli l'appel au motif qu'il n'y avait aucun conflit entre la législation albertaine sur l'environnement et la LFI. La juge dissidente était d'avis que l'art. 14.06 de la LFI n'a pas eu pour effet de libérer G Ltd. des obligations de R Corp. à l'égard de ses biens visés par des permis et que l'organisme de réglementation ne faisait valoir aucune réclamation prouvable, de sorte que le régime de priorité de la LFI n'était pas renversé. L'organisme de réglementation et l'association ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C. (Abella, Karakatsanis, Gascon, Brown, JJ., souscrivant à son opinion) : Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de

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la faillite. Bien que G Ltd. demeurait entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du failli en invoquant l'art. 14.06(4) de la LFI. À la simple lecture de ses termes, l'art. 14.06(4) était clair et sans équivoque. Il n'y avait aucune raison de considérer que les mots « le syndic est [. . .] dégagé de toute responsabilité personnelle » figurant à l'art. 14.06(4) de la LFI visaient la responsabilité de l'actif du failli. La « renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement. Les conflits d'application entre la LFI et la législation albertaine allégués par G Ltd. résultaient de sa qualité de « titulaire de permis » au sens de l'OGCA et de la PA. Vu l'interprétation qu'il convenait de donner à l'art. 14.06(4) de la LFI, aucun conflit d'application n'était imputable au fait que, suivant le droit albertain, G Ltd. demeurait, en qualité de « titulaire de permis », tenu d'abandonner les biens faisant l'objet de la renonciation et d'utiliser les autres éléments de l'actif. Il incombait à G Ltd. d'établir les objectifs précis des art. 14.06(2) et (4) s'il souhaitait démontrer qu'il y avait conflit. Compte tenu du libellé clair des art. 14.06(2) et (4) et des débats parlementaires, l'objectif de ces dispositions était manifestement de dégager les syndics de toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif qu'ils administrent. Cet objectif n'a pas été entravé par l'ajout des syndics à la définition de « titulaire de permis » dans l'OGCA et la PA.

Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI. On doit faire valoir uniquement les réclamations prouvables en matière de faillite dans le cadre de la procédure unique. Les réclamations non prouvables ne sont pas suspendues à la faillite et elles lient toujours l'actif. Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp. Aucune préoccupation n'a été soulevée en matière d'équité en ne tenant pas compte de la concession faite par l'organisme de réglementation. Les obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI. Obliger R Corp. à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbait pas le régime de priorité établi dans la LFI. Au moment d'élaborer ce régime, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination. La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Côté, J. (dissidente) (Moldaver, J., souscrivant à son opinion) : Le pourvoi devrait être rejeté. Deux aspects du régime de réglementation albertain entraient en conflit avec la LFI. D'abord, les lois albertaines qui règlementent l'industrie pétrolière et gazière précisent que le terme « titulaire de permis » vise les séquestres et syndics de faillite. Cette définition avait pour effet d'assujettir les professionnels de l'insolvabilité aux mêmes obligations et responsabilités que R Corp. elle-même, notamment l'obligation de se conformer aux ordonnances d'abandon et le risque d'engager sa responsabilité personnelle pour ne pas l'avoir fait. G Ltd. ayant valablement renoncé aux biens inexploités, il n'était donc plus assujetti aux engagements environnementaux liés à ces biens. Étant donné que le régime législatif albertain ne reconnaissait pas la légalité de ces renonciations, il y avait un conflit d'application inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaissait pas l'effet juridique des renonciations de G Ltd. Lu dans son ensemble, l'art. 14.06 indiquait que l'art. 14.06(4) ne se bornait pas à dégager les syndics de toute responsabilité personnelle. Le Parlement n'a pas rendu le pouvoir de renonciation prévu à l'art. 14.06(4) conditionnel à la possibilité pour la Couronne de se prévaloir de sa superpriorité. Il y avait un conflit d'application dans la mesure où le régime législatif albertain tenait les séquestres et les syndics responsables en tant que « titulaires de permis » relativement aux biens faisant l'objet d'une renonciation.

Ensuite, l'organisme de réglementation a exigé que G Ltd. acquitte les engagements environnementaux de R Corp. avant les autres dettes de l'actif, ce qui contrevenait au régime de priorité établi par la LFI. Comme les ordonnances d'abandon sont des « réclamations prouvables en matière de faillite » selon le test à trois volets énoncé par la Cour suprême du Canada dans une décision rendue en 2012, l'organisme de réglementation ne pouvait faire valoir ces réclamations en dehors du processus de faillite. Agir ainsi entraverait la réalisation d'un objet essentiel de la LFI : le partage de la valeur de l'actif conformément au régime de priorités établi par la loi. L'organisme de réglementation ne pouvait pas non plus atteindre indirectement le même

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151 At the beginning of this litigation, the OWA estimated that it would take 10 to 12 years to get through the backlog of orphans. By 2015, that backlog was increasing rapidly, and it may well have continued to increase at the same or an even greater speed in the intervening years, as submitted by the Regulator. If anything, this suggests the possibility of an even larger backlog. There is no indication that the Renounced Assets would have a particularly high priority in the backlog. Even if the potential additional funding materializes, the Regulator submits that it will be a generation or more before the OWA can address its existing inventory of orphans.

152 The dissenting reasons rely on the chambers judge's conclusion that the OWA would "probably" perform the abandonments eventually, while downplaying the fact that he also concluded that this would not "necessarily [occur] within a definite timeframe" (paras. 261 and 278, citing the chambers judge's reasons, at para. 173). Given the most conservative timeline — the 10 years discussed by the chambers judge — it is difficult to predict anything occurring with sufficient certainty. Much could change within the next decade, both in terms of government policy and in terms of the willingness of those in the Alberta oil and gas industry to discharge environmental liabilities. This is not at all the same situation as in *Northstar*, in which the MOE had already commenced environmental work.

153 Perhaps more to the point, this lengthy timeline means that, should it ultimately perform the work, the OWA will not advance a claim for reimbursement. Advancement of a claim is an element of the test that is just as essential as performance of the work. The OWA itself has no ability to seek reimbursement of its costs from licensees and, although the costs of abandonment carried out by a person authorized by the Regulator constitute a debt payable to the Regulator under s. 30(5) of the OGCA, no evidence has been adduced that the Regulator has exercised its power to recover such costs in comparable cases. There is a good reason for this: the reality is that, by the time the OWA got around to abandoning any of Redwater's wells, the estate would be finalized and GTL long since discharged. In sum, the chambers judge erred in failing to consider whether the OWA can be treated as the regulator and in failing to appreciate that, even if it can, it is not sufficiently certain that the OWA will in fact perform the abandonments and advance a claim for reimbursement.

154 Accordingly, even if the Regulator had acted as a creditor in issuing the Abandonment Orders, it cannot be said with sufficient certainty that it would perform the abandonments and advance a claim for reimbursement.

(b) The Conditions for the Transfer of Licenses

155 I will deal briefly with the LMR conditions for the transfer of licences. Much of the foregoing analysis with regard to the Abandonment Orders also applies to these conditions. As noted by Martin J.A., the requirement of regulatory approval for licence transfers is difficult to compare directly with the remediation orders at issue in *Abitibi*. However, this Court confirmed that the *Abitibi* test applies to a class of regulatory obligations that is broader than "orders" in *Moloney* , at paras. 54-55. The LMR conditions are a "non-monetary obligation" for the Redwater estate, since they must be satisfied before the Regulator will approve the transfer of any of Redwater's licences. However, it is notable that, even apart from the LMR conditions, licences are far from freely transferrable. The Regulator will not approve the transfer of licences where the transferee is not a licensee under the *OGCA*, the *Pipeline Act*, or both. The Regulator also reserves the right to reject a proposed transfer where it determines that the transfer is not in the public interest, such as where the transferee has outstanding compliance issues.

156 In a sense, the factors suggesting an absence of sufficient certainty are even stronger for the LMR requirements than for the Abandonment Orders. There is a debt enforcement scheme under the *OGCA* and the *Pipeline* Act in respect of abandonment, but there is no such scheme for the LMR requirements. The Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater. It is true that compliance with the LMR requirements results in a reduction in the value of the bankrupt estate. However, as discussed earlier, not every obligation that diminishes the value of the bankrupt estate, and therefore the amount available to secured creditors, satisfies the "sufficient certainty" step. The question is not whether an obligation is intrinsically financial.

157 Compliance with the LMR conditions prior to the transfer of licences reflects the inherent value of the assets held by the bankrupt estate. Without licences, Redwater's *profits à prendre* are of limited value at best. All licences held by Redwater were

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received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. R.*, 2013 SCC 29, [2013] 2 S.C.R. 336 (S.C.C.) , which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

158 The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the Abitibi test

159 Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

160 Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney* , the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

161 Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (BIA, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

162 There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot

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TAB 5

2022 ABCA 117
Alberta Court of Appeal

Manitok Energy Inc (Re)

2022 CarswellAlta 806, 2022 ABCA 117, [2022] 6 W.W.R. 1, [2022] A.W.L.D. 1734, 2022 A.C.W.S. 680, 468 D.L.R. (4th) 434, 98 C.B.R. (6th) 1

Alvarez & Marsal Canada Inc. in its capacity as the Court-appointed receiver and manager of Manitok Energy Inc. (Appellant) and Prentice Creek Contracting Ltd., Riverside Fuels Ltd. and Alberta Energy Regulator (Respondents) and Stettler County, Woodlands County and Orphan Well Association (Intervenors)

Frans Slatter, Ritu Khullar, Jolaine Antonio JJ.A.

Heard: March 10, 2022
Judgment: March 30, 2022
Docket: Calgary Appeal 2101-0085AC

Proceedings: reversing *Manitok Energy Inc (Re)* (2021), 25 Alta. L.R. (7th) 412, 87 C.B.R. (6th) 255, 2021 ABQB 227, [2021] 7 W.W.R. 557, 2021 CarswellAlta 698, B.E. Romaine J. (Alta. Q.B.)

Counsel: H.A.Gorman, Q.C., M Parker, D.A. Stephenson, for Appellant
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G.S.E. Hamilton, for Respondent, Riverside Fuels Ltd.
M.E. Lavelle, for Respondent, Alberta Energy Regulator
G.G. Plester, for Intervenors, Stettler County and Woodlands County
R. Gurofsky, G.J. Finegan, for Intervenor, Orphan Well Association

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.b Forms of secured interests
X.1.b.i Liens
Headnote
Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous
At time of its insolvency, company was Alberta Energy Regulator licensee of wells and facilities with associated deemed liability for end-of-life obligations (EOL obligations) — Two companies filed builders' liens prior to company's bankruptcy — Company's receiver entered into purchase and sale agreement with P Inc. for certain property — Sale approval and vesting order discharged lien registrations, including those of lien claimants, and required receiver to establish separate holdbacks for lien claimants to stand in place of their lien registrations pending further court order — In accordance with partial discharge order, receiver renounced and disclaimed and was discharged over majority of remaining unsold oil and gas assets in company's estate — Receiver anticipated renouncing and disclaiming remaining unsold assets — Total realizations from receivership would be substantially less than cost of satisfying EOL obligations associated with discharged assets — Lien claimants brought application to determine whether EOL obligations had to be satisfied by receiver from estate in preference to satisfying first-ranking builders' lien claims based on services provided by lien claimants before receivership date — Chambers judge concluded that Supreme Court of Canada case law was distinguishable and that builders' lien claimants were entitled to payment out of proceeds of sale to P Inc. — Receiver appealed — Appeal allowed — If proceeds of sale of bankrupt corporation's valuable

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assets cannot be used to reclaim "unrelated assets" there would never be any proceeds available to satisfy public EOL obligations — There was nothing in Alberta regulatory scheme, Bankruptcy and Insolvency Act, or binding SCC decision permitting licensee to avoid its EOL obligations by converting valuable licensed assets into cash before enforcement order can be issued — Neither existence of enforcement orders nor sequence in which enforcement action is taken is relevant to receiver's duty to discharge public environmental obligations — That proceeds of P Inc. sale were placed into trust by virtue of court order did not distinguish instant case from SCC decision.

Table of Authorities

Cases considered:

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — considered

Orphan Well Assn. v. Grant Thornton Ltd. (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.) — considered

Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150 (S.C.C.) — followed

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315, 1991 ABCA 181 (Alta. C.A.) — referred to

PricewaterhouseCoopers Inc v. Perpetual Energy Inc (2021), 2021 ABCA 16, 2021 CarswellAlta 119, 86 C.B.R. (6th) 9, 20 Alta. L.R. (7th) 23, 14 B.L.R. (6th) 161, 457 D.L.R. (4th) 1 (Alta. C.A.) — referred to

Toronto Dominion Bank v. 1287839 Alberta Ltd. (2021), 2021 ABQB 205, 2021 CarswellAlta 618, 14 P.P.S.A.C. (4th) 121 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 14.06(7) [en. 1997, c. 12, s. 15] — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 7.1(2) — considered

APPEAL by receiver from judgment reported at *Manitok Energy Inc (Re)* (2021), 2021 ABQB 227, 2021 CarswellAlta 698, 87 C.B.R. (6th) 255, [2021] 7 W.W.R. 557, 25 Alta. L.R. (7th) 412 (Alta. Q.B.), finding that builders' lien claimants were entitled to be paid by receiver from estate in preference to end-of-life obligations associated with abandonment and reclamation obligations for oil and gas property.

***Per curiam*:**

1 The issue underlying this appeal, as stated by consent under R. 7.1(2), is:

> Whether end of life obligations associated with the abandonment and reclamation of unsold oil and gas properties must be satisfied by the Receiver from Manitok's estate in preference to satisfying what may otherwise be first-ranking builders' lien claims based on services provided by the lien claimants before the receivership date.

This issue engages the reach of the Supreme Court of Canada's ***Redwater*** decision: ***Orphan Well Association v Grant Thornton Ltd.***, 2019 SCC 5, [2019] 1 SCR 150.

Facts

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Abandonment and reclamation obligations exist independently of the issuance of abandonment orders, which are merely an enforcement mechanism: ***Redwater*** at para. 92; ***Perpetual Energy*** at para. 87. There is also no reason to think that a receiver or trustee in bankruptcy would not discharge a statutory obligation on the estate in the absence of an enforcement order. It would be artificial to have the outcome of a priority dispute like this depend on whether the Alberta Energy Regulator had sufficient information to issue abandonment orders before, as opposed to after the insolvency event.

40 The use of the word "replicate" in para. 159 can best be understood by comparing the French text "reproduisent l'effet". Read in context, para. 159 is merely saying that recognizing the validity of the Alberta Energy Regulator's enforcement of environmental obligations in an insolvency is no more inconsistent with the *Bankruptcy and Insolvency Act* than s. 14.06(7), which also gives priority to the enforcement of environmental obligations.

41 In summary, neither the existence of enforcement orders nor the sequence in which enforcement action is taken is relevant to the Receiver's duty to discharge public environmental obligations. It is irrelevant that no enforcement orders were ever issued with respect to the Persist assets, because the proceeds of the sale of those assets are still a part of the Manitok bankruptcy estate. Contrary to what is implied in the reasons at paras. 39, 42, the fact that the Persist assets were sold before any enforcement orders were issued is not relevant.

The Effect of the Trust and Holdback

42 The chambers judge reasoned at paras. 41, 44 that the proceeds of the sale to Persist were paid into trust, and therefore were not captured by the *Redwater* decision. It is true that the physical oil and gas assets sold to Persist were no longer a part of the Manitok estate, because they had vested in Persist. This appeal, however, is not concerned with those physical assets, but rather with the proceeds resulting from the sale of those assets. Those proceeds are very much a part of the Manitok estate, even though they are held "in an interest bearing trust account". Under the Sale and Vesting Order they were specifically to stand in place of the physical assets that had been sold, without affecting in any way the priorities and claims of various claimants. The claims of the two respondent builders' lien claimants survive in those proceeds, but they are to be dealt with in accordance with the *Redwater* principles.

43 The respondents argue that this case is distinguishable from *Redwater* because the *Redwater* decision "changed the law". They argue that *Redwater* does not apply, because the Persist assets had been sold effective as of a date prior to the "seismic shift" caused by the reasons in *Redwater*, and the funds were paid into trust by court order. That is not an accurate statement of the legal position. The *Redwater* decision did not change the law. It merely stated what the law had always been, despite the opinions of some in the industry to the contrary. The law was always as stated in the *Bankruptcy and Insolvency Act*, *Northern Badger, Abitibi*, and as confirmed in *Redwater*. The 2019 *Redwater* decision stated the law as of the date that Redwater Energy Corporation became bankrupt four years earlier. The *Redwater* decision also stated the law as it existed on the day that Manitok became bankrupt, and it applies fully to these proceedings.

44 The builders' lien claimants overstate the effect of the "trust" created by the Sale and Vesting Order. The assets of an insolvent corporation belong to the estate of that corporation. Those assets are under the control of the receiver or trustee. The receiver or trustee obviously has no beneficial interest in those assets and would keep them segregated, and in that sense it is not inaccurate to say the assets are held "in trust" or "in an interest bearing trust account". But the "trust" is only to hold the assets for the stakeholders in the insolvency, in the same priority as their interests may appear. Any "trust" does not create any new or enhanced rights in any stakeholder, even if recited in a court order, and even if the assets are sub-segregated into smaller pools of assets. A court cannot by such a "trust order" reorder the priorities in an insolvency.

45 The Receiver was obviously required to hold the Persist proceeds "in an interest bearing trust account" for the bankrupt estate and its stakeholders, because the Receiver had no beneficial interest in them. The Order, however, did not create any new rights or trust beneficiaries or vary the entitlement of any stakeholder; it essentially provided that the funds were to be held in escrow pending a determination of entitlement: Toronto Dominion Bank v 1287839 Alberta Ltd, 2021 ABQB 205 at para. 17. The Order specifically stated that the funds were deemed to replace the sold real estate, and the claims of all stakeholders would

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be unaffected. The quantum of the two builders' lien claims was relevant to setting the quantum of the holdback, but the Order neither enhanced nor diminished the substantive priority rights of the builders' lien claimants to the holdback funds. There was no new "trust" created in favour of the builders' lien claimants in the holdbacks by placing them "in an interest bearing trust account", other than the requirement that the funds be held in escrow until the court could rule on entitlement.

46 In summary, the fact the proceeds of the Persist sale were placed into trust by virtue of a court order does not affect the outcome of this appeal or distinguish this case from *Redwater*.

Conclusion

47 In conclusion, the analysis at paras. 39-42 of the reasons under appeal is directly inconsistent with the binding decision in *Redwater*. The appeal is allowed, and the chambers decision is set aside. The stated question must be answered affirmatively.

Appeal allowed.

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TAB 6

2011 SCC 52, 2011 CSC 52
Supreme Court of Canada

British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)

2011 CarswellBC 2702, 2011 CarswellBC 2703, 2011 SCC 52, 2011 CSC 52, [2011] 12 W.W.R. 1, [2011] 3 S.C.R. 422, [2011] B.C.W.L.D. 7337, [2011] B.C.W.L.D. 7338, [2011] B.C.W.L.D. 7441, [2011] B.C.W.L.D. 7442, [2011] B.C.W.L.D. 7444, [2011] B.C.W.L.D. 7477, [2011] A.C.S. No. 52, [2011] S.C.J. No. 52, 2012 C.L.L.C. 230-001, 207 A.C.W.S. (3d) 375, 23 B.C.L.R. (5th) 1, 25 Admin. L.R. (5th) 173, 311 B.C.A.C. 1, 337 D.L.R. (4th) 413, 421 N.R. 338, 529 W.A.C. 1, 73 C.H.R.R. D/1, 95 C.C.E.L. (3d) 169

Workers' Compensation Board of British Columbia (Appellant) and Guiseppe Figliola, Kimberley Sallis, Barry Dearden and British Columbia Human Rights Tribunal (Respondents) and Attorney General of British Columbia, Coalition of BC Businesses, Canadian Human Rights Commission, Alberta Human Rights Commission and Vancouver Area Human Rights Coalition Society (Interveners)

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

Heard: March 16, 2011
Judgment: October 27, 2011
Docket: 33648

Proceedings: reversing *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* (2010), 2 B.C.L.R. (5th) 274, 2010 CarswellBC 330, 2010 BCCA 77, 316 D.L.R. (4th) 648, 284 B.C.A.C. 50, 3 Admin. L.R. (5th) 49 (B.C. C.A.); reversing *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* (2009), 2009 CarswellBC 737, 2009 BCSC 377, 67 C.H.R.R. D/195, 93 B.C.L.R. (4th) 384, 96 Admin. L.R. (4th) 250 (B.C. S.C.)

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Sheila Osborne-Brown, Philippe Dufresne for Intervener, Canadian Human Rights Commission
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Subject: Occupational Health and Safety; Public; Constitutional; Civil Practice and Procedure; Employment
Related Abridgment Classifications
Administrative law
III Standard of review
III.2 Reasonableness
III.2.b Patently unreasonable
Human rights
VIII Practice and procedure
VIII.5 Judicial review
VIII.5.d Standard of review
Headnote
Administrative law --- Standard of review — Reasonableness — Patently unreasonable
Human rights --- Practice and procedure — Commissions and boards of inquiry — Powers

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Discretion to dismiss complaints — Complainants with work-related chronic pain appealed to review division of Workers' Compensation Board, alleging that Board's chronic pain compensation policy was contrary to Human Rights Code — Review officer held policy did not contravene Code — Instead of seeking judicial review, complainants filed complaints with Human Rights Tribunal making same allegations — Board brought motion to dismiss complaints under s. 27(1)(f) of Code on basis that complaints had been appropriately dealt with in another proceeding — Tribunal dismissed application, concluding that substance of complaints was not appropriately dealt with in review process — Board applied for judicial review — Chambers judge granted application, concluding same issues had already been decided by review officer — Complainants appealed — Court of Appeal held standard of review was patent unreasonableness, and found chambers judge's reasons did not identify patently unreasonable behaviour — Board appealed to Supreme Court of Canada — Appeal allowed — Tribunal's decision set aside; complaints dismissed — Tribunal's decision was patently unreasonable — Tribunal based its decision to proceed with complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f) of Code — Tribunal's strict adherence to application of issue estoppel was overly formalistic interpretation of s. 27(1)(f) of Code, particularly of phrase "appropriately dealt with" — Complainants were trying to relitigate in different forum.

Droit administratif --- Norme de contrôle — Caractère raisonnable — Manifestement déraisonnable

Droits de la personne --- Procédure — Commissions et tribunaux — Pouvoirs

Pouvoir discrétionnaire de rejeter les plaintes — Plaignants souffraient de douleurs chroniques liées au travail et ont interjeté appel devant la section de révision de la Workers' Compensation Board de la Colombie-Britannique (« Commission »), soutenant que la politique de l'indemnité fixe pour les douleurs chroniques contrevenait au Human Rights Code de la Colombie-Britannique (« Code ») — Agent de révision a conclu que la politique n'enfreignait pas le Code — Plutôt que de demander un contrôle judiciaire de la décision de l'agent de révision, les plaignants ont déposé devant le tribunal des droits de la personne (« Tribunal ») des plaintes reprenant les mêmes arguments — Commission a présenté au Tribunal une requête pour rejet des plaintes en vertu de l'art. 27(1)(f) du Code, faisant valoir que les plaintes avaient fait l'objet d'un examen de façon appropriée dans une autre instance — Tribunal a rejeté la requête, concluant que le fond de la plainte n'avait pas fait l'objet d'un examen de façon appropriée dans le cadre du processus de révision — Commission a déposé une requête en contrôle judiciaire — Juge siégeant en cabinet a accueilli la requête, estimant que l'agent de révision avait déjà statué de façon définitive sur les mêmes questions — Plaignants ont interjeté appel — Cour d'appel a conclu que la norme de contrôle applicable était celle de la décision manifestement déraisonnable et que les motifs de la juge siégeant en cabinet ne relevaient aucun comportement manifestement déraisonnable — Commission a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Décision du Tribunal annulée et plaintes rejetées — Décision du Tribunal était manifestement déraisonnable — Décision du Tribunal de recevoir les plaintes et de les entendre de nouveau reposait principalement sur des facteurs non pertinents et ne tenait pas compte du mandat véritable que lui conférait l'art. 27(1)(f) du Code — En s'en tenant à l'application stricte de la préclusion découlant d'une question déjà tranchée, le Tribunal a donné une interprétation trop formaliste à l'art. 27(1)(f) du Code et, plus particulièrement, aux mots [TRADUCTION] « a été statué de façon appropriée » — Plaignants cherchaient à soulever de nouveau la question devant un autre forum.

The complainants with work-related chronic pain appealed to the review division of the Workers' Compensation Board, alleging that the Board's chronic pain compensation policy was contrary to s. 8 of the B.C. Human Rights Code. A review officer held the policy was not contrary to the Code. Instead of seeking judicial review of the review officer's decision, the complainants filed complaints with the Human Rights Tribunal based on the same allegations.

The Board brought a motion to have the Tribunal dismiss the complaints pursuant to s. 27(1)(f) of the Code, which provides that a complaint may be dismissed where the substance of the complaint has been appropriately dealt with in another proceeding. The Tribunal dismissed the Board's motion, concluding that the substance of the complaints was not appropriately dealt with in the review process.

On judicial review, the Tribunal's decision was set aside by a chambers judge who concluded that the same issues had already been conclusively decided by the review officer and that the Tribunal had failed to take into proper account the principles of res judicata, collateral attack, and abuse of process. The chambers judge found the complaints to the Tribunal were a veiled attempt to circumvent judicial review. The complainants appealed.

The Court of Appeal restored the Tribunal's decision. The Court of Appeal determined that the appropriate standard of review was patent unreasonableness, and concluded that the Tribunal's decision was not patently unreasonable. The Board appealed to the Supreme Court of Canada.

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Held: The appeal was allowed.

Per Abella J. (LeBel, Deschamps, Charron, Rothstein JJ. concurring): The Tribunal's decision should be reviewed on a standard of patent unreasonableness. Because the Tribunal based its decision to proceed with the complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f) of the Code, its decision was patently unreasonable. The Tribunal's decision should be set aside and the complaints dismissed.

Section 27(1)(f) of the Code is the statutory reflection of the collective principles underlying the doctrines of issue estoppel, collateral attack, and abuse of process. These principles are factors of primary importance that must be taken into account when exercising discretion under s. 27(1)(f) to hear or refrain from hearing a complaint.

Section 27(1)(f) does not codify the actual doctrines or their technical explications; it embraces their underlying principles in pursuit of finality, fairness, and integrity by preventing unnecessary inconsistency, multiplicity and delay. Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what was being complained of to the Tribunal; and whether there was an opportunity for the complainants to know the case to be met and have the chance to meet it. These questions go to determining whether the substance of a complaint has been "appropriately dealt with". The Tribunal's strict adherence to the application of issue estoppel was an overly formalistic interpretation of the section, particularly of the phrase "appropriately dealt with".

Per Cromwell J. (concurring in the result) (McLachlin C.J.C., Binnie, Fish JJ. concurring): The appeal should be allowed. In accordance with the general rule in B.C., the Board's application to dismiss the complaints should be remitted to the Tribunal for reconsideration.

The Tribunal's decision was patently unreasonable within the meaning of s. 59 of the Administrative Tribunals Act. However, the majority's interpretation of the discretion conferred by s. 27(1)(f) of the Code and the decision not to remit the complaints to the Tribunal were not agreed with. Looking at the text, context and purpose of the provision, the discretion conferred under s. 27(1)(f) of the Code was conceived of as a broad discretion.

Where the substance of a matter has been addressed previously, it becomes necessary for the Tribunal to exercise its discretion while giving significant weight to interests in finality and adherence to proper review mechanisms. The Tribunal must decide if there is something in the circumstances of the case to make it inappropriate to apply the general principle that the earlier resolution of the matter should be final. The most important consideration is whether giving the earlier proceeding final and binding effect will work an injustice.

The Tribunal committed a reversible error by basing its decision on the alleged lack of independence of the review officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the substance of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. It also failed to have regard to the fundamental fairness of the earlier proceeding. This led the Tribunal to give no weight to the interests of finality and to focus on irrelevant considerations of whether the strict elements of issue estoppel were present.

