Court of Appeal File Nos. C56115, C56118, C56125
Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

BOOK OF AUTHORITIES OF THE RESPONDENT, THE AD HOC COMMITTEE OF NOTEHOLDERS OF SINO-FOREST CORPORATION

VOLUME 1 OF 2

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CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

L.R.C., 1985, ch. C-36

Current to October 17, 2012

À jour au 17 octobre 2012

Last amended on January 1, 2010

Dernière modification le 1 janvier 2010

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

"equity claim" « *réclamation relative à des capitaux propres* »

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(*a*) a dividend or similar payment,

(*b*) a return of capital,

(*c*) a redemption or retraction obligation,

(*d*) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(*e*) contribution or indemnity in respect of a claim referred to in any of paragraphs (*a*) to (*d*);

"equity interest" « *intérêt relatif à des capitaux propres* »

"equity interest" means

(*a*) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(*b*) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

"financial collateral" « *garantie financière* »

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(*a*) cash or cash equivalents, including negotiable instruments and demand deposits,

(*b*) securities, a securities account, a securities entitlement or a right to acquire securities, or

(*c*) a futures agreement or a futures account;

"income trust" « *fiducie de revenu* »

"income trust" means a trust that has assets in Canada if

(*a*) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or

(*b*) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act;

toutes les fins de la présente loi sauf la votation à une assemblée des créanciers relativement à ces obligations.

« créancier garanti » "*secured creditor*"

« créancier garanti » Détenteur d'hypothèque, de gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens d'une compagnie débitrice, ou tout transport, cession ou transfert de la totalité ou d'une partie de ces biens, à titre de garantie d'une dette de la compagnie débitrice, ou un détenteur de quelque obligation d'une compagnie débitrice garantie par hypothèque, gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens de la compagnie débitrice, ou un transport, une cession ou un transfert de tout ou partie de ces biens, ou une fiducie à leur égard, que ce détenteur ou bénéficiaire réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire en vertu de tout acte de fiducie ou autre instrument garantissant ces obligations est réputé un créancier garanti pour toutes les fins de la présente loi sauf la votation à une assemblée de créanciers relativement à ces obligations.

« demande initiale » "*initial application*"

« demande initiale » La demande faite pour la première fois en application de la présente loi relativement à une compagnie.

« état de l'évolution de l'encaisse » "*cash-flow statement*"

« état de l'évolution de l'encaisse » Relativement à une compagnie, l'état visé à l'alinéa 10(2)*a*) portant, projections à l'appui, sur l'évolution de l'encaisse de celle-ci.

« fiducie de revenu » "*income trust*"

« fiducie de revenu » Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par règlement à la date à laquelle des procédures sont intentées sous le régime de la présente loi, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date.

« garantie financière » "*financial collateral*"

« garantie financière » S'il est assujetti soit à un intérêt ou, dans la province de Québec, à un droit garantissant le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible, soit à un accord de transfert de titres pour obtention de crédit, l'un ou l'autre des éléments suivants :

a) les sommes en espèces et les équivalents de trésorerie — notamment les effets négociables et dépôts à vue;

may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

R.S., c. C-25, s. 5.

ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(*a*) relate to contractual rights of one or more creditors; or

(*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

Démission ou destitution des administrateurs

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie débitrice est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 122.

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at

Homologation par le tribunal

6. (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres — présents et votant soit en personne, soit par fondé de pouvoir à l'assemblée ou aux assemblées de créanciers respectivement tenues au titre des articles 4 et 5, acceptent une transaction ou un

the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(*b*) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

arrangement, proposé ou modifié à cette ou ces assemblées, la transaction ou l'arrangement peut être homologué par le tribunal et, le cas échéant, lie :

a) tous les créanciers ou la catégorie de créanciers, selon le cas, et tout fiduciaire pour cette catégorie de créanciers, qu'ils soient garantis ou chirographaires, selon le cas, ainsi que la compagnie;

b) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité* ou qui est en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, le syndic en matière de faillite ou liquidateur et les contributeurs de la compagnie.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accord- ance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Modification des statuts constitutifs

(2) Le tribunal qui homologue une transaction ou un arrangement peut ordonner la modification des statuts constitutifs de la compagnie conformément à ce qui est prévu dans la transaction ou l'arrangement, selon le cas, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(*a*) subsection 224(1.2) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a purpose similar to subsection

Certaines réclamations de la Couronne

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités ou autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du para-

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

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

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

graphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités ou autres charges afférents, laquelle somme :

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

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

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Défaut d'effectuer un versement

(4) Lorsqu'une ordonnance comporte une disposition autorisée par l'article 11.09, le tribunal ne peut homologuer la transaction ou l'arrangement si, lors de l'audition de la demande d'homologation, Sa Majesté du chef du Canada ou d'une province le convainc du défaut de la compagnie d'effectuer un versement portant sur une somme visée au paragraphe (3) et qui est devenue exigible après le dépôt de la demande d'ordonnance visée à l'article 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(*a*) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(*d*) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the

Restriction — employés, etc.

(5) Le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit le paiement aux employés actuels et anciens de la compagnie, dès son homologation, de sommes égales ou supérieures, d'une part, à celles qu'ils seraient en droit de recevoir en application de l'alinéa 136(1)*d*) de la *Loi sur la faillite et l'insolvabilité* si la compagnie avait fait faillite à la date à laquelle des procédures ont été introduites sous le régime de la présente loi à son égard et, d'autre part, au montant des gages, salaires, commissions ou autre rémunération pour services fournis entre la date de l'introduction des procédures et celle de l'homologation, y compris les sommes que le voyageur de commerce a régulièrement déboursées dans le cadre de l'exploitation de la compagnie entre ces dates;

company's business during the same period; and

(*b*) the court is satisfied that the company can and will make the payments as required under paragraph (*a*).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(*a*) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act,*

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa *a*).

Restriction — régime de pension

(6) Si la compagnie participe à un régime de pension réglementaire institué pour ses employés, le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit que seront effectués des paiements correspondant au total des sommes ci-après qui n'ont pas été versées au fonds établi dans le cadre du régime de pension :

(i) les sommes qui ont été déduites de la rémunération des employés pour versement au fonds,

(ii) dans le cas d'un régime de pension réglementaire régi par une loi fédérale :

(A) les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds,

(B) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*,

(iii) dans le cas de tout autre régime de pension réglementaire :

(A) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi fédérale,

(B) les sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était régi par une loi fédérale;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa *a*).

1985, if the prescribed plan were regulated by an Act of Parliament; and

(*b*) the court is satisfied that the company can and will make the payments as required under paragraph (*a*).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

R.S., 1985, c. C-36, s. 6; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 123; 2004, c. 25, s. 194; 2005, c. 47, s. 126, 2007, c. 36, s. 106; 2009, c. 33, s. 27.

Court may give directions

7. Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

R.S., c. C-25, s. 7.

Scope of Act

8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

R.S., c. C-25, s. 8.

Non-application du paragraphe (6)

(7) Par dérogation au paragraphe (6), le tribunal peut homologuer la transaction ou l'arrangement qui ne prévoit pas le versement des sommes mentionnées à ce paragraphe s'il est convaincu que les parties en cause ont conclu un accord sur les sommes à verser et que l'autorité administrative responsable du régime de pension a consenti à l'accord.

Paiement d'une réclamation relative à des capitaux propres

(8) Le tribunal ne peut homologuer la transaction ou l'arrangement qui prévoit le paiement d'une réclamation relative à des capitaux propres que si, selon les termes de celle-ci, le paiement intégral de toutes les autres réclamations sera effectué avant le paiement de la réclamation relative à des capitaux propres.

L.R. (1985), ch. C-36, art. 6; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 123; 2004, ch. 25, art. 194; 2005, ch. 47, art. 126, 2007, ch. 36, art. 106; 2009, ch. 33, art. 27.

Le tribunal peut donner des instructions

7. Si une modification d'une transaction ou d'un arrangement est proposée après que le tribunal a ordonné qu'une ou plusieurs assemblées soient convoquées, cette ou ces assemblées peuvent être ajournées aux conditions que peut prescrire le tribunal quant à l'avis et autrement, et ces instructions peuvent être données tant après qu'avant l'ajournement de toute ou toutes assemblées, et le tribunal peut, à sa discrétion, prescrire qu'il ne sera pas nécessaire d'ajourner quelque assemblée ou de convoquer une nouvelle assemblée de toute catégorie de créanciers ou actionnaires qui, selon l'opinion du tribunal, n'est pas défavorablement atteinte par la modification proposée, et une transaction ou un arrangement ainsi modifié peut être homologué par le tribunal et être exécutoire en vertu de l'article 6.

S.R., ch. C-25, art. 7.

Champ d'application de la loi

8. La présente loi n'a pas pour effet de limiter mais d'étendre les stipulations de tout instrument actuellement ou désormais existant relativement aux droits de créanciers ou de toute catégorie de ces derniers, et elle est pleinement exécutoire et effective nonobstant toute stipulation contraire de cet instrument.

S.R., ch. C-25, art. 8.

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CANADA

CONSOLIDATION

CODIFICATION

Interpretation Act

Loi d'interprétation

R.S.C., 1985, c. I-21

L.R.C., 1985, ch. I-21

Current to October 17, 2012

Last amended on April 1, 2005

À jour au 17 octobre 2012

Dernière modification le 1 avril 2005

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

2001, c. 4, s. 8.

au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

2001, ch. 4, art. 8.

Terminology

8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

2001, c. 4, s. 8.

Terminologie

8.2 Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.

2001, ch. 4, art. 8.

Private Acts

Provisions in private Acts

9. No provision in a private Act affects the rights of any person, except as therein mentioned or referred to.

R.S., c. I-23, s. 9.

Lois d'intérêt privé

Effets

9. Les lois d'intérêt privé n'ont d'effet sur les droits subjectifs que dans la mesure qui y est prévue.

S.R., ch. I-23, art. 9.

Law Always Speaking

Law always speaking

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

R.S., c. I-23, s. 10.

Permanence de la règle de droit

Principe général

10. La règle de droit a vocation permanente; exprimée dans un texte au présent intemporel, elle s'applique à la situation du moment de façon que le texte produise ses effets selon son esprit, son sens et son objet.

S.R., ch. I-23, art. 10.

Imperative and Permissive Construction

"Shall" and "may"

11. The expression "shall" is to be construed as imperative and the expression "may" as permissive.

R.S., c. I-23, s. 28.

Obligation et pouvoirs

Expression des notions

11. L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.

S.R., ch. I-23, art. 28.

Enactments Remedial

Enactments deemed remedial

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal

Solution de droit

Principe et interprétation

12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus

construction and interpretation as best ensures the attainment of its objects.

R.S., c. I-23, s. 11.

équitable et la plus large qui soit compatible avec la réalisation de son objet.

S.R., ch. I-23, art. 11.

Preambles and Marginal Notes

Preamble

13. The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.

R.S., c. I-23, s. 12.

Marginal notes and historical references

14. Marginal notes and references to former enactments that appear after the end of a section or other division in an enactment form no part of the enactment, but are inserted for convenience of reference only.

R.S., c. I-23, s. 13.

Préambules et notes marginales

Préambule

13. Le préambule fait partie du texte et en constitue l'exposé des motifs.

S.R., ch. I-23, art. 12.

Notes marginales

14. Les notes marginales ainsi que les mentions de textes antérieurs apparaissant à la fin des articles ou autres éléments du texte ne font pas partie de celui-ci, n'y figurant qu'à titre de repère ou d'information.

S.R., ch. I-23, art. 13.

Application of Interpretation Provisions

Application of definitions and interpretation rules

15. (1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

Interpretation sections subject to exceptions

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

(*a*) as being applicable only if a contrary intention does not appear; and

(*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

R.S., c. I-23, s. 14.

Words in regulations

16. Where an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

R.S., c. I-23, s. 15.

Dispositions interprétatives

Application

15. (1) Les définitions ou les règles d'interprétation d'un texte s'appliquent tant aux dispositions où elles figurent qu'au reste du texte.

Restriction

(2) Les dispositions définitoires ou interprétatives d'un texte :

a) n'ont d'application qu'à défaut d'indication contraire;

b) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

S.R., ch. I-23, art. 14.

Terminologie des règlements

16. Les termes figurant dans les règlements d'application d'un texte ont le même sens que dans celui-ci.

S.R., ch. I-23, art. 15.

Her Majesty

Her Majesty not bound or affected unless stated

17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

R.S., c. I-23, s. 16.

Sa Majesté

Non-obligation, sauf indication contraire

17. Sauf indication contraire y figurant, nul texte ne lie Sa Majesté ni n'a d'effet sur ses droits et prérogatives.

S.R., ch. I-23, art. 16.

Proclamations

Proclamation

18. (1) Where an enactment authorizes the issue of a proclamation, the proclamation shall be understood to be a proclamation of the Governor in Council.

Proclamations

Auteur

18. (1) Les proclamations dont la prise est autorisée par un texte émanent du gouverneur en conseil.

3

Ontario

ServiceOntario
e-Laws

Français

Negligence Act

R.S.O. 1990, CHAPTER N.1

Consolidation Period: From January 1, 2004 to the e-Laws currency date.

Last amendment: 2002, c.24, Sched.B, s.25.

Extent of liability, remedy over

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent. R.S.O. 1990, c. N.1, s. 1.

Recovery as between tortfeasors

2. A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled. R.S.O. 1990, c. N.1, s. 2.

Plaintiff guilty of contributory negligence

3. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively. R.S.O. 1990, c. N.1, s. 3.

Where parties to be deemed equally at fault

4. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent. R.S.O. 1990, c. N.1, s. 4.

Adding parties

5. Wherever it appears that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant to

4

Case Name:

Bell ExpressVu Limited Partnership v. Rex

Bell ExpressVu Limited Partnership, appellant;
v.
Richard Rex, Richard Rex, c.o.b. as 'Can-Am Satellites', and c.o.b. as 'Can Am Satellites' and c.o.b. as 'CanAm Satellites' and c.o.b. as 'Can Am Satellite' and c.o.b. as 'Can Am Sat' and c.o.b. as 'Can-Am Satellites Digital Media Group' and c.o.b. as 'Can-Am Digital Media Group' and c.o.b. as 'Digital Media Group', Anne Marie Halley a.k.a. Anne Marie Rex, Michael Rex a.k.a. Mike Rex, Rodney Kibler a.k.a. Rod Kibler, Lee-Anne Patterson, Michelle Lee, Jay Raymond, Jason Anthony, John Doe 1 to 20, Jane Doe 1 to 20 and any other person or persons found on the premises or identified as working at the premises at 22409 McIntosh Avenue, Maple Ridge, British Columbia, who operate or work for businesses carrying on business under the name and style of 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group', 'Digital Media Group', or one or more of them, respondents, and
The Attorney General of Canada, the Canadian Motion Picture Distributors Association, DIRECTV, Inc., the Canadian Alliance for Freedom of Information and Ideas, and the Congres Iberoamericain du Canada, interveners.