Les plaignants souffraient de douleurs chroniques liées au travail et ont interjeté appel devant la section de révision de la Workers' Compensation Board de la Colombie-Britannique (« Commission »), soutenant que la politique de l'indemnité fixe pour les douleurs chroniques contrevenait à l'art. 8 du Human Rights Code de la Colombie-Britannique (« Code »). Un agent de révision a conclu que la politique n'enfreignait pas le Code. Plutôt que de demander un contrôle judiciaire de la décision de l'agent de révision, les plaignants ont déposé devant le tribunal des droits de la personne (« Tribunal ») des plaintes reprenant les mêmes arguments.

La Commission a présenté au Tribunal une requête pour rejet des plaintes en vertu de l'art. 27(1)(f) du Code, lequel prévoit qu'une plainte peut être rejetée si le fond de la plainte a fait l'objet d'un examen de façon appropriée dans une autre instance. Le Tribunal a rejeté la requête de la Commission, concluant que le fond de la plainte n'avait pas fait l'objet d'un examen de façon appropriée dans le cadre du processus de révision.

À l'issue d'un contrôle judiciaire, la juge siégeant en cabinet a annulé la décision du Tribunal, estimant que l'agent de révision avait déjà statué de façon définitive sur les mêmes questions et que le Tribunal n'avait pas dûment tenu compte des principes applicables en matière d'autorité de la chose jugée, de contestation indirecte et d'abus de procédure. La juge siégeant en cabinet a conclu que les plaintes déposées devant le Tribunal relevaient d'une tentative déguisée d'éluder le contrôle judiciaire. Les plaignants ont interjeté appel.

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La Cour d'appel a rétabli la décision du Tribunal. La Cour d'appel a conclu que la norme de contrôle applicable était celle de la décision manifestement déraisonnable et que la décision du Tribunal n'était pas manifestement déraisonnable. La Commission a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Abella, J. (LeBel, Deschamps, Charron, Rothstein, JJ., souscrivant à son opinion) : La norme de contrôle applicable à la décision du Tribunal est celle de la décision manifestement déraisonnable. Parce que la décision du Tribunal de recevoir ces plaintes et de les entendre de nouveau reposait principalement sur des facteurs non pertinents et ne tenait pas compte du mandat véritable que lui conférait l'art. 27(1)(f) du Code, elle était manifestement déraisonnable. La décision du Tribunal devrait être annulée et les plaintes rejetées.

L'article 27(1)(f) du Code codifie l'ensemble des principes sous-jacents des règles en matière de préclusion découlant d'une question déjà tranchée, de contestation indirecte et d'abus de procédure. Ces principes sont des facteurs primordiaux à prendre en compte dans l'exercice du pouvoir discrétionnaire d'entendre ou non une plainte conféré par l'art. 27(1)(f).

L'article 27(1)(f) ne codifie pas les doctrines elles-mêmes ou leurs explications techniques; il en englobe les principes sous-jacents afin d'assurer le caractère définitif des instances, l'équité et l'intégrité du système judiciaire en prévenant les incohérences, les dédoublements et les délais inutiles. En s'appuyant sur ces principes sous-jacents, le Tribunal est appelé à se demander s'il existe une compétence concurrente pour statuer sur les questions relatives aux droits de la personne, si la question juridique tranchée par la décision antérieure était essentiellement la même que celle qui est soulevée dans la plainte dont il est saisi et si le processus antérieur a offert la possibilité aux plaignants de connaître les éléments invoqués contre eux et de les réfuter. Ces questions visent à déterminer s'il « a été statué de façon appropriée » sur le fond de la plainte. En s'en tenant à l'application stricte de la préclusion découlant d'une question déjà tranchée, le Tribunal a donné une interprétation trop formaliste à la disposition et, plus particulièrement, aux mots [TRADUCTION] « a été statué de façon appropriée ».

Cromwell, J. (souscrivant au résultat des juges majoritaires) (McLachlin, J.C.C., Binnie, Fish, JJ., soucrivant à son opinion) : Le pourvoi devrait être accueilli. Conformément à la règle générale suivie en Colombie-Britannique, la requête de la Commission demandant le rejet des plaintes devrait être soumise de nouveau au Tribunal pour réexamen.

La décision du Tribunal était manifestement déraisonnable au sens de l'art. 59 de la Administrative Tribunals Act. Toutefois, on ne partageait pas l'interprétation des juges majoritaires quant à la discrétion conférée par l'art. 27(1)(f) du Code et la décision de ne pas renvoyer les plaintes devant le Tribunal pour réexamen. Compte tenu du texte, du contexte et de l'objectif de l'art. 27(1)(f), le pouvoir discrétionnaire qu'il conférait se voulait large.

Si le fond d'un dossier a fait déjà l'objet d'un examen, il devient nécessaire que le Tribunal exerce sa discrétion tout en attribuant un poids appréciable aux intérêts que revêtent le caractère définitif de la décision et le recours aux mécanismes de révision applicables. Le Tribunal doit établir si un élément des circonstances de l'affaire fait en sorte qu'il ne conviendrait pas d'appliquer le principe général du caractère définitif de la décision antérieure. Le facteur le plus important est celui de savoir si une injustice peut résulter de l'attribution d'une portée définitive et exécutoire à l'instance antérieure.

Le Tribunal a commis une erreur justifiant l'annulation de sa décision en fondant cette dernière sur le prétendu manque d'indépendance de l'agent de révision et en faisant abstraction de la possibilité de recourir au contrôle judiciaire pour corriger tout vice procédural. Plus fondamentalement encore, il n'a pas examiné s'il avait été statué sur le fond de la plainte, omettant ainsi de prendre en considération une condition imposée par la loi. De plus, il n'a pas pris en compte l'équité fondamentale de l'instance antérieure. Tout cela a fait en sorte que le Tribunal n'a accordé aucun poids aux intérêts en jeu en matière de caractère définitif de la décision, et qu'il a largement fondé son analyse sur des facteurs non pertinents rattachés à l'existence des stricts éléments constitutifs de la préclusion fondée sur une question déjà tranchée.

Table of Authorities

Cases considered by *Abella J.*:

Angle v. Minister of National Revenue (1974), 1974 CarswellNat 375, 28 D.T.C. 6278, 1974 CarswellNat 375F, [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 2 N.R. 397 (S.C.C.) — referred to

Berezoutskaia v. British Columbia (Human Rights Tribunal) (2006), 51 B.C.L.R. (4th) 4, 223 B.C.A.C. 71, 369 W.A.C. 71, 55 C.H.R.R. D/450, 2006 BCCA 95, 2006 CarswellBC 468 (B.C. C.A.) — referred to

Boucher c. Stelco Inc. (2005), (sub nom. *Bourdon v. Stelco)* 341 N.R. 207, [2005] 3 S.C.R. 279, (sub nom. *Bourdon v. Stelco Inc.)* 2005 C.E.B. & P.G.R. 8173, 48 C.C.P.B. 167, 2005 CarswellQue 9790, 2005 CarswellQue 9791, 2005 SCC 64, (sub nom. *Bourdon v. Stelco Inc.)* 259 D.L.R. (4th) 34 (S.C.C.) — considered

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British Columbia (Workers' Compensation Appeal Tribunal) v. Hill (2011), 16 B.C.L.R. (5th) 142, (sub nom. *Workers' Compensation Appeal Tribunal (B.C.) v. Hill)* 299 B.C.A.C. 129, (sub nom. *Workers' Compensation Appeal Tribunal (B.C.) v. Hill)* 508 W.A.C. 129, 2011 CarswellBC 147, 2011 BCCA 49 (B.C. C.A.) — referred to

Canada (Attorney General) v. TeleZone Inc. (2010), 410 N.R. 1, 56 C.E.L.R. (3d) 1, 327 D.L.R. (4th) 527, [2010] 3 S.C.R. 585, (sub nom. *TeleZone Inc. v. Canada (Attorney General))* 273 O.A.C. 1, 2010 SCC 62, 2010 CarswellOnt 9657, 2010 CarswellOnt 9658, 96 C.L.R. (3d) 1, 13 Admin. L.R. (5th) 24 (S.C.C.) — referred to

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — followed

Dominion Ready Mix Inc. c. Rocois Construction Inc. (1990), 112 N.R. 241, (sub nom. *Rocois Construction Inc. v. Québec Ready Mix Inc.)* [1990] 2 S.C.R. 440, 31 Q.A.C. 241, 1990 CarswellQue 105, 1990 CarswellQue 105F (S.C.C.) — referred to

Figliola v. British Columbia (Workers' Compensation Board) (2008), 2008 BCHRT 374 (B.C. Human Rights Trib.) — referred to

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — referred to

Hines v. Canpar Industries Ltd. (2006), 55 B.C.L.R. (4th) 372, 56 C.H.R.R. D/140, 2006 BCSC 800, 2006 CarswellBC 1256 (B.C. S.C.) — referred to

Martin v. Nova Scotia (Workers' Compensation Board) (2003), 2003 CarswellNS 360, 2003 CarswellNS 361, 2003 SCC 54, (sub nom. *Workers' Compensation Board (N.S.) v. Martin)* 217 N.S.R. (2d) 301, (sub nom. *Workers' Compensation Board (N.S.) v. Martin)* 683 A.P.R. 301, 310 N.R. 22, (sub nom. *Nova Scotia (Workers' Compensation Board) v. Martin)* [2003] 2 S.C.R. 504, 110 C.R.R. (2d) 233, (sub nom. *Nova Scotia (Workers' Compensation Board) v. Martin)* 231 D.L.R. (4th) 385, 28 C.C.E.L. (3d) 1, 4 Admin. L.R. (4th) 1 (S.C.C.) — referred to

Matuszewski v. British Columbia (Ministry of Competition, Science & Enterprise) (2008), 82 Admin. L.R. (4th) 308, 64 C.H.R.R. D/293, 2008 CarswellBC 1450, 2008 BCSC 915 (B.C. S.C.) — considered

R. v. Mahalingan (2008), 2008 CarswellOnt 6664, 2008 CarswellOnt 6665, 2008 SCC 63, 243 O.A.C. 252, 300 D.L.R. (4th) 1, [2008] 3 S.C.R. 316, 381 N.R. 199, 61 C.R. (6th) 207, 237 C.C.C. (3d) 417 (S.C.C.) — referred to

Rasanen v. Rosemount Instruments Ltd. (1994), 1994 CarswellOnt 960, 1 C.C.E.L. (2d) 161, 94 C.L.L.C. 14,024, 17 O.R. (3d) 267, 112 D.L.R. (4th) 683, 68 O.A.C. 284 (Ont. C.A.) — referred to

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — considered

VIA Rail Canada Inc. v. Canadian Transportation Agency (2007), 2007 SCC 15, 2007 CarswellNat 608, 2007 CarswellNat 609, 360 N.R. 1, 279 D.L.R. (4th) 1, (sub nom. *Council of Canadians with Disabilities v. Via Rail Canada Inc.)* 59 C.H.R.R. D/276, 59 Admin. L.R. (4th) 1, (sub nom. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.)* [2007] 1 S.C.R. 650 (S.C.C.) — referred to

Werbeski v. Ontario (Director of Disability Support Program, Ministry of Community & Social Services) (2006), (sub nom. *Tranchemontagne v. Ontario (Director, Disability Support Program))* [2006] 1 S.C.R. 513, 42 Admin. L.R. (4th) 104, (sub nom. *Tranchemontagne v. Disability Support Program (Ont.))* 210 O.A.C. 267, 2006 SCC 14, 2006 CarswellOnt 2350, 2006 CarswellOnt 2351, (sub nom. *Tranchemontagne v. Ontario (Dir., Disability Support Program))* 56 C.H.R.R. D/1, (sub nom. *Tranchemontagne v. Disability Support Program (Ont.))* 347 N.R. 144, (sub nom. *Tranchemontagne v. Ontario (Disability Support Program, Director))* 266 D.L.R. (4th) 287 (S.C.C.) — followed

Cases considered by *Cromwell J.*:

Allman v. Amacon Property Management Services Inc. (2007), 68 B.C.L.R. (4th) 237, 243 B.C.A.C. 52, 2007 BCCA 302, 2007 CarswellBC 1203, 280 D.L.R. (4th) 550 at 573, 401 W.A.C. 52 (B.C. C.A.) — considered

Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd. (2006), 42 Admin. L.R. (4th) 266, 2006 BCSC 43, 2006 CarswellBC 107, (sub nom. *Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd. v. Becker)* 56 C.H.R.R. D/321 (B.C. S.C. [In Chambers]) — referred to

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Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 159 D.L.R. (4th) 50, 19 C.P.C. (4th) 1, 107 B.C.A.C. 191, 174 W.A.C. 191, 50 B.C.L.R. (3d) 1, 1998 CarswellBC 965, 7 Admin. L.R. (3d) 209 (B.C. C.A.) — considered

British Columbia (Workers' Compensation Appeal Tribunal) v. Hill (2011), 16 B.C.L.R. (5th) 142, (sub nom. *Workers' Compensation Appeal Tribunal (B.C.) v. Hill)* 299 B.C.A.C. 129, (sub nom. *Workers' Compensation Appeal Tribunal (B.C.) v. Hill)* 508 W.A.C. 129, 2011 CarswellBC 147, 2011 BCCA 49 (B.C. C.A.) — considered

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — considered

Figliola v. British Columbia (Workers' Compensation Board) (2008), 2008 BCHRT 374 (B.C. Human Rights Trib.) — referred to

R. v. Consolidated Maybrun Mines Ltd. (1998), 158 D.L.R. (4th) 193, 123 C.C.C. (3d) 449, 225 N.R. 41, 1998 CarswellOnt 1476, 1998 CarswellOnt 1477, 26 C.E.L.R. (N.S.) 262, 38 O.R. (3d) 576 (note), [1998] 1 S.C.R. 706, 108 O.A.C. 161, 7 Admin. L.R. (3d) 23 (S.C.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — considered

Schweneke v. Ontario (2000), 2000 CarswellOnt 339, 47 O.R. (3d) 97, 48 C.C.E.L. (2d) 306, (sub nom. *Schweneke v. Ontario (Minister of Education))* 130 O.A.C. 93, 41 C.P.C. (4th) 237 (Ont. C.A.) — considered

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — considered

Villella v. Vancouver (City) (2005), 2005 BCHRT 405, 2005 CarswellBC 3416 (B.C. Human Rights Trib.) — considered

Weber v. Ontario Hydro (1995), 12 C.C.E.L. (2d) 1, 24 C.C.L.T. (2d) 217, 30 Admin. L.R. (2d) 1, 24 O.R. (3d) 358 (note), 125 D.L.R. (4th) 583, 183 N.R. 241, 30 C.R.R. (2d) 1, 82 O.A.C. 321, [1995] 2 S.C.R. 929, 1995 CarswellOnt 240, 1995 CarswellOnt 529, [1995] L.V.I. 2687-1, 95 C.L.L.C. 210-027 (S.C.C.) — considered

Werbeski v. Ontario (Director of Disability Support Program, Ministry of Community & Social Services) (2006), (sub nom. *Tranchemontagne v. Ontario (Director, Disability Support Program))* [2006] 1 S.C.R. 513, 42 Admin. L.R. (4th) 104, (sub nom. *Tranchemontagne v. Disability Support Program (Ont.))* 210 O.A.C. 267, 2006 SCC 14, 2006 CarswellOnt 2350, 2006 CarswellOnt 2351, (sub nom. *Tranchemontagne v. Ontario (Dir., Disability Support Program))* 56 C.H.R.R. D/1, (sub nom. *Tranchemontagne v. Disability Support Program (Ont.))* 347 N.R. 144, (sub nom. *Tranchemontagne v. Ontario (Disability Support Program, Director))* 266 D.L.R. (4th) 287 (S.C.C.) — considered

Statutes considered by *Abella J.*:

Administrative Tribunals Act, S.B.C. 2004, c. 45

Generally — referred to

s. 44 — referred to

s. 59(1) — considered

s. 59(3) — considered

s. 59(4) — considered

Attorney General Statutes Amendment Act, 2007, S.B.C. 2007, c. 14

Generally — referred to

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Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 15 — referred to

Code civil du Québec, L.Q. 1991, c. 64

art. 2848 — referred to

Human Rights Amendment Act, 1995, S.B.C. 1995, c. 42

Generally — referred to

Human Rights Code, R.S.B.C. 1996, c. 210

Generally — referred to

s. 8 — referred to

s. 25(3) — considered

s. 27(1) — considered

s. 27(1) [rep. & sub. 2002, c. 62, s. 12] — referred to

s. 27(1)(a) — considered

s. 27(1)(a) [rep. & sub. 2002, c. 62, s. 12] — considered

s. 27(1)(f) — considered

s. 27(1)(f) [rep. & sub. 2002, c. 62, s. 12] — considered

s. 27(2) — considered

s. 27(2) [rep. & sub. 2002, c. 62, s. 12] — considered

Human Rights Code Amendment Act, 2002, S.B.C. 2002, c. 62

Generally — referred to

Workers Compensation Act, R.S.B.C. 1996, c. 492

Generally — referred to

s. 245.1 [en. 2004, c. 45, s. 182] — referred to

Statutes considered by *Cromwell J.*:

Administrative Tribunals Act, S.B.C. 2004, c. 45

Generally — referred to

s. 59 — considered

s. 59(4)(c) — considered

s. 59(4)(d) — considered

Attorney General Statutes Amendment Act, 2007, S.B.C. 2007, c. 14

Generally — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 15 — referred to

Human Rights Amendment Act, 1995, S.B.C. 1995, c. 42

Generally — referred to

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Human Rights Code, R.S.B.C. 1996, c. 210

Generally — referred to

s. 4 — referred to

s. 25(2) — considered

s. 25(3) — considered

s. 27 — referred to

s. 27 [rep. & sub. 2002, c. 62, s. 12] — referred to

s. 27(1) — considered

s. 27(1) [rep. & sub. 2002, c. 62, s. 12] — considered

s. 27(1)(a) — considered

s. 27(1)(a) [rep. & sub. 2002, c. 62, s. 12] — considered

s. 27(1)(b) — considered

s. 27(1)(b) [rep. & sub. 2002, c. 62, s. 12] — considered

s. 27(1)(d) — considered

s. 27(1)(d) [rep. & sub. 2002, c. 62, s. 12] — considered

s. 27(1)(f) — considered

s. 27(1)(f) [rep. & sub. 2002, c. 62, s. 12] — considered

s. 27(2) — considered

s. 27(2) [rep. & sub. 2002, c. 62, s. 12] — considered

Human Rights Code Amendment Act, 2002, S.B.C. 2002, c. 62

Generally — referred to

Workers Compensation Act, R.S.B.C. 1996, c. 492

Generally — referred to

s. 96.4(2) [en. 2002, c. 66, s. 21] — referred to

s. 99 — considered

ss. 245-250 — referred to

s. 251 — referred to

APPEAL by Workers' Compensation Board from judgment reported at *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* (2010), 2 B.C.L.R. (5th) 274, 2010 CarswellBC 330, 2010 BCCA 77, 316 D.L.R. (4th) 648, 284 B.C.A.C. 50, 3 Admin. L.R. (5th) 49 (B.C. C.A.), allowing complainants' appeal from judgment quashing decision of Human Rights Tribunal.

POURVOI de la Workers' Compensation Board à l'encontre d'un jugement publié à *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* (2010), 2 B.C.L.R. (5th) 274, 2010 CarswellBC 330, 2010 BCCA 77, 316

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D.L.R. (4th) 648, 284 B.C.A.C. 50, 3 Admin. L.R. (5th) 49 (B.C. C.A.), ayant accueilli l'appel interjeté par les plaignants à l'encontre d'une décision ayant infirmé une décision du tribunal des droits de la personne.

***Abella J.*:**

1 Litigants hope to have their legal issues resolved as equitably and expeditiously as possible by an authoritative adjudicator. Subject only to rights of review or appeal, they expect, in the interests of fairness, to be able to rely on the outcome as final and binding. What they do not expect is to have those same issues relitigated by a different adjudicator in a different forum at the request of a losing party seeking a different result. On the other hand, it may sometimes be the case that justice demands fresh litigation.

2 In British Columbia, there is legislation giving the Human Rights Tribunal a discretion to refuse to hear a complaint if the substance of that complaint has already been appropriately dealt with in another proceeding. The issue in this appeal is how that discretion ought to be exercised when another tribunal with concurrent human rights jurisdiction has disposed of the complaint.

Background

3 Giuseppe Figliola, Kimberley Sallis, and Barry Dearden suffered from chronic pain. Mr. Figliola suffered a lower back injury while trying to place a sixty-pound, steel airshaft in the centre of a roll of paper. Ms. Sallis fell down a set of slippery stairs while delivering letters for Canada Post. Mr. Dearden, who also worked for Canada Post, developed back pain while delivering mail.

4 Each of them sought compensation from British Columbia's Workers' Compensation Board for, among other things, their chronic pain. The employers were notified in each case.

5 The Board's chronic pain policy, set by its board of directors, provided for a fixed award for such pain:

> Where a Board officer determines that a worker is entitled to [an] award for chronic pain ... an award equal to 2.5% of total disability will be granted to the worker.
>
> (*Rehabilitation Services and Claims Manual*, vol. I, Policy No. 39.01, Chronic Pain, at para. 4(b); later replaced by vol. II, Policy No. 39.02, Chronic Pain (online).)

6 Pursuant to this policy, the complainants received a fixed compensation award amounting to 2.5% of total disability for their chronic pain. The Workers' Compensation Board expresses partial disability as a percentage of the disability suffered by a completely disabled worker. This is intended to reflect "the extent to which a particular injury is likely to impair a worker's ability to earn in the future" (*Rehabilitation Services and Claims Manual*, vol. II, Policy No. 39.00).

7 Each complainant appealed to the Board's Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional under s. 15 of the *Canadian Charter of Rights and Freedoms*, and discriminatory on the grounds of disability under s. 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210.

8 At the Review Division, the Review Officer, Nick Attewell, found that only the Workers' Compensation Appeal Tribunal ("WCAT") had the authority to scrutinize policies for patent unreasonableness. He also concluded that, since the combination of s. 44 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("*ATA*") and s. 245.1 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492, expressly deprived the WCAT of jurisdiction over constitutional questions, this meant that he too had no such jurisdiction.

9 The Review Officer accepted that he had jurisdiction over the *Human Rights Code* complaint. This authority flowed from this Court's decision in *Werbeski v. Ontario (Director of Disability Support Program, Ministry of Community & Social Services)*, 2006 SCC 14, [2006] 1 S.C.R. 513 (S.C.C.), where the majority concluded that human rights tribunals did not have exclusive jurisdiction over human rights cases and that unless there was statutory language to the contrary, other tribunals had concurrent jurisdiction to apply human rights legislation.

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TAB 7

2003 SCC 63
Supreme Court of Canada

Toronto (City) v. C.U.P.E., Local 79

2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 SCC 63, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 31 C.C.E.L. (3d) 216, 59 W.C.B. (2d) 334, 9 Admin. L.R. (4th) 161, J.E. 2003-2108, REJB 2003-49439

Canadian Union of Public Employees, Local 79, Appellant v. City of Toronto and Douglas C. Stanley, Respondents and Attorney General of Ontario, Intervener

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: February 13, 2003

Judgment: November 6, 2003 *
Docket: 28840

Proceedings: affirming (2001), 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40 (Ont. C.A.); affirming (2000), 23 Admin. L.R. (3d) 72 (Ont. Div. Ct.)

Counsel: Douglas J. Wray and Harold F. Caley for appellant
Jason Hanson, Mahmud Jamal and Kari M. Abrams for respondent City of Toronto
No one for respondent Douglas C. Stanley
Sean Kearney, Mary Gersht and Meredith Brown for intervener Attorney General of Ontario

Subject: Labour; Criminal; Civil Practice and Procedure; Public; Evidence
Related Abridgment Classifications
Administrative law
III Standard of review
  III.3 Miscellaneous
Civil practice and procedure
XXII Judgments and orders
  XXII.23 Res judicata and issue estoppel
    XXII.23.a Res judicata
      XXII.23.a.iii Where abuse of process
Civil practice and procedure
XXII Judgments and orders
  XXII.23 Res judicata and issue estoppel
    XXII.23.a Res judicata
      XXII.23.a.v Nature of prior proceedings
        XXII.23.a.v.D Criminal
Civil practice and procedure
XXII Judgments and orders
  XXII.23 Res judicata and issue estoppel
    XXII.23.b Issue estoppel
      XXII.23.b.i General principles
Labour and employment law
I Labour law
  I.8 Labour arbitrations

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I.8.b Jurisdiction of arbitration board
I.8.b.ii Scope
I.8.b.ii.B Jurisdictional error
I.8.b.ii.B.3 Exceeding jurisdiction
Labour and employment law
I Labour law
I.8 Labour arbitrations
I.8.i Judicial review
I.8.i.ii Standard of review
I.8.i.ii.C Correctness

Headnote

Labour law --- Labour arbitrations — Jurisdiction of arbitration board — Scope — Jurisdictional error — Exceeding jurisdiction

Appropriate standard of review for question of whether employee's criminal conviction may be relitigated in grievance proceeding is correctness — Arbitrator's decision that employee's criminal conviction could be relitigated during grievance proceeding was incorrect — Doctrine of abuse of process barred relitigation of employee's criminal conviction — As matter of law, arbitrator was required to give full effect to employee's conviction and his failure to do so rendered his decision that employee had been dismissed without cause patently unreasonable.

Labour law --- Labour arbitrations — Review of award — Judicial review — General principles

Appropriate standard of review for question of whether employee's criminal conviction may be relitigated in grievance proceeding is correctness — Arbitrator's decision that employee's criminal conviction could be relitigated during grievance proceeding was incorrect — Doctrine of abuse of process barred relitigation of employee's criminal conviction — As matter of law, arbitrator was required to give full effect to employee's conviction and his failure to do so rendered his decision that employee had been dismissed without cause patently unreasonable.

Practice --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Nature of prior proceedings — Criminal

Appropriate standard of review for question of whether employee's criminal conviction may be relitigated in grievance proceeding is correctness — Arbitrator's decision that employee's criminal conviction could be relitigated during grievance proceeding was incorrect — Doctrine of abuse of process barred relitigation of employee's criminal conviction — As matter of law, arbitrator was required to give full effect to employee's conviction and his failure to do so rendered his decision that employee had been dismissed without cause patently unreasonable.

Practice --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Introduction — Where abuse of process

Appropriate standard of review for question of whether employee's criminal conviction may be relitigated in grievance proceeding is correctness — Arbitrator's decision that employee's criminal conviction could be relitigated during grievance proceeding was incorrect — Doctrine of abuse of process barred relitigation of employee's criminal conviction — As matter of law, arbitrator was required to give full effect to employee's conviction and his failure to do so rendered his decision that employee had been dismissed without cause patently unreasonable.

Practice --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

Appropriate standard of review for question of whether employee's criminal conviction may be relitigated in grievance proceeding is correctness — Arbitrator's decision that employee's criminal conviction could be relitigated during grievance proceeding was incorrect — Doctrine of abuse of process barred relitigation of employee's criminal conviction — As matter of law, arbitrator was required to give full effect to employee's conviction and his failure to do so rendered his decision that employee had been dismissed without cause patently unreasonable.

Administrative law --- Standard of review — General principles

Appropriate standard of review for question of whether employee's criminal conviction may be relitigated in grievance proceeding is correctness — Arbitrator's decision that employee's criminal conviction could be relitigated during grievance proceeding was incorrect — Doctrine of abuse of process barred relitigation of employee's criminal conviction — As matter of law, arbitrator was required to give full effect to employee's conviction and his failure to do so rendered his decision that employee had been dismissed without cause patently unreasonable.

Droit du travail collectif --- Arbitrages relatifs aux relations de travail — Compétence du tribunal d'arbitrage — Étendue — Erreur de compétence — Excès de compétence

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Norme de la décision correcte était la norme de contrôle applicable à la question de savoir si la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité — Arbitre avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de l'employé et son défaut de le faire a rendu manifestement déraisonnable sa décision finale, soit que l'employé avait été congédié sans cause.

Droit du travail collectif --- Arbitrages relatifs aux relations de travail — Contrôle de la décision arbitrale — Contrôle judiciaire — Principes généraux

Norme de la décision correcte était la norme de contrôle applicable à la question de savoir si la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité — Arbitre avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de l'employé et son défaut de le faire a rendu manifestement déraisonnable sa décision finale, soit que l'employé avait été congédié sans cause.

Procédure --- Jugements et ordonnances — Chose jugée et préclusion découlant d'une question déjà tranchée — Chose jugée — Nature des procédures antérieures — Procédures pénales

Norme de la décision correcte était la norme de contrôle applicable à la question de savoir si la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité — Arbitre avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de l'employé et son défaut de le faire a rendu manifestement déraisonnable sa décision finale, soit que l'employé avait été congédié sans cause.

Procédure --- Jugements et ordonnances — Chose jugée et préclusion découlant d'une question déjà tranchée — Chose jugée — Introduction — Lorsqu'il s'agit d'un abus de procédure

Norme de la décision correcte était la norme de contrôle applicable à la question de savoir si la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité — Arbitre avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de l'employé et son défaut de le faire a rendu manifestement déraisonnable sa décision finale, soit que l'employé avait été congédié sans cause.

Procédure --- Jugements et ordonnances — Chose jugée et préclusion découlant d'une question déjà tranchée — Préclusion découlant d'une question déjà tranchée — Principes généraux

Norme de la décision correcte était la norme de contrôle applicable à la question de savoir si la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité — Arbitre avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de l'employé et son défaut de le faire a rendu manifestement déraisonnable sa décision finale, soit que l'employé avait été congédié sans cause.

Droit administratif --- Norme de contrôle — Principes généraux

Norme de la décision correcte était la norme de contrôle applicable à la question de savoir si la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de l'employé pouvait être remise en cause dans le cadre de procédures d'arbitrage — Doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité — Arbitre avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de l'employé et son défaut de le faire a rendu manifestement déraisonnable sa décision finale, soit que l'employé avait été congédié sans cause.

A municipality employed O as a recreation instructor. O was charged with the sexual assault of a boy under his supervision. O was convicted following a trial by judge alone. The trial judge found that O was not credible. The conviction was affirmed on appeal.

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The municipality fired O a few days after his conviction. O grieved his dismissal. At the grievance hearing, the municipality submitted the complainant's testimony from the criminal trial and the notes of O's supervisor, who had spoken to the complainant at the time. The municipality did not call the complainant to testify. O testified that he did not sexually assault the complainant. The grievance arbitrator ruled that the criminal conviction was admissible as prima facie, though not conclusive, evidence that O had sexually assaulted the complainant. No new evidence or evidence of fraud at trial was introduced at the arbitration. The arbitrator held that the presumption raised by the criminal conviction was rebutted and that O had been dismissed without cause. The municipality applied for judicial review of the arbitrator's decision. The application was granted. The union appealed and the appeal was dismissed. The union appealed.

Held: The appeal was dismissed.

Per Arbour J. (McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie JJ. concurring):

The doctrine of abuse of process applied to bar the relitigation of O's conviction. O was convicted in a criminal court and he has exhausted all his avenues of appeal. O's conviction had to stand, with all its consequent legal effects. As a matter of law, the arbitrator was required to give full effect to the conviction and, in failing to do so, he erred in law and reached a patently unreasonable conclusion. The evidence before the arbitrator could lead him to conclude only that the municipality had established just cause for O's dismissal.

The standard of review for the arbitrator's decision regarding whether the union was entitled to relitigate the issue decided against O in the criminal proceeding was correctness. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is complex and lies at the heart of the administration of justice. The application of the governing principles of res judicata and abuse of process is clearly outside the sphere of expertise of a labour arbitrator.

The doctrine of issue estoppel did not apply in this case because the requirement of mutuality of parties had not been met. Furthermore, a reversal or relaxation of the long-standing application of the mutuality requirement was not necessary. The primary concerns in this case were the integrity of the criminal process and the authority of a criminal verdict, and not some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple vexation.

Similarly, the doctrine of collateral attack, which focuses on the order itself and its legal effect, was not responsive to the real concerns at play in this case. The union's position was an implicit attack on the correctness of the factual basis of the decision in the criminal proceeding, not a contest about whether that decision had legal force, which it clearly did.

The primary focus of the doctrine of abuse of process is the integrity of the adjudicative function of the courts. The motive of the party who seeks to relitigate and whether he or she is a plaintiff or a defendant are not decisive factors in the application of the bar against relitigation. An attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum is improper. Relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that doing so will enhance the credibility and effectiveness of the adjudicative process as a whole, such as, for example, when the first proceeding is tainted by fraud or dishonesty or when new evidence, previously unavailable, conclusively impeaches the original result.

The common law doctrines of issue estoppel, collateral attack, and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is no need to endorse, as the Court of Appeal did, a self-standing and independent finality principle either as a separate doctrine or as an independent test to preclude relitigation.

Per LeBel J. (concurring) (Deschamps J. concurring): The case was appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of collateral attack and issue estoppel. The appropriate standard of review for whether a criminal conviction may be relitigated in a grievance proceeding is correctness. That question is one of law and requires an arbitrator not only to interpret the Ontario Labour Relations Act and the Ontario Evidence Act but also to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue at the heart of the administration of justice.

The arbitrator's decision that O's criminal conviction could be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to O's conviction. The arbitrator's failure to do so was sufficient to render patently unreasonable his decision that O had been dismissed without cause, a decision within the arbitrator's area of specialized expertise and reviewable on a deferential standard.

In reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the correct result. In this case there were two standards of review at play. On the fundamental legal question of whether O's criminal conviction

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could be relitigated, the arbitrator was subject to a standard of correctness. On the question of whether O had been dismissed for just cause, a question at the core of the arbitrator's expertise, the standard was patent unreasonableness. The arbitrator's failure to decide correctly the fundamental relitigation question was sufficient to lead to a patently unreasonable outcome. The application of the patent unreasonableness standard is not, however, predicated on a finding of incorrectness.

In obiter it was noted that the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. Patent unreasonableness has, at times, shaded uncomfortably into what should presumably be its antithesis, the correctness review. It is also becoming increasingly difficult to distinguish patent unreasonableness from its ostensibly less deferential counterpart, reasonableness simpliciter. Although an intermediate standard of reasonableness simpliciter appears to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation, that advantage is outweighed by the drawbacks of the current framework, including the overlap between patent unreasonableness and reasonableness simpliciter, and the difficulty caused by the interplay between patent unreasonableness and correctness. On the assumption that an effective distinction between an unreasonable and a patently unreasonable decision can be made, there are situations in which an unreasonable decision must be allowed to stand, that is, when the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. It is doubtful that such an outcome could be reconciled with legislative intent. It remains to be seen whether, in an attempt to solve these difficulties, courts should move to a two-standard system of review of correctness and a revised, unified standard of reasonableness.

O travaillait pour la municipalité à titre d'instructeur en loisirs. Il a été accusé d'avoir agressé sexuellement un garçon sous sa surveillance. O a été déclaré coupable au terme de son procès devant juge seul. Le juge du procès a conclu que O n'était pas crédible. La déclaration de culpabilité a été subséquemment confirmée en appel.

La municipalité a congédié O quelques jours après sa condamnation. O a déposé un grief contestant son congédiement. Au cours de l'audition du grief, la municipalité a mis en preuve le témoignage du plaignant durant le procès ainsi que les notes du superviseur de O, lequel avait parlé avec le plaignant à l'époque de l'agression. La municipalité n'a pas fait témoigner le plaignant. O a témoigné qu'il n'avait pas agressé sexuellement ce dernier.

L'arbitre de grief a jugé que la déclaration de culpabilité était admissible comme preuve prima facie que O avait agressé sexuellement le plaignant, mais qu'il ne s'agissait cependant pas d'une preuve concluante. Au cours de l'arbitrage, il n'a été présenté aucune preuve nouvelle ni de preuve que le procès était entaché de fraude. L'arbitre a conclu que l'on avait repoussé la présomption découlant de la déclaration de culpabilité et que O avait été congédié sans cause.

La municipalité a demandé le contrôle judiciaire de la décision arbitrale. La demande a été accueillie. Le syndicat a interjeté appel et son pourvoi a été rejeté. Le syndicat a interjeté appel.

Arrêt: Le pourvoi a été rejeté.

Arbour, J. (McLachlin, J.C.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, JJ., souscrivant à l'opinion d'Arbour, J.): La doctrine de l'abus de procédure s'appliquait et empêchait la remise en cause de la déclaration de culpabilité de O. Ce dernier a été condamné par une cour pénale et avait utilisé tous les moyens d'appel dont il disposait. Sa condamnation était valide et devait recevoir son plein effet. L'arbitre avait l'obligation, en droit, de lui donner plein effet. Il a commis une erreur de droit en omettant de le faire, ce qui lui a fait faire une erreur manifestement déraisonnable. La preuve qu'on lui avait présentée lui permettait simplement de conclure que la municipalité avait établi la cause justifiant le congédiement de O.

La norme de la décision correcte était la norme de contrôle applicable à la décision de l'arbitre qui déterminait si le syndicat pouvait demander la remise en cause de la déclaration de culpabilité. Le droit en matière de remise en cause de questions ayant fait l'objet de décisions judiciaires définitives antérieures est complexe et il joue un rôle central dans l'administration de la justice. L'application des principes de la chose jugée et de l'abus de procédure échappe clairement au domaine d'expertise des arbitres du travail.

La doctrine de la préclusion découlant d'une question déjà tranchée ne s'appliquait pas en l'espèce puisque l'exigence requérant la réciprocité des parties n'était pas respectée. Rien ne justifiait non plus de supprimer ou d'assouplir l'exigence de la réciprocité, établie depuis longtemps. En l'espèce, l'intégrité du processus pénal et l'autorité d'un verdict de culpabilité étaient les considérations primordiales, et non certaines des préoccupations plus traditionnelles de la préclusion découlant d'une question déjà tranchée où l'accent est mis sur l'intérêt des parties, comme les dépens et les incidents vexatoires multiples.

De la même façon, la doctrine de la contestation indirecte, qui se concentre surtout sur l'ordonnance elle-même et ses effets, ne répondait pas adéquatement aux préoccupations réelles de l'espèce. Par sa position, le syndicat attaquait implicitement le bien-

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fondé factuel de la décision en matière pénale; il ne contestait pas la validité juridique de celle-ci, puisqu'elle était manifestement valide.

La doctrine de l'abus de procédure vise principalement l'intégrité de la fonction décisionnelle des tribunaux. Tant les raisons pour lesquelles une partie cherche à obtenir la remise en cause d'une décision que la question de savoir s'il s'agit de la partie plaignante ou défenderesse ne constituent aucunement des éléments décisifs de l'application de l'interdiction de remettre en cause. Il n'est pas approprié d'essayer de contester une décision judiciaire par le biais de la voie interdite de la remise en cause devant un autre forum. La remise en cause a de graves effets préjudiciables et il faut l'éviter à moins que les circonstances ne l'exigent, parce qu'elle est nécessaire pour accroître la crédibilité et l'efficacité du processus décisionnel dans son ensemble, comme lorsque le premier procès est entaché de fraude ou de malhonnêteté ou lorsqu'il existe une nouvelle preuve, qui n'était pas disponible auparavant, permettant d'attaquer de façon concluante le résultat initial.

Les doctrines de common law que sont la préclusion découlant d'une question déjà tranchée, la contestation indirecte et l'abus de procédure répondent adéquatement aux préoccupations qui surgissent lorsqu'il faut pondérer le principe de l'irrévocabilité des jugements et celui de l'équité envers un justiciable particulier. Il n'est donc pas nécessaire, comme l'a fait la Cour d'appel, d'ériger le principe de l'irrévocabilité en doctrine distincte ou critère indépendant pour interdire la remise en cause.

LeBel, J. (souscrivant) (Deschamps, J., souscrivant à l'opinion de LeBel, J.): L'affaire a été à bon droit décidée sur la base de la doctrine de l'abus de procédure, et non sur la base des doctrines plus étroites et techniques que sont la contestation indirecte et la préclusion découlant d'une question déjà tranchée. La norme de la décision correcte était la norme de contrôle applicable à la question de savoir si l'on pouvait remettre en cause une déclaration de culpabilité dans le cadre de procédures d'arbitrage. Il s'agit d'une question de droit qui requiert non seulement que l'arbitre interprète la Loi sur les relations de travail et la Loi sur la preuve, mais également qu'il détermine si certaines doctrines de common law portant sur la remise en question étaient applicables, une question qui était centrale à l'administration de la justice.

L'arbitre n'a pas décidé correctement en concluant que la déclaration de culpabilité de O pouvait être remise en cause dans le cadre de la procédure d'arbitrage. Il avait l'obligation, en droit, de donner plein effet à la déclaration de culpabilité de O. Son défaut de le faire suffisait pour rendre manifestement déraisonnable sa décision voulant que O ait fait l'objet d'une congédiement sans cause, décision qui se situait par ailleurs à l'intérieur de son expertise spécialisée et qui ne pouvait être révisée que sur la base d'une norme exigeant la retenue.

Le tribunal qui révise une décision en fonction de la norme de la décision manifestement déraisonnable n'a pas à identifier quel est le résultat « correct ». En l'espèce, deux normes de contrôle se confrontaient. En ce qui concernait la question fondamentale de savoir si la déclaration de culpabilité de O pouvait être remise en cause, la norme applicable était celle de la décision correcte. Quant à la question de savoir si O avait été congédié pour cause, une question se situant au coeur de l'expertise de l'arbitre, la norme applicable était celle de la décision manifestement déraisonnable. Le défaut de l'arbitre de trancher correctement la question de la remise en cause suffisait pour conclure à l'existence d'une erreur manifestement déraisonnable. Cependant, l'application elle-même de cette norme ne dépend pas d'une conclusion que la décision rendue n'était pas correcte.

Il a été noté, en obiter, que la norme de la décision manifestement déraisonnable ne fournit pas actuellement aux tribunaux réviseurs des paramètres clairs pour l'évaluation des décisions rendues par des décideurs administratifs. Il est arrivé, à certains moments, que la norme de la décision manifestement déraisonnable se soit malheureusement mêlée avec ce qui constitue sans nul doute son antithèse, soit la norme de la décision correcte. Il est également de plus en plus difficile de faire la distinction entre la norme de la décision manifestement déraisonnable et son équivalent, lequel requiert beaucoup moins de retenue, soit la norme de la décision raisonnable simpliciter. Même si la norme intermédiaire de la décision raisonnable simpliciter semble permettre aux tribunaux réviseurs de mieux façonner le degré de retenue nécessaire en fonction d'une situation particulière, il n'en demeure pas moins que cet avantage est englouti par les inconvénients du cadre actuel, y compris le chevauchement existant entre la décision manifestement déraisonnable et la décision raisonnable simpliciter ainsi que la difficulté résultant de l'interaction entre la première et la décision correcte. Même si l'on présume qu'une distinction efficace peut être faite entre une décision déraisonnable et une décision manifestement déraisonnable, il existe quand même des situations où la décision déraisonnable doit être maintenue, lorsque la norme de contrôle applicable est celle de la décision manifestement déraisonnable et que la décision faisant l'objet du contrôle est déraisonnable mais ne l'est pas de façon manifeste. L'on peut douter que ce genre de résultat puisse être concilié avec l'intention du législateur. Il reste à voir si les tribunaux ne devraient pas, pour tenter de résoudre ces difficultés, établir un régime de contrôle comportant deux normes, soit la norme de la décision correcte ainsi qu'une norme de la décision raisonnable révisée et unifiée.

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1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

5 The arbitrator ruled that the criminal conviction was admissible as *prima facie*, but not conclusive, evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted and that Oliver had been dismissed without just cause.

III. Procedural History

A. Superior Court of Justice (Divisional Court) (2000), 187 D.L.R. (4th) 323

6 At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, 2003 SCC 64 (S.C.C.), is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellants' argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision," applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each case, the standard for judicial review had been met (para. 86).

B. Court of Appeal for Ontario (2001), 55 O.R. (3d) 541

7 Doherty J.A., for the court, held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing relitigation of issues finally decided in a previous judicial proceeding," the appropriate standard of review was correctness (paras. 22 and 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited

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to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results and which serves to conserve the resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice:

> - Does the *res judicata* doctrine apply?
>
> - If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
>
> - If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

10 Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest and because there was no new evidence presented at arbitration (paras. 103-108).

IV. Relevant Statutory Provisions

11 *Evidence Act*, R.S.O. 1990, c. E.23

> 22.1(1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,
>
> > (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
> >
> > (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.
>
> (2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.
>
> (3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

> 48.(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. Standard of Review

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the

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benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous decisions of *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), and *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.).)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) (see also *Q.*, *supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

14 Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), where he said, at para. 39:

> It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. *The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard* . . . . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

15 In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex, it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. Theses rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (S.C.C.), at para. 21.

16 Therefore, I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. Section 22.1 of Ontario's Evidence Act

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary," that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction - the finding of another court - admissible for the truth of its content, as an exception to the inadmissibility of hearsay (David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 3rd ed. (Toronto: Irwin Law, 2002), at p. 120; M.N. Howard, Peter Crane and Daniel A. Hochberg, *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990), at pp. 33-94 to 33-95).

19 Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary." There are circumstances in which evidence

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will be admissible to rebut the presumption that the person convicted committed the crime, in particular, where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

20 This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound*, *supra*, at para. 39. Section 22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.), at p. 264, affirmed (1984), 48 O.R. (2d) 266 (Ont. C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits." However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *McIlkenny v. Chief Constable of the West Midlands* (1981), [1982] A.C. 529 (U.K. H.L.), at p. 541; see also *Del Core v. College of Pharmacists (Ontario)* (1985), 51 O.R. (2d) 1 (Ont. C.A.), at p. 22, *per* Blair J.A.). Section 22.1 does not change this; the legislature has not explicitly displaced the common law doctrines and the rebuttal is consequently subject to them.

21 The question, therefore, is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

C. The Common Law Doctrines

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle." I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* (the other branch being *cause of action* estoppel) which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision, (2) the prior judicial decision must have been final, and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (S.C.C.), at para. 25, *per* Binnie J.). The final requirement, known as "mutuality," has been largely abandoned in the United States and has been the subject of much academic and judicial debate there, as well as in the United Kingdom and, to some extent, in this country (See Garry D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-651). In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

24 The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear

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> foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.
>
> In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

31 On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Commentary R. 4.01(3) of the *Rules of Professional Conduct*, Law Society of Upper Canada (Toronto: Law Society of Upper Canada, 2002), at pp. 58 and 61; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12 (S.C.C.); *R. v. Lemay* (1951), [1952] 1 S.C.R. 232 (S.C.C.), at pp. 256-257, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621, at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

32 As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation." For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599, the rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

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Thus, in *Wilson*, *supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.), at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction." Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.), this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk*, *supra*, at para. 20, as follows: "that a *judicial order* pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.), at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), at p. 1007:

> . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway*, *supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.), this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.)). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21 (S.C.C.), at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63 (S.C.C.))). Goudge J.A. expanded on that concept in the following terms, at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel*. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> *One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined*. [Emphasis added.]

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TAB 8

1983 CarswellMan 154
Supreme Court of Canada, Laskin C.J.C.

R. v. Wilson

1983 CarswellMan 154, 1983 CarswellMan 189, 1983 J.E. 70, [1983] 2 S.C.R. 594, [1983] S.C.J. No. 88, [1984] 1 W.W.R. 481, 11 W.C.B. 200, 26 Man. R. (2d) 194, 37 C.R. (3d) 97, 4 D.L.R. (4th) 577, 51 N.R. 321, 9 C.C.C. (3d) 97, J.E. 84-70

James Stephen Wilson, Appellant and Her Majesty the Queen, Respondent

Dickson, Estey, McIntyre and Chouinard JJ.

Heard: March 14, 1983
Judgment: December 15, 1983
Docket: 16931

Proceedings: Affirmed, 65 C.C.C. (2d) 507, 13 Man. R. (2d) 155, 1982 CarswellMan 69, [1982] 2 W.W.R. 91 (Man. C.A.)

Counsel: *R.L. Pollack*, for appellant
J.D. Montgomery, Q.C., for respondent

Subject: Criminal
Related Abridgment Classifications
Criminal law
XXVIII Admissibility of private communications
XXVIII.2 Authorization
XXVIII.2.j Miscellaneous
Headnote
Criminal Law --- Invasion of privacy — Interception of private communications — Admissibility — Authorization
Authorization reviewable only upon prompt application to court originally granting it.
At trial, wiretap evidence was ruled inadmissible on the basis that the authorization granted by the Court of Queen's Bench was unlawful. This determination was made without opening the sealed packet containing the documents relating to the authorization after cross-examination of the police officer indicated that there was no evidence to support the statement in the authorization that other investigative procedures had been tried and failed, that other investigative procedures were unlikely to succeed, and that the matter was urgent. Upon the Crown's appeal from the accused's acquittal, a new trial was ordered on the basis that an authorization could not be challenged collaterally in Provincial Court. The accused appealed.
Held:
Appeal dismissed.
Per McIntyre J. (Laskin C.J.C. and Estey J. concurring)
A trial judge has no authority to collaterally attack a wiretap authorization; he is limited to a consideration of defects and irregularities apparent on the face of the authorization and may not go behind it. In his capacity as trial judge, there is no authority to direct the opening of the sealed packet. Having no access to the materials necessary to review the granting of the authorization, a collateral attack is not possible. Any application to review an authorization must be made as soon as possible to the court which originally granted it, preferably before the authorizing judge. If the trial judge happens to be of the same court that made the authorization order, an application may be made to him directly for review to avoid delay, but such a review would be done in his capacity as a judge of the authorizing court, not in his capacity as trial judge. The trial judge effectively went behind the authorizations, even though he did not open the sealed packet, and thus exceeded his jurisdiction and was in error in refusing to admit the Crown's evidence.
Per Dickson J. (concurring in result) (Chouinard J. concurring)

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Section 178.16(1)(*a*) and 3(*b*) of the Criminal Code require a trial judge to consider the validity of an authorization and give him authority in doing so to go behind an apparently valid wiretap authorization to determine whether there are defects or irregularities in either the giving of the authorization or in the application for it. Such a determination cannot properly be made without opening the sealed packet. A superior court judge has authority to do so. A trial before an inferior court judge should be adjourned to allow counsel to apply for an order permitting its opening. The trial judge erred in deciding that the pre-conditions of s. 178.13(1)(*b*) had not been met without examining the contents of the sealed packet.

Table of Authorities

Cases considered:

Statutes considered:

Criminal Code, R.S.C. 1970, c. C-34, Pt. IV.1 [en. 1973-74, c. 50, s. 2], ss. 2 "superior court of criminal jurisdiction" [am. 1974-75-76, c. 19, s. 1

1978-79, c. 11, s. 10(1)], 178.12(1)(*g*) [en. 1973-74, c. 50, s. 2], 178.13 [en. 1973-74, c. 50, s. 2

am. 1976-77, c. 53, s. 9], 178.14 [en. 1973-74, c. 50, s. 2], 178.16 [en. 1973-74, c. 50, s. 2

am. 1976-77, c. 53, s. 10], 482 "judge" [am. 1974-75-76, c. 48, s. 25(1)

c. 93, s. 61

78-79, c. 11, s. 10(1)], 613(1)(*b*)(iii).

Authorities considered:

Bellemare, "Larevisiond'une authorisation en écoute electronique" (1979), 39 Revue du Barreau 496.

Cohen, Invasion of Privacy: Police and Electronic Surveillance in Canada (1983), p. 155.

Manning, Protection of Privacy Act (1974), pp. 135-37.

Appeal from decision of Manitoba Court of Appeal, [1982] 2 W.W.R. 91, 65 C.C.C. (2d) 507, 13 Man. R. (2d) 155, allowing appeal and ordering new trial on basis trial judge had no authority to exclude wiretap evidence on basis of collateral attack on wiretap authorization.

Considered by majority:

Bador Bee v. Habib Merican Noordin, [1909] A.C. 615 (P.C.) — *referred to*

Bidder v. Bridges (1884), 26 Ch. D. 1 (C.A.) — *referred to*

Boyle v. Sacker (1888), 39 Ch. D. 249 (C.A.) — *referred to*

Can. Tpt. (U.K.) Ltd. v. Alsbury, 7 W.W.R. (N.S.) 49, 105 C.C.C. 20, [1953] 1 D.L.R. 385 , affirmed *(*sub nom. *Poje v. A.G.B.C.)* [1953] 1 S.C.R. 516, 17 C.R. 176, 105 C.C.C. 311, [1953] 2 D.L.R. 785 — *applied*

Charette v. R., [1980] 1 S.C.R. 785, 14 C.R. (3d) 191, 51 C.C.C. (2d) 350, 110 D.L.R. (3d) 71, 33 N.R. 158 , affirming *(*sub nom. *R. v. Parsons)* 17 O.R. (2d) 465, 40 C.R.N.S. 202, 37 C.C.C. (2d) 497, 80 D.L.R. (3d) 430, 33 N.R. 161 — *considered*

Clarke v. Phinney, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 — *referred to*

Dickie v. Woodworth (1883), 8 S.C.R. 192 — *applied*

Gibson v. Le Temps Publishing Co. (1903), 6 O.L.R. 690 — *applied*

Goldman v. R., [1980] 1 S.C.R. 976, 13 C.R. (3d) 228, 51 C.C.C. (2d) 1, 108 D.L.R. (3d) 17, 30 N.R. 453 — *referred to*

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Gulf Islands Navigation Ltd. v. Seafarers' Int. Union (1959), 28 W.W.R. 517, 18 D.L.R. (2d) 625 (B.C.C.A.) — *applied*

Maynard v. Maynard, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 — *referred to*

Miller and Thomas, Re (1975), 28 C.C.C. (2d) 128 (B.C. Co. Ct.) — *considered*

Pashko v. Can. Accept. Corp. Ltd. (1957), 12 D.L.R. (2d) 380 (B.C.C.A.) — *referred to*

R. v. Blacquiere (1980), 57 C.C.C. (2d) 330, 28 Nfld. & P.E.I.R. 336, 79 A.P.R. 336 (P.E.I.S.C.) — *considered*

R. v. Bradley, [1980] C.S. 1051, 19 C.R. (3d) 336 (Que. S.C.) — *referred to*

R. v. Cardoza (1981), 61 C.C.C. (2d) 412 (Ont. C.A.) — *referred to*

R. v. Crease (1980), 53 C.C.C. (2d) 378 (Ont. C.A.) — *referred to*

R. v. Dass, [1979] 4 W.W.R. 97, 8 C.R. (3d) 224, 47 C.C.C. (2d) 194 , leave to appeal to S.C.C. refused 30 N.R. 609n — *considered*

R. v. Donnelly, [1976] W.W.D. 100, 29 C.C.C. (2d) 58 (Alta. T.D.) — *considered*

R. v. Gabourie (1976), 31 C.C.C. (2d) 471 (Ont. Prov. Ct.) — *referred to*

R. v. Gill (1980), 56 C.C.C. (2d) 169 (B.C.C.A.) — *considered*

R. v. Hancock, [1976] 5 W.W.R. 609, 36 C.R.N.S. 102, 30 C.C.C. (2d) 544 (B.C.C.A.) — *referred to*

R. v. Haslam (1977), 36 C.C.C. (2d) 250 (Nfld. T.D.) — *referred to*

R. v. Ho (1976), 32 C.C.C. (2d) 339 (B.C. Co. Ct.) — *referred to*

R. v. Hollyoake (1975), 27 C.C.C. (2d) 63 (Ont. Prov. Ct.) — *referred to*

R. v. Johnny (1981), 62 C.C.C. (2d) 33 (B.C.S.C.) — *referred to*

R. v. Kalo (1975), 28 C.C.C. (2d) 1 (Ont. Co. Ct.) — *referred to*

R. v. Miller, [1976] 1 W.W.R. 97, 32 C.R.N.S. 192, (sub nom. *Re Miller and Thomas)* 23 C.C.C. (2d) 257, 59 D.L.R. (3d) 679 (B.C.S.C.) — *referred to*

R. v. Newall (1982), 67 C.C.C. (2d) 431, 136 D.L.R. (3d) 734 (B.C.S.C.) *referred to*

R. v. Robinson, [1977] 4 W.W.R. 697, 39 C.R.N.S. 158 (B.C. Co. Ct.) — *referred to*

R. v. Turangan, [1976] 4 W.W.R. 107, 32 C.C.C. (2d) 249 , affirmed 32 C.C.C. (2d) 254n (B.C.C.A.) — *referred to*

R. v. Welsh (1977), 15 O.R. (2d) 1, 32 C.C.C. (2d) 363, 74 D.L.R. (3d) 748 (C.A.) — *applied*

R. v. Wong (1976), 33 C.C.C. (2d) 506 (B.C.S.C.) — *considered*

R. and Collos, Re, [1977] 5 W.W.R. 284, 37 C.C.C. (2d) 405 , reversing [1977] 2 W.W.R. 693, 34 C.C.C. (2d) 313 (B.C.C.A.) — *referred to*

R. and Kozak, Re (1976), 32 C.C.C. (2d) 235 (B.C.S.C.) — *referred to*

Royal Comm. Inquiry into Royal Amer. Shows Inc. (1978), 40 C.C.C. (2d) 212 (Alta. T.D.) — *referred to*

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Royal Trust Co. v. Jones, [1962] S.C.R. 132, 37 W.W.R. 1, 31 D.L.R. (2d) 292 — *applied*

Stewart and R., Re (1975), 8 O.R. (2d) 588, 23 C.C.C. (2d) 306, 58 D.L.R. (3d) 644 , affirmed 13 O.R. (2d) 260, 30 C.C.C. (2d) 391, 70 D.L.R. (3d) 592 (H.C.) — *referred to*

Stewart v. Braun, [1924] 2 W.W.R. 1103, [1924] 3 D.L.R. 941 (Man K.B.) — *applied*

Zaduk and R., Re (1977), 37 C.C.C. (2d) 1 (Ont. H.C.) — *referred to*

***McIntyre J.*:**

1 The appellant was charged with nine counts relating to betting. He was tried before Dubienski, Provincial Court Judge in the Manitoba Provincial Court. The Crown's case depended on evidence obtained by wiretap for which it had procured four authorizations under the provision of Part IV. 1 of the *Criminal Code* from judges of the Court of Queen's Bench of Manitoba. Each authorization contained the following words:

> AND UPON hearing read the affidavit of Detective Sergeant Anton Chemiak;
>
> AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

2 At trial, on cross-examination of the police officer Cherniak who is referred to in the authorizations, evidence was given that Cherniak had had the sole direction of the investigation and that he had made the applications for the authorizations. He said that the interceptions were made under the authorizations, that they were the sole investigations made and that no other investigation was done or ordered by him after the first authorization. He was unaware of any other investigating steps. It is evident that counsel for the appellant by this line of cross-examination was attempting to ascertain whether or not the above-quoted words from the authorization were true and whether the prescriptions of s. 178.13(1)(b) of the *Code* had been satisfied. That section reads:

> 178.13 (1) An authorization may be given if the judge to whom the application is made is satisfied.
>
> [...]
>
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

3 No objection was taken by the Crown to this line of examination.

4 On the basis of the cross-examination of the police officer, the trial judge made the following finding:

> No other investigative procedures had been tried and failed, that there was no evidence that investigative procedures were likely to succeed, nor that there was any urgency.