[2002] S.C.J. No. 43

[2002] A.C.S. no 43

2002 SCC 42

2002 CSC 42

[2002] 2 S.C.R. 559

[2002] 2 R.C.S. 559

212 D.L.R. (4th) 1

287 N.R. 248

[2002] 5 W.W.R. 1

J.E. 2002-775

166 B.C.A.C. 1

100 B.C.L.R. (3d) 1

18 C.P.R. (4th) 289

93 C.R.R. (2d) 189

REJB 2002-30904

2002 CarswellBC 851

113 A.C.W.S. (3d) 52

File No.: 28227.

Supreme Court of Canada

2001: December 4 / 2002: April 26.

Present: L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (68 paras.)

Communications law -- Radiocommunications -- Direct-to-home distribution of television programming -- Decoding in Canada of encrypted signals originating from foreign satellite distributor -- Whether s. 9 (1)(c) of Radiocommunication Act prohibits decoding of all encrypted satellite signals, with a limited exception, or whether it bars only unauthorized decoding of signals that emanate from licensed Canadian distributors -- Radiocommunication Act, R.S.C. 1985, c. R-2, s. 9(1)(c).

Statutes -- Interpretation -- Principles -- Contextual approach -- Grammatical and ordinary sense -- "Charter values" to be used as an interpretive principle only in circumstances of genuine ambiguity.

Appeals -- Constitutional questions -- Factual record necessary for constitutional questions to be answered.

The appellant engages in the distribution of direct-to-home (DTH) television programming and encrypts its signals to control reception. The respondents sell U.S. decoding systems to Canadian customers that enable them to receive and watch U.S. DTH progamming. They also provide U.S. mailing addresses to their customers who do not have one, since the U.S. broadcasters will not knowingly authorize their signals to be decoded by persons outside the United States. The appellant, as a licensed distribution undertaking, brought an action in the British Columbia Supreme Court, pursuant to ss. 9(1)(c) and 18(1) of the Radiocommunication Act, requesting in part an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. Section 9(1)(c) enjoins the decoding of encrypted signals without the authorization of the "lawful distributor of the signal or feed". The chambers judge declined to grant the injunctive relief. A majority of the Court of Appeal held that there is no contravention of s. 9(1)(c) where a person decodes unregulated signals such

as those broadcast by the U.S. DTH companies, and dismissed the appellant's appeal.

Held: The appeal should be allowed. Section 9(1)(c) of the Act prohibits the decoding of all encrypted satellite signals, with a limited exception.

It is necessary in every case for the court charged with interpreting a provision to undertake the preferred contextual and purposive interpretive approach before determining that the words are ambiguous. This requires reading the words of the Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids, including other principles of interpretation such as the strict construction of penal statutes and the "Charter values" presumption.

When the entire context of s. 9(1)(c) is considered, and its words are read in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found, there is no ambiguity and accordingly no need to resort to any of the subsidiary principles of statutory interpretation. Because the Radiocommunication Act does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(e), which forbids their unauthorized retransmission within Canada) and only concerns decrypting that occurs in Canada or other locations contemplated in s. 3(3), this does not give rise to any extra-territorial exercise of authority. Parliament intended to create an absolute bar on Canadian residents' decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the signal and provide the required authorization. The U.S. DTH distributors in the present case are not "lawful distributors" under the Act. This interpretation of s. 9(1)(c) as an absolute prohibition with a limited exception accords well with the objectives set out in the Broadcasting Act and complements the scheme of the Copyright Act.

The constitutional questions stated in this appeal are not answered because there is no Charter record permitting this Court to address the stated questions. A party cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial. "Charter values" cannot inform the interpretation given to s. 9(1)(c) of the Radiocommunication Act, for these values are to be used as an interpretive principle only in circumstances of genuine ambiguity. A blanket presumption of Charter consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction, and wrongly upset the dialogic balance among the branches of governance. Where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the Charter to achieve a different result.

Cases Cited

Not followed: R. v. Love (1997), 117 Man. R. (2d) 123; R. v. Ereiser (1997), 156 Sask. R. 71; R. v. LeBlanc, [1997] N.S.J. No. 476 (QL); R. v. Thériault, [2000] R.J.Q. 2736, aff'd Sup. Ct. Drummondville, No. 405-36-000044-003, June 13, 2001; R. v. Gregory Électronique Inc., [2000] Q.J. No. 4923 (QL), aff'd [2001] Q.J. No. 4925 (QL); R. v. S.D.S. Satellite Inc., C.Q. Laval, No. 540-73-000055-980, October 31, 2000; R. v. Branton (2001), 53 O.R. (3d) 737; referred to: Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554; R. v. Open Sky Inc., [1994] M.J. No. 734 (QL), aff'd (1995), 106 Man. R. (2d) 37, leave to appeal ref'd (1996), 110 Man. R. (2d) 153; R. v. King, [1996] N.B.J. No. 449 (QL), rev'd (1997), 187 N.B.R. (2d) 185; R. v. Knibb (1997), 198 A.R. 161, aff'd [1998] A.J. No. 628 (QL); ExpressVu Inc. v. NII Norsat International Inc., [1998] 1 F.C. 245, aff'd (1997), 222 N.R. 213; WIC Premium Television Ltd. v. General Instrument Corp. (2000), 272 A.R. 201, 2000 ABQB 628; Canada (Procureure générale) v. Pearlman, [2001] R.J.Q. 2026; Ryan v. 361779 Alberta Ltd.

(1997), 208 A.R. 396; R. v. Scullion, [2001] R.J.Q. 2018; Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536; Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours, [1994] 3 S.C.R. 3; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; R. v. Gladue, [1999] 1 S.C.R. 688; R. v. Araujo, [2000] 2 S.C.R. 992, 2000 SCC 65; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2; Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3; R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867, 2001 SCC 56; Stoddard v. Watson, [1993] 2 S.C.R. 1069; Pointe-Claire (City) v. Quebec (Labour Court), [1997] 1 S.C.R. 1015; Marcotte v. Deputy Attorney General for Canada, [1976] 1 S.C.R. 108; R. v. Goulis (1981), 33 O.R. (2d) 55; R. v. Hasselwander, [1993] 2 S.C.R. 398; R. v. Russell, [2001] 2 S.C.R. 804, 2001 SCC 53; Westminster Bank Ltd. v. Zang, [1966] A.C. 182; CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743; Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée, [1985] 1 S.C.R. 831; Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203; Bisaillon v. Keable, [1983] 2 S.C.R. 60; Perka v. The Queen, [1984] 2 S.C.R. 232; Idziak v. Canada (Minister of Justice), [1992] 3 S.C.R. 631; R. v. Gayle (2001), 54 O.R. (3d) 36, leave to appeal to S.C.C. refused, [2002] 1 S.C.R. vii; Moysa v. Alberta (Labour Relations Board), [1989] 1 S.C.R. 1572; Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086; Baron v. Canada, [1993] 1 S.C.R. 416; R. v. Mills, [1999] 3 S.C.R. 668; Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342; RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; Cloutier v. Langlois, [1990] 1 S.C.R. 158; R. v. Salituro, [1991] 3 S.C.R. 654; R. v. Golden, [2001] 3 S.C.R. 679, 2001 SCC 83; R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156, 2002 SCC 8; Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; R. v. Zundel, [1992] 2 S.C.R. 731; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; R. v. Lucas, [1998] 1 S.C.R. 439; Symes v. Canada, [1993] 4 S.C.R. 695; Willick v. Willick, [1994] 3 S.C.R. 670; Vriend v. Alberta, [1998] 1 S.C.R. 493.

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Canadian Charter of Rights and Freedoms, ss. 1, 2(b).
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Radiocommunication Act, R.S.C. 1985, c. R-2, ss. 2, "broadcasting", "encrypted" [ad. 1991, c. 11, s. 81], "lawful distributor" [idem], "radiocommunication" or "radio", "subscription programming signal" [idem], 3(3)(a), (b) [rep. & sub. 1989, c. 17, s. 4], (c) [idem; am. 1996, c. 31, s. 94], 5(1)(a), 9(1)(c) [ad. 1989, c. 17, s. 6, am. 1991, c. 11, s. 83], (e) [ad. 1991, c. 11, s. 83], 10(1)(b) [ad. 1989, c. 17, s. 6], (2.1) [ad. 1991, c. 11, s. 84], (2.5) [idem], 18(1) [idem, s. 85], (6) [idem].
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APPEAL from a judgment of the British Columbia Court of Appeal (2000), 191 D.L.R. (4th) 662, 9 W.W.R. 205, 142 B.C.A.C. 230, 233 W.A.C. 230, 79 B.C.L.R. (3d) 250, [2000] B.C.J. No. 1803 (QL), 2000 BCCA 493, dismissing an appeal from a decision of the British Columbia Supreme Court, [1999] B.C.J. No. 3092 (QL), refusing to grant an injunction. Appeal allowed.

K. William McKenzie, Eugene Meehan, Q.C., and Jessica Duncan, for the appellant.
Alan D. Gold and Maureen McGuire, for all respondents except Michelle Lee.
Graham R. Garton, Q.C., and Christopher Rupar, for the intervener the Attorney General of Canada.
Roger T. Hughes, Q.C., for the intervener the Canadian Motion Picture Distributors Association.
Christopher D. Bredt, Jeffrey D. Vallis and Davit D. Akman, for the intervener DIRECTV, Inc.
Ian W. M. Angus, for the intervener the Canadian Alliance for Freedom of Information and Ideas.
Alan Riddell, for the intervener the Congres Iberoamerican du Canada.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of the Court was delivered by

IACOBUCCI J.:--

I. Introduction

1 This appeal involves an issue that has divided courts in our country. It concerns the proper interpretation of s. 9(1)(c) of the Radiocommunication Act, R.S.C. 1985, c. R-2 (as am. by S.C. 1991, c. 11, s. 83). In practical terms, the issue is whether s. 9(1)(c) prohibits the decoding of all encrypted satellite signals, with a limited exception, or whether it bars only the unauthorized decoding of signals that emanate from licensed Canadian distributors.

2 The respondents facilitate what is generally referred to as "grey marketing" of foreign broadcast signals. Although there is much debate -- indeed rhetoric -- about the term, it is not necessary to enter that discussion in these reasons. Rather, the central issue is the much narrower one surrounding the above statutory provision: does s. 9(1)(c) operate on these facts to prohibit the decryption of encrypted signals emanating from U.S. broadcasters? For the reasons that follow, my conclusion is that it does have this effect. Consequently, I would allow the appeal.

II. Background

3 The appellant is a limited partnership engaged in the distribution of direct-to-home ("DTH") television programming. It is one of two current providers licensed by the Canadian Radio-television and Telecommunications Commission ("CRTC") as a DTH distribution undertaking under the Broadcasting Act, S.C. 1991, c. 11. There are two similar DTH satellite television distributors in the United States, neither of which possesses a CRTC licence. The door has effectively been shut on foreign entry into the regulated Canadian broadcast market since April 1996, when the Governor in Council directed the CRTC not to issue, amend or renew broadcasting licences for non-Canadian applicants (SOR/96-192). The U.S. companies are, however, licensed by their country's Federal Communications Commission to broadcast their signals within that country. The intervener DIRECTV is the larger of

these two U.S. companies.

4 DTH broadcasting makes use of satellite technology to transmit television programming signals to viewers. All DTH broadcasters own or have access to one or more satellites located in geosynchronous orbit, in a fixed position relative to the globe. The satellites are usually separated by a few degrees of Earth longitude, occupying "slots" assigned by international convention to their various countries of affiliation. The DTH broadcasters send their signals from land-based uplink stations to the satellites, which then diffuse the signals over a broad aspect of the Earth's surface, covering an area referred to as a "footprint". The broadcasting range of the satellites is oblivious to international boundaries and often extends over the territory of multiple countries. Any person who is somewhere within the footprint and equipped with the proper reception devices (typically, a small satellite reception dish antenna, amplifier, and receiver) can receive the signal.

5 The appellant makes use of satellites owned and operated by Telesat Canada, a Canadian company. Moreover, like every other DTH broadcaster in Canada and the U.S., the appellant encrypts its signals to control reception. To decode or unscramble the appellant's signals so as to permit intelligible viewing, customers must possess an additional decoding system that is specific to the appellant: the decoding systems used by other DTH broadcasters are not cross-compatible and cannot be used to decode the appellant's signals. The operational component of the decoding system is a computerized "smart card" that bears a unique code and is remotely accessible by the appellant. Through this device, once a customer has chosen and subscribed to a programming package, and rendered the appropriate fee, the appellant can communicate to the decoder that the customer is authorized to decode its signals. The decoder is then activated and the customer receives unscrambled programming.

6 The respondent, Richard Rex, carries on business as Can-Am Satellites. The other respondents are employees of, or independent contractors working for, Can-Am Satellites. The respondents are engaged in the business of selling U.S. DTH decoding systems to Canadian customers who wish to subscribe to the services offered by the U.S. DTH broadcasters, which make use of satellites owned and operated by U.S. companies and parked in orbital slots assigned to the U.S. The footprints pertaining to the U.S. DTH broadcasters are large enough for their signals to be receivable in much of Canada, but because these broadcasters will not knowingly authorize their signals to be decoded by persons outside of the U.S., the respondents also provide U.S. mailing addresses for their customers who do not already have one. The respondents then contact the U.S. DTH broadcasters on behalf of their customers, providing the customer's name, U.S. mailing address, and credit card number. Apparently, this suffices to satisfy the U.S. DTH broadcasters that the subscriber is resident in the U.S., and they then activate the customer's smart card.

7 In the past, the respondents were providing similar services for U.S. residents, so that they could obtain authorization to decode the Canadian appellant's programming signals. The respondents were authorized sales agents for the appellant at the time, but because this constituted a breach of the terms of the agency agreement, the appellant unilaterally terminated the relationship.