5 As a result, the trial judge held that the interceptions of the private communications of the appellant had not been lawfully made as required by s. 178.16 of the *Criminal Code* and he ruled the evidence obtained by the wiretaps inadmissible. The case for the Crown collapsed and the appellant was acquitted on all counts.

6 On appeal to the Manitoba Court of Appeal, the Crown argued that the provincial court judge was without jurisdiction to go behind the authorizations and thereby make a collateral attack upon the order of a superior court. The appeal was allowed and a new trial was ordered. Monnin J.A. (as he then was), with whom Matas J.A. concurred, held that an authorization granted

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by a superior court judge could not be collaterally attacked in a provincial court. O'Sullivan J.A., concurring in the result, went further and said that: "In my opinion, where there is an authorization granted by a superior court of record, it cannot be collaterally attacked in any court and it cannot be attacked at all in an inferior court." A further argument was advanced by the appellant Wilson that there was no evidence of proper notice of intention to adduce wiretap evidence as required under s. 178.16(4) of the *Code*. This argument was rejected in the Court of Appeal and, on an acknowledgment that there was some five months' notice given, it was rejected in this Court as well. The only remaining issue then is whether or not the trial judge erred in law in refusing to admit the wiretap evidence.

7 In the Manitoba Court of Appeal, Monnin J.A. said:

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

8 I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally-and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

9 Authority for these propositions is to be found in many cases. A particularly clear statement of the law, together with reference to many of the authorities, is to be found in *Can. Tpt. (U.K.) Ltd. v. Alsbury*, 7 W.W.R. (N.S.) 49, 105 C.C.C. 20, [1953] 1 D.L.R. 385, affirmed (sub nom. *Poje v. A.G. B.C.)* [1953] 1 S.C.R. 516, 17 C.R. 176, 105 C.C.C. 311, [1953] 2 D.L.R. 785, a judgment of the British Columbia Court of Appeal. In that case striking employees picketed the wharf where a vessel was waiting to take on cargo. The shipowner secured an ex *parte* injunction in the Supreme Court restraining the defendant and others from picketing. The injunction was disobeyed and contempt proceedings were commenced against the defendant. At first instance before the Chief Justice of the Supreme Court of British Columbia the defendants contended that an attachment for contempt should not issue for the reason that the injunction order, made by a judge of the Supreme Court, was a nullity and could not therefore form the basis for a contempt order. This collateral attack was rejected by the Chief Justice, attachment issued, and penalties for contempt including fines and imprisonment were imposed. In the Court of Appeal the appeal was dismissed with one dissent and, at p. 406, Sidney Smith J.A. said:

> First it was said that the injunction order of Clyne J. was a nullity that could be ignored with impunity, and could form no basis for contempt proceedings. Many objections were levelled at this learned Judge's order, chief among them being: (1) that it was based on improper and inadmissible evidence; (2) that the injunction was in conflict with the *Trade-unions Act* [R.S.B.C. 1948, c. 342] and the *Laws Declaratory Act*[R.S.B.C. 1948, c. 179]; (3) that the injunction was in permanent form and no Court could grant a permanent injunction *ex parte*.
>
> To this the general answer is made that the order of a Superior Court is *never* a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. This seems to be established by the authorities cited by counsel for the Attorney-General, *viz., Scott v. Bennett* (1871), L.R. 5 Hi. 234 at p. 245; *viz., Scott v. Bennett* (1871), L.R. 5 H.L. 234 at p. 245; *Revell v. Blake* (1873), L.R. 8 C.P. 533 at p. 544 (Ex. Ch.); *Scotia Const. Co. v. Halifax*, [1935] S.C.R. 124, [1935] 1 D.L.R. 316; and to these I might add *Re Padstow Total Loss & Collision Assur. Assn.* (1882), 20 Ch.D. 137 at p. 145 (C.A.), and *Hughes v. Northern Elec. & Mfg. Co.* (1915), 50 S.C.R. 626 at pp. 652-3, 21 D.L.R. 358. To these general authorities may be added the more specific line of cases holding that an injunction, however wrong, must be obeyed until it is set aside, as shown by the authorities cited in Kerr on Injunctions, 6th éd., p. 668, and 7 Hals., p. 32, which include the authoritative decision in *Eastern Trust Co. v. MacKenzie, Mann & Co.*, [1915] A.C. 750 at p. 761, 31 W.L.R. 248, 22 D.L.R. 410, where a party was held to be rightly committed for disobeying an injunction, later set aside. Other authorities for holding that an injunction, though wrong, must be obeyed till set aside, are *Leberry v. Braden* (1900), 7 B.C.R. 403, and *Bassel's Lunch Ltd. v. Kick*, [1936] O.R. 445 at p. 456, 67 Can. C.C. 131 at p. 135.

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TAB 9

2023 ABKB 488
Alberta Court of King's Bench

Re Mantle Materials Group, Ltd

2023 CarswellAlta 2276, 2023 ABKB 488, [2023] 10 W.W.R. 453, 61 Alta. L.R. (7th) 406, 9 C.B.R. (7th) 86

In the Matter of the Bankruptcy and Insolvency Act, RSC 1985, c B-3, as Amended

And In the Matter of the Notice of Intention to Make a Proposal of Mantle Materials Group, Ltd

Colin C.J. Feasby J.

Heard: August 15, 2023
Judgment: August 28, 2023
Docket: Calgary 2301-10358

Counsel: Tom Cumming, Stephen Kroeger, for Mantle Materials Group, Ltd.
Alexis Teasdale, Joel Schachter, for Travelers Capital Corp
Pantelis Kyriakakis, for Proposal Trustee, FTI Consulting Canada Inc.
Doug Nishimura, for Alberta Environment and Protected Areas
Darren Bieganek, for 945441 Alberta Ltd

Subject: Civil Practice and Procedure; Environmental; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.b Forms of secured interests
X.1.b.iii Miscellaneous
Headnote
Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Miscellaneous
Debtor operated gravel pits on public land pursuant to surface material leases issued by Alberta Environment and Protected Areas (AEPA) — Secured lender (creditor) loaned debtor money for acquisition of equipment used in its operation — Debtor granted creditor money security interest over equipment — Pursuant to agreement between creditor, debtor and private debt fund which held general security interest in debtor's present and after acquired property, creditor's security interest was designated to have first priority — Debtor filed notice of intention to make proposal under s. 50.1 of Bankruptcy and Insolvency Act — Extension of stay period was granted and creation and priority and ranking of various restructuring changes "restructuring charges" was approved — Issue arose as to creditor's rank — Creditor's security interest was subordinate to restructuring charges — Restructuring charges were necessary to completion of environmental remediation work that was important part of pending proposal — Creditor could not realize on its security until environmental reclamation work was completed to AEPA's satisfaction — Only way debtor could perform such work was with support of debtor's officers and directors, lawyers and insolvency professionals, and interim lender who were all protected by restructuring charges.
Table of Authorities
Cases considered by *Colin C.J. Feasby J.*:
Manitok Energy Inc (Re) (2022), 2022 ABCA 117, 2022 CarswellAlta 806, [2022] 6 W.W.R. 1, 98 C.B.R. (6th) 1, 468 D.L.R. (4th) 434 (Alta. C.A.) — considered
Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150, [2019] 1 R.C.S. 150 (S.C.C.) — followed

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Orphan Well Association v. Trident Exploration Corp (2022), 2022 ABKB 839, 2022 CarswellAlta 3672, 4 C.B.R. (7th) 258 (Alta. K.B.) — followed

R. v. Comeau (2018), 2018 SCC 15, 2018 CSC 15, 2018 CarswellNB 124, 2018 CarswellNB 125, 420 D.L.R. (4th) 199, [2018] 1 S.C.R. 342, [2018] 1 R.C.S. 342 (S.C.C.) — considered

R. v. Henry (2005), 2005 SCC 76, 2005 CarswellBC 2972, 2005 CarswellBC 2973, 33 C.R. (6th) 215, 202 C.C.C. (3d) 449, 260 D.L.R. (4th) 411, 49 B.C.L.R. (4th) 1, 219 B.C.A.C. 1, 361 W.A.C. 1, 376 A.R. 1, 360 W.A.C. 1, 136 C.R.R. (2d) 121, [2006] 4 W.W.R. 605, (sub nom. *R. c. Henry)* [2005] 3 S.C.R. 609, 342 N.R. 259 (S.C.C.) — considered

R. v. Kirkpatrick (2022), 2022 SCC 33, 2022 CSC 33, 2022 CarswellBC 2013, 2022 CarswellBC 2014, 471 D.L.R. (4th) 440, 414 C.C.C. (3d) 417, 82 C.R. (7th) 1 (S.C.C.) — considered

R. v. Sullivan (2022), 2022 SCC 19, 2022 CSC 19, 2022 CarswellOnt 6589, 2022 CarswellOnt 6590, 80 C.R. (7th) 86, 413 C.C.C. (3d) 447, 472 D.L.R. (4th) 521 (S.C.C.) — considered

South Side Woodwork (1979) Ltd. v. R.C. Contracting Ltd. (1989), 33 C.L.R. 43, 95 A.R. 161, 1989 CarswellAlta 516 (Alta. Q.B.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 50.4(8) [en. 1992, c. 27, s. 19] — pursuant to

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

Generally — referred to

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

s. 140 — referred to

DETERMINATION of creditor's rank in debtor's proposal.

***Colin C.J. Feasby J.*:**

Introduction

1 Mantle Materials Group, Ltd. applied for an extension of time to make a proposal pursuant to the Bankruptcy and Insolvency Act, RSC 1985, c B3 s 50.4(8), approval of various charges on the bankrupt estate ("Restructuring Charges") including the priority of those charges, and approval of the payment of certain prefiling debts to creditors whose support is required to perform environmental reclamation work that will be integral to the pending proposal. The application was granted with a temporary proviso with respect to the priority of the Restructuring Charges over certain equipment to ensure that Travelers Capital Corp, a secured lender, was not prejudiced prior to the release of these Reasons.

2 Mantle advises that the proposal that it intends to make will not allow payment to any creditors before Mantle has satisfied its end of life obligations stemming from Environmental Protection Orders issued by Alberta Environment and Protected Areas ("AEPA" formerly Alberta Environment and Parks) with respect to several gravel producing properties. Mantle submits that this is what is required by Orphan Well Association v Grant Thornton Ltd 2019 SCC 5 ("Redwater") because the environmental remediation obligation is an obligation of the company that must be satisfied prior to distributions to creditors. AEPA supports Mantle's position.

3 Travelers asserts that it has priority with respect to security in certain equipment and Travelers' ability to realize on its security should not be postponed until after the remediation work has been completed to AEPA's satisfaction and subordinated to the Restructuring Charges. Travelers offers a different interpretation of *Redwater*. Travelers contends that *Redwater* held that an end of life environmental obligation need only be satisfied using assets encumbered by or related to the end of life obligation. Travelers submits the Court should find that a creditor with security over assets unrelated to assets burdened with the environmental remediation obligation may realize on such security without delay.

Background

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4 Mantle operates 14 gravel pits on public land pursuant to surface material leases issued by AEPA. Mantle also operates 10 gravel pits on private land pursuant to royalty agreements with the landowners.

5 Mantle acquired its gravel producing assets in 2021 in the *Companies' Creditors Arrangement Act* proceedings for JMB Crushing Systems Inc. and associated companies. [1] Financial liabilities of JMB were compromised and undesired assets were transferred to a residual company pursuant to a Reverse Vesting Order. The desired assets remained in JMB and its subsidiary 2161889 Alberta Ltd, both of which then amalgamated with Mantle on May 1, 2021.

6 Following the commencement of the JMB CCAA proceedings, AEPA issued Environmental Protection Orders ("EPOs") to JMB and 216 in respect of some of the gravel producing properties.

7 EPOs are issued pursuant to AEPA's authority under the Environmental Protection and Enhancement Act, RSA 2000, c E 12 s 140. An AEPA inspector is permitted to "issue an environmental protection order regarding conservation and reclamation to an operator directing the performance of any work or the suspension of any work if in the inspector's opinion the performance or suspension of the work is necessary in order to conserve and reclaim the land."

8 An EPO issued by AEPA in respect of end of life reclamation is similar in nature to an Abandonment and Reclamation Order ("ARO") issued by the Alberta Energy Regulator ("AER"). Indeed, all the parties in the present case proceeded on the basis that an EPO issued by AEPA had the same legal effect and should be subject to like treatment in insolvency proceedings as an ARO issued by the AER.

9 The EPOs issued by AEPA to JMB address end of life reclamation steps to be taken at various gravel producing or formerly gravel producing assets operated by JMB on both public and private land.

10 The original Reverse Vesting Order presented to the Court in the JMB CCAA proceedings sought to absolve the directors of JMB and 216 of responsibility for the EPOs and sought to usurp AEPA's regulatory role by putting the Court in a supervisory role with respect to the performance of reclamation work by Mantle and compliance with the EPOs. AEPA objected to the original proposed Reverse Vesting Order.

11 As a result of AEPA's objections, the Court approved a revised Reverse Vesting Order that provided that the order did not affect the liability of JMB, 216, or the directors of those companies for "Compliance Issues" or performing "Reclamation Obligations" in respect of the various gravel producing properties. Mantle accordingly remained liable for the EPOs issued with respect to both the properties acquired in the amalgamation with JMB and 216 and the properties now possessed by the residual company. Mantle negotiated a plan with AEPA for the reclamation work to be done to satisfy the EPOs.

12 Following completion of the JMB CCAA proceedings, Mantle entered a loan transaction with Travelers. Travelers loaned Mantle $1,7000,000 for the acquisition of equipment for use in its operations. Mantle granted Travelers a purchase money security interest (PMSI) over the equipment. The security interest was registered in the Alberta Personal Property Registry. Pursuant to an agreement between Travelers, Mantle, and Fiera Private Debt Fund V LP, which holds a general security interest in all of Mantle's present and after acquired property, Travelers' security interest in the equipment was designated to have first priority. As of July 21, 2023, Mantle owed Travelers just short of $1.1 million.

13 Mantle experienced operational problems and was burdened with excessive debt inherited from the JMB CCAA proceedings and incurred in the period following the acquisition of the gravel producing properties. Mantle's difficulties were compounded by the significant reclamation obligations it was required to complete to satisfy the EPOs. On July 14, 2023, Mantle filed a notice of intention to make a proposal under s 50.4 of the BIA.

14 On August 15, 2023, I granted an extension of the BIA stay period and the time period to permit Mantle to make its proposal. I further approved the creation and priority ranking of various Restructuring Charges, including an Administration Charge, a Directors & Officers Charge, and an Interim Lending Facility Charge. I was satisfied that the participation of lawyers,

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insolvency professionals, and directors and officers was required for the proposal to succeed. I was further satisfied that the Interim Lending Facility, which is to be primarily used to fund reclamation work, is necessary for the success of the proposal.

15 Travelers' argued that the Restructuring Charges should not have priority over Travelers' security interest in the equipment and that Travelers should be able to be paid out or realize on its security without delay. Mantle, supported by AEPA, submitted that the Restructuring Charges were necessary to put the proposal into effect and that the main plank of the proposal was the completion of the reclamation work to satisfy the EPOs. Mantle is of the view that the value of the gravel pits that are still active exceeds the amount of the reclamation obligations. Mantle has also posted more than $1 million as security with AEPA which will be returned upon completion of the reclamation obligations to AEPA's satisfaction. Mantle submits that Travelers should not be permitted to realize on its security prior to the completion of the reclamation work because if it were allowed to do so, that would jeopardize Mantle's ability to complete the reclamation work and thereby jeopardize its ability to make a proposal to its creditors.

16 I granted an Order to allow work on the pending proposal, including reclamation work, to get underway while preserving Travelers' position pending these Reasons. The Order provided, in part, as follows:

> The Charges shall constitute a security and charge on the Property and, with the exception of the security interests in favour of Travelers registered in the Alberta Property Registry as base registration number 21100725361 (the "**Travelers' Security Interests**"), such Charges shall rank in priority to all other security interests, trusts, liens, charges, deemed trusts, encumbrances and claims of secured creditors, statutory or otherwise in favour of any person, including liens and trusts created by federal and provincial legislation (collectively, the "**Encumbrances**"), provided, however, that the relative priority of Charges and the Travelers' Security Interests is subject to further order of the Court . . .

Redwater, Manitok, Trident, and Stare Decisis

17 Mantle and AEPA submit that three decisions dictate the outcome of this case: *Redwater; Manitok Energy Inc (Re)*, 2022 ABCA 117; and *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839. These decisions, they say, stand for the principle that end of life environmental obligations must be satisfied before any creditors may recover and that the whole estate of the insolvent entity is to be used to satisfy such end of life environmental obligations. This rule leaves no room for those with security in assets unrelated to the environmental condition or damage to realize on that security until end of life obligations have been satisfied using, if necessary, the unrelated assets in which they have security.

18 Travelers submits that Mantle and AEPA are wrong that *Redwater* and *Manitok* are controlling and that instead the present case is one of "first instance." *Redwater* and *Manitok* indicate that there is an exception to the rule posited by Mantle and AEPA for assets unrelated to the environmental condition or damage and that it is for this Court to give that exception shape. Travelers, citing *R v Comeau*, 2018 SCC 15 and *R v Sullivan*, 2022 SCC 19, further asserts that *Trident* at para 66 67 is inconsistent with *Redwater* and *Manitok* and "violates the doctrine of vertical *stare decisis* . . . " *Trident*, Travelers argues, should not be followed because of its conflict with *Redwater* and *Manitok*.

19 Rather than discussing a basic concept like *stare decisis* in Reasons, I normally just ask what the relevant cases and statutes say the law is and then apply the law to the facts of the case before me. Travelers, however, has raised the issue of *stare decisis* and provided me with some authorities, making it clear that they attach some importance to it.

20 As a judge of a court of first instance, the principle of vertical *stare decisis* provides that I am bound to follow the *ratio decidendi* of decisions of higher courts. The inimitable Master Funduk explained: "The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around": South Side Woodwork v R.C. Contracting, 1989 CanLII 3384 (AB KB) at para 53.

21 The Court held in *Comeau* at para 26 "[s]ubject to extraordinary exceptions, a lower court must apply the decisions of higher courts to the facts before it." None of the exceptions apply in the present case. The issue, as will be come clear later in these Reasons, is whether there is a decision that is on point that must be followed or whether the reasons of the Supreme Court of Canada and the Court of Appeal left the question open.

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22 The principle of horizontal *stare decisis* requires that judges of the same Court pay heed to each others' decisions. This is particularly important in the commercial arena where parties plan their affairs and make significant investment decisions based on the law that emerges from this Court.

23 Kasirer J, writing for the Court, observed in *Sullivan* at para 65 "Horizontal *stare decisis* applies to courts of coordinate jurisdiction within a province . . . While not strictly binding in the same way as vertical *stare decisis*, decisions of the same court should be followed as a matter of judicial comity, as well as for the reasons supporting *stare decisis* generally."

24 Kasirer J explained in *Sullivan* at para 75 that a Court should only depart from horizontal *stare decisis* if:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;

2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or

3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

25 Vertical *stare decisis* requires me to determine the *ratio decidendi* of *Redwater* and *Manitok* while horizontal *stare decisis* demands that I determine the *ratio decidendi* of *Trident* with respect to the question before me - whether the whole of a debtor's estate, including unrelated assets, must be used to satisfy end of life environmental obligations prior to any distribution to creditors.

26 Justices Côté, Brown, and Rowe writing for themselves and Wagner CJC in dissent in R v Kirkpatrick, 2022 SCC 33 at para 127 explained what the *ratio decidendi* of a decision is:

> The *ratio decidendi* of a decision is a statement of law, not facts, and "[q]uestions of law forming part of the *ratio* . . . of a decision are binding . . . as a matter of *stare decisis*." A question of law cannot, therefore, be confused with the various factual matrices from which that question of law might arise [citations omitted].

27 The *ratio decidendi* of a case can be difficult to separate from *obiter dictum*, which is an expression of opinion that is not essential to a decision. Binnie J explained in R v Henry, 2005 SCC 76 at para 52: "the submissions of the attorneys general presuppose a strict and tidy demarcation between the narrow *ratio decidendi* of a case, which is binding, and *obiter*, which they say may safely be ignored. I believe that this supposed dichotomy is an oversimplification of how the common law develops."

28 The discussion that follows shows that the issue in the present case is not one of distinguishing between *ratio decidendi* and *obiter dictum*; rather, it is to what extent the Court is bound by what *Redwater* and *Manitok* imply or, perhaps more accurately, what the parties infer from those decisions. With *Trident*, the question is whether the *ratio decidendi*, which is clear, applies on the facts of the present case.

29 What does *Redwater* say about environmental obligations and unrelated assets? Wagner CJC, writing for the majority, pointed out that Redwater's environmental liabilities were not required to be satisfied with unrelated assets. He held at para 159:

> it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, <u>the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end of life obligations with assets unrelated to the environmental condition or damage</u>. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them [emphasis added].

30 Travelers submits that Wagner CJC chose his words carefully and that the only plausible inference from those words is that unrelated assets cannot be conscripted to satisfy end of life environmental obligations. Though he may have chosen his words carefully in the sense that he did not want to foreclose a scenario where assets were so unrelated to an environmental obligation that they should not be called upon to satisfy the environmental obligation, he did not provide any guidance as to what he meant by "assets unrelated" or how unrelated the assets must be to escape the reach of the regulator.

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31 The Court of Appeal in *Manitok* addressed the question of whether a debtor's oil and gas assets could be divided into two pools, one consisting of valuable assets and the other consisting of assets burdened by environmental obligations. The Court viewed the situation in *Manitok* to be the same as in *Redwater* where the proceeds of the sale of valuable oil and gas assets "had to be used by Redwater's trustee to satisfy abandonment and reclamation obligations before any distribution to secured creditors" (para 31). The Court went on at para 31 to explain how it interpreted *Redwater*:

> The point is that the outcome of ***Redwater*** demonstrates that the Supreme Court of Canada did not treat Redwater's assets as falling into different pools. All of the oil and gas assets were treated collectively as being contaminated, and they all had to answer for the abandonment and reclamation obligations attached to the disclaimed assets. None of the other oil and gas assets were 'assets unrelated' to the other oil and gas assets. Manitok is in exactly the same position. The 'substantial assets' of Manitok are the same as the 'substantial assets' of Redwater.

32 Though the Court of Appeal adverted in *Manitok* to the question of whether in theory unrelated assets could not be called upon to satisfy environmental obligations it deferred the question because it did not have to be decided given the Court's conclusion that all of Manitok's substantial assets were related to the environmental obligations. The Court held at para 36:

> ***Redwater*** confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day [emphasis added].

33 Mantle and AEPA argue that Wagner CJC's words in para 159 must be viewed in the context of the whole ruling in *Redwater*. Wagner CJC held that environmental obligations are a corporate or estate obligation that must be satisfied before any creditor claims (para 98; see also, *Manitok* at para 17, 30, & 35). According to Mantle and AEPA, the logic of this ruling leaves no room for the exception for assets unrelated to the environmental condition or damage asserted by Travelers.

34 The reference to "assets unrelated" in *Redwater* unaccompanied by any explanation followed by the Court of Appeal's statement in *Manitok* that it was leaving the issue for "another day" indicates that there is no *ratio decidendi* in those cases that binds me in the present case. As I will explain below, the facts of the present case do not require me to decide whether Travelers is correct that some category of assets unrelated to the environmental condition or damage in issue may not be used to satisfy environmental regulatory obligations or Mantle and AEPA are correct that all the assets that comprise the estate of a debtor must be used to address environmental regulatory obligations before creditor claims are paid.

35 That Redwater and Manitok's substantial assets were all oil and gas assets was not surprising. Many oil and gas companies do not own much in the way of assets other than oil and gas rights and the equipment required to produce oil and gas from those interests in land such as compressors, pumpjacks, and tanks. And even this kind of equipment may be leased instead of owned. Jack R Maslen & Tiffany Bennett, "Going Green? New Interpretations of Redwater from Canada's Natural Resource Sectors" in in Jill Corrani Nadeau & D. Blair Nixon, eds., *Annual Review of Insolvency Law*, (Toronto: Thomson Reuters, 2022) 105 concluded at 119, "based on *Manitok*, assets or proceeds that relate in any way to the debtor's oil and gas business will be used to satisfy non monetary end of life obligations. For most oil and gas producers, this likely means all of their property." A question to be considered later in these Reasons is whether Mantle, a gravel company, is any different than oil and gas companies like Redwater and Manitok.

36 Whether assets of an oil and gas company other than oil and gas rights are unrelated assets was tested in *Trident*. Justice Neufeld in *Trident* was required to consider whether a receiver was required to allocate proceeds of the sale of assets, including "non licensed assets such as real estate and equipment" (para 80) to satisfy environmental obligations in priority to municipal tax claims. Neufeld J took a pragmatic approach, refusing to get engaged in a debate over how to draw a line between related and unrelated assets of an oil and gas company. He concluded that because Trident had one business, oil and gas exploration and production, that all assets were related to the environmental obligation. He wrote at para 67:

> I also find that the assets subject to the AER super priority are not limited to licenced oil and gas wells, pipelines and production facilities. Trident had certain real estate assets that were used for office or equipment storage and the like.

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> However, Trident had only one business: exploration and production of oil and gas. It makes no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in ***Manitok*** to carve out economic licensed assets from uneconomic ones. In either case, the result would be to undermine the policy purposes upon which the super priority principle is based.

37 Neufeld J's statement of the law in *Trident* is consistent with *Redwater* and *Manitok* though his application of the law breaks new ground. Whereas in *Redwater* and *Manitok*, it was held that all oil and gas assets should be treated as related to environmental obligations that attached only to some of the oil and gas assets, *Trident* extended this principle to other assets used in an oil and gas business even if they were not directly involved in oil and gas production (e.g. the real estate used to store equipment).

38 None of the exceptions to the principle of horizontal *stare decisis* apply to *Trident*. The decision was fully considered, carefully reasoned, and has not been undermined by appellate authority. That means that the question in the present case is whether Mantle's equipment subject to the Travelers security interest is analogous to the equipment and real estate in *Trident*.