8 The present appeal arises from an action brought by the appellant in the Supreme Court of British Columbia. The appellant, as a licensed distribution undertaking, commenced the action pursuant to ss. 9 (1)(c) and 18(1) of the Radiocommunication Act. As part of the relief it sought, the appellant requested an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. The chambers judge hearing the matter declined to grant the injunctive relief, and directed that the trial of the matter proceed on an expedited basis. On appeal of the chambers judge's ruling, Huddart J.A. dissenting, the Court of Appeal for British Columbia dismissed the appellant's appeal.

9 The appellant applied for leave to appeal to this Court, which was granted on April 19, 2001, with

costs to the applicant in any event of the cause ([2001] 1 S.C.R. vi). The Chief Justice granted the respondents' subsequent motion to state constitutional questions on September 4, 2001.

III. Relevant Statutory Provisions

10 The Radiocommunication Act is one of the legislative pillars of Canada's broadcasting framework. It and another of the pillars, the Broadcasting Act, provide context that is of central importance to this appeal. I set out the most pertinent provisions below. I will cite other provisions throughout the course of my reasons as they become relevant.

11 Radiocommunication Act, R.S.C. 1985, c. R-2

2. In this Act,

"broadcasting" means any radiocommunication in which the transmissions are intended for direct reception by the general public;

...

"encrypted" means treated electronically or otherwise for the purpose of preventing intelligible reception;

"lawful distributor", in relation to an encrypted subscription programming signal or encrypted network feed, means a person who has the lawful right in Canada to transmit it and authorize its decoding;

...

"radiocommunication" or "radio" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3 000 GHz propagated in space without artificial guide;

...

"subscription programming signal" means radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge;

9. (1) No person shall

...

(c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;

...

10. (1) Every person who

...

(b) without lawful excuse, manufactures, imports, distributes, leases, offers for sale, sells, installs, modifies, operates or possesses any equipment or device, or any component thereof, under circumstances that give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9,

...

is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

...

(2.1) Every person who contravenes paragraph 9(1)(c) or (d) is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

...

(2.5) No person shall be convicted of an offence under paragraph 9(1)(c), (d) or (e) if the person exercised all due diligence to prevent the commission of the offence.

...

18. (1) Any person who

(a) holds an interest in the content of a subscription programming signal or network feed, by virtue of copyright ownership or a licence granted by a copyright owner,

...

(c) holds a licence to carry on a broadcasting undertaking issued by the Canadian Radio-television and Telecommunications Commission under the Broadcasting Act, or

...

may, where the person has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(c), (d) or (e) or 10(1)(b), in any court of competent jurisdiction, sue for and recover damages from the person who engaged in the conduct, or obtain such other remedy, by way of injunction, accounting or otherwise, as the court considers appropriate.

...

(6) Nothing in this section affects any right or remedy that an aggrieved person may have under the Copyright Act.

Broadcasting Act, S.C. 1991, c. 11

2. (1) In this Act,

"broadcasting" means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

...

"broadcasting undertaking" includes a distribution undertaking, a programming undertaking and a network; ...

"distribution undertaking" means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking;

...

(2) For the purposes of this Act, "other means of telecommunication" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system.

(3) This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.

3. (1) It is hereby declared as the broadcasting policy for Canada that

(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;
(b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

...

(d) the Canadian broadcasting system should

(i) serve to safeguard, enrich and strengthen the cultural, political, social and

economic fabric of Canada,

(ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

(iv) be readily adaptable to scientific and technological change;

...

(t) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

(ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

(iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

Copyright Act, R.S.C. 1985, c. C-42

21. (1) Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

(a) to fix it,

(b) to reproduce any fixation of it that was made without the broadcaster's consent,

(c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast, and

(d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (a), (b) or (d).

31. ...

(2) It is not an infringement of copyright to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(a) the communication is a retransmission of a local or distant signal;
(b) the retransmission is lawful under the Broadcasting Act;
(c) the signal is retransmitted simultaneously and in its entirety, except as otherwise required or permitted by or under the laws of Canada; and
(d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act.

IV. Judgments Below

A. Supreme Court of British Columbia, [1999] B.C.J. No. 3092 (QL)

12 In a judgment delivered orally in chambers, Brenner J. (now C.J.B.C.S.C.) noted that there is conflicting jurisprudence on the interpretation of s. 9(1)(c). It was the chambers judge's opinion, however, that the provision is unambiguous, and that it poses no contradiction to the remainder of the Radiocommunication Act. He interpreted s. 9(1)(c) as applying only to the theft of signals from "lawful distributors" in Canada, and not applying to the "paid subscription by Canadians to signals from distributors outside Canada" (para. 20). He reasoned (at paras. 18-19):

> The offence in that section that was created by the language Parliament chose to use was the offence of stealing encrypted signals from distributors in Canada. In my view, if Parliament had intended in that section to make it an offence in Canada to decode foreign encrypted transmissions originating outside Canada as contended by the [appellant], it would have said so. In s. 9(1)(c) Parliament could have used language prohibiting the unauthorized decoding of all or any subscription programming in Canada. This, it chose not to do.
>
> The interpretation of s. 9(1)(c) asserted by the [appellant] makes no distinction between those who subscribe and pay for services from non-resident distributors and those who steal the signals of lawful distributors in Canada. That interpretation would create a theft offence applicable to persons in Canada who are nonetheless paying for the services they receive. If Parliament had intended s. 9(1)(c) to apply to such conduct, it would have said so in clear language. In my view the quasi criminal provisions in the Radiocommunication Act should not be interpreted in this manner in the absence of such clear parliamentary language.

13 Brenner J. therefore refused to grant the injunctive relief sought by the appellant. He directed that the trial of the matter proceed on an expedited basis.

B. Court of Appeal for British Columbia (2000), 79 B.C.L.R. (3d) 250, 2000 BCCA 493

14 The majority of the Court of Appeal, in a judgment written by Finch J.A. (now C.J.B.C.), identified two divergent strands of case law regarding the proper interpretation of s. 9(1)(c). The majority also noted that judgments representing each side had found the provision to be unambiguous; in its assessment, though, "[l]egislation which can reasonably be said to bear two unambiguous but contradictory, interpretations must, at the very least, be said to be ambiguous" (para. 35). For this reason,

and the fact that s. 9(1)(c) bears penal consequences, the majority held that the "narrower interpretation adopted by the chambers judge ... must ... prevail" (para. 35). Conflicting authorities aside, however, the majority was prepared to reach the same result through application of the principles of statutory construction.

15 Section 9(1)(c) enjoins the decoding of encrypted signals without the authorization of the "lawful distributor of the signal or feed" (emphasis added). The majority interpreted the legislator's choice of the definite article "the", underlined in the above phrase, to mean that the prohibition applies only "to signals broadcast by lawful distributors who are licensed to authorize decoding of that signal" (para. 36). In other words, "[i]f there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding" (para. 36). Consequently, according to the majority, there is no contravention of s. 9(1)(c) where a person decodes unregulated signals such as those broadcast by the U.S. DTH companies.

16 The majority characterized s. 9(1)(c) as being clearly directed at regulation of the recipient rather than the distributor, but stated that Parliament had not chosen language that would prohibit the decoding of encrypted signals regardless of origin. Rather, in the majority's view, Parliament elected to regulate merely in respect of signals transmitted by parties who are authorized by Canadian law to do so. Dismissing the appellant's argument regarding the words "or elsewhere" in the definition of "subscription programming signal", the majority held that "the fact that a subscription program signal originating outside Canada was intended for reception outside Canada, does not avoid the requirement in s. 9(1)(c) that the decoding of such signals is only unlawful if it is done without the authorization of a lawful distributor" (para. 40).

17 Basing its reasons on these considerations, the majority held that it was unnecessary to address "the wider policy issues" or the issues arising from the Canadian Charter of Rights and Freedoms (para. 44). Finding no error in the chambers judge's interpretation, the majority dismissed the appeal.

18 Dissenting, Huddart J.A. considered the text of s. 9(1)(c) in light of the definitions set out in s. 2, and concluded that Parliamentary intent was evident: the provision "simply render[s] unlawful the decoding in Canada of all encrypted programming signals ... regardless of their source or intended destination", except where authorization is given by a person having the lawful right in Canada to transmit and authorize the decoding of the signals (para. 48). She stressed that the line of cases relied upon by the chambers judge "[a]t most ... provides support for a less inclusive interpretation of s. 9(1)(c) than its wording suggests on its face because it has penal consequences" (para. 54), and proceeded to set out a number of reasons for which these cases should not be followed.

19 For one, "the task of interpreting a statutory provision does not begin with its being typed as penal. The task of interpretation is a search for the intention of Parliament" (para. 55). As well, the more restrictive reading of s. 9(1)(c) "ignores the broader policy objective" of the governing regulatory scheme, this being "the maintenance of a distinctively Canadian broadcasting industry in a large country with a small population within the transmission footprint of arguably the most culturally assertive country in the world with a population ten times larger" (para. 49). Huddart J.A. also referred to the existence of copyright interests, and stated that "[i]t can reasonably be inferred that U.S. distributors have commercial or legal reasons apart from Canadian laws for not seeking a Canadian market. ... Yet only Canada can control the reception of foreign signals in Canada" (para. 50).

20 Huddart J.A. declined the respondents' invitation to read s. 9(1)(c) in a manner that "respect[s] section 2(b) of the Charter" (para. 57), relying on Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, in this regard. She then concluded (at para. 58):

> In summary, I am not persuaded the line of cases on which the chambers judge

> relied establish the provision is ambiguous or capable of contradictory meanings. I do not consider courts have found two entirely different unambiguous meanings for the provision. The words of section 9(1)(c), taken alone, provide a clear basis for the determination of Parliament's intention. That meaning is consistent with the purpose of the entire regulatory scheme in the context of the international copyright agreements, with the purpose of the Act within that scheme, and with the scheme of the Act itself. Those cases interpreting the provision differently have done so with the purpose of narrowing its application to avoid penal consequences of what Parliament clearly intended to have penal consequences, as at least one of the judges taking that view explicitly acknowledged in his reasons. In my view it takes a convoluted reading of the provision to produce the result reached by the court in R. v. Love [(1997), 117 Man. R. (2d) 123 (Q.B.)], and the decisions that have followed it.

Huddart J.A. would have allowed the appeal and granted the declaration requested by the appellant.

V. Issues

21 This appeal raises three issues:

1. Does s. 9(1)(c) of the Radiocommunication Act create an absolute prohibition against decoding, followed by a limited exception, or does it allow all decoding, except for those signals for which there is a lawful distributor who has not granted its authorization?
2. Is s. 9(1)(c) of the Radiocommunication Act inconsistent with s. 2(b) of the Canadian Charter of Rights and Freedoms?
3. If the answer to the above question is "yes", can the statutory provision be justified pursuant to s. 1 of the Charter?

VI. Analysis

A. Introduction

22 It is no exaggeration to state that s. 9(1)(c) of the federal Radiocommunication Act has received inconsistent application in the courts of this country. On one hand, there is a series of cases interpreting the provision (or suggesting that it might be interpreted) so as to create an absolute prohibition, with a limited exception where authorization from a lawful Canadian distributor is received: R. v. Open Sky Inc., [1994] M.J. No. 734 (QL) (Prov. Ct.), at para. 36, aff'd (1995), 106 Man. R. (2d) 37 (Q.B.) (sub nom. R. v. O'Connor), at para. 10, leave to appeal refused on other grounds (1996), 110 Man. R. (2d) 153 (C.A.); R. v. King, [1996] N.B.J. No. 449 (QL) (Q.B.), at paras. 19-20, rev'd on other grounds (1997), 187 N.B.R. (2d) 185 (C.A.) (sub nom. King v. Canada (Attorney General)); R. v. Knibb (1997), 198 A.R. 161 (Prov. Ct.), aff'd [1998] A.J. No. 628 (QL) (Q.B.) (sub nom. R. v. Quality Electronics (Taber) Ltd.); ExpressVu Inc. v. NII Norsat International Inc., [1998] 1 F.C. 245 (T.D.), aff'd (1997), 222 N.R. 213 (F.C.A.); WIC Premium Television Ltd. v. General Instrument Corp. (2000), 272 A.R. 201, 2000 ABQB 628, at para. 72; Canada (Procureure générale) v. Pearlman, [2001] R.J.Q. 2026 (C.Q.), at p. 2034.

23 On the other hand, there are a number of conflicting cases that have adopted the more restrictive interpretation favoured by the majority of the Court of Appeal for British Columbia in the case at bar: R. v. Love (1997), 117 Man. R. (2d) 123 (Q.B.); R. v. Ereiser (1997), 156 Sask. R. 71 (Q.B.); R. v. LeBlanc, [1997] N.S.J. No. 476 (QL) (S.C.); Ryan v. 361779 Alberta Ltd. (1997), 208 A.R. 396 (Prov. Ct.), at para. 12; R. v. Thériault, [2000] R.J.Q. 2736 (C.Q.), aff'd Sup. Ct. Drummondville, No. 405-36-000044-003, June 13, 2001 (sub nom. R. v. D'Argy); R. v. Gregory Électronique Inc., [2000] Q.J. No.

4923 (QL) (C.Q.), aff'd [2001] Q.J. No. 4925 (QL) (Sup. Ct.); R. v. S.D.S. Satellite Inc., C.Q. Laval, No. 540-73-000055-980, October 31, 2000; R. v. Scullion, [2001] R.J.Q. 2018 (C.Q.); R. v. Branton (2001), 53 O.R. (3d) 737 (C.A.).

24 As can be seen, the schism is not explained simply by the adoption of different approaches in different jurisdictions. Although the highest courts in British Columbia and Ontario have now produced decisions that bind the lower courts in those provinces to the restrictive interpretation, and although the Federal Court of Appeal has similarly bound the Trial Division courts under it to the contrary interpretation, the trial courts in Alberta, Manitoba, and Quebec have produced irreconcilable decisions. Those provinces remain without an authoritative determination on the matter. This appeal, therefore, places this Court in a position to harmonize the interpretive dissonance that is echoing throughout Canada.

25 In attempting to steer its way through this maze of cases, the Court of Appeal for British Columbia, in my respectful view, erred in its interpretation of s. 9(1)(c). In my view, there are five aspects of the majority's decision that warrant discussion. First, it commenced analysis from the belief that an ambiguity existed. Second, it placed undue emphasis on the sheer number of judges who had disagreed as to the proper interpretation of s. 9(1)(c). Third, it did not direct sufficient attention to the context of the Radiocommunication Act within the regulatory régime for broadcasting in Canada, and did not consider the objectives of that régime, feeling that it was unnecessary to address these "wider policy issues". Fourth, the majority did not read s. 9(1)(c) grammatically in accordance with its structure, namely, a prohibition with a limited exception. Finally, the majority of the court effectively inverted the words of the provision, such that the signals for which a lawful distributor could provide authorization to decode (i.e., the exception) defined the very scope of the prohibition.

B. Does Section 9(1)(c) of the Radiocommunication Act Create an Absolute Prohibition Against Decoding, Followed by a Limited Exception, or Does it Allow all Decoding, Except for Those Signals for Which There Is a Lawful Distributor who Has not Granted its Authorization?

(1) Principles of Statutory Interpretation

26 In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours, [1994] 3 S.C.R. 3, at p. 17; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21; R. v. Gladue, [1999] 1 S.C.R. 688, at para. 25; R. v. Araujo, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also Stoddard v. Watson, [1993] 2 S.C.R. 1069, at p. 1079; Pointe-Claire (City) v. Quebec (Labour Court), [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

28 Other principles of interpretation -- such as the strict construction of penal statutes and the "Charter values" presumption -- only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: Marcotte v. Deputy Attorney General for Canada, [1976] 1 S.C.R. 108, at p. 115, per Dickson J. (as he then was); R. v. Goulis (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; R. v. Hasselwander, [1993] 2 S.C.R. 398, at p. 413; R. v. Russell, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the "Charter values" principle later in these reasons.)

29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (Marcotte, supra, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (Westminster Bank Ltd. v. Zang, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

30 For this reason, ambiguity cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, supra, at pp. 4-5).

(2) Application to this Case

31 The interpretive factors laid out by Driedger need not be canvassed separately in every case, and in any event are closely related and interdependent (Chieu, supra, at para. 28). In the context of the present appeal, I will group my discussion under two broad headings. Before commencing my analysis, however, I wish to highlight a number of issues on these facts. First, there is no dispute surrounding the fact that the signals of the U.S. DTH broadcasters are "encrypted" under the meaning of the Act, nor is there any dispute regarding the fact that the U.S. broadcasters are not "lawful distributors" under the Act. Secondly, all of the DTH broadcasters in Canada and the U.S. require a person to pay "a subscription fee or other charge" for unscrambled reception. Finally, I note that the "encrypted network feed" portion of s. 9(1)(c) is not relevant on these facts and can be ignored for the purposes of analysis.

(a) Grammatical and Ordinary Sense

32 In its basic form, s. 9(1)(c) is structured as a prohibition with a limited exception. Again, with the relevant portions emphasized, it states that:

> No person shall
>
> ...
>
> (c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;
>
> Il est interdit :
>
> ...
>
> c) de décoder, sans l'autorisation de leur distributeur légitime ou en contravention avec celle-ci, un signal d'abonnement ou une alimentation réseau; [Emphasis added.]

The provision opens with the announcement of a broad prohibition ("No person shall"), follows by announcing the nature ("decode") and object ("an encrypted subscription programming signal") of the prohibition, and then announces an exception to it ("otherwise than under and in accordance with an authorization from the lawful distributor"). The French version shares the same four features, albeit in a modified order (see Provost C.Q.J. in Pearlman, supra, at p. 2031).

33 The forbidden activity is decoding. Therefore, as noted by the Court of Appeal, the prohibition in s. 9(1)(c) is directed towards the reception side of the broadcasting equation. Quite apart from the provenance of the signals at issue, where the impugned decoding occurs within Canada, there can be no issue of the statute's having an extra-territorial reach. In the present case, the reception that the appellant seeks to enjoin occurs entirely within Canada.

34 The object of the prohibition is of central importance to this appeal. What is interdicted by s. 9(1)(c) is the decoding of "an encrypted subscription programming signal" (in French, "un signal d'abonnement") (emphasis added). The usage of the indefinite article here is telling: it signifies "one, some [or] any" (Canadian Oxford Dictionary (1998), at p. 1). Thus, what is prohibited is the decoding of any encrypted subscription programming signal, subject to the ensuing exception.

35 The definition of "subscription programming signal" suggests that the prohibition extends to signals emanating from other countries. Section 2 of the Act defines that term as, "radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge" (emphasis added). I respectfully disagree with the respondents and Weiler J.A. in Branton, supra, at para. 26, "that the wording 'or elsewhere' is limited to the type of situation contemplated in s. 3(3)" of the Act. Section 3(3) reads:

> 3. ...
>
> (3) This Act applies within Canada and on board
>
> (a) any ship, vessel or aircraft that is

(i) registered or licensed under an Act of Parliament, or
(ii) owned by, or under the direction or control of, Her Majesty in right of Canada or a province;

(b) any spacecraft that is under the direction or control of

(i) Her Majesty in right of Canada or a province,
(ii) a citizen or resident of Canada, or
(iii) a corporation incorporated or resident in Canada; and

(c) any platform, rig, structure or formation that is affixed or attached to land situated in the continental shelf of Canada.

36 This provision is directed at an entirely different issue from that which is at play in the definition of "subscription programming signal". Section 3(3) specifies the geographic scope of the Radiocommunication Act and all its constituent provisions, as is confirmed by the marginal note accompanying the subsection, which states "Geographical application". To phrase this in the context of the present appeal, any person within Canada or on board any of the things enumerated in ss. 3(3)(a) through (c) could potentially be subject to liability for unlawful decoding under s. 9(1)(c); in this way, s. 3(3) addresses the "where" question. On the other hand, the definition of "subscription programming signal" provides meaning to the s. 9(1)(c) liability by setting out the class of signals whose unauthorized decoding will trigger the provision; this addresses the object of the prohibition, or the "what" question. These are two altogether separate issues.

37 Furthermore, it was not necessary for Parliament to include the phrase "or elsewhere" in the s. 2 definition if it merely intended "subscription programming signal" to be interpreted as radiocommunication intended for direct or indirect reception by the public on board any of the s. 3(3) vessels, spacecrafts or rigs. In my view, the words "or elsewhere" were not meant to be tautological. It is sometimes stated, when a court considers the grammatical and ordinary sense of a provision, that "[t]he legislator does not speak in vain" (Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée, [1985] 1 S.C.R. 831, at p. 838). Parliament has provided express direction to this effect through its enactment of s. 10 of the Interpretation Act, which states in part that "[t]he law shall be considered as always speaking". In any event, "or elsewhere" ("ou ailleurs", in French) suggests a much broader ambit than the particular and limited examples in s. 3(3), and I would be reticent to equate the two.

38 In my opinion, therefore, the definition of "subscription programming signal" encompasses signals originating from foreign distributors and intended for reception by a foreign public. Again, because the Radiocommunication Act does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(e), which forbids their unauthorized retransmission within Canada) and only concerns decrypting that occurs in the s. 3(3) locations, this does not give rise to any extra-territorial exercise of authority. At this stage, what this means is that, contrary to the holdings of the chambers judge and the majority of the Court of Appeal in the instant case, Parliament did in fact choose language in s. 9(1)(c) that prohibits the decoding of all encrypted subscription signals, regardless of their origin, "otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed". I shall now consider this exception.

39 The Court of Appeal relied upon the definite article found in this portion of s. 9(1)(c) ("the signal"), in order to support its narrower reading of the provision. Before this Court, counsel for the respondents submitted as well that the definite article preceding the words "lawful distributor" confirms that the provision "is only intended to operate where there is a lawful distributor". Finally, the respondents draw to our attention the French language version of the provision, and particularly the

word "leur" that modifies "distributeur légitime": a number of cases considering the French version of s. 9(1)(c) have relied upon that word to arrive at the narrower interpretation (see the Court of Quebec judgments in Thériault, supra, at p. 2739; Gregory Électronique, supra, at paras. 24-26; and S.D.S. Satellite, supra, at p. 7. See also Branton, supra, at para. 25).

40 I do not agree with these opinions. The definite article "the" and the possessive adjective "leur" merely identify the party who can authorize the decoding in accordance with the exception (see Pearlman, supra, at p. 2032). Thus, while I agree with the majority of the Court of Appeal that "[i]f there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding", I cannot see how it necessarily follows that decoding unregulated signals "cannot therefore be in breach of the Radiocommunication Act" (par. 36). Such an approach would require one to read words from the exception into the prohibition, which is circular and incorrect. Again, as Provost C.Q.J. stated in Pearlman, supra, at p. 2031: [TRANSLATION] "To seek the meaning of the exception at the outset, and thereafter to define the rule by reference to the exception, is likely to distort the meaning of the text and misrepresent the intention of its author."

41 In my view, the definite articles are used in the exception portion of s. 9(1)(c) in order to identify from amongst the genus of signals captured by the prohibition (any encrypted subscription programming signal) that species of signals for which the rule is "otherwise". Grammatically, then, the choice of definite and indefinite articles essentially plays out into the following rendition: No person shall decode any (indefinite) encrypted subscription programming signal unless, for the (definite) particular signal that is decoded, the person has received authorization from the (definite) lawful distributor. Thus, as might happen, if no lawful distributor exists to grant such authorization, the general prohibition must remain in effect.

42 Although I have already stated that the U.S. DTH distributors in the present case are not "lawful distributors" under the Act, I should discuss this term, because it is important to the interpretive process. Section 2 provides that a "lawful distributor" of an encrypted subscription programming signal is "a person who has the lawful right in Canada to transmit it and authorize its decoding". In this connection, the fact that a person is authorized to transmit programming in another country does not, by that fact alone, qualify as granting the lawful right to do so in Canada. Moreover, the phrase "lawful right" ("légitimement autorisée") comprehends factors in addition to licences granted by the CRTC. In defining "lawful distributor", Parliament could have made specific reference to a person holding a CRTC licence (as it did in s. 18(1)(c)) or a Minister's licence (s. 5(1)(a)). Instead, it deliberately chose broader language. I therefore agree with the opinion of Létourneau J.A. in the Federal Court of Appeal decision in Norsat, supra, at para. 4, that

> [t]he concept of "lawful right" refers to the person who possesses the regulatory rights through proper licensing under the Act, the authorization of the Canadian Radio-television and Telecommunications Commission as well as the contractual and copyrights necessarily pertaining to the content involved in the transmission of the encrypted subscription programming signal or encrypted network feed.

As pointed out by the Attorney General of Canada, this interpretation means that even where the transmission of subscription programming signals falls outside of the definition of "broadcasting" under the Broadcasting Act (i.e., where the transmitted programming is "made solely for performance or display in a public place") and no broadcasting licence is therefore required, additional factors must still be considered before it can be determined whether the transmitter of the signals is a "lawful distributor" for the purposes of the Radiocommunication Act.

43 In the end, I conclude that when the words of s. 9(1)(c) are read in their grammatical and ordinary

sense, taking into account the definitions provided in s. 2, the provision prohibits the decoding in Canada of any encrypted subscription programming signal, regardless of the signal's origin, unless authorization is received from the person holding the necessary lawful rights under Canadian law.

(b) Broader Context

44 Although the Radiocommunication Act is not, unfortunately, equipped with its own statement of purpose, it does not exist in a vacuum. The Act's focus is upon the allocation of specified radio frequencies, the authorization to possess and operate radio apparatuses, and the technical regulation of the radio spectrum. The Act also places restrictions on the reception of and interference with radiocommunication, which includes encrypted broadcast programming signals of the sort at issue. S. Handa et al., Communications Law in Canada (loose-leaf), at p. 3.8, describe the Radiocommunication Act as one "of the three statutory pillars governing carriage in Canada". These same authors note at p. 3.17 that:

> The Radiocommunication Act embraces all private and public use of the radio spectrum. The close relationship between this and the telecommunications and broadcasting Acts is determined by the fact that telecommunications and broadcasting are the two principal users of the radioelectric spectrum.

45 The Broadcasting Act came into force in 1991, in an omnibus statute that also brought substantial amendments to the Radiocommunication Act, including the addition thereto of s. 9(1)(c). Its purpose, generally, is to regulate and supervise the transmission of programming to the Canadian public. Of note for the present appeal is that the definition of "broadcasting" in the Broadcasting Act captures the encrypted DTH programme transmissions at issue and that DTH broadcasters such as the appellant receive their licences under, and are subject to, that Act. The Broadcasting Act also enumerates 20 broad objectives of the broadcasting policy for Canada (in s. 3(1)(a) through (t)). The emphasis of the Act, however, is placed on broadcasting and not reception.

46 Ultimately, the Acts operate in tandem. On this point, I agree with the following passage from the judgment of LeGrandeur Prov. Ct. J. in Knibb, supra, at paras. 38-39, which was adopted by Gibson J. in the Federal Court, Trial Division decision in Norsat, supra, at para. 35:

> The Broadcasting Act and the Radiocommunication Act must be seen as operating together as part of a single regulatory scheme. The provisions of each statute must accordingly be read in the context of the other and consideration must be given to each statute's roll [sic] in the overall scheme. [Cite to R. Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994), at p. 286.]
>
> The addition of s. 9(1)(c), (d) and (e) and other sections to the Radiocommunication Act through the provisions of the Broadcasting Act, 1991 are supportive of that approach in my view. Subsections 9(1)(c), (d) and (e) of the Radiocommunication Act must be seen as part of the mechanism by which the stated policy of regulation of broadcasting in Canada is to be fulfilled.

47 Canada's broadcasting policy has a number of distinguishing features, and evinces a decidedly cultural orientation. It declares that the radio frequencies in Canada are public property, that Canadian ownership and control of the broadcasting system should be a base premise, and that the programming offered through the broadcasting system is "a public service essential to the maintenance and enhancement of national identity and cultural sovereignty". Sections 3(1)(d) and 3(1)(t) enumerate a number of specific developmental goals for, respectively, the broadcasting system as a whole and for

distribution undertakings (including DTH distribution undertakings) in particular. Finally, s. 3(2) declares that "the Canadian broadcasting system constitutes a single system" best regulated and supervised "by a single independent public authority".

48 In this context, one finds little support for the restrictive interpretation of s. 9(1)(c). Indeed, as counsel for the Attorney General of Canada argued before us, after consideration of the Canadian broadcasting policy Parliament has chosen to adopt, one may legitimately wonder

> why would Parliament enact a provision like the restrictive interpretation? Why would Parliament provide for Canadian ownership, Canadian production, Canadian content in its broadcasting and then simply leave the door open for unregulated, foreign broadcasting to come in and sweep all of that aside? What purpose would have been served?