39 Warren Miller, Vice President of Structured Finance and Capital Markets at Travelers, deposed that it was his understanding that Mantle sought financing from Travelers so that it could "purchas[e] the equipment necessary to operate its business (instead of renting it)." Mr. Miller's Affidavit attached as part of an exhibit a Notice of Intention to Enforce Security which listed all Mantle's equipment that Travelers had financed. The descriptions include the following: Jaw Crushing Plant, Cone Crushing Plant, Screen Plant, Aggregate Feeder, Aggregate Surge Bin, Material Washer, Conveyor, Truck Scale, Articulated Dump Truck, Tracked Excavator, and the like. The equipment in which Travelers has a security interest appears to be part to Mantle's gravel production business.

40 In my view, no sensible distinction can be made between the equipment and real estate in *Trident* and the equipment in the present case. The equipment over which Travelers has a security interest is as much a part of Mantle's gravel business as the equipment and real estate in *Trident* was a part of Trident's oil and gas business. Based on this factual finding, I am bound by the principle of horizontal *stare decisis* to follow *Trident*. In finding that the equipment in the present case is part of Mantle's gravel business, I make no comment on how in theory a line should be drawn between related and unrelated assets or even if a line should be drawn. As the Court of Appeal said in *Manitok*, that "can be left for another day."

41 Travelers advanced policy arguments as to why it should not have to wait to realize upon its security until after Mantle completes the reclamation work required by the EPOs. Mantle and AEPA responded with policy arguments supporting the deferral of realization of all secured creditors, including Travelers, until after the satisfactory completion of the reclamation work. Given my conclusion that the equipment subject to the Travelers security interest is related to the assets to which Mantle's environmental obligations pertain in the sense that the equipment is used in gravel production, it is not necessary to explore these policy arguments.

42 Though I decline to debate the wisdom of the policy of effectively subordinating secured creditors to environmental obligations in these Reasons, it is noteworthy that the evidential record shows that Travelers conducted due diligence prior to entering the financing arrangement with Mantle. Among the materials available to Travelers as part of that due diligence process were documents indicating the existence of Mantle's environmental reclamation obligations and the security posted by Mantle with AEPA. Prior to entering the financing arrangement, Travelers had the opportunity to assess the risk of doing business with Mantle, make an informed decision whether to do business with Mantle, and to negotiate a cost of borrowing that reflected the risk inherent in Mantle's business.

Conclusion

43 The Travelers security interest in the equipment must be subordinated to the Restructuring Charges because the Restructuring Charges are necessary to the completion of the environmental remediation work that is an important part of the pending proposal. Travelers cannot realize on its security until the environmental reclamation work is completed to AEPA's

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satisfaction and the only way that such work can be done is with the support of the officers and directors of Mantle, lawyers and insolvency professionals, and the interim lender who are all protected by the Restructuring Charges.

44 Paragraph 10 of the Order dated August 15, 2023 shall be amended to provide that the Restructuring Charges have priority over the Travelers security interest in the equipment identified in the Travelers security registration.

Order accordingly.

Footnotes

1 For a discussion of the restructuring of JMB and the use of a reverse vesting order in that case, see Candace Formosa, "Dampening the Effect of Redwater Through a Reverse Vesting Order," in Jill Corrani & D. Blair Nixon, eds., *Annual Review of Insolvency Law*, (Toronto: Thomson Reuters, 2021) 697.

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TAB 10

2021 BCSC 2531
British Columbia Supreme Court

Otso Gold Corp. (Re)

2021 CarswellBC 4130, 2021 BCSC 2531, 2021 A.C.W.S. 589

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

AND IN THE MATTER OF OTSO GOLD CORP., OTSO GOLD OY, OTSO GOLD AB, and 2273265 ALBERTA LTD. (Petitioners)

Gomery J., In Chambers

Heard: December 15, 2021
Judgment: December 17, 2021
Docket: Vancouver S2110503

Counsel: R. Morse, T. Louman-Gardiner, for Petitioners
J. Kanji, K. Esaw, for Blackrock
V. Tickle, for Westech and Lionsbridge
M. Buttery, Q.C., J. Enns, K. Davis, for Pandion Mine Finance
M. McKie, R. Laity, for Monitor
W. Stransky, for Brunswick Gold

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order
Petitioner, group of companies that included Canadian parent and Swedish and Finish subsidiaries whose primary asset was gold mine in Finland, was managed by L Ltd and subsidiary W Ltd — Majority of its shares were owned by B Ltd, whose representatives made up majority of its board of directors — As gold mine was reaching point of producing and earning income, petitioner sought additional funding from B Ltd in exchange for additional shares — When refinancing became necessary, and petitioner's board voted to retain third party to advise on restructuring and assume control of mining operation, representatives from L Ltd and W Ltd resigned board positions and terminated management agreement — When petitioner's only secured creditor, P Ltd, gave notice of default claiming to be owed US$95 million, petitioner sought relief under Companies' Creditors Arrangement Act and interim stay of proceedings was granted — When petitioner applied to extend stay for some 30 days, and to increase administrative charge for payment of monitor's and counsel's expenses, P Ltd and L Ltd objected — Application granted — While petitioner was placing blame for current difficulties on L Ltd, and L Ltd and P Ltd were placing blame on B Ltd, resolution of dispute would require resolution of conflicts in evidence that was not possible in current application — It was not, in any event, necessary to resolve dispute at this time — Of greater importance were determination of amount actually owed to P Ltd and development of long-term plan for mining operation — Review of materials made it clear application was being brought in good faith, for purpose of obtaining breathing space to ascertain petitioner's financial position and prospects, to determine whether restructuring was possible — Monitor was satisfied petitioner had been acting with due diligence, including

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by suspending mining operations until long-term plan was in place — Although it was clear there were conflicts between interested parties, there had been no findings of misconduct — It did not appear petitioner was seeking to extend stay for purpose of obtaining advantage over P Ltd — There was little evidence brief extension would result in prejudice to P Ltd or L Ltd — Stay was extended on terms granting P Ltd leave to bring application to enforce security by appointing receiver upon expiry.

Table of Authorities

Cases considered by *Gomery J., In Chambers*:

Canada v. Canada North Group Inc. (2021), 2021 SCC 30, 2021 CSC 30, 2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 D.T.C. 5080, (sub nom. *La Reine c. Canada North Group Inc.)* 2021 D.T.C. 5081, 91 C.B.R. (6th) 1, [2021] 5 C.T.C. 111, 28 Alta. L.R. (7th) 1, [2021] 10 W.W.R. 1, 460 D.L.R. (4th) 309, 19 B.L.R. (6th) 1 (S.C.C.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — referred to

Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — referred to

Re Canada North Group Inc (2017), 2017 ABQB 508, 2017 CarswellAlta 1609, 51 C.B.R. (6th) 282, (sub nom. *Plan of Arrangement for Canada North Group Inc. et al.)* 2017 D.T.C. 5110 (Alta. Q.B.) — considered

San Francisco Gifts Ltd., Re (2005), 2005 ABQB 91, 2005 CarswellAlta 174, 10 C.B.R. (5th) 275, 42 Alta. L.R. (4th) 377, 378 A.R. 361 (Alta. Q.B.) — referred to

Statutes considered:

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

Generally — referred to

s. 11.02(2) [en. 2005, c. 47, s. 128] — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — referred to

APPLICATION by petitioner for extension of stay of proceedings granted under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

***Gomery J., In Chambers*:**

1 These are my reasons for the order I pronounced on December 15, 2021. Although I began to give reasons on December 15, because I had not gotten very far when the sitting was interrupted by a fire alarm, I will start again at the beginning.

BACKGROUND

2 The principal asset of the Otso group of companies, collectively Otso, is a gold mine in Finland. The parent, Otso Gold Corp., is a Canadian company. It owns the shares in a Swedish subsidiary which owns a Finnish subsidiary that owns the mine.

3 Otso has one secured creditor, Pandion Mine Finance Ltd. Pandion has delivered notice of default and says that it is owed $95 million.

4 Otso's largest shareholder is Brunswick Gold Ltd. ("BGL"), which owns approximately 67% of the common shares. BGL's representatives make up the majority of Otso's board. One of them is Victor Koshkin.

5 From 2019, until November 30, 2021, Otso was managed by Lionsbridge Capital Pty. Ltd. and its subsidiary, Westech International Pty. Ltd. Lionsbridge is a family company whose principals are Brian Wesson and Clyde Wesson.

6 In the summer and fall of 2021, Otso's mine was approaching the point where it would begin producing gold and earning revenue. In the run-up to production, Otso needed more cash. BGL advanced funds in exchange for shares in July and October 2021. Production commenced on November 3, 2021. It was apparent that Otso would not be in a position to make a $29 million payment to Pandion when it became due on December 7, 2021. A refinancing would be necessary.

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

(3) The court shall not make the order unless

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

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

16 The statute affords the court a broad discretion to stay proceedings against the debtor company for the purpose of giving it breathing room to negotiate a way out of insolvency because debtor companies retain more value as going concerns than in liquidation; Canada v. Canada North Group Inc.2021 SCC 30at paras. 19 to 21. Continuing as a going concern benefits the shareholders, employees, and other firms doing business with the debtor company.

17 The primary requirements are, first, good faith and diligence on the part of the debtor company, and second, appropriateness, which means that the court must be satisfied that the order sought will provide the conditions under which the debtor can attempt to reorganize its affairs.; *Canada North* at para. 21.

18 In Re Canada North Group Inc., 2017 ABQB 508 at para. 57, Justice Hillier helpfully offered examples of what might constitute bad faith on the part of a debtor company making application under the *CCAA*: Knowing reliance on an unsupportable interpretation of documents; intentional concealing of a practice calling into question the debtor's future viability; intentional concealment of any relevant financial information. He distinguished intentional concealment from an omission based on a genuine, though possibly mistaken, understanding of the debtor's financial position and entitlement.

19 The court will not continue a stay if it is clear that any attempt at restructuring is doomed to fail. Conversely, the court will not allow itself to be gamed by a secured creditor's simple assertion that it is intent on rejecting whatever restructuring proposal may emerge in order that it may immediately foreclose on its security, a policy summarized in the aphorism that secured creditors do not possess a veto; Pacific Shores Resort & Spa Ltd. (Re), 2011 BCSC 1775 at paras. 40 to 44.

THE EVIDENCE

20 Mr. Koshkin on behalf of Otso and Clyde Wesson on behalf of Lionsbridge and Pandion have sworn lengthy affidavits addressing Otso's recent history. These affidavits present divergent perspectives and are sometimes in conflict. In effect, Mr. Wesson blames BGL for Otso's present financial predicament and Mr. Koshkin blames Lionsbridge.

21 There are conflicts in the evidence that I cannot resolve on this application. I agree with all counsel that much of this dispute is beside the point. The three or four-cornered dispute involving Otso, Pandion, BGL, and Lionsbridge involves claims and cross-claims that need not be resolved in order to decide whether the stay that is presently in effect should continue until January 14, 2022.

22 I should add that the affidavits advance colourful and unproven allegations against various individuals involved with the parties to which the involved parties take exception. Brian Wesson has been arrested and is currently in jail in Finland on what Clyde Wesson has described as trumped-up charges initiated by Otso. Mr. Wesson's affidavit intimates that BGL's principals are Russian Oligarchs who are associated with money laundering activities and, therefore, cannot be trusted. None of this is helpful.

23 An important question that cannot be resolved on this application is the amount Pandion is owed. I accept Otso's submission that the basis of Pandion's US dollar $95 million claim is not fleshed out in the evidence and the amount actually owing may be substantially smaller.

24 Otso's present financial position is unclear. The uncertainty as to the amount owing to Pandion is one reason. Another is that there is not at present a long-term mine plan in place.

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TAB 11

Alta. Reg. 124/2010, s. 6.28

s 6.28 Application of this Division

Currency

6.28Application of this Division

Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

Currency

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Alta. Reg. 124/2010, s. 6.29

s 6.29 Restricted court access applications and orders

Currency

6.29Restricted court access applications and orders

An application under this Division is to be known as a restricted court access application and an order made under this Division is to be known as a restricted court access order.

Currency

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Alta. Reg. 124/2010, s. 6.30

s 6.30 When restricted court access application may be filed

Currency

6.30When restricted court access application may be filed
A person may file a restricted court access application only if the Court has authority to make a restricted court access order under an enactment or at common law.

Amendment History
Alta. Reg. 194/2020, s. 2

Currency
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Alta. Reg. 124/2010, s. 6.31

s 6.31 Timing of application and service

Currency

6.31Timing of application and service
An applicant for a restricted court access order must, 5 days or more before the date scheduled for the hearing, trial or proceeding in respect of which the order is sought,

(a) file the application in Form 32, and

(b) unless the Court otherwise orders, serve every party and any other person named or described by the Court.

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Alta. Reg. 124/2010, s. 6.32

s 6.32 Notice to media

Currency

6.32Notice to media

When a restricted court access application is filed, a copy of it must be served on the court clerk, who must, in accordance with the direction of the Chief Justice, give notice of the application to

(a) the electronic and print media identified or described by the Chief Justice, and

(b) any other person named by the Court.

Amendment History

Alta. Reg. 163/2010, s. 3

Currency

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Alta. Reg. 124/2010, s. 6.33

s 6.33 Judge or applications judge assigned to application

Currency

6.33Judge or applications judge assigned to application
A restricted court access application must be heard and decided by

(a) the judge or applications judge assigned to hear the application, trial or other proceeding in respect of which the restricted court access order is sought,

(b) if the assigned judge or applications judge is not available or no judge or applications judge has been assigned, the case management judge for the action, or

(c) if there is no judge or applications judge available to hear the application as set out in clause (a) or (b), the Chief Justice or a judge designated for the purpose by the Chief Justice.

Amendment History
Alta. Reg. 194/2020, s. 3; 136/2022, s. 1(5)

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Alta. Reg. 124/2010, s. 6.34

s 6.34 Application to seal or unseal court files

Currency

6.34Application to seal or unseal court files
6.34(1) An application to seal an entire court file or an application to set aside all or any part of an order to seal a court file must be filed.

6.34(2) The application must be made to

(a) the Chief Justice, or

(b) a judge designated to hear applications under subrule (1) by the Chief Justice.

6.34(3) The Court may direct

(a) on whom the application must be served and when,

(b) how the application is to be served, and

(c) any other matter that the circumstances require.

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Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 6 — Resolving Issues and Preserving Rights
Division 4 — Restriction on Media Reporting and Public Access to Court Proceedings

Alta. Reg. 124/2010, s. 6.35

s 6.35 Persons having standing at application

Currency

6.35Persons having standing at application

The following persons have standing to be heard when a restricted court access application is considered

(a) a person who was served or given notice of the application;

(b) any other person recognized by the Court who claims to have an interest in the application, trial or proceeding and whom the Court permits to be heard.

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Alta. Reg. 124/2010, s. 6.36

s 6.36 Confidentiality of information

Currency

6.36Confidentiality of information

Information that is the subject of the initial restricted court access application must not be published without the Court's permission.

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TAB 12

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

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

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Related Abridgment Classifications

Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous

Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous

Evidence
XIV Privilege
XIV.8 Public interest immunity
XIV.8.a Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order

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— Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the

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environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux

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pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

Table of Authorities

Cases considered by *Iacobucci J.*:

AB Hassle v. Canada (Minister of National Health & Welfare), 1998 CarswellNat 2520, 83 C.P.R. (3d) 428, 161 F.T.R. 15 (Fed. T.D.) — considered

AB Hassle v. Canada (Minister of National Health & Welfare), 2000 CarswellNat 356, 5 C.P.R. (4th) 149, 253 N.R. 284, [2000] 3 F.C. 360, 2000 CarswellNat 3254 (Fed. C.A.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — followed

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to

Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General))* [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

M. (A.) v. Ryan, 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — considered

N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. E. (O.N.), 2001 SCC 77, 2001 CarswellBC 2479, 2001 CarswellBC 2480, 158 C.C.C. (3d) 478, 205 D.L.R. (4th) 542, 47 C.R. (5th) 89, 279 N.R. 187, 97 B.C.L.R. (3d) 1, [2002] 3 W.W.R. 205, 160 B.C.A.C. 161, 261 W.A.C. 161 (S.C.C.) — referred to

R. v. Keegstra, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed

R. v. Mentuck, 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409 (S.C.C.) — followed

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R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1 re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

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3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

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151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of

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a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

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(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

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V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

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A publication ban should only be ordered when:

> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such

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to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

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

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

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

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

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

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

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

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

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TAB 13

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 2021 SCC 25, 2021 CSC 25, [2021] S.C.J. No. 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer JJ.

Heard: October 6, 2020
Judgment: June 11, 2021
Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

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Subject: Civil Practice and Procedure; Criminal; Estates and Trusts
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
  XXIII.13 Powers and duties of appellate court
    XXIII.13.e Evidence on appeal
      XXIII.13.e.i New evidence
Judges and courts
XVI Jurisdiction

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XVI.11 Jurisdiction of court over own process
XVI.11.c Sealing files

Headnote

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Wealthy couple were found dead in their home and deaths generated intense public interest and press scrutiny — Estates and estate trustees sought to stem press scrutiny — When applications to obtain certificates of appointment of estate trustees were made, trustees sought sealing order — Application judge granted sealing order — Journalist and newspaper successfully appealed and sealing order was set aside — Trustees appealed — Appeal dismissed — Court of Appeal was right to set aside sealing order — Information in court files was not of highly sensitive character that it could be said to strike at core identity of affected persons — Trustees had failed to show how lifting of sealing orders engaged dignity of affected individuals — It could not be said that risk to privacy was sufficiently serious to overcome strong presumption of openness — Same was true of risk to physical safety.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Evidence on appeal — New evidence

Juges et tribunaux --- Compétence — Compétence de la cour sur sa propre procédure — Mise sous scellés de dossiers

Couple riche et célèbre a été retrouvé sans vie dans sa résidence, et la mort du couple a suscité un vif intérêt dans le public et provoqué une attention médiatique intense — Successions ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense — Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés — Juge de première instance a accordé l'ordonnance de mise sous scellés — Journaliste et journal ont eu gain de cause en appel et l'ordonnance a été annulée — Fiduciaires ont formé un pourvoi — Pourvoi rejeté — Cour d'appel a eu raison d'annuler l'ordonnance de mise sous scellés — Renseignements contenus dans les dossiers judiciaires ne revêtaient pas un caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées — Fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées — On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires — Il en était de même du risque pour la sécurité physique.

Procédure civile --- Procédure en appel — Pouvoirs et obligations de la cour d'appel — Preuve en appel — Nouvelle preuve

A wealthy and prominent husband and wife were found dead in their home. Their deaths generated intense public interest and press scrutiny, and the following year the police service announced that the deaths were being investigated as homicides. The couple's estates and the estate trustees sought to stem the intense press scrutiny. When the time came to obtain certificates of appointment of estate trustees, the trustees sought a sealing order so that the trustees and beneficiaries might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. These sealing orders were granted, with the application judge sealing the orders for an initial period of two years with the possibility of renewal.

The sealing orders were challenged by a journalist, who had written a series of articles on the couple's death, and the newspaper for which he wrote. The Court of Appeal allowed the appeal and the sealing orders were lifted. The Court of Appeal concluded that the privacy interest for which the trustees sought protection lacked the quality of public interest and that there was no evidence that could warrant a finding that disclosure of the content of the estate files posed a real risk to anyone's physical safety. The trustees had failed the first stage of the test for obtaining orders sealing the probate files.

The trustees appealed, seeking to restore the sealing orders. The newspaper brought a motion to adduce new evidence on the appeal.

Held: The appeal was dismissed; the motion was dismissed as moot.

Per Kasirer J. (Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin JJ. concurring): There is a strong presumption in favour of open courts. Notwithstanding this presumption, exceptional circumstances do arise where competing interests justified a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness was sought, the applicant must demonstrate as a threshold requirement that openness presents a serious risk to a competing interest of public importance. The applicant must show that the order was necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweighed its negative effects. For the purposes of the relevant test, an aspect of privacy was recognized as an important public interest. Proceedings in open court could lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an

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affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what was seen as the public interest in protecting human dignity, was shown to be at serious risk, an exception to the open court principle may be justified. It could not be said that the risk to privacy was sufficiently serious to overcome the strong presumption of openness. The same was true of the risk to physical safety. The Court of Appeal was right to set aside the sealing orders.

The broad claims of the trustees failed to focus on the elements of privacy that were deserving of public protection in the open court context. Personal information disseminated in open court could be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy served to protect individuals from this affront, it was an important public interest relevant under the 2002 Supreme Court of Canada judgment that set out the relevant test. This public interest would only be seriously at risk where the information in question struck at what was the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings. The information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons. The trustees had failed to show how the lifting of the sealing orders engaged the dignity of the affected individuals.

In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects. Only where all three of these prerequisites have been met can a discretionary limit on openness properly be ordered. Contrary to what the trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. The fundamental rationale for openness applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action. The emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement was mistaken. It was inappropriate to dismiss the public interest in protecting privacy as merely a personal concern. The important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. The risk to this interest would be serious only where the information that would be disseminated as a result of court openness was sufficiently sensitive such that openness could be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity.

The failure of the application judge to assess the sensitivity of the information constituted a failure to consider a required element of the legal test, and this warranted intervention on appeal. Applying the appropriate framework to the facts of this case, it was concluded that the risk to the important public interest in the affected individuals' privacy was not serious. The information that the trustees sought to protect was not highly sensitive and this alone was sufficient to conclude that there was no serious risk to the important public interest in privacy so defined. The relevant privacy interest bearing on the dignity of the affected persons had not been shown. Merely associating the beneficiaries or trustees with the couple's unexplained deaths was not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity. The trustees did not advance any specific reason why the contents of these files were more sensitive than they may seem at first glance. While some of the material in the court files may well be broadly disseminated, the nature of the information had not been shown to give rise to a serious risk to the important public interest in privacy.

There was no controversy that there was an important public interest in protecting individuals from physical harm. Direct evidence was not necessarily required to establish a serious risk to an important interest. It was not just the probability of the feared harm but also the gravity of the harm itself that was relevant to the assessment of serious risk. There was no dispute that the feared physical harm was grave, but it was agreed that the probability of this harm was speculative. The bare assertion that such a risk exists failed to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting intervention. Even if the trustees had succeeded in showing a serious risk to the privacy interest they asserted, a publication ban would likely have been sufficient as a reasonable alternative to prevent this risk. The trustees were not entitled to any discretionary order limiting the open court principle. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the trustees had failed at this stage of the test for discretionary limits on court openness.

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Les cadavres d'un homme et de sa femme, un couple riche et célèbre, ont été retrouvés dans leur résidence. Leur mort a suscité un vif intérêt dans le public et provoqué une attention médiatique intense et, au cours de l'année qui a suivi, le service de police a annoncé que les morts faisaient l'objet d'une enquête pour homicides. La succession du couple ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense. Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés dans le but d'épargner aux fiduciaires des successions et aux bénéficiaires de nouvelles atteintes à leur vie privée, et de les protéger contre ce qui, selon les allégations, aurait constitué un risque pour leur sécurité. Les ordonnances de mise sous scellés ont été accordées et le juge de première instance a fait placer sous scellés les dossiers pour une période initiale de deux ans avec possibilité de renouvellement.

Les ordonnances de mise sous scellés ont été contestées par un journaliste qui avait écrit une série d'articles sur la mort du couple et par le journal pour lequel il écrivait. La Cour d'appel a accueilli l'appel et les ordonnances de mise sous scellés ont été levées. La Cour d'appel a conclu que l'intérêt en matière de vie privée à l'égard duquel les fiduciaires sollicitaient une protection ne comportait pas la qualité d'intérêt public et qu'il n'y avait aucun élément de preuve permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. Les fiduciaires n'avaient pas franchi la première étape du test relatif à l'obtention d'ordonnances de mise sous scellés des dossiers d'homologation.

Les fiduciaires ont formé un pourvoi visant à faire rétablir les ordonnances de mise sous scellés. Le journal a déposé une requête visant à introduire une nouvelle preuve dans le cadre du pourvoi.

Arrêt: Le pourvoi a été rejeté; la requête, devenue théorique, a été rejetée.

Kasirer, J. (Wagner, J.C.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, JJ., souscrivant à son opinion) : Il existe une forte présomption en faveur de la publicité des débats judiciaires. Malgré cette présomption, il peut arriver des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le demandeur doit démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs. On a reconnu qu'un aspect de la vie privée constituait un intérêt public important pour l'application du test pertinent. La tenue de procédures judiciaires publiques était susceptible de mener à la diffusion de renseignements personnels très sensibles, laquelle entraînerait non seulement un désagrément ou de l'embarras pour la personne touchée, mais aussi une atteinte à sa dignité. Dans les cas où il est démontré que cette dimension plus restreinte de la vie privée, qui semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, était sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée. On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en était de même du risque pour la sécurité physique. La Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés.

Les larges revendications des fiduciaires n'étaient pas axées sur les éléments de la vie privée qui méritaient une protection publique dans le contexte de la publicité des débats judiciaires. La diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent en vertu du critère établi par la Cour suprême du Canada dans une décision rendue en 2002. L'intérêt public ne serait sérieusement menacé que si les renseignements en question portaient atteinte à ce que l'on considère comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires. En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtaient pas ce caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées. Les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées.

Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que : 1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; 2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et 3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Ce n'est que lorsque ces trois conditions préalables sont remplies

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qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires pourra dûment être rendue. Contrairement à ce que les fiduciaires soutiennent, les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. La raison d'être fondamentale de la publicité des débats s'applique aux procédures d'homologation et donc au transfert de biens sous l'autorité d'un tribunal ainsi qu'à d'autres questions touchées par ce recours judiciaire. La Cour d'appel a eu tort de mettre l'accent sur les préoccupations personnelles pour décider que les ordonnances de mise sous scellés ne satisfaisaient pas à l'exigence de la nécessité. Il est inapproprié de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. L'intérêt public important en matière de vie privée, tel qu'il est considéré dans le contexte des limites à la publicité des débats, vise à permettre aux personnes de garder un contrôle sur leur identité fondamentale dans la sphère publique dans la mesure nécessaire pour protéger leur dignité. Le public a un intérêt dans la publicité des débats, mais il a aussi un intérêt dans la protection de la dignité : l'administration de la justice exige que, lorsque la dignité est menacée de cette façon, des mesures puissent être prises pour tenir compte de cette préoccupation en matière de vie privée. Le risque pour cet intérêt ne sera sérieux que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles pour que l'on puisse démontrer que la publicité porte atteinte de façon significative au coeur même des renseignements biographiques de la personne d'une manière qui menace son intégrité.

En n'examinant pas le caractère sensible des renseignements, le juge de première instance a omis de se pencher sur un élément nécessaire du test juridique, ce qui justifiait une intervention en appel. En appliquant le cadre approprié aux faits de la présente affaire, on a conclu que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées n'était pas sérieux. Les renseignements que les fiduciaires cherchaient à protéger n'étaient pas très sensibles, ce qui suffisait en soi pour conclure qu'il n'y avait pas de risque sérieux pour l'intérêt public important en matière de vie privée tel que défini. L'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées n'a pas été démontré. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexpliquée du couple ne suffisait pas à constituer un risque sérieux pour l'intérêt public important en matière de dignité ayant été constaté, intérêt défini au regard de la dignité. Les fiduciaires n'ont pas fait valoir de raison précise pour laquelle le contenu de ces dossiers serait plus sensible qu'il n'y paraît à première vue. Même si certains des éléments contenus dans les dossiers judiciaires pouvaient fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraînerait un risque sérieux pour l'intérêt public important en matière de vie privée.

Nul n'a contesté l'existence d'un intérêt public important dans la protection des personnes contre un préjudice physique. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt important est sérieusement menacé. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Si nul ne contestait que le préjudice physique appréhendé fût grave, il fallait cependant reconnaître que la probabilité que ce préjudice se produise était conjecturale. Le simple fait d'affirmer qu'un tel risque existe ne permettait pas de franchir le seuil requis pour établir l'existence d'un risque sérieux de préjudice physique. La conclusion contraire tirée par le juge de première instance était une erreur justifiant l'intervention de la Cour d'appel. Même si les fiduciaires avaient réussi à démontrer l'existence d'un risque sérieux pour l'intérêt en matière de vie privée qu'ils invoquent, une interdiction de publication aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires. La Cour d'appel a conclu à juste titre qu'il n'y avait aucune raison de demander un caviardage parce que les fiduciaires n'avaient pas franchi cette étape du test des limites discrétionnaires à la publicité des débats judiciaires.