49 On the other hand, the interpretation of s. 9(1)(c) that I have determined to result from the grammatical and ordinary sense of the provision accords well with the objectives set out in the Broadcasting Act. The fact that DTH broadcasters encrypt their signals, making it possible to concentrate regulatory efforts on the reception/decryption side of the equation, actually assists with attempts to pursue the statutory broadcasting policy objectives and to regulate and supervise the Canadian broadcasting system as a single system. It makes sense in these circumstances that Parliament would seek to encourage broadcasters to go through the regulatory process by providing that they could only grant authorization to have their signal decoded, and thereby collect their subscription fees, after regulatory approval has been granted.

50 There is another contextual factor that, while not in any way determinative, is confirmatory of the interpretation of s. 9(1)(c) as an absolute prohibition with a limited exception. As I have noted above, the concept of "lawful right" in the definition of "lawful distributor" incorporates contractual and copyright issues. According to the evidence in the present record, the commercial agreements between the appellant and its various programme suppliers require the appellant to respect the rights that these suppliers are granted by the persons holding the copyright in the programming content. The rights so acquired by the programme suppliers permit the programmes to be broadcast in specific locations, being all or part of Canada. As such, the appellant would have no lawful right to authorize decoding of its programming signals in an area not included in its geographically limited contractual right to exhibit the programming.

51 In this way, the person holding the copyright in the programming can conclude separate licensing deals in different regions, or in different countries (e.g., Canada and the U.S.). Indeed, these arrangements appear typical of the industry: in the present appeal, the U.S. DTH broadcaster DIRECTV has advocated the same interpretation of s. 9(1)(c) as the appellant, in part because of the potential liability it faces towards both U.S. copyright holders and Canadian licencees due to the fact that its programming signals spill across the border and are being decoded in Canada.

52 I also believe that the reading of s. 9(1)(c) as an absolute prohibition with a limited exception complements the scheme of the Copyright Act. Sections 21(1)(c) and 21(1)(d) of the Copyright Act provide broadcasters with a copyright in the communication signals they transmit, granting them the sole right of retransmission (subject to the exceptions in s. 31(2)) and, in the case of a television communication signal, of performing it on payment of a fee. By reading s. 9(1)(c) as an absolute prohibition against decoding except where authorization is granted by the person with the lawful right to transmit and authorize decoding of the signal, the provision extends protection to the holders of the copyright in the programming itself, since it would proscribe the unauthorized reception of signals that violate copyright, even where no retransmission or reproduction occurs: see F. P. Eliadis and S. C.

McCormack, "Vanquishing Wizards, Pirates and Musketeers: The Regulation of Encrypted Satellite TV Signals" (1993), 3 M.C.L.R. 211, at pp. 213-18. Finally, I note that the civil remedies provided for in ss. 18(1)(a) and 18(6) of the Radiocommunication Act both illustrate that copyright concerns are of relevance to the scheme of the Act, thus supporting the finding that there is a connection between these two statutes.

(c) Section 9(1)(c) as a "Quasi-Criminal" Provision

53 I wish to comment regarding the respondents' argument regarding the penal effects that the "absolute prohibition" interpretation would bring to bear. Although the present case only arises in the context of a civil remedy the appellant is seeking under s. 18(1) of the Act (as a person who "has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(c)") and does not therefore directly engage the penal aspects of the Radiocommunication Act, the respondents direct our attention to ss. 10(1)(b) and 10(2.1). These provisions, respectively, create summary conviction offences for every person providing equipment for the purposes of contravening s. 9 and for every person who in fact contravenes s. 9(1)(c). Respondents' counsel argued before us that, if s. 9(1)(c) is interpreted in the manner suggested by the appellant, "hundreds of thousands of Canadians can expect a knock on their door, because they will be in breach of the statute" and that "the effect of [the appellant's] submissions is to criminalize subscribers even if they pay every cent to which DIRECTV is entitled". The thrust of the respondents' submission is that the presence of ss. 10(1)(b) and 10(2.1) in the Radiocommunication Act provides context that is important to the interpretation of s. 9(1)(c), and that this context militates in favour of the respondents' position.

54 Section 9(1)(c) does have a "dual aspect", in so far as it gives rise to both civil and criminal penalties. I am not, however, persuaded that this plays an important role in the interpretive process here. In any event, I do not think it correct to insinuate that the decision in this appeal will have the effect of automatically branding every Canadian resident who subscribes to and pays for U.S. DTH broadcasting services as a criminal. The penal offence in s. 10(1)(b) requires that circumstances "give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9" (emphasis added), and allows for a "lawful excuse" defence. Section 10(2.5) further provides that "[n]o person shall be convicted of an offence under paragraph 9(1)(c) ... if the person exercised all due diligence to prevent the commission of the offence". Since it is neither necessary nor appropriate to pursue the meaning of these provisions absent the proper factual context, I refrain from doing so.

(d) Conclusion

55 After considering the entire context of s. 9(1)(c), and after reading its words in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found, I find no ambiguity. Rather, I can conclude only that Parliament intended to create an absolute bar on Canadian residents decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the signal and provide the required authorization. There is no need in this circumstance to resort to any of the subsidiary principles of statutory interpretation.

C. The Constitutional Questions

56 As I will discuss, I do not propose to answer the constitutional questions that have been stated in this appeal.

57 Rule 32 of the Rules of the Supreme Court of Canada, SOR/83-74, mandates that constitutional

questions be stated in every appeal in which the constitutional validity or applicability of legislation is challenged, and sets out the procedural requirements to that end. As recognized by this Court, the purpose of Rule 32 is to ensure that the Attorney General of Canada, the attorneys general of the provinces, and the ministers of justice of the territories are alerted to constitutional challenges, in order that they may decide whether or not to intervene: Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, at para. 49, per L'Heureux-Dubé J.; see also B. A. Crane and H. S. Brown, Supreme Court of Canada Practice 2000 (1999), at p. 253. Rule 32 also serves to advise the parties and other potential interveners of the constitutional issues before the Court.

58 On the whole, the parties to an appeal are granted "wide latitude" by the Chief Justice or other judge of this Court in formulating the questions to be stated: Bisaillon v. Keable, [1983] 2 S.C.R. 60, at p. 71; Corbiere, supra, at para. 48. This wide latitude is especially appropriate in a case like the present, where the motion to state constitutional questions was brought by the respondents: generally, a respondent may advance any argument on appeal that would support the judgment below (Perka v. The Queen, [1984] 2 S.C.R. 232, at p. 240; Idziak v. Canada (Minister of Justice), [1992] 3 S.C.R. 631, at pp. 643-44, per Cory J.). Like many general rules, however, this one is subject to an exception. A respondent, like any other party, cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial: Perka, supra; Idziak, supra; R. v. Gayle (2001), 54 O.R. (3d) 36 (C.A.), at para. 69, leave to appeal refused January 24, 2002, [2002] 1 S.C.R. vii.

59 In like manner, even where constitutional questions are stated under Rule 32, it may ultimately turn out that the factual record on appeal provides an insufficient basis for their resolution. The Court is not obliged in such cases to provide answers: Bisaillon, supra; Crane and Brown, supra, at p. 254. In fact, there are compelling reasons not to: while we will not deal with abstract questions in the ordinary course, "[t]his policy ... is of particular importance in constitutional matters" (Moysa v. Alberta (Labour Relations Board), [1989] 1 S.C.R. 1572, at p. 1580; see also Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086, at p. 1099; Baron v. Canada, [1993] 1 S.C.R. 416, at p. 452; R. v. Mills, [1999] 3 S.C.R. 668, at para. 38, per McLachlin and Iacobucci JJ.). Thus, as Sopinka J. stated for the Court in Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, at p. 357: "The procedural requirements of Rule 32 of the Supreme Court Rules are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record" (emphasis added).

60 Respondents' counsel properly conceded during oral argument that there is no Charter record permitting this Court to address the stated questions. Rather, he argued that "Charter values" must inform the interpretation given to the Radiocommunication Act. This submission, inasmuch as it is presented as a stand alone proposition, must be rejected. Although I have already set out the preferred approach to statutory interpretation above, the manner in which the respondents would have this Court consider and apply the Charter warrants additional attention at this stage.

61 It has long been accepted that, where it will not upset the appropriate balance between judicial and legislative action, courts should apply and develop the rules of the common law in accordance with the values and principles enshrined in the Charter: RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, at p. 603, per McIntyre J.; Cloutier v. Langlois, [1990] 1 S.C.R. 158, at p. 184; R. v. Salituro, [1991] 3 S.C.R. 654, at p. 675; R. v. Golden, [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 86, per Iacobucci and Arbour JJ.; R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156, 2002 SCC 8, at paras. 18-19. One must keep in mind, of course, that the common law is the province of the judiciary: the courts are responsible for its application, and for ensuring that it continues to reflect the basic values of society. The courts do not, however, occupy the same role vis-à-vis statute law.

62 Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any

challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not" (Sullivan, supra, at p. 325), it must be stressed that, to the extent this Court has recognized a "Charter values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.

63 This Court has striven to make this point clear on many occasions: see, e.g., Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513, at p. 558, per L'Heureux-Dubé J.; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at p. 1078, per Lamer J. (as he then was); R. v. Zundel, [1992] 2 S.C.R. 731, at p. 771, per McLachlin J. (as she then was); R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, at p. 660; Mossop, supra, at pp. 581-82, per Lamer C.J.; R. v. Lucas, [1998] 1 S.C.R. 439, at para. 66, per Cory J.; Mills, supra, at paras. 22 and 56; Sharpe, supra, at para. 33.

64 These cases recognize that a blanket presumption of Charter consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. Moreover, another rationale for restricting the "Charter values" rule was expressed in Symes v. Canada, [1993] 4 S.C.R. 695, at p. 752:

> [T]o consult the Charter in the absence of such ambiguity is to deprive the Charter of a more powerful purpose, namely, the determination of a statute's constitutional validity. If statutory meanings must be made congruent with the Charter even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the Charter. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the Charter, since the interpretive process would preclude one from finding infringements in the first place. [Emphasis in original.]

(See also Willick v. Willick, [1994] 3 S.C.R. 670, at pp. 679-80, per Sopinka J.)

65 This last point touches, fundamentally, upon the proper function of the courts within the Canadian democracy. In Vriend v. Alberta, [1998] 1 S.C.R. 493, at paras. 136-42, the Court described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect. As was stated, judicial review on Charter grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches. "The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the Charter)" (Vriend, supra, at para. 139).

66 To reiterate what was stated in Symes, supra, and Willick, supra, if courts were to interpret all statutes such that they conformed to the Charter, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on Charter grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on Charter rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the Charter right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret this sort of enactment in light of Charter principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, where a statute is unambiguous, courts

must give effect to the clearly expressed legislative intent and avoid using the Charter to achieve a different result.

67 It may well be that, when this matter returns to trial, the respondents' counsel will make an application to have s. 9(1)(c) of the Radiocommunication Act declared unconstitutional for violating the Charter. At that time, it will be necessary to consider evidence regarding whose expressive rights are engaged, whether these rights are violated by s. 9(1)(c), and, if they are, whether they are justified under s. 1.

VII. Disposition

68 In the result, I would allow the appeal with costs throughout, set aside the judgment of the Court of Appeal for British Columbia, and declare that s. 9(1)(c) of the Radiocommunication Act creates a prohibition against all decoding of encrypted programming signals, followed by an exception where authorization is received from the person holding the lawful right in Canada to transmit and authorize decoding of the signal. No answer is given to the constitutional questions stated by order of the Chief Justice.

Solicitors for the appellant: Crawford, McKenzie, McLean & Wilford, Orillia and Lang Michener, Ottawa.
Solicitors for all the respondents, except Michelle Lee: Gold & Fuerst, Toronto.

Solicitor for the intervener the Attorney General of Canada: The Department of Justice, Ottawa.
Solicitors for the intervener the Canadian Motion Picture Distributors Association: Sim, Hughes, Ashton & McKay, Toronto.
Solicitors for the intervener DIRECTV, Inc.: Borden Ladner Gervais, Toronto.
Solicitor for the intervener the Canadian Alliance for Freedom of Information and Ideas: Ian W. M. Angus, Port Hope.
Solicitors for the intervener the Congres Iberoamerican du Canada: Soloway, Wright, Ottawa.

cp/e/qllls/qlvls

5

Case Name:

CanadianOxy Chemicals Ltd. v. Canada (Attorney General)

The Attorney General of Canada, appellant;
v.
CanadianOxy Chemicals Ltd., CanadianOxy Industrial Chemicals Limited Partnership and Canadian Occidental Petroleum Ltd., respondents, and
The Attorney General for Ontario, intervener.

[1998] S.C.J. No. 87

[1998] A.C.S. no 87

[1999] 1 S.C.R. 743

[1999] 1 R.C.S. 743

171 D.L.R. (4th) 733

237 N.R. 373

J.E. 99-861

122 B.C.A.C. 1

133 C.C.C. (3d) 426

29 C.E.L.R. (N.S.) 1

23 C.R. (5th) 259

1999 CanLII 680

41 W.C.B. (2d) 411

File No.: 25944.

Supreme Court of Canada

Hearing and judgment: December 10, 1998.
Reasons delivered: April 23, 1999.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Major and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law -- Search and seizure -- Search warrants -- Criminal Code authorizing issuance of warrants to search for "evidence with respect to the commission of an offence" -- Whether provision authorizes granting of warrants to search for and seize evidence of negligence going to defence of due diligence -- Criminal Code, R.S.C., 1985, c. C-46, s. 487(1)(b).

A plant operated by the respondents discharged a quantity of chlorine into the adjacent waters, killing a number of fish. This incident occurred during a power outage at the plant, which resulted from a power line being struck by a tree. The respondents reported the discharge to the authorities and an investigation followed. Five months after the discharge, a fishery officer swore an information and obtained a warrant to search the plant for a range of documents. He later obtained an order for a new warrant to reseize several items which had been returned and which were relevant to the investigation. The respondents were charged with offences under the Fisheries Act and the Waste Management Act. They subsequently brought a motion to quash the warrants, alleging that s. 487(1) of the Criminal Code, which provides for the issuance of search warrants pertaining to "evidence with respect to the commission of an offence", had been exceeded. The chambers judge ruled that the documents seized pertaining to the issue of due diligence were not documents with respect to the commission of this particular offence and quashed both warrants. The Court of Appeal, in a majority decision, upheld the ruling.