Table of Authorities

Cases considered by *Kasirer J.*:

A. c. B. & Southam Inc. (1990), 1990 CarswellQue 2075 (C.A. Que.) — referred to

A.B. (Litigation Guardian of) v. Bragg Communications Inc. (2012), 2012 SCC 46, 2012 CarswellNS 675, 2012 CarswellNS 676, 25 C.P.C. (7th) 1, 350 D.L.R. (4th) 519, 95 C.C.L.T. (3d) 171, 1021 A.P.R. 1, 322 N.S.R. (2d) 1, (sub nom. *A.B. v. Bragg Communications Inc.)* [2012] 2 S.C.R. 567, (sub nom. *B. (A.) v. Bragg Communications Inc.)* 266 C.R.R. (2d) 185 (S.C.C.) — considered

A.B. v. Canada (Citizenship and Immigration) (2017), 2017 FC 629, 2017 CarswellNat 3046, 2017 CF 629, 2017 CarswellNat 3604 (F.C.) — considered

C. (R.) c. Gourdeau (2004), 2004 CarswellQue 1804 (C.A. Que.) — considered

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Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — considered

Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Dagg v. Canada (Minister of Finance) (1997), 213 N.R. 161, 148 D.L.R. (4th) 385, 1997 CarswellNat 869, 1997 CarswellNat 870, 46 Admin. L.R. (2d) 155, [1997] 2 S.C.R. 403, 132 F.T.R. 55 (note) (S.C.C.) — considered

Douez v. Facebook, Inc. (2017), 2017 SCC 33, 2017 CSC 33, 2017 CarswellBC 1663, 2017 CarswellBC 1664, 1 C.P.C. (8th) 213, 97 B.C.L.R. (5th) 1, [2017] 7 W.W.R. 637, 3 C.P.C. (8th) 1, 411 D.L.R. (4th) 434, 71 B.L.R. (5th) 1, [2017] 1 S.C.R. 751 (S.C.C.) — considered

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — considered

Fedeli v. Brown (2020), 2020 ONSC 994, 2020 CarswellOnt 1710, 60 C.P.C. (8th) 417 (Ont. S.C.J.) — referred to

Foster-Jacques v. Jacques (2012), 2012 NSCA 83, 2012 CarswellNS 591, 1014 A.P.R. 166, 320 N.S.R. (2d) 166, 353 D.L.R. (4th) 1, (sub nom. *Coltsfoot Publishing Ltd. v. Foster-Jacques)* 266 C.R.R. (2d) 1, 26 R.F.L. (7th) 259 (N.S. C.A.) — referred to

Godbout c. Longueuil (Ville) (1995), [1995] R.J.Q. 2561, 31 M.P.L.R. (2d) 130, 1995 CarswellQue 175 (C.A. Que.) — considered

Godbout c. Longueuil (Ville) (1997), 219 N.R. 1, (sub nom. *Godbout v. Longueuil (City))* 152 D.L.R. (4th) 577, 1997 CarswellQue 883, 1997 CarswellQue 884, (sub nom. *Godbout v. Longueuil (City))* 47 C.R.R. (2d) 1, 43 M.P.L.R. (2d) 1, (sub nom. *Longueuil (City) v. Godbout)* 97 C.L.L.C. 210-031, [1997] 3 S.C.R. 844 (S.C.C.) — referred to

Goulet c. Transamerica du Canada, cie d'assurance-vie (2002), 2002 SCC 21, 2002 CarswellQue 191, 2002 CarswellQue 192, (sub nom. *Goulet v. Transamerica Life Insurance Co. of Canada)* 210 D.L.R. (4th) 22, (sub nom. *Goulet v. Transamerica Life Insurance Co. of Canada)* [2002] I.L.R. I-4059, (sub nom. *Goulet v. Compagnie d'assurance-vie Transamerica du Canada)* 284 N.R. 139, 35 C.C.L.I. (3d) 204, (sub nom. *Goulet v. Transamerica Life Insurance Co. of Canada)* [2002] 1 S.C.R. 719, 2002 CSC 21 (S.C.C.) — considered

H. (M.E.) v. Williams (2012), 2012 ONCA 35, 2012 CarswellOnt 1100, 108 O.R. (3d) 321, 287 O.A.C. 133, 346 D.L.R. (4th) 668, 15 R.F.L. (7th) 37 (Ont. C.A.) — considered

Himel v. Greenberg (2010), 2010 ONSC 2325, 2010 CarswellOnt 8261, 93 R.F.L. (6th) 357 (Ont. S.C.J.) — considered

Khuja v. Times Newspapers Ltd (2017), [2019] A.C. 161, 2017 UKSC 49 (U.K. S.C.) — considered

Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc. (2001), 2001 SCC 51, 2001 CarswellQue 1864, 2001 CarswellQue 1865, (sub nom. *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.)* 204 D.L.R. (4th) 331, (sub nom. *Lac d'Amiante du Québec ltée v. 2858-0702 Québec inc.)* 274 N.R. 201, 14 C.P.C. (5th) 189, [2001] 2 S.C.R. 743, 2001 CSC 51 (S.C.C.) — considered

Lavigne v. Canada (Commissioner of Official Languages) (2002), 2002 SCC 53, 2002 CarswellNat 1357, 2002 CarswellNat 1358, 214 D.L.R. (4th) 1, 289 N.R. 282, 228 F.T.R. 319 (note), [2002] 2 S.C.R. 773, 2002 CSC 53 (S.C.C.) — considered

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 21, 1982 CarswellNS 110 (S.C.C.) — followed

N. (F.), Re (2000), 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

Otis v. Otis (2004), 2004 CarswellOnt 1643, 7 E.T.R. (3d) 221 (Ont. S.C.J.) — referred to

R. v. Chanmany (2016), 2016 ONCA 576, 2016 CarswellOnt 11225, 338 C.C.C. (3d) 578, 352 O.A.C. 121 (Ont. C.A.) — referred to

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R. v. Cole (2012), 2012 SCC 53, 2012 CarswellOnt 12684, 2012 CarswellOnt 12685, D.T.E. 2012T-731, 96 C.R. (6th) 88, 223 L.A.C. (4th) 1, 290 C.C.C. (3d) 247, 353 D.L.R. (4th) 447, 436 N.R. 102, 2012 C.L.L.C. 210-059, 297 O.A.C. 1, [2012] 3 S.C.R. 34, 269 C.R.R. (2d) 228, 128 O.R. (3d) 639 (note) (S.C.C.) — considered

R. v. Dyment (1988), 10 M.V.R. (2d) 1, 66 C.R. (3d) 348, 89 N.R. 249, [1988] 2 S.C.R. 417, 45 C.C.C. (3d) 244, 73 Nfld. & P.E.I.R. 13, 229 A.P.R. 13, 55 D.L.R. (4th) 503, 38 C.R.R. 301, 1988 CarswellPEI 7, 1988 CarswellPEI 73 (S.C.C.) — considered

R. v. Esseghaier (2017), 2017 ONCA 970, 2017 CarswellOnt 19349, 356 C.C.C. (3d) 455 (Ont. C.A.) — distinguished

R. v. Henry (2009), 2009 BCCA 86, 2009 CarswellBC 439, 244 C.C.C. (3d) 175, 270 B.C.A.C. 5, 454 W.A.C. 5, 187 C.R.R. (2d) 366 (B.C. C.A. [In Chambers]) — referred to

R. v. Mabior (2012), 2012 SCC 47, 2012 CarswellMan 509, 2012 CarswellMan 510, [2012] 11 W.W.R. 213, 96 C.R. (6th) 1, 352 D.L.R. (4th) 619, 290 C.C.C. (3d) 32, 284 Man. R. (2d) 114, 555 W.A.C. 114, [2012] 2 S.C.R. 584, 268 C.R.R. (2d) 39, 434 N.R. 341 (S.C.C.) — considered

R. v. Marakah (2017), 2017 SCC 59, 2017 CSC 59, 2017 CarswellOnt 19341, 2017 CarswellOnt 19342, 42 C.R. (7th) 1, [2017] 2 S.C.R. 608, 418 D.L.R. (4th) 313, 357 C.C.C. (3d) 281, 396 C.R.R. (2d) 247 (S.C.C.) — referred to

R. v. Mentuck (2001), 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409, 163 Man. R. (2d) 1, 269 W.A.C. 1, [2001] 3 S.C.R. 442 (S.C.C.) — followed

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 1986 CarswellOnt 95, 1986 CarswellOnt 1001, 53 O.R. (2d) 719 (note) (S.C.C.) — referred to

R. v. Paterson (1998), 122 C.C.C. (3d) 254, 1998 CarswellBC 122, 102 B.C.A.C. 200, 166 W.A.C. 200 (B.C. C.A.) — considered

R. v. Pickton (2010), 2010 BCSC 1198, 2010 CarswellBC 2242 (B.C. S.C.) — referred to

R. v. Plant (1993), [1993] 8 W.W.R. 287, 145 A.R. 104, 55 W.A.C. 104, 17 C.R.R. (2d) 297, 12 Alta. L.R. (3d) 305, 84 C.C.C. (3d) 203, [1993] 3 S.C.R. 281, 24 C.R. (4th) 47, 157 N.R. 321, 1993 CarswellAlta 94, 1993 CarswellAlta 566 (S.C.C.) — considered

R. v. Quesnelle (2014), 2014 SCC 46, 2014 CSC 46, 2014 CarswellOnt 9195, 2014 CarswellOnt 9196, 11 C.R. (7th) 221, 460 N.R. 27, 320 O.A.C. 38, 375 D.L.R. (4th) 71, 312 C.C.C. (3d) 187, [2014] 2 S.C.R. 390, 314 C.R.R. (2d) 283, 129 O.R. (3d) 640 (note) (S.C.C.) — referred to

R. v. Spencer (2014), 2014 SCC 43, 2014 CSC 43, 2014 CarswellSask 342, 2014 CarswellSask 343, [2014] 8 W.W.R. 209, 11 C.R. (7th) 52, 458 N.R. 249, 438 Sask. R. 230, 608 W.A.C. 230, 312 C.C.C. (3d) 215, 375 D.L.R. (4th) 255, [2014] 2 S.C.R. 212, 312 C.R.R. (2d) 349 (S.C.C.) — referred to

R. v. Tessling (2004), 2004 SCC 67, 2004 CarswellOnt 4351, 2004 CarswellOnt 4352, 244 D.L.R. (4th) 541, 189 C.C.C. (3d) 129, 23 C.R. (6th) 207, 326 N.R. 228 (Eng.), 326 N.R. 228 (Fr.), [2004] 3 S.C.R. 432, 192 O.A.C. 168, 75 O.R. (3d) 480 (note), 123 C.R.R. (2d) 257 (S.C.C.) — referred to

Reference re s. 12 (1) of the Juvenile Delinquents Act (Canada) (1983), 146 D.L.R. (3d) 408, 41 O.R. (2d) 113, 3 C.C.C. (3d) 515, (sub nom. *R. v. Southam Inc.)* 34 C.R. (3d) 27, 6 C.R.R. 1, (sub nom. *R. v. Southam Inc.)* 33 R.F.L. (2d) 279, 1983 CarswellOnt 273 (Ont. C.A.) — referred to

S. c. Lamontagne (2020), 2020 QCCA 663, 2020 CarswellQue 4349 (C.A. Que.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Toronto Star Newspaper Ltd. v. R. (2012), 2012 ONCJ 27, 2012 CarswellOnt 1255, (sub nom. *Toronto Star Newspaper Ltd. v. Ontario)* 255 C.R.R. (2d) 207, 289 C.C.C. (3d) 549 (Ont. C.J.) — referred to

Toronto Star Newspapers Ltd. v. Ontario (2005), 2005 SCC 41, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 200 O.A.C. 348, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188 (S.C.C.) — referred to

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UFCW, Local 401 v. Alberta (Information and Privacy Commissioner) (2013), 2013 SCC 62, 2013 CarswellAlta 2210, 2013 CarswellAlta 2211, D.T.E. 2013T-775, 365 D.L.R. (4th) 257, [2014] 2 W.W.R. 1, 60 Admin. L.R. (5th) 173, 88 Alta. L.R. (5th) 1, (sub nom. *Alberta (IPC) v. UFCW, Local 401)* 2014 C.L.L.C. 210-003, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 451 N.R. 253, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401)* [2013] 3 S.C.R. 733, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 561 A.R. 359, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 594 W.A.C. 359, 239 L.A.C. (4th) 317, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, local 401)* 297 C.R.R. (2d) 71 (S.C.C.) — considered

Vancouver Sun, Re (2004), 2004 SCC 43, 2004 CarswellBC 1376, 2004 CarswellBC 1377, (sub nom. *R. v. Bagri)* 184 C.C.C. (3d) 515, (sub nom. *R. v. Bagri)* 240 D.L.R. (4th) 147, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 322 N.R. 161, 21 C.R. (6th) 142, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671 (S.C.C.) — considered

Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario (2021), 2021 ONSC 1100, 2021 CarswellOnt 1831 (Ont. Div. Ct.) — referred to

X. v. Y. (2011), 2011 BCSC 943, 2011 CarswellBC 1874, 21 B.C.L.R. (5th) 410, [2011] 11 W.W.R. 514, 338 D.L.R. (4th) 156, 238 C.R.R. (2d) 219 (B.C. S.C.) — distinguished

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(b) — referred to

s. 8 — considered

Charte des droits et libertés de la personne, RLRQ, c. C-12

art. 5 — referred to

Code civil du Québec, L.Q. 1991, c. 64

art. 35-41 — referred to

Code de procédure civile, RLRQ, c. C-25.01

art. 12 — considered

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

Generally — referred to

Privacy Act, R.S.C. 1985, c. P-21

Generally — referred to

APPEAL by estate trustees from judgment reported at *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), allowing appeal from judgment imposing sealing orders.

POURVOI formé par les fiduciaires d'une succession à l'encontre d'un jugement publié à *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), ayant accueilli l'appel interjeté à l'encontre d'un jugement imposant une ordonnance de mise sous scellés.

Kasirer J. **(Wagner C.J.C. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring):**

I. Overview

1 This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public

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can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

2 Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

4 This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

5 This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

6 This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

7 For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

9 Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny.

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In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

10 The couple's estates and estate trustees (collectively the "Trustees") [1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

11 When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

12 Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star"). [2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)

13 In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club* . He noted that a confidentiality order should only be granted when: "(1) such an order is necessary ... to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

14 The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and ... excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

15 The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

16 Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to

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make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)

17 The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

18 The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

19 While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

20 The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. Subsequent Proceedings

21 The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

22 The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

23 First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club* . The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

24 Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

25 The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

26 The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is

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non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

28 In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

29 The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club* .

30 Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 23; Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd*, 2017 UKSC 49, [2019] A.C. 161 (U.K. S.C.), at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1326-39, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; R. v. Mentuck, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

31 The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., R. v. Henry, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated

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with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

32 For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club* . Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

33 Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club* . Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

34 This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

35 I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

36 In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club* . Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. The Test for Discretionary Limits on Court Openness

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

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

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

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

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

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

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (New Brunswick, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the Charter is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also Mentuck, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55).

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By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

43 The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 Ottawa L. Rev. 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

44 Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis*, (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

45 It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. The Public Importance of Privacy

46 As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

47 I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised

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by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

48 Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club* . But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within the meaning of *Sierra Club* . To invoke the expression of Binnie J. in F.N. (Re), 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional ... harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club* . It is true that an individual's privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

49 The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club* .

50 In the context of s. 8 of the Charter and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in Dagg, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in Lavigne, at para. 25.

51 Further, in Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401 2013 SCC 62, [2013] 3 S.C.R. 733 ("UFCW"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., Lavigne, at para. 24; *Bragg*, at para. 18, per Abella J., citing TorontoStar Newspaper Ltd. v. Ontario, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; Douez v. Facebook, Inc., 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

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52 Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., Privacy Act, R.S.C. 1985, c. P-21; Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 (“PIPEDA”); Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31; Charter of Human Rights and Freedoms, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41). [3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 U.B.C. L. Rev. 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Modern L. Rev*. 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev*. 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

53 The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

54 In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, Law of Publication Bans, Private Hearings and Sealing Orders (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., R. v. Paterson(1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see S. v. Lamontagne, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., Himel v. Greenberg, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

55 Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from

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publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., A.B. v. Canada (Citizenship and Immigration), 2017 FC 629, at para. 9 (CanLII)) and a history of substance abuse and criminality (see, e.g., R. v. Pickton, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003), 8 Deakin L. Rev. 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. The Important Public Interest in Privacy Bears on the Protection of Individual Dignity

56 While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

57 Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants *requires* that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (p. 185).

58 Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

59 The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310* Canada inc. v. Chamberland2004 CanLII 4122(Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

60 Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy*

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in Canada (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 Cal. L. Rev. 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (R. v. Spencer, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

61 While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

62 Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

63 Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; Coltsfoot Publishing Ltd. v. Foster-Jacques, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club* . As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy .... However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

64 How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

65 In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different

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aspect of privacy, one more closely related to the protection of one's dignity ... namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing Toronto Star Newspaper Ltd., at para. 44).

66 Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the Code of Civil Procedure, CQLR, c. C-25.01 ("C.C.P."), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile*, *chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

67 The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see Goulet v. Transamerica Life Insurance Co. of Canada, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also A. v. B.1990 CanLII 3132(Que. C.A.), at para. 20, per Rothman J.A.).

68 The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif*: *Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club* 's notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

69 Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 McGill L.J. 289, at p. 314).

70 It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy *and dignity* of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

71 Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of

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oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

72 Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally Bragg, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

73 I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

74 Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

75 If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the Charter as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; R. v. Tessling, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

76 The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

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77 There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., Fedeli v. Brown, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

78 I pause here to note that I refer to cases on s. 8 of the Charter above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v.* Marakah, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

79 In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

80 I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, “Privacy and Court Records: Online Access and the Loss of Practical Obscurity”(2017), 4 U. Ill. L. Rev. 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

81 It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v.* Quesnelle, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000), 50 U.T.L.J. 305, at p. 346).

82 Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared

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dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (R. v. Mabior, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

83 That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

84 Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

85 To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest

86 As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

87 As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

88 The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the

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equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

89 Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

90 There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

91 With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club* .

92 The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see Bragg, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., Bragg, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

93 Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

94 Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

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95 Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

96 Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

97 At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v.* Chanmany, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

98 As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

99 This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

100 Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

101 The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact

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that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

102 Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

103 Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy

104 While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

105 Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

106 Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

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107 The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

108 For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

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TAB 14

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

AUG 16 2016

ENTERED

NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

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

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT
OF WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS
LISTED ON SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

ORDER MADE AFTER APPLICATION
(CLAIMS PROCESS ORDER)

BEFORE THE HONOURABLE	)	TUESDAY, THE 16TH DAY OF
MADAM JUSTICE FITZPATRICK	)	AUGUST, 2016
	)	

ON THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 15th and 16th day of August, 2016; AND ON HEARING Mary I.A. Buttery, H. Lance Williams, Marc S. Wasserman and Patrick Riesterer, counsel for the Petitioners and the Partnerships listed on Schedule "A" and Schedule "C" of the Initial Order (collectively, the "**Walter Canada Group**"), Peter Reardon and Wael Rostom, counsel for KPMG Inc. and those other counsel listed on Schedule "A" hereto; AND UPON READING the material filed, including the Third Affidavit of William E. Aziz sworn August 9, 2016 and the Fourth Report of the Monitor dated August 11, 2016;

THIS COURT ORDERS AND DECLARES THAT:

DEFINITIONS AND INTERPRETATION

1. All capitalised terms not otherwise defined in this Claims Process Order shall have the definitions set out in Schedule "B" hereto.

2. All references herein to time shall mean local time in Vancouver, British Columbia, Canada, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein and any event that occurs on a day that is not a Business Day shall be deemed to occur on the next Business Day.

3. All references to the word "including" shall mean "including, without limitation."

4. All references to the singular herein include the plural, the plural include the singular and any gender includes all genders.

GENERAL PROVISIONS

5. The Claims Process, including the Claims Bar Date and the Restructuring Claims Bar Date is hereby approved.

6. The Monitor, in consultation with the Walter Canada Group, is hereby authorised to use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered hereunder are completed and executed and the time in which they are submitted and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Claims Process Order, including in respect of the completion, execution and time of delivery of such forms, and may request any further documentation from a Claimant that the Monitor, in consultation with the Walter Canada Group, may determine is necessary or desirable in order to enable it to determine the validity of a Claim.

7. If any Claim arose in a currency other than Canadian dollars, then the Person making the Claim shall complete its Proof of Claim, indicating the amount of the Claim in such currency, rather than in Canadian dollars or any other currency. Where no currency is indicated, the Claim shall be presumed to be in Canadian dollars. The Monitor shall subsequently calculate the amount of such Claim in Canadian Dollars, using the Reuters closing rate on the Commencement Date (as found at http://www.reuters.com/finance/currencies).

8. Copies of all forms delivered by or to a Claimant hereunder, as applicable, and determinations of Claims by the Monitor or the Court, as the case may be, shall be maintained by the Monitor and, subject to further order of the Court, such Claimant will be entitled to have access in relation to their respective Claim by appointment during normal business hours on written request to the Monitor.

MONITOR'S ROLE

9. The Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA, the Initial Order and any other Orders of the Court in the CCAA Proceeding, is hereby directed and empowered to implement the Claims Process set out herein, including the determination of Claims of Claimants and the referral of any Claim to the Court and to take such other actions and fulfill such other roles as are authorized by this Claims Process Order or incidental thereto.

10. The Monitor shall: (i) have all of the protections given to it by the CCAA, the Initial Order, any other Orders of the Court in the CCAA Proceeding, and this Claims Process Order, and as an officer of the Court, including the stay of proceedings in its favour; (ii) incur no liability or obligation as a result of

the carrying out of the provisions of this Claims Process Order; (iii) be entitled to rely on the books and records of the Walter Canada Group and any information provided by the Walter Canada Group and the CRO (as defined herein), all without independent investigation; and (iv) not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

11. Consultation with the Court-appointed Chief Restructuring Officer of the Walter Canada Group, William E. Aziz of BlueTree Advisors Inc. (the "**CRO**"), shall satisfy any obligation of the Monitor in this Claims Process Order to consult with the Walter Canada Group.

12. [Intentionally Deleted.]

13. The Monitor, exercising its reasonable judgement may schedule a motion with the Court on notice to the Service List to seek approval of a process for the resolution of any dispute in connection with the Intercompany Claims and any other disputes of Claimants and related motions, including a process regarding requests for the production of documents or any oral examinations.

14. The Monitor shall file a report with the Court as soon as practicable following the Claims Bar Date (and serve such report on the Service List) detailing the nature and quantum of all Claims filed or determined in accordance with this Order and the status thereof, including the nature and quantum of any Intercompany Claims.

NOTICE OF CLAIMS

15. Forthwith after this Claims Process Order, and in any event within seven (7) Business Days following the date of this Claims Process Order, the Monitor shall cause a Claims Package to be sent to:

(a) Each known Claimant with a Claim as evidenced in the books and records of the Walter Canada Group as of the Commencement Date in accordance with paragraph **42** of this Claims Process Order; and

(b) Each party having provided contact information to the Service List.

16. The Claims Package sent by the Monitor to each Employee Claimant shall include (i) a Notice of Employee Claim that sets out the amount of such Employee Claimant's Employee Claim as determined by the Monitor (in consultation with the Walter Canada Group) and as evidenced by the books and records of the Walter Canada Group and the identity of the Walter Canada Group entity liable for such Employee Claim and (ii) a blank Notice of Dispute of Employee Claim. Where an Employee Claimant is represented by the United Steelworkers, a copy of the Notice of Employee Claim will be provided to the United Steelworkers.

17. Forthwith after this Claims Process Order, and in any event within ten (10) Business Days following the date of this Claims Process Order, the Monitor shall cause the Newspaper Notice to be

published for one (1) Business Day in the Globe and Mail (National Edition), the Vancouver Sun, the Chetwynd Echo and the Tumbler Ridge News.

18. Forthwith after the date of this Claims Process Order and in any event within five (5) Business Days following the date of this Claims Process Order, the Monitor shall post on the Monitor's Website a copy of this Claims Process Order, a blank Proof of Claim form, the Instruction Letter and a blank Notice of Dispute form.

19. To the extent that any Claimant requests documents relating to the Claims Process prior to the Claims Bar Date or the Restructuring Claims Bar Date, as applicable, or the Monitor becomes aware of any further Claimants, the Monitor shall forthwith cause a Claims Package to be sent to the Claimant, direct the Claimant to the documents posted on the Monitor's Website, and otherwise respond to the request relating to the Claims Process as may be appropriate in the circumstances.

20. Subject to further order of the Court, any Notice of Disclaimer or Resiliation issued by a member of the Walter Canada Group must be issued by such Walter Canada Group entity at least fifteen (15) days prior to a scheduled Meeting Date, if any, or any adjournment thereof. Any Notice of Disclaimer or Resiliation delivered to a Person after the date of this Claims Process Order shall be accompanied by a Claims Package.

NOTICE SUFFICIENT

21. The forms of Instruction Letter, Employee Claim Amount Notice, Proof of Claim, Notice of Dispute of Employee Claim, Notice of Revision or Disallowance, Notice of Dispute and Newspaper Notice substantially in the forms attached to this Claims Process Order as Schedules "C", "D", "E", "F", "G", "H" and "I", respectively, are hereby approved. Schedule "J", Walter Canada Claims Process Key Dates, is also approved. Despite the forgoing, the Monitor, in consultation with the Walter Canada Group, may, from time to time, make minor changes to such forms as the Monitor, in consultation with the Walter Canada Group, may consider necessary or desirable and may make such changes to the key dates as are permitted pursuant to the terms hereof.

22. Publication of the Newspaper Notice, the mailing to the known Claimants of a Claims Package in accordance with this Claims Process Order, the mailing to Employee Claimants of the Employee Claim Amount Notices and completion of the other requirements of this Claims Process Order shall constitute good and sufficient service and delivery of notice of this Claims Process Order, the Claims Bar Date and the Restructuring Claims Bar Date on all Persons who may be entitled to receive notice and who may wish to assert a Claim, and no other notice or service need be given or made and no other document or material need be sent to or served upon any Person in respect of this Claims Process Order.

FILING PROOFS OF CLAIM FOR CLAIMS OTHER THAN RESTRUCTURING CLAIMS

23. Subject to paragraphs **25** and **28** hereof, any Claimant who wishes to assert a Claim (other than a Restructuring Claim) against any of the members of the Walter Canada Group and/or any Director and/or Officer shall file a Proof of Claim with the Monitor in the manner set out in paragraph **43** hereof so that the Proof of Claim is received by the Monitor by no later than the Claims Bar Date.

24. Subject to paragraphs **25** and **28** hereof, any Person who does not file a Proof of Claim as provided for in paragraph **23** hereof so that such Proof of Claim is received by the Monitor on or before the Claims Bar Date, or such later date as the Monitor, in consultation with the Walter Canada Group, may agree in writing or the Court may otherwise direct, shall:

(a) be and is hereby forever barred, estopped and enjoined from asserting or enforcing any Claim against any of the Walter Canada Group entities and/or any of the Directors and/or Officers and all such Claims shall forever be extinguished;

(b) not be permitted to vote on any Plan on account of such Claim;

(c) not be permitted to participate in any distribution under the Plan, from the proceeds of any sale of the Walter Canada Group's assets or otherwise on account of such Claim(s); and

(d) not be entitled to receive further notice in respect of the Claims Process, these CCAA Proceedings or the Meeting Dates.

25. Notwithstanding paragraphs **23** and **24** hereof, any Employee Claimant who receives an Employee Claim Amount Notice and who does not dispute the Employee Claim as set forth in the Employee Claim Amount Notice is not required to file a Proof of Claim by the Claims Bar Date. If an Employee Claimant who receives an Employee Claim Amount Notice does not file a Notice of Dispute of Employee Claim by the Claims Bar Date, then the Employee Claim as set out in such Employee Claimant's Employee Claim Amount Notice shall be such Employee's Allowed Claim for voting and distribution purposes. For the purposes of their Employee Claim, if the Monitor determines, in its discretion, that the Claims Process would be furthered thereby, all unionized Employees who have not yet been terminated as of the date of this Order shall be deemed to have been terminated as of the date of this Order solely for the purpose of calculating the value of their Employee Claim; provided, however, that nothing in this Order affects the rights of those unionized employees under their collective agreement or the operation of s. 35 of the *Labour Relations Code*.