Held: The appeal should be allowed.

Statutory provisions should be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur. On a plain reading, the phrase "evidence with respect to the commission of an offence" is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. Anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant. It can be assumed that Parliament chose not to limit s. 487(1) to evidence establishing an element of the Crown's prima facie case. To conclude otherwise would effectively delete the phrase "with respect to" from the section. While s. 487(1) is broad enough to authorize the search in question even absent this phrase, the inclusion of these words plainly supports the validity of these warrants. Although s. 487(1) is part of the Criminal Code, and may occasion significant invasions of privacy, the public interest requires prompt and thorough investigation of potential offences. It is with respect to that interest that all relevant information and evidence should be located and preserved as soon as possible. This interpretation accords with the purposes underlying the Criminal Code and the demands of a fair and expeditious administration of justice. Furthermore, denying the Crown the ability to gather evidence in anticipation of a defence would have serious consequences on the functioning of our justice system. While the broad powers contained in s. 487(1) do not authorize investigative fishing expeditions, nor do they diminish the proper privacy interests of individuals or corporations, in this case the specific terms of the warrant were not at issue, as the respondents challenged only the underlying authority to grant warrants for the purpose of investigating the presence of negligence. Both a plain reading of the relevant section and consideration of the role and obligations of state investigators support the conclusion that s. 487(1) authorized the granting of the warrants in question.

Cases Cited

Referred to: Re Domtar Inc. (1995), 18 C.E.L.R. (N.S.) 106; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; Nowegijick v. The Queen, [1983] 1 S.C.R. 29; R. v. McIntosh, [1995] 1 S.C.R. 686; Re Church of Scientology and the Queen (No. 6) (1987), 31 C.C.C. (3d) 449; R. v. Storrey, [1990] 1 S.C.R.

241; Nelles v. Ontario, [1989] 2 S.C.R. 170; R. v. Levogiannis, [1993] 4 S.C.R. 475; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860; Thomson Newspapers Ltd. v. Canada (Director of Research and Investigation, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; Baron v. Canada, [1993] 1 S.C.R. 416.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46, s. 487(1)(b) [am. c. 27 (1st Supp.), s. 68; am. 1994, c. 44, s. 36].
Fisheries Act, R.S.C., 1985, c. F-14, ss. 36(3), 40(2).
Interpretation Act, R.S.C., 1985, c. I-21, s. 12.
Waste Management Act, S.B.C. 1982, c. 41, ss. 3(1.1) [ad. 1985, c. 52, s. 96], 34(3).

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APPEAL from a judgment of the British Columbia Court of Appeal (1997), 145 D.L.R. (4th) 427, 90 B.C.A.C. 126, 147 W.A.C. 126, 114 C.C.C. (3d) 537, [1997] B.C.J. No. 724 (QL), affirming a decision of the British Columbia Supreme Court (1996), 138 D.L.R. (4th) 104, 108 C.C.C. (3d) 497, [1996] B.C.J. No. 1482 (QL), quashing certain search warrants. Appeal allowed.

S. David Frankel, Q.C., and Kenneth Yule, for the appellant.
Gary A. Letcher, Jonathan S. McLean and Eric B. Miller, for the respondents.
Michal Fairburn, for the intervener.

Solicitor for the appellant: The Attorney General of Canada, Vancouver.
Solicitors for the respondents: Edwards, Kenny & Bray, Vancouver.
Solicitor for the intervener: The Attorney General for Ontario, Toronto.

The judgment of the Court was delivered by

1 **MAJOR J.**:-- This appeal raises the question of whether search warrants issued under s. 487(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, authorize investigators to search for and seize evidence of negligence in the investigation of strict liability offences. At the conclusion of argument the question was answered in the affirmative and the appeal was allowed with reasons to follow.

I. Facts

2 On October 13, 1994 a chlor-alkali plant operated by the respondents (collectively referred to as "CanadianOxy") in North Vancouver, British Columbia discharged a quantity of chlorine into the waters of Burrard Inlet, killing a number of fish. This incident occurred during a three and a half hour power outage at the plant, as a result of one of two B.C. Hydro 60 kv power lines servicing the plant being struck by a tree.

3 The company reported the discharge to the authorities and an investigation by the Department of Fisheries and Oceans followed. Fishery Officer Robert Tompkins went to the plant that night, spoke with the Plant Chemist, and seized a number of documents. He also seized samples of dead fish recovered in the vicinity of the plant by the Harbour Master's patrol vessel. He advised the Plant

Manager that he had reasonable grounds to believe that an offence had been committed under the Fisheries Act, R.S.C., 1985, c. F-14.

4 Over a short time Tompkins made three further visits to the plant, formally interviewed the Plant Chemist, was shown the valve which the company had identified as the cause of the discharge and was provided with certain documents. His request to interview additional employees was refused.

5 Tompkins subsequently made a written request to CanadianOxy's counsel for additional technical information believed relevant for Environment Canada's Pollution Abatement Division to assess whether the discharge had been preventable. Only a few of these questions were answered.

6 On March 16, 1995, five months after the discharge, Tompkins swore an information and obtained a warrant to search the respondents' plant for a range of documents relating to process records, plant maintenance, employee training, discipline, and general plant operations. In the information, Tompkins described the reasons for seeking this information:

> The business records ... are required to establish and prove that CanadianOxy Chemicals Ltd... . operate a chlor-alkali plant that discharges effluent to the waters of Burrard Inlet near North Vancouver, B.C., that the release of effluent with a chlorine concentration exceeding 10 ppm, which I know would be acutely lethal to fish, occurred on October 13, 1994, and that the company could have taken additional reasonable measures to prevent the release of a deleterious substance into water frequented by fish....
>
> ... I have reasonable grounds to believe that correspondence had been generated by company personnel in January 1994, and that maintenance was performed in March 1994, and again in October 1994, and that the company conducted their own investigation, prepared reports, and provided information regarding the incident until February 1995... .
>
> It is necessary to examine effluent discharge records, effluent water quality sampling and analysis records, mechanical and instrument maintenance records, environmental control records, instrument calibration records and flow rate calculation records covering an extended period of time before and after October 13, 1994. This will ... permit analysis of the maintenance programs undertaken by CanadianOxy Chemicals Ltd.
>
> It is necessary to examine company personnel records covering the period between January 1, 1994 and February 28, 1995 ... to determine if any company employees have been disciplined in any manner as a result of this incident... .

7 The warrant was executed on March 17, 1995. In total 139 items were seized pursuant to the warrant, and 73 additional items were seized under the investigators' understanding of the "plain view" doctrine. Following the search, Tompkins learned by coincidence of an adverse ruling by a British Columbia Provincial Court judge on the validity of a similar seizure in an unrelated case. As a result, he sought legal advice with respect to a number of the items taken.

8 On April 26, 1995, Tompkins made two applications to a Justice of the Peace, one for an order to return the documents which had been improperly seized under the first warrant, and the second for a new warrant to re-seize 13 of the items returned which were relevant to the investigation. These orders were granted and executed the same day.

9 On June 15, 1995 the respondents were charged with:

(a) depositing, or permitting the deposit, of a deleterious substance in waters frequented by fish, contrary to ss. 36(3) and 40(2) of the Fisheries Act; and

(b) introducing, or causing or allowing the introduction of waste into the environment, contrary to ss. 3(1.1) and 34(3) of the Waste Management Act, S.B.C. 1982, c. 41 (now R.S.B.C. 1996, c. 482).

10 The respondents subsequently brought a motion to quash the warrants alleging that s. 487(1) of the Criminal Code had been exceeded. The warrants were broad enough to authorize a search for evidence of negligence which if found would negate a defence of due diligence.

II. Judicial History

A. British Columbia Supreme Court (1996), 138 D.L.R. (4th) 104

11 Sigurdson J. felt bound by Re Domtar Inc. (1995), 18 C.E.L.R. (N.S.) 106 (B.C.S.C.), which held that a s. 487 warrant could not be used to search for and seize evidence of negligence going to the defence of due diligence. As a result, he ruled that the documents seized pertaining to the issue of due diligence were not documents with respect to the commission of this particular offence and quashed both warrants.

B. British Columbia Court of Appeal (1997), 145 D.L.R. (4th) 427

12 In dismissing the appeal, Goldie J.A. (Carrothers J.A. concurring) held that the appellant had failed to demonstrate on any reasonable construction that s. 487(1)(b) authorizes the issuance of a warrant that includes a search for evidence with respect to due diligence in a regulatory offence. In dissent, Southin J.A. concluded that a warrant can issue upon proper evidence to search for and seize things relating to the question of due diligence.

III. Analysis

13 At issue is whether search warrants issued pursuant to s. 487(1) of the Criminal Code are limited only to evidence relevant to an element of the offence which is part of the Crown's prima facie case, or whether such warrants encompass evidence that may relate to potential defences, such as due diligence, which may or may not be raised at the trial. The relevant section of the Code provides:

> 487. (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place
>
> ...
>
> (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
>
> ...
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer

(d) to search the building, receptacle or place for any such thing and to seize it ... [Emphasis added.]

14 Statutory provisions should be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at paras. 21-22. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids. In our opinion there is no such ambiguity in s. 487(1).

A. The Ordinary Meaning of the Words

15 On a plain reading, the phrase "evidence with respect to the commission of an offence" is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant.

16 This reading is supported by Dickson J.'s interpretation of almost identical language in Nowegijick v. The Queen, [1983] 1 S.C.R. 29, at p. 39:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added.]

17 We can assume that Parliament chose not to limit s. 487(1) to evidence establishing an element of the Crown's prima facie case. To conclude otherwise would effectively delete the phrase "with respect to" from the section. While s. 487(1) is broad enough to authorize the search in question even absent this phrase, the inclusion of these words plainly supports the validity of these warrants.

18 The respondents urged that s. 487(1) be given a restrictive reading in accordance with the principle that an ambiguous penal statute should be interpreted in a manner most favourable to an accused: see R. v. McIntosh, [1995] 1 S.C.R. 686, at para. 39. That argument was rejected as, in our opinion, this section is neither ambiguous, nor the type of penal provisions to which the rule should apply. Instead, s. 487 should be given a liberal and purposive interpretation; Interpretation Act, R.S.C., 1985, c. I-21, s. 12.

19 While s. 487(1) is part of the Criminal Code, and may occasion significant invasions of privacy, the public interest requires prompt and thorough investigation of potential offences. It is with respect to that interest that all relevant information and evidence should be located and preserved as soon as possible. This interpretation accords with the purposes underlying the Criminal Code and the demands of a fair and expeditious administration of justice.

B. Purpose of the Search Warrant Provisions of the Criminal Code

20 A primary, though not exclusive, purpose of the Criminal Code, and penal statutes in general, is to promote a safe, peaceful and honest society, This is achieved by providing guidelines prohibiting unacceptable conduct, and providing for the just prosecution and punishment of those who transgress these norms. The prompt and comprehensive investigation of potential offences is essential to fulfilling that purpose. The point of the investigative phase is to gather all the relevant evidence in order to allow a responsible and informed decision to be made as to whether charges should be laid.

21 At the investigative stage the authorities are charged with determining the following: What happened? Who did it? Is the conduct criminally culpable behaviour? Search warrants are a staple investigative tool for answering those questions, and the section authorizing their issuance must be interpreted in that light.

22 The purpose of s. 487(1) is to allow the investigators to unearth and preserve as much relevant evidence as possible. To ensure that the authorities are able to perform their appointed functions properly they should be able to locate, examine and preserve all the evidence relevant to events which may have given rise to criminal liability. It is not the role of the police to investigate and decide whether the essential elements of an offence are made out - that decision is the role of the courts. The function of the police, and other peace officers, is to investigate incidents which might be criminal, make a conscientious and informed decision as to whether charges should be laid, and then present the full and unadulterated facts to the prosecutorial authorities. To that end an unnecessary and restrictive interpretation of s. 487(1) defeats its purpose. See Re Church of Scientology and the Queen (No. 6) (1987), 31 C.C.C. (3d) 449, p. 475:

> Police work should not be frustrated by the meticulous examination of facts and law that is appropriate to a trial process... . There may be serious questions of law as to whether what is asserted amounts to a criminal offence... . However, these issues can hardly be determined before the Crown has marshalled its evidence and is in a position to proceed with the prosecution.

23 Moreover, extrinsic factors such as the accused's motive or the failure to exercise due diligence are often relevant to determining whether the event which triggered the investigation in the first place is criminally culpable. Everyone, including accused persons, who lacks the means of obtaining and preserving evidence prior to trial has an interest in seeing that these facts are brought to light. It would be undesirable if a narrow reading of s. 487(1) resulted in either inculpatory or exculpatory evidence being lost because of the investigators' inability to secure it. See R. v. Storrey, [1990] 1 S.C.R. 241, per Cory J., at p. 254:

> The essential role of the police is to investigate crimes. That role and function can and should continue after they have made a lawful arrest. The continued investigation will benefit society as a whole and not infrequently the arrested person. It is in the interest of the innocent arrested person that the investigation continue so that he or she may be cleared of the charges as quickly as possible.

24 It is important that an investigation unearth as much evidence as possible. It is antithetical to our system of justice to proceed on the basis that the police, and other authorities, should only search for evidence which incriminates their chosen suspect. Such prosecutorial "tunnel vision" would not be appropriate: see The Commission on Proceedings Involving Guy Paul Morin: Report, vol. 1 (1998), per the Honourable F. Kaufman at pp. 479-82.

25 In Nelles v. Ontario, [1989] 2 S.C.R. 170, Lamer J. (later C.J.C.) stated for the majority that:

> Traditionally the Crown Attorney has been described as a "minister of justice" and "ought to regard himself as part of the Court rather than as an advocate". (Morris Manning, "Abuse of Power by Crown Attorneys", [1979] L.S.U.C. Lectures 571, at p. 580, quoting Henry Bull, Q.C.) As regards the proper role of the Crown Attorney, perhaps no more often quoted statement is that of Rand J. in Boucher v. The Queen, [1955] S.C.R. 16, at pp. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

26 The majority of the British Columbia Court of Appeal found that the word "commission" in s. 487 (1) restricted its application to evidence that the accused had done those acts, or allowed those omissions, which constitute the elements of the offence. The criminal justice system is not solely concerned with whether a prima facie case can be made out against an accused, but whether he or she is ultimately guilty. The dissenting reasons of Southin J.A. are persuasive on both the purpose and meaning of s. 487(1). At para. 63 she stated:

> ... I would translate the words in issue to mean "touching upon whether a breach of the law involving a penal sanction has occurred". Whether or not there can be said to have been such a breach depends upon whether there can be a penal sanction and there can be no sanction without a conviction.

27 In addition, as pointed out by the intervener Attorney General of Ontario, denying the Crown the ability to gather evidence in anticipation of a defence would have serious consequences on the functioning of our justice system. In order to be fair, the criminal process must "enable the trier of fact to 'get at the truth and properly and fairly dispose of the case' while at the same time providing the accused with the opportunity to make a full defence"; R. v. Levogiannis, [1993] 4 S.C.R. 475, at p. 486. This reciprocal fairness demands that the Crown be able to fairly seek and obtain evidence rebutting the accused's defences. If the respondents' submission on the interpretation of s. 487(1) were accepted, a search warrant would never be available for this purpose. This narrow interpretation would frustrate the basic imperative of trial fairness and the search for truth in the criminal process.

C. Privacy Concerns

28 There is no doubt that search warrants are highly intrusive, and that an investigation bearing on the issue of due diligence could, as Shaw J. pointed out in Re Domtar, supra, at p. 119, "entail a detailed inquiry into the affairs of a corporation over a period of several years". This Court has endorsed the importance of privacy and the need to constrain search powers within reasonable limits: Hunter v. Southam Inc., [1984] 2 S.C.R. 145; Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860, at p. 889; Thomson Newspapers Ltd. v. Canada (Director of Research and Investigation, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at pp. 520-22; Baron v. Canada, [1993] 1 S.C.R. 416, at pp. 436-37.

29 The broad powers contained in s. 487(1) do not authorize investigative fishing expeditions, nor do they diminish the proper privacy interests of individuals or corporations. This is particularly true with respect to personnel records which may contain a great deal of highly personal information unrelated to the investigation at hand. Judges and magistrates should continue to apply the standards and safeguards which protect privacy from unjustified searches and seizures.

30 In this case, however, the specific terms of the warrant were not at issue, as the respondents challenged only the underlying authority to grant warrants for the purpose of investigating the presence

of negligence. In our opinion both a plain reading of the relevant section and consideration of the role and obligations of state investigators support the conclusion that s. 487(1) authorized the granting of the warrants at issue.

IV. Disposition

31 The appeal is allowed, without costs, as agreed by counsel.

cp/d/hbb

6

Case Name:

Markevich v. Canada

Her Majesty The Queen, appellant;
v.
Joe Markevich, respondent, and
Teck Cominco Metals Ltd., intervener.

[2003] S.C.J. No. 8

[2003] A.C.S. no 8

2003 SCC 9

2003 CSC 9

[2003] 1 S.C.R. 94

[2003] 1 R.C.S. 94

239 F.T.R. 159

223 D.L.R. (4th) 17

300 N.R. 321

J.E. 2003-506

2003 D.T.C. 5185

120 A.C.W.S. (3d) 532

File No.: 28717.

Supreme Court of Canada

Heard: December 4, 2002;
Judgment: March 6, 2003.

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

(56 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

Income tax -- Collection -- Limitation of actions -- Taxpayer failing to pay federal and provincial taxes for 1980 to 1985 taxation years as assessed by Revenue Canada in 1986 -- Revenue Canada taking no collection action until 1998 -- Whether federal and provincial limitation periods bar Revenue Canada from collecting taxpayer's federal and provincial tax debts -- Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 32 -- Limitation Act, R.S.B.C. 1996, c. 266, ss. 1, 3(5).

Crown -- Liability -- Prescription and limitation -- Collection of federal tax debt -- Whether term "proceedings" in federal limitation provision encompasses collection procedures available under Income Tax Act -- Whether cause of action arose "otherwise than in a province" -- Whether Income Tax Act complete code excluding application of federal limitation period to collection procedures -- Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 32.

Limitation of actions -- Collection of provincial tax debt -- Definition of action -- Whether phrase "self help remedy" in definition of "action" in provincial limitation legislation encompasses collection procedures available under provincial Income Tax Act -- Limitation Act, R.S.B.C. 1996, c. 266, ss. 1, 3 (5).

Summary:

In 1986, t he respondent, a resident of British Columbia, received a Notice of Assessment from the Minister of National Revenue that indicated a federal and provincial tax liability of $234,136 arising from a series of assessments and unpaid taxes in respect of his 1980 to 1985 taxation years. The respondent did not challenge this assessment, and paid nothing on the outstanding amount. From 1987 to 1998, Revenue Canada made no effort to collect the debt, and statements issued to the respondent during that period did not reflect the 1986 balance. In 1998, Revenue Canada sent a statement of account to the respondent that indicated a balance of $770,583, which included the amount owing as of 1986 and accrued interest. The respondent applied to the Federal Court, Trial Division, for judicial review of the 1998 claim, and sought a declaration that the Crown was prohibited from taking any steps to collect his tax debts for 1990 and prior years. The motions judge dismissed the application. The Federal Court of Appeal set aside that decision and held that the Crown was, pursuant to s. 32 of the *Crown Liability and Proceedings Act* ("*CLPA*") and s. 3(5) of the B.C. *Limitation Act*, statute-barred from collecting the respondent's federal and provincial tax debt.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.: The six-year limitation period prescribed by s. 32 of the *CLPA* bars the Crown from collecting the respondent's federal tax debt. First, as a law of general application, s. 32 presumptively applies on a residual basis to all Crown proceedings. The breadth of the provision's application can be narrowed only by an Act of Parliament that has "otherwise provided", either expressly or impliedly, for limitation periods. The *Income Tax Act* ("*ITA*") does not provide for limitation periods within its collection provisions, and the legislative silence with regard to prescription in these provisions, interpreted in conjunction with the express language used in the *ITA*'s assessment provisions, supports the finding that Parliament intended that limitation provisions of general application apply to the Minister's collection of tax debts. A purposive interpretation of the *ITA* confirms this conclusion. Furthermore, the certainty, evidentiary and diligence rationales for limitation periods do not offend the principles of horizontal and vertical equity

that should in part govern the *ITA* and are directly applicable to the collection of tax debts. Second, the ordinary meaning of the phrase "proceedings...in respect of a cause of action" in s. 32 encompasses the statutory collection procedures of the Minister. It would be incongruous to find that s. 32 was intended to apply to the court action but not to the statutory collection procedures that serve the identical purpose. The rationales that support the application of limitation provisions to Crown proceedings apply equally to both the court and non-court proceedings at issue here. To exclude s. 32's application to proceedings that are equivalent in purpose and effect to a court action would frustrate the object and aim of the provision. The legislative history of s. 32 also supports the inference that Parliament intended its application to extend beyond proceedings in court. Third, on both a plain and purposive reading of s. 32, the cause of action in this case arose "otherwise than in a province". Tax debts created under the *ITA* arise pursuant to federal legislation and create rights and duties between the federal Crown and residents of Canada or those who have earned income within Canada. The debt may arise from income earned in a combination of provinces or in a foreign jurisdiction. The debt is owed to the federal Crown, which is not located in any particular province and does not assume a provincial locale in its assessment of taxes.

The Minister, in its role as agent of the province of British Columbia, is also barred by s. 3(5) of the B.C. *Limitation Act* from collecting the respondent's provincial tax debt arising under the British Columbia *Income Tax Act* ("B.C. *ITA*"). Section 3(5) applies a limitation period of six years to actions for which prescription is not "specifically provided for" in another Act. Under s. 1 of the B.C. *Limitation Act*, an action is defined as including "any proceeding in a court and any exercise of a self help remedy". The term "self help remedy" encompasses the statutory collection procedures available under the B.C. *ITA*. A statutory collection procedure is a self help mechanism by which the Minister is able to effect a result that could otherwise be achieved only through an action in court. As well, the B.C. *ITA* does not specifically provide for limitation periods in its collection provisions. Since the province's collection rights are subject to expiry six years after the underlying cause of action arose, so too are the collection rights of the federal Crown as its agent.

Per Gonthier and Deschamps JJ.: The conclusion that the cause of action arises "otherwise than in a province" is inappropriate in two ways. First, it emphasizes the residence of the creditor instead of relying on the connecting factors of the cause of action. Second, it means that the federal government is not located anywhere in Canada. Common sense dictates that the federal Crown is located in every province. Since the federal government is, by virtue of its agreement with all of the provinces (except Quebec), responsible for collecting all provincial income taxes, it is sensible to bind its federal tax claim to the limits available on the provincial one. Efficiency is thus preserved by invoking one limitation for both the federal and provincial income tax debts arising in each province other than Quebec. Here, all of the connecting factors point to British Columbia. Consequently, the British Columbia six-year limitation period should apply.

Cases Cited

By Major J.

Referred to: Will-Kare Paving & Contracting Ltd. v. Canada, [2000] 1 S.C.R. 915, 2000 SCC 36; 65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804; Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536; Friesen v. Canada, [1995] 3 S.C.R. 103; M. (K.) v. M. (H.), [1992] 3 S.C.R. 6; Symes v. Canada, [1993] 4 S.C.R. 695; Ross v. Canada, [2002] 2 C.T.C. 222, 2002 FCT 401; MacKinnon v. Canada, [2002] 4 C.T.C. 48, 2002 FCT 824; Royce v. MacDonald (Municipality) (1909), 12 W.L.R. 347; Nowegijick v. The Queen, [1983] 1 S.C.R. 29; Letang v. Cooper, [1964] 2 All E.R. 929; Domco Industries Ltd. v. Mannington Mills, Inc. (1990), 29 C.P.R. (3d) 481; Berardinelli v. Ontario Housing Corp., [1979] 1 S.C.R. 275; E. H. Price Ltd. v. The Queen, [1983] 2 F.C. 841.

By Deschamps J.

Referred to: Williams v. Canada, [1992] 1 S.C.R. 877.

Statutes and Regulations Cited

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 32 [rep. & sub. 1990, c. 8, s. 31].

Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 38(2).

Federal Court Act, R.S.C. 1985, c. F-7, s. 39(3) [rep. 1990, c. 8, s. 10].

Income Tax Act, R.S.B.C. 1996, c. 215, ss. 1(7), 49, 69.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 152(4), 152(4.2), 159(3), 160(2), 160.1(3), 160.2(3), 160.3(2), 160.4(3), 222, 223(2), (3), (5) to (8), 224(1), 225(1), 225.1(1) to 225.1(4), 227(10.1).

Interpretation Act, R.S.B.C. 1996, c. 238, s. 14(1).

Limitation Act, R.S.B.C. 1996, c. 266, ss. 1 "action", 3(5), 9(1), (3).

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal, [2001] 3 F.C. 449, 199 D.L.R. (4th) 255, 270 N.R. 275, 2001 D.T.C. 5305, [2001] 3 C.T.C. 39, [2001] F.C.J. No. 696 (QL), 2001 FCA 144, reversing a judgment of the Trial Division, [1999] 3 F.C. 28, 163 F.T.R. 209, 172 D.L.R. (4th) 164, 99 D.T.C. 5136, [1999] 2 C.T.C. 104, [1999] F.C.J. No. 250 (QL). Appeal dismissed.

Counsel:

Graham R. Garton, Q.C., and Carl Januszczak, for the appellant.

Ian Worland, for the respondent.

Edwin G. Kroft, and Geoffrey T. Loomer, for the intervener.

The judgment of McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ. was delivered by

1 **MAJOR J.**:-- The issue in this appeal is narrow and easily stated: that is, whether federal and provincial limitation periods when exceeded apply to the Crown's ability to exercise its statutory powers to collect tax debts. I have concluded that the limitation period prescribed by s. 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 ("*CLPA*"), bars the Crown from collecting the respondent's federal tax debt, and that s. 3(5) of the British Columbia *Limitation Act*, R.S.B.C. 1996, c. 266 ("B.C. *Limitation Act*") bars the Crown from collecting the respondent's provincial tax debt.

I. Factual Background

2 The respondent was a resident of British Columbia at all times relevant to this appeal. He received a Notice of Assessment from the Minister of National Revenue (the "Minister") dated June 17, 1986, that indicated a federal and provincial tax liability of $234,136.04 arising from a series of assessments and unpaid taxes in respect of his 1980 to 1985 taxation years. The respondent did not challenge this assessment, and paid nothing on the outstanding amount after 1986. In 1987, while of no consequence to this appeal, the indebtedness was internally written off by Revenue Canada, but was not extinguished or forgiven. From 1987 to 1998, Revenue Canada made no effort to collect the debt, and statements issued to the respondent during that period did not reflect the 1986 balance. However, on January 15, 1998, approximately 12 years after the Notice of Assessment, Revenue Canada, for the first time during this period, sent a statement of account to the respondent that indicated a balance of $770,583.42, which included the amount owing as of June 17, 1986, and accrued interest.

3 The respondent applied to the Trial Division of the Federal Court for judicial review of the January 15, 1998 claim, and sought a declaration that the Crown was prohibited from taking any steps to collect his tax debts for 1990 and prior years. The motions judge dismissed the application. The Federal Court of Appeal allowed the appeal from that decision, and held that the Crown was statute-barred from collecting the respondent's tax debt reflected in the 1986 Notice of Assessment. The Crown appeals from that decision.

II. Relevant Statutory Provisions

4 The following statutory provisions are relevant:

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

222. All taxes, interest, penalties, costs and other amounts payable under this Act are debts due to Her Majesty and recoverable as such in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.

223... .

(2) An amount payable by a person (in this section referred to as a "debtor") that has not been paid or any part of an amount payable by the debtor that has not been paid may be certified by the Minister as an amount payable by the debtor.

(3) On production to the Federal Court, a certificate made under subsection (2) in respect of a debtor shall be registered in the Court and when so registered has the same effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the Court against the debtor for a debt in the amount certified plus interest thereon to the day of payment as provided by the statute or statutes referred to in subsection (1) under which the amount is payable and, for the purpose of any such proceedings, the certificate shall be deemed to be a judgment of the Court against the debtor for a debt due to Her Majesty, enforceable in the amount certified plus interest thereon to the day of payment as provided by that statute or statutes.

224. (1) Where the Minister has knowledge or suspects that a person is, or will be within one year, liable to make a payment to another person who is liable to make a payment under this Act (in this subsection and subsections (1.1) and (3) referred to as the "tax debtor"), the Minister may in writing require the person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.