26. Any Employee Claimant who receives an Employee Claim Amount Notice and wishes to dispute the amount set out therein shall file a Notice of Dispute of Employee Claim with the Monitor in the manner

set out in paragraph **43** hereof so that the Notice of Dispute of Employee Claim is received by the Monitor by no later than the Claims Bar Date.

27. Notwithstanding anything contained in this Claims Process Order, Unaffected Claims shall not be extinguished or affected by this Claims Process Order and, for greater certainty, paragraph **24** shall not apply to the Unaffected Claims.

FILING PROOFS OF CLAIM FOR RESTRUCTURING CLAIMS

28. Notwithstanding paragraphs **23** and **24** hereof, any Claimant who wishes to assert a Restructuring Claim against any member of the Walter Canada Group and/or any Director and/or Officer shall file a Proof of Claim with the Monitor in the manner set out in paragraph **43** hereof so that the Proof of Claim is received by the Monitor no later than the Restructuring Claims Bar Date. All other dates contained herein (other than the Claims Bar Date), shall apply equally to any Restructuring Claims.

29. Any Person that does not file a Proof of Claim in respect of a Restructuring Claim as provided for in paragraph **28** hereof, so that the Proof of Claim is received by the Monitor on or before the Restructuring Claims Bar Date, or such later date as the Monitor, in consultation with the Walter Canada Group, may agree in writing or the Court may otherwise direct, shall:

(a) be and is hereby forever barred, estopped and enjoined from asserting or enforcing any Restructuring Claim against any of the Walter Canada Group entities and/or any of the Directors and/or Officers and all such Restructuring Claims shall be forever extinguished;

(b) not be permitted to vote on the Plan on account of such Restructuring Claim(s);

(c) not be permitted to participate in any distribution under any Plan, from the proceeds of any sale of the Walter Canada Group's assets or otherwise on account of such Restructuring Claim(s); and,

(d) not be entitled to receive further notice in respect of the Claims Process, these CCAA Proceedings or the Meeting Dates (unless such Person is also a Claimant with a Claim other than such Restructuring Claim entitling such Person to further notice in these proceedings).

UMWA 1974 PENSION PLAN CLAIMS

30. Notwithstanding any other provision of this Claims Process Order, the UMWA 1974 Pension Plan Claim shall be adjudicated by this Court under a procedure to be determined more fully by subsequent Order of this Court after completion of the following steps, which hereby are ordered to be taken:

(a) On or before August 26, 2016, the UMWA 1974 Pension Plan is authorized but not directed to file and deliver to the Service List a notice of claim substantially in Form 1 of the *Supreme Court Civil Rules*; and

(b) On or before September 26, 2016 any person on the Service List who contests the UMWA 1974 Pension Plan Claim filed pursuant to sub-paragraph **(a)** of this paragraph **30** is authorized but not directed to file and deliver to the Service List a response to notice of claim substantially in Form 2 of the *Supreme Court Civil Rules*; and

(c) On or before the Claims Bar Date, the UMWA 1974 Pension Plan may file and deliver to the Service List a reply substantially in Form 7 of the *Supreme Court Civil Rules*.

31. Promptly upon completion of sub-paragraphs **(a)**, **(b)** and **(c)** of paragraph **30** of this Claims Process Order, the Monitor shall, in consultation with counsel for the UMWA 1974 Pension Plan, seek a scheduling appointment before the Court, on notice to the Service List, to seek further directions concerning the procedure for adjudicating the UMWA 1974 Pension Plan Claim.

32. Pending the determination of the UMWA 1974 Pension Plan Claim, the UMWA 1974 Pension Plan Claim shall not be accepted or determined as Allowed Claims pursuant to this Claims Process without approval of this Court, but the UMWA 1974 Pension Plan shall have the same rights and entitlements in respect of the Claims Process as Claimants who file Proofs of Claim in accordance with paragraphs **23** or **28** hereof.

33. If the UMWA 1974 Pension Plan does not a notice of claim pursuant to sub-paragraph **(a)** of paragraph **30**, paragraph **24** hereof shall apply and the UMWA 1974 Pension Plan Claim shall be forever barred.

ADJUDICATION OF CLAIMS

34. The Monitor shall provide the Walter Canada Group's counsel with copies of all Proofs of Claim, Employee Claim Amount Notices, Notices of Dispute of Employee Claims, Notices of Dispute and any other materials delivered by or filed with the Monitor pursuant to the Claims Process. The Monitor shall grant the Walter Canada Group and its legal counsel access to a database to be created by the Monitor, which includes, among other things:

(a) a regularly updated claims register;

(b) electronic copies of all Proofs of Claim filed with the Monitor;

(c) electronic copies of all Employee Claim Amount Notices delivered by the Monitor;

(d) electronic copies of all Notices of Dispute of Employee Claims filed with the Monitor;

(e) electronic copies of all Notices of Revision or Disallowance issued by the Monitor; and,

(f) electronic copies of all Notices of Dispute filed with the Monitor.

35. The Monitor, in consultation with the Walter Canada Group, shall review all Proofs of Claim, Notices of Dispute of Employee Claim and other Claims Process materials received on or before the Claims Bar Date or the Restructuring Claims Bar Date, as applicable, and shall accept, revise or disallow each Pre-Commencement Claim, Restructuring Claim or Employee Claim, as applicable, as set out therein. If the Monitor, in consultation with the Walter Canada Group, wishes to revise or disallow a Pre-Commencement Claim, a Restructuring Claim or an Employee Claim, the Monitor shall, by no later than November 7, 2016 or thirty (30) Business Days after the Restructuring Claims Bar Date, as applicable, send such Claimant a Notice of Revision or Disallowance advising that the Claimant's Claim as set out in its Proof of Claim has been revised or disallowed and the reasons therefore. Where an Employee Claimant is represented by the United Steelworkers, a copy of the Notice of Revision of Disallowance will be provided to the United Steelworkers. If the Monitor does not send a Notice of Revision or Disallowance to a Claimant by such date or such other date as may be determined by the Monitor, in consultation with the Walter Canada Group, and on notice to the Claimant, the Claim set out in the applicable Proof of Claim shall be an Allowed Claim for voting and/or distribution purposes. Unless otherwise agreed to by the Monitor, in consultation with the Walter Canada Group, or ordered by the Court, all Claims set out in Proofs of Claim that are filed after the Claims Bar Date or the Restructuring Claims Bar Date, as applicable, are deemed to be disallowed and the Monitor need not deliver a Notice of Revision or Disallowance in respect of such Claim.

36. Any Claimant who is sent a Notice of Revision or Disallowance pursuant to paragraph **35** hereof and wishes to dispute such Notice of Revision or Disallowance shall deliver a completed Notice of Dispute to the Monitor by no later than 5:00 p.m. on the later of December 6, 2016 or the day which is twenty (20) Business Days after the date of the applicable Notice of Revision or Disallowance or such other date as may be agreed to by the Monitor. If a Claimant fails to deliver a Notice of Dispute by such date, the Claim set out in the applicable Notice of Revision or Disallowance, if any, shall be deemed to be an Allowed Claim for voting and/or distribution purposes. Where an Employee Claimant is represented by the United Steelworkers, a Notice of Dispute may be filed by the United Steelworkers and may represent the employee in the resolution of the disputed Claim.

37. Upon receipt of a Notice of Dispute, the Monitor, in consultation with the Walter Canada Group, may attempt to consensually resolve the disputed Claim.

38. If the Monitor, in consultation with the Walter Canada Group, and the Claimant consensually resolve the disputed Claim, such Claim (as resolved) shall be an Allowed Claim.

39. If the disputed Claim cannot be consensually resolved the disputing party may bring a motion on a de novo basis before the Court in these proceedings to resolve the disputed Claim by the later of January 9, 2016 and the day that is twenty (20) Business Days after the date of delivery of a Notice of Dispute, or such time as may be extended by agreement between the Claimant and the Monitor.

40. Notwithstanding any other provision of this Order, the Monitor may refer any Claim to the Court for adjudication by sending written notice to the Claimant at any time, including, for greater certainty, in lieu of sending a Notice of Revision or Disallowance to any Claimant.

NOTICE OF TRANSFEREES

41. Subject to the terms of the order fixing a Meetings Date and the Plan if, after the Commencement Date, the holder of a Claim transfers or assigns the whole of such Claim to another Person, neither the Monitor nor the Walter Canada Group shall be obligated to give notice or otherwise deal with the transferee or assignee of such Claim in respect thereof unless and until actual written notice of such transfer or assignment, together with satisfactory evidence of such transfer or assignment shall have been received and acknowledged by the relevant member of the Walter Canada Group and the Monitor in writing and the Monitor has acknowledged such transfer through written notice to the transferor and thereafter such transferee or assignee shall for the purposes hereof constitute the "Claimant" in respect of such Claim. Any such transferee or assignee of a Claim shall be bound by any notices given or steps taken in respect of such Claim in accordance with the Claims Process prior to the receipt and acknowledgement by the relevant member of the Walter Canada Group and the Monitor of the delivery of satisfactory evidence of such transfer or assignment. A transferee or assignee of a Claim takes the Claim subject to any rights of set-off to which a member of the Walter Canada Group may be entitled with respect to such Claim. For greater certainty, a transferee or assignee of a Claim is not entitled to set-off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such Person to any of the Walter Canada Group entities. Reference to a transfer in this Claims Process Order includes a transfer or assignment whether absolute or intended as security.

SERVICES AND NOTICES

42. The Monitor may, unless otherwise specified by this Claims Process Order, serve and deliver the Claims Package, any Notices of Revision or Disallowance, any letters, notices or other documents to a Claimant or any other interested Person by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, or electronic transmission to such Persons at their respective addresses or contact information as last shown on the records of the Walter Canada Group entities or set out in such Claimant's Proof of Claim. Any such service and delivery shall be deemed to have been received:

(a) If sent by ordinary mail, on the third Business Day after mailing within British Columbia, the fifth Business Day after mailing within Canada (other than British Columbia) and the seventh Business Day after mailing outside of Canada;

(b) If sent by courier or personal delivery, on the next Business Day following dispatch;

(c) If delivered by electronic transmission, by 5:00 p.m. on a Business Day on such Business Day and if delivered after 5:00 p.m. or other than a Business Day, on the following Business Day.

43. Any Proofs of Claim, Notice of Dispute of Employee Claim, Notice of Dispute or other notice or communication to be provided or delivered by a Claimant to the Monitor under this Claims Process Order, shall be in writing in substantially the form, if any, provided for in this Claims Process Order and will be sufficiently given only if delivered by prepaid registered mail, courier, personal delivery, or email addressed to:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al*
777 Dunsmuir St
Vancouver, BC V7Y 1K3

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

<u>Any such notice or communication delivered by a Claimant shall be deemed to be received upon actual receipt thereof by the Monitor before 5:00 p.m. (Vancouver Time) on a Business Day or, if delivered after 5:00 p.m. (Vancouver Time), on the next Business Day.</u>

44. If during any period which notice or other communications are being given pursuant to this Claims Process Order, a postal strike or postage work stoppage of general application should occur, such notice or other communications sent by ordinary mail and then not received shall not, absent further Order of this Court, be effective, and notices and other communications given hereunder during the course of any such postage strike or work stoppage of general application shall only be effective if given by courier, personal delivery, email or posting on the Monitor's Website.

45. In the event this Claims Process Order is later amended by further Order of the Court, the Monitor may post such further Order on the Monitor's Website and serve such further Order on the Service List, and such posting and service shall constitute adequate notice to Claimants of such amended claims procedure.

MISCELLANEOUS

46. Notwithstanding any other provisions of this Claims Process Order, the solicitation by the Monitor of Proofs of Claim, and the filing by any Claimant of any Proof of Claim shall not, for that reason only, grant any Person standing in these CCAA Proceedings or rights under any proposed Plan.

47. Nothing in this Claims Process Order shall constitute or be deemed to constitute an allocation or assignment of Claims or Unaffected Claims by the Walter Canada Group into particular affected or unaffected classes for the purpose of a Plan.

48. Nothing in this Order shall prejudice the rights and remedies of any Directors, Officers, the Chief Restructuring Officer or other Persons under the Directors' Charge, any other Charge or any applicable insurance policy or prevent or bar any Person from seeking recourse against or payment from the Walter Canada Group's insurance and any Director's or Officer's liability insurance policy or policies that exist to protect or indemnify the Directors, Officers, or other Persons, whether such recourse or payment is sought directly by the Person asserting a Claim or a Directors/Officers Claim from the insurer or derivatively through the Director, Officer or any other Person, including any member of the Walter Canada Group; provided, however, that nothing in this Order shall create any rights in favour of such Person under any policies of insurance nor shall anything in this Order limit, remove, modify or alter any defence to such claim available to the insurer pursuant to the provisions of any insurance policy or at law; and further provided that any Claim or Directors/Officers Claim or portion thereof for which the Person receives payment directly from, or confirmation that she is covered by, the Walter Canada Group's insurance or any Director's or Officer's liability insurance or other liability insurance policy or policies that exist to protect or indemnify the Directors, Officers or other Persons shall not be recoverable as against the Walter Canada Group or a Director, Officer, or other Person, as applicable.

49. The Claims Bar Date and the Restructuring Claims Bar Date, and the amount and status of every Allowed Claim, as determined under the Claims Process, including any determination as to the nature, amount, value, priority or validity of any Claim, including any secured claim, shall continue in full force and effect and be final for all purposes (except as expressly stated in any Notice of Disallowance or Revision or settlement or order of the Court), including in respect of any Plan and voting thereon (unless provided for otherwise in any Order of Court), and, including for any distribution made to Claimants of any of the Walter Canada Group entities, whether in these CCAA Proceedings or in any of the proceedings authorised by this Court or permitted by statute, including a receivership proceeding or bankruptcy affecting any member of the Walter Canada Group.

50. In carrying out the terms of this Claims Process Order and aiding the Monitor in accordance with the terms of this Claims Process Order, the CRO shall:

(a) be entitled to rely on all of the protections granted to it in the SISP Order;

(b) be entitled to rely on the books and records of the Walter Canada Group entities and any information provided by the Walter Canada Group entities, all without independent investigations; and

(c) shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

51. Notwithstanding the terms of this Claims Process Order, the Walter Canada Group and the Monitor may apply to this Court from time to time for advice and directions from this Court with respect to this Claims Process Order, including the Claims Process and the schedules to this Claims Process Order, or for such further Order or Orders as either of them may consider necessary or desirable to amend, supplement or replace this Order, including any schedule to this Order.

APPROVAL

52. Endorsement of this Order by counsel appearing on this application is hereby dispensed with.

THIS COURT REQUESTS the aid, recognition and assistance of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any Federal or State Court or administrative body in the United States of America, to act in aid of and be complementary to this Court in carrying out the terms of this Claims Process Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to:

(a) make such orders and to provide such assistance to the Walter Canada Group and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Claims Process Order;

(b) grant representative status to any of the Walter Canada Group entities and the Monitor to act on behalf of any or all of the Walter Canada Group entities in any foreign proceeding; and,

(c) assist the Walter Canada Group, the Monitor and the respective agents of each of the forgoing in carrying out the terms of this Claims Process Order.

In addition, each of the Walter Canada Group entities and the Monitor shall be at liberty, and is hereby authorized and empowered, to make such further applications, motions or proceedings to or before such other courts and judicial regulatory and administrative bodies, and take such other steps, in Canada, the United States of America or elsewhere, as may be necessary or advisable to give effect to this Claims

Process Order and any other Order granted by this Court.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Lawyers for the Petitioners

DLA Piper (Canada) LLP
(Mary I.A. Buttery and H. Lance Williams)

and

Osler, Hoskin & Harcourt LLP
(Marc Wasserman and Patrick Riesterer)

BY THE COURT

REGISTRAR

Schedule "A"

Counsel List	
Name	**Party Represented**
Kathryn Esaw Angela Crimeni	Canadian Counsel for Morgan Stanley Senior Funding, Inc., as Administrative Agent and Collateral Agent under the First Lien Credit Facility
John Sandrelli Tevia Jeffries	UMWA 1974 Pension Plan and Trust
Heather L. Jones	Kevin James
Aaron Welch	Her Majesty the Queen in right of British Columbia
Craig Bavis Stephanie Drake	USW, Local 1-424
Kieran Siddall	Pine Valley Mining Corporation
David Wachowich Leanne Krawchuck (by phone)	Conuma Coal Resources Limited

Schedule "B"
Definitions

"**Allowed Claim**" means the amount, status and/or validity of the Claim of a Claimant finally determined in accordance with the Claims Process, which shall be final and binding for voting and/or distribution purposes under the Plan or otherwise. A Claim will be "finally determined" and become an Allowed Claim in accordance with the Claims Process if:

i. An Employee Claimant was sent an Employee Claim Amount Notice by the Monitor and the Employee Claimant does not file a Notice of Dispute of Employee Claim by the Claims Bar Date;
ii. A Claimant filed a Proof of Claim by the Claims Bar Date or the Restructuring Claims Bar Date, as applicable, and the Monitor has not sent a Notice of Revision or Disallowance by the deadline set out in paragraph **35** of the Claims Process Order;
iii. The Monitor has sent the Claimant a Notice of Revision or Disallowance in accordance with the Claims Process and the Claimant has not sent a Notice of Dispute in response by the deadline set out in paragraph **36** of the Claims Process Order;
iv. The Claimant sent a Notice of Dispute by the deadline set out in paragraph **36** and the Monitor and the Claimant have consensually resolved the disputed Claim; or
v. The Court has made a determination with respect to the Claim and no appeal or application for appeal therefrom has been taken or served on either party, or if any appeal(s) or applications for leave to appeal or further appeal have been taken therefrom or served on either party, any (and all) such appeal(s) or application(s) have been dismissed, determined or withdrawn;

"**Business Day**" means any day, other than a Saturday, Sunday or holiday, on which banks in Vancouver, British Columbia are generally open for business;

"**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

"**CCAA Charge**" means any of the charges granted by the Court in the CCAA Proceedings pursuant to the Initial Order, the SISP Order and any further Orders of the Court;

"**CCAA Proceedings**" means the CCAA proceedings commenced by the Walter Canada Group, being Supreme Court of British Columbia Action No. S-1510120, on the Commencement Date pursuant to the Initial Order;

"**Claim**" means (i) any Pre-Commencement Claim, (ii) any Restructuring Claim; (iii) any Employee Claim (iv) any Intercompany Claim, (v) any Directors/Officers Claim, or (vi) the UMWA 1974 Pension Plan Claims;

"**Claims Bar Date**" means October 5, 2016 at 5:00 p.m. (Vancouver Time) or such other date as may be ordered by the Court;

"**Claims Package**" means the document package which includes a copy of (i) this Claims Process Order; (ii) the Instruction Letter, (iii) a blank Proof of Claim, and (v) such other materials as the Monitor, in consultation with the Walter Canada Group, considers necessary or appropriate;

"**Claims Process**" means the call for claims to be administered by the Monitor, in consultation with the Walter Canada Group, pursuant to the terms of this Claims Process Order;

"**Claims Process Order**" means this Order establishing a claims process;

"**Commencement Date**" means December 7, 2015;

"**Court**" means the Supreme Court of British Columbia;

"**Claimant**" means any Person asserting a Claim, whether such Person is located in Canada, the United States or elsewhere, and includes, without limitation, the transferee or assignee of a transferred Claim that is recognised in accordance with paragraph **41** hereof, or a trustee, liquidator, receiver, manager or other Person acting on behalf of such Person;

"**CRO**" has the meaning attributed to it in paragraph **11** of the Claims Process Order;

"**Director**" means any Person who is or was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director of any one or more members of the Walter Canada Group;

"**Directors/Officers Claim**" means any right or claim of any Person against one or more of the Directors and/or Officers that relates to a Pre-Commencement Claim or a Restructuring Claim, however arising, for which the Directors and/or Officers are by statute or otherwise by law liable to pay in their capacity as Directors and/or Officers;

"**Dispute Package**" means, with respect to any Claim, a copy of the related Proof of Claim, Notice of Revision or Disallowance and Notice of Dispute;

"**Employees**" means all employees of the Walter Canada Group as at the Commencement Date (including inactive employee of a Walter Canada Group entity as of the Commencement Date and including any employees of the Wolverine mine who were terminated after the Commencement Date due to the expiration of any recall or other rights under the applicable collective bargaining agreement), and "Employee" means any one of them. For the avoidance of doubt, Employee does not include individuals whose employment was terminated for any reason, without regard to any period of notice, prior to the Commencement Date;

"**Employee Claim**" means a Claim held by an Employee against a Walter Canada Group entity in respect of Wages and Benefits and, for greater certainty, does not include any other Claim of an Employee;

"**Employee Claimant**" means an Employee with an Employee Claim;

"**Employee Claim Amount Notice**" means a form of notice in which the Monitor may include in an Employee's Claims Package setting out the Monitor's determination of such Claimant Employee's Claim, which shall be in substantially the form set out in **Schedule "D"**;

"**Financial Advisor**" means PJT Partners LP as financial advisor to the Walter Canada Group;

"**Initial Order**" means the Order of this Honourable Court granted on December 7, 2015 in these CCAA Proceedings, as amended;

"**Instruction Letter**" means the letter regarding completion of a Proof of Claim, which letter shall be substantially in the form attached hereto as **Schedule "C"**;

"**Intercompany Claim**" means: (i) any Claim of a member of the Walter Canada Group against another member of the Walter Canada Group (including for greater certainty any amount secured by one of the CCAA Charges) and (ii) any Claim by Walter Energy, Inc. or any of its non-Canadian affiliates against the Walter Canada Group in respect of the Hybrid Debt Structure (as defined in the First Affidavit of William E. Harvey sworn December 5, 2015 in these proceedings), but excluding any other Claims of Walter Energy, Inc. or any of its non-Canadian affiliates against the Walter Canada Group and any Claims that Warrior Met Coal, LLC acquired from Walter Energy, Inc. or any of its U.S. affiliates against the Walter Canada Group;

"**Lien**" means any valid and enforceable mortgage, charge, pledge, assignment by way of security, lien, hypothec, security interest, deemed trust or other encumbrance granted or arising pursuant to a written agreement or statute or otherwise created by law;

"**Meeting Date**" means the date set for the meeting of the Walter Canada Group's Claimants, to be set by further Order of the Court;

"**Monitor**" means KPMG Inc., in its capacity as Court-appointed Monitor pursuant to the Initial Order;

"**Monitor's Website**" means the Monitor's website located at http://www.kpmg.com/ca/walterenergycanada;

"**Newspaper Notice**" means the notice of Claims Process to be published in the newspapers listed in paragraph **17** of this Claims Process Order, calling for any and all Claims of Claimants against the Walter Canada Group in substantially the form attached hereto as **Schedule "I"**;

"**Notice of Disclaimer or Resiliation**" means a written notice in any form issued on or after the Commencement Date by a member of the Walter Canada Group, with the prior consent of the Monitor, advising a Person of the restructuring, disclaimer, resiliation, termination or breach of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral, and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of this Claims Process Order;

"**Notice of Dispute**" means the notice that may be delivered by a Claimant who has received a Notice of Revision or Disallowance disputing such Notice of Revision or Disallowance, which notice shall be in substantially the form attached hereto as **Schedule "H"**;

"**Notice of Dispute of Employee Claim**" means the notice that may be delivered by an Employee Claimant who has received an Employee Claim Amount Notice and disputes the amount of the Employee Claim set out therein, which notice shall be in substantially the form attached hereto as **Schedule "E"**;

"**Notice of Revision or Disallowance**" means the notice that may be delivered by the Monitor to a Claimant advising that the Monitor has revised or disallowed in whole or in part such Claimant's Claim as set out in its Proof of Claim, which notice shall be substantially in the form attached hereto as **Schedule "G"**;

"**Officer**" means any Person who was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer of any one or more members of the Walter Canada Group;

"**Person**" means any individual, firm, partnership, joint venture, venture capital fund, association, trust, trustee, executor, administrator, legal personal representative, estate, group, body corporate (including a limited liability company and an unlimited liability company), corporation, unincorporated association or organisation, governmental authority, syndicate or other entity, whether or not having legal status;

"**Plan**" means any plan of compromise or arrangement of the Walter Canada Group pursuant to the CCAA, or any scheme of distribution by a trustee in bankruptcy of the Walter Canada Group under the *Bankruptcy and Insolvency Act*.

"**Pre-Commencement Claim**" means any right or claim of any Person that may be asserted or made in whole or in part against the Walter Canada Group (or any of them), whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever and any interest accrued thereon or costs payable in respect thereof, in existence on, or which is based on, an agreement, event, fact, act or omission or other matter which occurred, was entered into or relates in whole or in part prior to the Commencement Date, at law or in equity by reason of the commission of a tort (intentional or unintentional), any breach of contract or other agreement (oral or written), any breach of duty (including without limitation, any legal, statutory, equitable or fiduciary duty), any right of ownership or title to property or assets, any other claim on property or assets (including a royalty right or intellectual property right), or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise) or for any reason whatsoever against any members of the Walter Canada Group or any of their property or assets, any whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, un-liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise and whether or not any right or claim is executive or anticipatory in nature including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future, together with any other rights or claims not referred to above that are or would be claims provable in bankruptcy had the Walter Canada Group (or any of them) become bankrupt on the Commencement Date and, for greater certainty, includes any Tax Claim; provided, however, that "Pre-Commencement Claim" shall not include an Employee Claim or an Unaffected Claim;

"**Proof of Claim**" means the form to be completed and filed by a Claimant setting forth its proposed Claim, which shall be substantially in the form attached hereto as **Schedule "E"**;

"**Restructuring Claim**" means any right or claim of any Person against the Walter Canada Group (or any of them) in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the Walter Canada Group (or any of them) to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach on or after the Commencement Date of any contract, employment agreement, lease or other agreement or arrangement, whether written or oral, and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of this Claims Process Order; provided, however, that "Restructuring Claim" shall not include an Employee Claim, an UMWA 1974 Pension Plan Claim or an Unaffected Claim;

"**Restructuring Claims Bar Date**" means the later of (i) the Claims Bar Date; and (ii) 5:00 p.m. (Vancouver Time) on the day that is twenty (20) Business Days after the date of the applicable Notice of Disclaimer or Resiliation or such other date as may be ordered by the Court;

"**SISP Order**" means the Order of this Honourable Court granted on January 5, 2016 in these CCAA Proceedings approving, among other things, a sale and investment solicitation process with respect to the Walter Canada Group's assets.

"**Tax**" or "**Taxes**" means any and all taxes, duties, fees, premiums, assessments, imposts, levies and other charges of any kind whatsoever, including all interest, penalties, fines, additions to tax or other additional amounts in respect thereof, and including those levied on, or measured by, or referred to as, income, gross receipts, profits, capital, transfer, land transfer, sales, goods and services, harmonized sales, use, value-added, excise, stamp, withholding, business, franchising, property, development, occupancy, employer health, payroll, employment, health, social services, education and social security taxes, all surtaxes, all customs duties and import and export taxes, countervail and anti-dumping, all licence, franchise and registration fees and all employment insurance, health insurance and Canada, Quebec and other government pension plan premiums or contributions.

"**Tax Claim**" means any Claim against the Walter Canada Group (or any of them) for any Taxes in respect of any taxation year or period ending on or prior to the Commencement Date, and in any case where a taxation year or period commences on or prior to the Commencement Date, for any Taxes in respect of or attributable to the portion of that taxation period commencing prior to the Commencement Date and up to and including the Commencement Date. For greater certainty, a Tax Claim shall include, without limitation, any and all Claims of any Taxing Authority in respect of transfer pricing adjustments and any Canadian or non-resident Tax related thereto;

"**Taxing Authorities**" means Her Majesty the Queen, Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, the Canada Revenue Agency, any similar revenue or taxing authority of each and every province or territory of Canada and any political subdivision thereof, the Internal Revenue Service and any similar revenue or taxing authority of the federal or state governments of the United States of America and any Canadian or foreign governmental authority and "Taxing Authority" means any one of the Taxing Authorities;

"**UMWA 1974 Pension Plan Claim**" means any claim alleged by or on behalf of the United Mine Workers of America 1974 Pension Plan and Trust against any member of the Walter Canada Group;

"**United Steelworkers**" means the United Steelworkers, Local 1-424;

"**Unaffected Claim**" means, subject to further Order of this Court,

i. Any right or claim of any Person that may be asserted or made in whole or in part against the Walter Canada Group (or any of them) in connection with any indebtedness, liability or obligation of any kind which arose in respect of obligations first incurred on or after the Commencement Date (other than Restructuring Claims and Directors/Officers Claims) and any interest thereon, including any obligation of the Walter Canada Group toward Claimants who have supplied or shall supply services, utilities, goods or materials or who have or shall have advanced funds to the Walter Canada Group on or after the Commencement Date, but only to the extent of their claims in respect of the supply of such services, utilities, goods, materials or funds on or after the Commencement Date;
ii. Any claim of any bank in respect of the Cash Management System as described in the Initial Order;
iii. Any claim secured by any CCAA Charge;
iv. Any Intercompany Claim;
v. That portion of the Claim arising from a cause of action for which the Walter Canada Group entities are covered by insurance, but only to the extent of such coverage;
vi. Any claim referred to in sections 6(3), 6(5) and 6(6) of the CCAA;

vii. Any claims with respect to reasonable fees and disbursements of the CRO, the Financial Advisor, counsel of the Walter Canada Group and the Monitor or any Assistant (as defined in paragraph 4 of the Initial Order);

"**Wages and Benefits**" means all outstanding wages, salaries, benefits (including, but not limited to, medical, dental, disability, life insurance, post-retirement and pension benefits and any other similar benefits, plans or arrangements, employee assistance programs, and any contributions in respect of such benefits, plans, arrangements or programs) vacation pay, holiday pay, overtime pay, expense reimbursements, commissions, bonuses and other incentive compensation, payments under employment agreements or arrangements, collective bargaining agreements, stock options, profit sharing or other equity compensation, pay in lieu of notice, severance pay and termination pay, any amounts payable under the *Employment Standards Act*, any monies payable under the *Labour Relations Code* or due to order of the Labour Relations Board, in all cases whether owing under common law, contract, statute or otherwise.

Schedule "C"

FORM OF INSTRUCTION LETTER

INSTRUCTION LETTER
FOR THE CLAIMS PROCESS FOR THE CLAIMANTS OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER (collectively, the "Walter Canada Group")

1. **Claims Procedure**

By order of the Supreme Court of British Columbia (the "**Court**") dated ●, 2016 (as may be amended, restated or supplemented from time to time, (the "**Claims Process Order**"), in the proceeding commenced by Walter Energy Canada Holdings, Inc. and the other Petitioners listed on Schedule "A" to the Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "**CCAA**"), KPMG Inc., in its capacity as the Court-appointed Monitor of the Walter Canada Group (the "**Monitor**"), has been authorised to conduct a claims process with respect to claims against the Walter Canada Group entities (the "**Claims Process**"). A copy of the Claims Process, with all schedules, may be found on the Monitor's Website at: http://www.kpmg.com/ca/walterenergycanada. Capitalised terms used in this letter which are not defined in this letter shall have the meaning ascribed to them in the Claims Process Order.

This letter provides instructions for completing the Proof of Claim. A blank Proof of Claim is included with this letter.

The Claims Process is intended for any Person asserting a Claim (other than an Unaffected Claim) of any kind or nature whatsoever against any of the Walter Canada Group entities and/or any of their Directors and/or Officers arising before the Commencement Date, and/or any Restructuring Claim arising on or after the Commencement Date as a result of a restructuring, disclaimer, resiliation, termination or breach by any of the Walter Canada Group entities on or after the Commencement Date of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral, and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of Claims Process Order.

Current employees are **not** required to submit a Proof of Claim in respect of any Employee Claim pertaining to wages, including vacation pay and banked time due to them.

In the event that you are an Employee Claimant, a notice setting out the amount which the Monitor has determined to be the amount of your Employee Claim (an "**Employee Claim Amount Notice**") is enclosed with this letter, and if you do **not** dispute the nature or amount of such Employee Claim as set out in the Employee Claim Amount Notice, you are **not** required to file a Proof of Claim, a Notice of Dispute of Employee Claim or any other materials with the Monitor unless you are requested to do so. If an Employee Claim Amount Notice is enclosed and you dispute the nature or amount of your Employee Claim as set out in the Employee Claim Amount Notice, you must file a Notice of Dispute of Employee Claim (as referenced in paragraph 2 below) to avoid the barring and extinguishment of that portion of your Employee Claim that exceeds the amount set out in the Employee Claim Amount Notice. Any Employee Claimant who receives an Employee Claim Amount Notice and who does not file a Notice of Dispute of Employee Claim by the Claims Bar Date in accordance with paragraph 2 below is deemed to have accepted the nature and amount of such Employee Claim as set out in the applicable Employee Claim Amount Notice.

If an Employee Claim Amount Notice is not enclosed with this letter and you wish to file a Claim, you must file a Proof of Claim (as referenced in paragraph 2 below) to avoid the barring and extinguishment of any Claim which you may have against any of the Walter Canada Group entities and/or any of their Directors and/or Officers.

If you have any questions regarding the Claims Process, please contact the Court-appointed Monitor at the address below.

All enquiries with respect of the Claims Process should be addressed to:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

2. **For Claimants Submitting a Proof of Claim or Notice of Dispute of Employee Claim**

If you have not received an Employee Claim Amount Notice you are required to file a Proof of Claim, in the form enclosed herewith, and **ensure that it is received by the Monitor by 5:00 p.m. (Vancouver Time) on October 5, 2016** (the "**Claims Bar Date**") to avoid the barring and extinguishment of any Claim (other than a Restructuring Claim) that you may have against any of the Walter Canada Group entities and/or any of their Directors and/or Officers.

To avoid the barring and extinguishment of any Restructuring Claim you may have against any of the Walter Canada Group entities and/or any of their Directors and/or Officers, you are required to file a Proof of Claim, in the form enclosed herewith, and ensure **that it is received by the Monitor by the later of: (a) the Claims Bar Date; and (b) 5:00 p.m. (Vancouver Time) on the day which is twenty (20) Business Days after the date of the Notice of Disclaimer or Resiliation** sent to you (the "**Restructuring Claims Bar Date**").

If you have received an Employee Claim Amount Notice and you dispute the nature or amount of the Employee Claim as set out in such Employee Claim Amount Notice, you are required to file a Notice of Dispute of Employee Claim, in the form enclosed herewith, and ensure that it is received by the Monitor by the Claims Bar Date or such further date as stipulated by the Monitor.

For the avoidance of doubt, any Claim or Restructuring Claim you may have against the Walter Canada Group must be filed in accordance with the procedures set forth herein. Proofs of Claim filed solely with the United States Bankruptcy Court, Northern District of Alabama in Walter Energy, Inc.'s Chapter 11 proceedings, are invalid, and failure to file an additional Proof of Claim with the Monitor pursuant to these procedures will lead to the consequences detailed below. Please note, however, that if you received an Employee Claim Amount Notice with this letter and you fail to file an additional Proof of Claim with the Monitor pursuant to these procedures, your Employee Claim shall be deemed to be the amount set forth in the Employee Claim Amount Notice.

Additional Proof of Claim forms can be found on the Monitor's website at http://www.kpmg.com/ca/walterenergycanada or obtained by contacting the Monitor at the address indicated above and providing particulars as to your name, address, facsimile number and email address. Once the Monitor has this information, you will receive, as soon as practicable, additional Proof of Claim forms.

If you are submitting your Proof of Claim electronically, please submit it in PDF form and ensure that the name of the file is **[legal name of Claimant]**poc.pdf. If you submit your claim electronically and you do **not** receive an email confirming receipt of your Proof of Claim within one (1) business day of submitting the Proof of Claim, your Proof of Claim has **not** been successfully received by the Monitor and you should submit your Proof of Claim using an alternate method.

UNLESS YOU ARE THE HOLDER OF AN EMPLOYEE CLAIM FOR WHICH YOU HAVE RECEIVED AN EMPLOYEE CLAIM AMOUNT NOTICE THAT YOU DO NOT DISPUTE, **IF A PROOF OF CLAIM IN**

<u>RESPECT OF YOUR CLAIM IS NOT RECEIVED BY THE MONITOR BY THE CLAIMS BAR DATE OR THE RESTRUCTURING CLAIMS BAR DATE</u>, AS APPLICABLE:

A. YOUR CLAIM SHALL BE FOREVER <u>BARRED</u> AND <u>EXTINGUISHED</u> AND YOU WILL BE PROHIBITED FROM MAKING OR ENFORCING ANY CLAIM AGAINST ANY MEMBER OF THE WALTER CANADA GROUP AND/OR ANY OF THEIR DIRECTORS AND/OR OFFICERS;

B. YOU SHALL NOT BE PERMITTED TO VOTE ON THE PLAN OR ENTITLED TO ANY FURTHER NOTICE OR DISTRIBUTION UNDER THE PLAN, IF ANY;

C. YOU SHALL NOT BE ENTITLED TO ANY PROCEEDS OF SALE OF ANY MEMBER OF THE WALTER CANADA GROUP'S ASSETS; AND,

D. YOU SHALL NOT BE ENTITLED TO PARTICIPATE AS A CLAIMANT IN THE CCAA PROCEEDINGS OF ANY MEMBER OF THE WALTER CANADA GROUP.

Schedule "D"

FORM OF EMPLOYEE CLAIM AMOUNT NOTICE

EMPLOYEE CLAIM AMOUNT NOTICE
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER
(collectively, the "Walter Canada Group")

Full Legal Name of Claimant: ______________________________.

Pursuant to the order of the Supreme Court of British Columbia dated ●, 2016, and as may be amended restated or supplemented from time to time (the "**Claims Process Order**"), KPMG Inc., in its capacity as the Court-appointed Monitor of the Walter Canada Group, hereby gives you notice that the Walter Canada Group, in consultation with the Monitor, have determined your Employee Claim to be as follows:

	Walter Entity	**Unsecured ($CDN)**
Contractual Severance Pay (per **[collective bargaining / employment]** agreement)		
Group Termination Pay		
Northern Working Allowance		
Section 54 Claim		
Section 54 Claim Mitigation		
Other (specify): __________________		
Total Claim		

If you do not agree with this Employee Claim Amount Notice, please take note of the following:

If you intend to dispute this Employee Claim Amount Notice, you must deliver a Notice of Dispute of Employee Claim, in the form attached hereto, by prepaid registered mail, personal delivery, email (in PDF format), or courier to the following address:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

so that such Notice of Dispute of Employee Claim is received by the Monitor by 5:00 p.m. (Vancouver time) on October 5, 2016, being the Claims Bar Date, or such other date as may be agreed by the Monitor. The form of Notice of Dispute of Employee Claim is attached to this Notice.

If you do not deliver a Notice of Dispute of Employee Claim by the time specified, the nature and amount of your Employee Claim, shall be as set out in this Employee Claim Amount Notice for voting and/or distribution purposes.

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD, THIS EMPLOYEE CLAIM AMOUNT NOTICE WILL BE BINDING UPON YOU.

DATED at ____________________, ____________________, ____________________, this ________ day of ____________________, 2016

KPMG INC.

In its capacity as Court-appointed Monitor
of Walter Energy Canada Holdings, Inc., *et al.* and not in its personal
or corporate capacity

Per: ____________________

Name: ____________________

Title: ____________________

Schedule "E"

FORM OF PROOF OF CLAIM

PROOF OF CLAIM
AGAINST WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER (collectively, the "Walter Canada Group")

Please read the enclosed Instruction Letter carefully prior to completing this Proof of Claim. Defined terms not defined within this Proof of Claim form shall have the meaning ascribed thereto in the Claims Process Order dated ●, 2016, as may be amended, restated or supplemented from time to time.

1. **Particulars of Claimant**

a. Please complete the following (Full legal name should be the name of the original Claimant, regardless of whether an assignment of a Claim, or a portion thereof, has occurred prior to or following the Commencement Date) and Full Mailing Address of the Claimant (the Original Claimant, not the Assignee.)

Full Legal Name:	
Full Mailing Address:	
Telephone Number:	
Facsimile Number:	
Email Address:	
Attention (Contact Person):	

b. Has the Claim been sold, transferred or assigned by the Claimant to another party (an Assignee")

Yes: [______]

No: [______]

2. **Particulars of Assignee (if any)**

a. Please complete the following if all or a portion of the Claim has been assigned, insert full legal name of assignee(s) of the Claim. If there is more than one assignee, please attach a separate sheet with the required information:

Full Legal Name of Assignee:	
Full Mailing Address of Assignee:	
Telephone Number of Assignee:	
Facsimile Number of Assignee:	

Email Address of Assignee:	
Attention (Contact Person):	

Proof of Claim

I, ________________________________ ,(*name of individual Claimant or Representative of corporate Claimant*), of ___________________________________(*City, Province or State*) do hereby certify: that I [__] am a Claimant; OR

that I [______] am a Claimant; OR

[______] am ___________________________________ (*state position or title*) of ______ __________________________(*name of corporate Claimant*) which is a Claimant;

that I have knowledge of all the circumstances connected with the Claim referred to below;

that ____(*name of applicable Walter Canada Group entity and/or Directors and/or Officers*) was and still is indebted to the Claimant as follows;

CLAIM (other than a Restructuring Claim):

$ ____ (*insert value of Claim*)

RESTRUCTURING CLAIM

$ ____ (*insert value of Claim arising after the Commencement Date resulting from the restructuring, disclaimer, resiliation, termination or breach after the Commencement Date of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral)*;

that the Claimant's Claim and the Claimant's invoices, statements and/or supporting documents attached are denominated in:

[ ] Canadian Dollars

[ ] U.S. Dollars

[ ] Other ____________________ (*stipulate other currency referenced*)

A. TOTAL CLAIM(S): $ _____________________________

Nature of Claim:

(*Check and complete appropriate category*)

[______] A. UNSECURED CLAIM OF$ ____________________________. That in respect of this debt, no assets of any of the Walter Canada Group entities are pledged as security.

[______] B. SECURED CLAIM OF$ _______________________________. That in respect of this debt, assets of ______________________________________ (*insert name of applicable Walter*

Canada Group entity) valued at $ ______________________ are pledged to me as security, particulars of which are as follows.

(*Give full particulars of the security, including the date on which the security was given and the value at which you assess the security, and attach a copy of the security documents.*)

Particulars of Claims:

Other than as already set out herein, the particulars of the undersigned's total Claim and/or Restructuring Claim are attached.

(Provide all particulars of the claims and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the claims, name of any guarantor which has guaranteed the claims, and amount of invoices, particulars of all credits, discounts, etc. claimed, description of the security, if any, granted by the Walter Canada Group entities to the Claimant and estimated value of such security. Where a claim is advanced against any Directors or Officers, please provide either a reference to a statutory authority for your claim or enclose a draft Notice of Civil Claim.)

Filing of Claims:

This Proof of Claim **must be received by the Monitor by no later than 5:00 p.m. (Vancouver Time) on October 5, 2016** (the "**Claims Bar Date**") unless your claim is a Restructuring Claim.

Proofs of Claim for Restructuring Claims arising after the Commencement Date resulting from a restructuring, disclaimer, resiliation, termination or breach after the Commencement Date of any contract, employment agreement, lease or other agreement, or arrangement of any nature whatsoever, whether written or oral, **must be received by the Monitor by the later of (a) the Claims Bar Date, and (b) by 5:00 p.m. (Vancouver Time) on the day which is twenty (20) Business Days after the date of the applicable Notice of Disclaimer or Resiliation** (the "**Restructuring Claims Bar Date**")

Failure to file your proof of claim as directed by the Claims Bar Date or Restructuring Claims Bar Date, as applicable, will result in your claim being forever barred and extinguished and you will be prohibited from making or enforcing a claim against any of the Walter Canada Group entities and/or any of their Directors and/or Officers.

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

DATED this __________ day of ____________________, 2016.

______________________________ Per: ______________________________

Witness: Print name of Claimant:

If Claimant is not an individual, print name and title of authorised signatory.

Name: ____________________

Title: ____________________

Schedule "F"

FORM OF NOTICE OF DISPUTE OF EMPLOYEE CLAIM

NOTICE OF DISPUTE
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER (collectively, the "Walter Canada Group")

Pursuant to the order of the Supreme Court of British Columbia dated ●, 2016, and as may be amended restated or supplemented from time to time (the "**Claims Process Order**"), I/we hereby give you notice of my/our intention to dispute the Notice of Employee Claim Amount bearing Reference Number ________________ and dated ________________, 2016 issued by KPMG Inc., in its capacity as Monitor of the Walter Canada Group in respect of my/our Claim.

Full Legal Name of Claimant: ________________________________

	Employee Claim Amount per Notice of Employee Claim Amount **($CDN)**	**Employee Claim Amount Asserted** **($CDN)**
Contractual Severance Pay (per **[collective bargaining / employment]** agreement)		
Group Termination Pay		
Northern Working Allowance		
Section 54 Claim		
Section 54 Claim Mitigation		
Other (specify): ________________		
TOTAL CLAIM		

Reasons for Dispute (attach additional sheet and copies of supporting documentation if necessary):

____

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____

Signature of Individual: ______________________

Date: ______________________

(Print name): ______________________

Telephone number: ______________________

Facsimile number: ______________________

Email address: ______________________

Mailing Address: ______________________

____

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This form and supporting documentation is to be returned by prepaid registered mail, personal delivery, email (in PDF format), or courier to the address indicated herein and is to be received by the Monitor by 5:00 p.m. (Vancouver time) on October 5, 2016 (the Claims Bar Date) or such other date as may be agreed to by the Monitor. If this Notice of Dispute is not received by the Monitor on or before the Claims Bar Date, your Employee Claim will be the amount set out in your Notice of Employee Claim Amount.

Where this Notice of Dispute of Employee Claim is being submitted electronically, please submit one PDF file with the file name as follows: **[legal name of Claimant]**pocdispute.pdf. If you submit your Notice of Dispute electronically and you do **not** receive an email confirming receipt of your Notice of Dispute within one (1) business day of submitting the Notice of Dispute of Employee Claim, your Notice of Dispute of Employee Claim has **not** been successfully received by the Monitor and you should submit your Notice of Dispute of Employee Claim using an alternative method.

Address for service of Notices of Dispute of Employee Claim:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

Schedule "G"

FORM OF NOTICE OF REVISION OR DISALLOWANCE

NOTICE OF REVISION OR DISALLOWANCE
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER
(collectively, the "Walter Canada Group")

Full Legal Name of Claimant: ______________________________

Reference Number: ______________________________

Pursuant to the order of the Supreme Court of British Columbia dated ●, 2016, and as may be amended restated or supplemented from time to time (the "**Claims Process Order**"), KPMG Inc., in its capacity as Monitor of the Walter Canada Group, hereby gives you notice that the Walter Canada Group, in consultation with the Monitor, have reviewed your Proof of Claim and have revised or disallowed your Claim as follows:

	Proof of Claim as Submitted **($CDN)**	**Revised Claim as accepted** **($CDN)**	**Secured** **($CDN)**	**Unsecured** **($CDN)**
Total Claim				

Reason for the Revision or Disallowance

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If you do not agree with this Notice of Revision or Disallowance, please take note of the following:

<u>If you intend to dispute a Notice of Revision or Disallowance, you must deliver a Notice of Dispute, in the form attached hereto, by prepaid registered mail, personal delivery, email (in PDF format), or courier to the address indicated herein so that such Notice of Dispute is received by the Monitor by the later of November 7, 2016 and the day that is twenty (20) Business Days after the date of this Notice of Revision or Disallowance, or such other date as may be agreed by the Monitor. The form of Notice of Dispute is attached to this Notice.</u>

Where a Notice of Dispute is being submitted electronically, please submit one PDF file with the file named as follows: ***[legal name of Claimant]****pocdispute.pdf.*

If you do not deliver a Notice of Dispute by the time specified, the nature and amount of your Claim, if any, shall be as set out in this Notice of Revision or Disallowance for voting and/or distribution purposes.

Address for service of Notices of Dispute:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

DATED at ________________________, ____________________, ____________________, this ________ day of ______________________________, 2016

KPMG INC.

In its capacity as Court-appointed Monitor
of Walter Energy Canada Holdings, Inc. *et al.* and not in its personal or
corporate capacity

Per: ______________________________

Name: ______________________________

Title: ______________________________

Schedule "H"

FORM OF NOTICE OF DISPUTE

NOTICE OF DISPUTE
OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER (collectively, the "Walter Canada Group")

Pursuant to the order of the Supreme Court of British Columbia dated ●, 2016, and as may be amended restated or supplemented from time to time (the "**Claims Process Order**"), I/we hereby give you notice of my/our intention to dispute the Notice of Revision or Disallowance bearing Reference Number __________ _______ and dated __________________ , 2016 issued by KPMG Inc., in its capacity as Monitor of the Walter Canada Group in respect of my/our Claim.

Full Legal Name of Claimant: ____

	Proof of Claim as Submitted ($CDN)	**Revised Claim as accepted ($CDN)**	**Secured ($CDN)**	**Unsecured ($CDN)**
Total Claim				

Reasons for Dispute (attach additional sheet and copies of supporting documentation if necessary):

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Signature of Individual: ____

Date: ____

(Print name): ____

Telephone number: ____

Facsimile number: ______________________________

Email address: ______________________________

Mailing Address: ______________________________

____

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____

This form and supporting documentation is to be returned by prepaid registered mail, personal delivery, email (in PDF format), or courier to the address indicated herein and is to be received by the Monitor by the later of December 6, 2016 and the day that is twenty (20) Business Days after the date of the Notice of Revision or Disallowance or such other date as may be agreed to by the Monitor.

Where this Notice of Dispute is being submitted electronically, please submit one PDF file with the file name as follows: **[legal name of Claimant]**pocdispute.pdf. If you submit your Notice of Dispute electronically and you do **not** receive an email confirming receipt of your Notice of Dispute within one (1) business day of submitting the Notice of Dispute, your Notice of Dispute has **not** been successfully received by the Monitor and you should submit your Notice of Dispute using an alternative method.

Address for service of Notices of Dispute:

KPMG Inc.
Court-appointed Monitor of Walter Energy Canada Holdings, Inc., *et al.*
777 Dunsmuir St
Vancouver, BC V7Y 1K4

Attention: Mark Kemp-Gee/Mike Clark
Email: mkempgee@kpmg.ca, maclark@kpmg.ca
Phone: 604-691-3397; 604-691-3468

Schedule "I"

FORM OF NEWSPAPER NOTICE

NOTICE TO THE CREDITORS OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE PETITIONERS AND PARTNERSHIPS LISTED ON SCHEDULE "A" AND SCHEDULE "C", RESPECTIVELY, OF THE INITIAL ORDER (collectively, the "Walter Canada Group")

RE: NOTICE OF THE CLAIMS PROCESS FOR THE WALTER CANADA GROUP PURSUANT TO THE COMPANIES' CREDITORS ARRANGEMENT ACT ("CCAA")

This notice is being published pursuant to an order of the Supreme Court of British Columbia dated ●, 2016 (the "**Claims Process Order**") which approved a claims process for the determination of certain claims against the Walter Canada Group and/or their Directors and/or Officers. Any capitalized terms used but not defined herein have the meanings ascribed to them in the Claims Process Order.

The claims procedure only applies to the Claims or Claimants described in the Claims Process Order. A copy of the Claims Process Order and other public information concerning the CCAA proceedings can be obtained on the website of KPMG Inc., the Court-Appointed Monitor of the Walter Canada Group (the "**Monitor**") at http://www.kpmg.com/ca/walterenergycanada. Any person who may have a claim against any of the Walter Canada Group entities and/or any of their Directors and/or Officers should carefully review and comply with the Claims Process Order.

Any person having a Claim against any of the Walter Canada Group entities and/or any of their Directors and/or Officers arising or relating to the period prior to December 7, 2015 (the "**Commencement Date**"), which would have been a claim provable in bankruptcy had the Walter Canada Group become bankrupt on the Commencement Date and who does not receive an Employee Claim Amount Notice with their Claims Package, or who receives an Employee Claim Amount Notice with their Claims Packages, but disputes the amount or nature of their Employee Claim as listed in their Employee Claim Amount Notice, must send a Proof of Claim to the Monitor, **to be received by the Monitor by no later than 5:00 p.m. (Vancouver Time) on October 5, 2016** (the "**Claims Bar Date**").

Proofs of Claim for claims arising as a result of a restructuring, disclaimer, resiliation, termination or breach by any of the Walter Canada Group entities on or after the Commencement Date of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral, **must be received by the Monitor by no later than (a) the Claims Bar Date, and (b) 5:00 p.m. (Vancouver Time) on which is twenty (20) Business Days after the date of the notice of disclaimer or resiliation sent by the Monitor to such Claimant.**

For the avoidance of doubt, any claim a Claimant may have against any of the Walter Canada Group entities must be filed in accordance with the procedures set forth in the Claims Process Order. Proofs of Claim filed solely with the United States Bankruptcy Court, Northern District of Alabama in respect of Walter Energy, Inc.'s Chapter 11 proceedings are invalid.

Claimants requiring more information or who have not received a Proof of Claim form or Claims Package should contact the Monitor by phone at ● or email at ● or visit the Monitor's website at http://www.kpmg.com/ca/walterenergycanada.

UNLESS EXPRESSLY PROVIDED IN THE CLAIMS PROCESS ORDER, HOLDERS OF CLAIMS THAT DO NOT FILE PROOFS OF CLAIM WITH THE MONITOR BY THE APPLICABLE DEADLINE SPECIFIED ABOVE SHALL NOT BE ENTITLED TO ANY FURTHER NOTICE OR DISTRIBUTION UNDER A PLAN, IF ANY, OR OF ANY PROCEEDS OF SALE OF ANY OF THE WALTER CANADA GROUP'S ASSETS, OR TO PARTICIPATE AS A CLAIMANT IN THE CCAA PROCEEDINGS OF THE WALTER CANADA GROUP, AND SHALL BE PROHIBITED FROM MAKING OR ENFORCING ANY CLAIM AGAINST ANY OF THE WALTER CANADA GROUP ENTITIES AND/OR ANY OF THEIR DIRECTORS AND/OR OFFICERS. ADDITIONALLY, ANY CLAIMS SUCH CLAIMANT MAY HAVE

AGAINST ANY OF THE WALTER CANADA GROUP ENTITIES AND/OR ANY OF THEIR DIRECTORS AND/OR OFFICERS SHALL BE FOREVER BARRED AND EXTINGUISHED.

Schedule "J"

WALTER CANADA CLAIMS PROCESS KEY DATES

Event	Date
Issuance of the Claims Process Order	August 15, 2016
Monitor to post on its Website a copy of the Claims Process Order, a blank Proof of Claim form, the Instruction Letter and a blank Notice of Dispute form.	August 22, 2016
Monitor to send Claims Packages to known Claimants	August 24, 2016
Deadline for UMWA Pension Plan to serve Notice of Claim	August 26, 2016
Monitor to have Newspaper Notice published for one Business Day in the Globe and Mail (National Edition), the Vancouver Sun, the Tumbler Ridge News and the Chetwynd Echo	August 29, 2016
Deadline for Petitioners and other stakeholders to serve Response to Notice of Claim of UMWA 1974 Pension Plan	September 26, 2016
Claims Bar Date	October 5, 2016
~~Filing of the Intercompany Claims Report~~	~~October 5, 2016~~
Deadline for UMWA Pension Plan to serve reply	October 5, 2016
Monitor to seek a scheduling appointment before the Court for a hearing of a motion to determine the validity of the UMWA 1974 Pension Plan Claim, if applicable	Following service by UMWA 1974 Pension Plan to prove the enforceability of its Claim
Monitor to send Notices of Revision or Disallowance in respect of Pre-Commencement Claims or Employee Claims	November 7, 2016
Claimants to send Notices of Dispute to the Monitor in respect of Pre-Commencement Claims or Employee Claims	December 6, 2016
Disputing party to bring a motion to the Court to resolve a disputed Claim in respect of Pre-Commencement Claims or Employee Claims	January 9, 2017

NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

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

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF WALTER ENERGY CANADA HOLDINGS, INC., AND THOSE PARTIES LISTED ON SCHEDULE "A"

PETITIONERS

ORDER MADE AFTER APPLICATION
(CLAIM PROCESS ORDER)

DLA PIPER (CANADA) LLP
Barristers & Solicitors
2800 Park Place
666 Burrard Street
Vancouver, BC V6C 2Z7

Tel. No. 604.687.9444
Fax No. 604.687.1612

Client Matter No. 15375-00001 TAG/mlf

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