225. (1) Where a person has failed to pay an amount as required by this Act, the Minister may give 30 days notice to the person by registered mail addressed to the person's latest known address of the Minister's intention to direct that the person's goods and chattels be seized and sold, and, if the person fails to make the payment before the expiration of the 30 days, the Minister may issue a certificate of the failure and direct that the person's goods and chattels be seized.

225.1 (1) Where a taxpayer is liable for the payment of an amount assessed under this Act, other than an amount assessed under subsection 152(4.2), 169(3) or 220(3.1), the Minister shall not, for the purpose of collecting the amount, [take any collection action] until after the day that is 90 days after the day of the mailing of the notice of assessment.

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be

taken within six years after the cause of action arose.

British Columbia *Limitation Act*, R.S.B.C. 1996, c. 266

1 ...

"action" includes any proceeding in a court and any exercise of a self help remedy;

3 ...

(5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

9 (1) On the expiration of a limitation period set by this Act for a cause of action to recover any debt, damages or other money, or for an accounting in respect of any matter, the right and title of the person formerly having the cause of action and of a person claiming through the person in respect of that matter is, as against the person against whom the cause of action formerly lay and as against the person's successors, extinguished.

...

(3) A cause of action, whenever arising, to recover costs on a judgment or to recover arrears of interest on principal money is extinguished by the expiration of the limitation period set by this Act for an action between the same parties on the judgment or to recover the principal money.

III. Judicial History

5 At the Federal Court, Trial Division ([1999] 3 F.C. 28), the motions judge held that s. 32 of the *CLPA* does not apply to the statutory collection procedures authorized by the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"). He found both that the collection procedures do not qualify under s. 32 as proceedings in respect of a cause of action, and that the *ITA* is a complete code in itself that excludes the application of s. 32 . The motions judge also held that the B.C. *Limitation Act* does not apply to the Crown's collection of the provincial tax debt under the British Columbia *Income Tax Act*, R.S.B.C. 1996, c. 215 ("B.C. *ITA*"). As a result, his conclusion was that neither the Crown's collection of the federal nor the provincial tax debt was subject to the limitation periods.

6 The Federal Court of Appeal disagreed and allowed the appeal ([2001] 3 F.C. 449, 2001 FCA 144). Rothstein J.A. decided that the *ITA* is not a complete code that excludes the application of s. 32 of the *CLPA*, and that the statutory collection procedures qualify as proceedings in respect of a cause of action under s. 32 . Consequently, the limitation period prescribed by s. 32 applies to the statutory collection procedures in the *ITA*. He held that the relevant limitation provision was s. 3(5) of the B.C. *Limitation Act*. Section 3(5) includes both court proceedings and self help remedies, and so applies to both court and statutory collection procedures under the *ITA*. Owing to this provision, the Minister was barred from

collecting the federal tax debt six years after the right to do so arose. Rothstein J.A. also concluded that s. 3(5) bars the Crown, in its role as collection agent for British Columbia under the B.C. *ITA*, from pursuing the taxpayer's provincial debt.

IV. Issues

7 The appeal raises the following issues:

1. (a) Are statutory collection proceedings under the *ITA* subject to a limitation period pursuant to s. 32 of the *CLPA*? This requires the determination of:
   - (i) Does the *ITA* provide for limitation periods for the collection of tax debts, or otherwise exclude the operation of s. 32 of the *CLPA*?
   - (ii) Is the exercise of a statutory collection power a "proceeding ... in respect of any cause of action" under s. 32?
   - (b) If s. 32 is found to apply to the statutory collection proceedings, does the cause of action arise in a province or otherwise than in a province?
2. Does the B.C. *Limitation Act* apply to statutory collection proceedings undertaken by the Crown acting as collection agent for the Province of British Columbia pursuant to the B.C. *ITA*?

V. Analysis

A. *The Federal Tax Debt*

(1) Is the Federal Tax Debt Subject to Section 32 of the *CLPA*?

8 Prior to an analysis of the problem, it is useful to describe the broad collection powers available under the *ITA*. The Minister is authorized to collect tax debts by means of either a court action or statutory collection procedures. Section 222 of the *ITA* provides:

> All taxes, interest, penalties, costs and other amounts payable under this Act are debts due to Her Majesty and recoverable as such in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.

The various collection mechanisms enumerated in the *ITA* provide the Minister with an extensive range of remedies to recover debts. The Minister may certify an unpaid tax amount (s. 223(2)) and register the certificate in the Federal Court (s. 223(3)), at which point the certificate is deemed to be a judgment of that court. The Federal Court can then issue a certificate, notification, or writ evidencing the s. 223(2) certificate, which can be used by the Minister to create a charge, lien, priority, or other interest on property in any province (ss. 223(5) to 223(8)). Under the garnishment provision of s. 224(1), the Minister may require a third party who is indebted to the taxpayer to make payments directly to the Minister. The Minister may also order the seizure and sale of the taxpayer's goods and chattels under s. 225(1). These collection powers cannot be exercised until 90 days after the later of the mailing of a notice of assessment or the mailing of a confirmation or variation of the assessment, or until the taxpayer's appeal has been finally determined by the Tax Court of Canada (ss. 225.1(1) to 225.1(4)).

9 The outcome of this appeal narrows to whether the exercise of these collection powers is subject to prescription under s. 32 of the *CLPA*. Section 32 applies limitation periods to proceedings brought by or against the Crown in all cases unless Parliament has otherwise provided. The section states:

> Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose. [Emphasis added.]

The section applies to the statutory collection procedures if two criteria are met. First, the *ITA* must not otherwise provide for limitation periods with respect to the collection of tax debts. Second, the statutory collection procedures must qualify under s. 32 as "proceedings ... in respect of a cause of action".

10 I agree with the reasons of the Federal Court of Appeal that each of the two criteria is met in this case, and that s. 32 must apply to the Crown's exercise of statutory collection powers.

(a) *Does the ITA Otherwise Provide for Prescription?*

11 As a law of general application, s. 32 of the *CLPA* presumptively applies on a residual basis to all Crown proceedings. The breadth of the provision's application can be narrowed only by an Act of Parliament that has "otherwise provided", either expressly or impliedly, for limitation periods. It is evident that the *ITA* does not provide for limitation periods within its collection provisions.

12 The noted author E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87, stated that the modern approach to statutory interpretation requires the words of an Act "to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". These principles have frequently been adopted by this Court both generally and in the construction of taxation legislation: see *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 S.C.R. 915, 2000 SCC 36, at para. 32; *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, both in the majority and minority concurring reasons , and *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578.

13 The assessment provisions of the *ITA* are clearly stated on prescription. By contrast, the collection provisions of the *ITA* are silent with respect to prescription. There is no reference in s. 222 or its accompanying provisions to either the absence or presence of a limitation period. Nonetheless, the appellant submits that the *ITA* has "otherwise provided" for prescription. In the appellant's submission, the *ITA* constitutes a complete statutory scheme for the collection of taxes, and so silence in the legislation indicates Parliament's intent to avoid fettering the Crown's collection powers with limitation periods.

14 There is no authority to support the proposition that the *ITA* is a complete code that cannot be informed by laws of general application. The *ITA* does not operate in a legislative vacuum: see *Will-Kare, supra*, at para. 31. See also P. W. Hogg, J. E. Magee and T. Cook, *Principles of Canadian Income Tax Law* (3rd ed. 1999), at p. 2, where the authors note that the "Income Tax Act relies implicitly on the general law". Accordingly , whether a statute or legal principle affects the operation of the *ITA* must be decided by an analysis of the specific provisions involved.

15 Absent legislation or judicial support, the appellant nonetheless requests the Court to interpret s. 222 of the *ITA* as if it permits the collection of tax debts "at any time". It is "a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording": see *Friesen v. Canada*, [1995] 3 S.C.R. 103, at para. 27. This principle weighs against accepting the appellant's interpretation. The provision does not include the words "at any time", and is

capable of a reasonable construction without that insertion. The legislative silence with regard to prescription gives rise to the logical inference that Parliament intended for limitation provisions of general application to apply to the Minister's collection powers.

16 This conclusion is supported by the explicit manner in which the *ITA* addresses limitation periods in its assessment provisions. The Court held in *Friesen, supra*, at para. 27, that "[r]eading extra words into a statutory definition is even less acceptable when the phrases which must be read in appear in several other definitions in the same statute". Numerous provisions in the *ITA* expressly stipulate that the Minister may make an assessment "at any time": see ss. 152(4), 152(4.2), 159(3), 160(2), 160.1(3), 160.2(3), 160.3(2), 160.4(3), and 227(10.1). Parliament has demonstrated a clear willingness to address the issue of limitation periods in the *ITA* where it sees fit to do so. As Rothstein J.A. noted at para. 22, "Parliament has put its mind to the limitation question in the *Income Tax Act* and when it intends there to be no limitation period, it has so stated." Accordingly, the unescapable conclusion is that the plain language used in the collection provisions does not support the inference that Parliament intended to exclude the application of limitation provisions to the Minister's collection powers.

17 In finding that the collection provisions implicitly exclude s. 32, the learned motions judge appeared to rely predominantly on s. 225.1 of the *ITA*, which prevents the Minister from initiating collection procedures pending objection or appeal of an assessment by the taxpayer. With respect, I do not agree that s. 225.1 lends any weight to the appellant's argument. The statutory stay prescribed by s. 225.1 is directed towards protecting the taxpayer from collection action pending a final determination of the validity of his or her assessment. Limitation periods, on the other hand, are meant to promote certainty, avoid stale evidence, encourage diligence, and bring repose: see *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at p. 29, *per* La Forest J. The rationales outlined above for stays and limitation provisions are entirely distinct. I agree with Rothstein J.A.'s conclusion at para. 21:

> The enactment of a statutory stay which specifies when collection action may commence, cannot logically support the inference that Parliament considered that no limitation period should apply to that collection action.

18 A purposive analysis of the *ITA* confirms that the collection provisions do not by implication exclude the operation of s. 32. The application of limitation periods to the collection of tax debts does not offend the principles of horizontal and vertical equity that, as Iacobucci J. noted in *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 738, should in part govern the *ITA*. The appellant submits that applying laws of prescription to tax collection would unfairly alleviate the tax burden of individuals who experience fluctuations in income at the expense of those who enjoy a steady stream of income. This apparent problem can be averted, however, by the Minister's reasonably diligent exercise of debt collection. If a taxpayer does not have the ability to satisfy a tax debt prior to the expiration of the limitation period, the Minister can choose from a variety of means to extend the limitation period. In *Ross v. Canada*, [2002] 2 C.T.C. 222, 2002 FCT 401, the Federal Court, Trial Division, held that the registration of a certificate with the Federal Court in accordance with s. 223(3) of the *ITA* gives rise to a renewal of the limitation period. See also *MacKinnon v. Canada*, [2002] 4 C.T.C. 48, 2002 FCT 824, where the court found that the taxpayer's acknowledgement of indebtedness by way of a hypothecation agreement with the Minister, and his partial payment of the tax debt, each served to renew the limitation period. There is no need to exhaustively set out the ways in which the Minister can extend the limitation period, other than to note that there are numerous avenues open to the Minister by which renewals may be effected. There is no credible basis to support the submission that the laws of prescription will undermine the equitable collection of taxes when minimum diligence would have the opposite effect.

19 The appellant's submission that the rationales for limitation periods militate against their application to tax collection cannot be correct. As noted above, limitation provisions are based upon

what have been described as the certainty, evidentiary, and diligence rationales: see *M. (K.), supra*, at p. 29 . The certainty rationale recognizes that, with the passage of time, an individual "should be secure in his reasonable expectation that he will not be held to account for ancient obligations": *M. (K.), supra*, at p. 29. The evidentiary rationale recognizes the desire to preclude claims where the evidence used to support that claim has grown stale. The diligence rationale encourages claimants "to act diligently and not 'sleep on their rights'": *M. (K.), supra*, at p. 30.

20 Each of the rationales submitted as applicable to there being no limitation periods affecting collection are in fact just the opposite and are directly applicable to the Minister's collection of tax debts. If the Minister makes no effort to collect a tax debt for an extended period, at a certain point a taxpayer may reasonably come to expect that he or she will not be called to account for the liability, and may conduct his or her affairs in reliance on that expectation. As well, a limitation period encourages the Minister to act diligently in pursuing the collection of tax debts. In light of the significant effect that collection of tax debts has upon the financial security of Canadian citizens, it is contrary to the public interest for the department to sleep on its rights in enforcing collection. It is evident that the rationales which justify the existence of limitation periods apply to the collection of tax debts.

21 The legislative silence with regard to prescription in these provisions, interpreted in conjunction with the express language used in the *ITA*'s assessment provisions, supports the finding that Parliament intended that limitation provisions of general application apply to the Minister's collection of tax debts. A purposive interpretation of the statute confirms this conclusion. There was no evidence before the Court to lend any support to the submission that laws of prescription would frustrate the equitable collection of taxes. Finally, the rationales for limitation periods for the reasons given apply directly to the collection of tax debts.

22 As a result, whether s. 32 of the *CLPA* applies to the Minister's statutory collection procedures depends entirely upon whether such procedures qualify under s. 32 as "proceedings ... in respect of a cause of action".

(b) *Do the Statutory Collection Procedures Qualify as "Proceedings ... in Respect of a Cause of Action"?*

23 The application of s. 32 is limited to "proceedings by or against the Crown in respect of a cause of action".

24 Interpreted in their grammatical and ordinary sense, these words clearly encompass the statutory collection procedures in the *ITA*. Although the word "proceeding" is often used in the context of an action in court, its definition is more expansive. The Manitoba Court of Appeal stated in *Royce v. MacDonald (Municipality)* (1909), 12 W.L.R. 347, at p. 350, that the "word 'proceeding' has a very wide meaning, and includes steps or measures which are not in any way connected with actions or suits". In *Black's Law Dictionary* (6th ed. 1990), at p. 1204, the definition of "proceeding" includes, *inter alia*, "an act necessary to be done in order to obtain a given end; a prescribed mode of action for carrying into effect a legal right".

25 The statutory collection procedures closely resemble various proceedings in court. The registration of a certificate in Federal Court is deemed by s. 223(3) to be a judgment of that court. As Rothstein J.A. notes at para. 35:

> A requirement to pay under section 224 (as am. by S.C. 1994, c. 21, s. 101) is analogous to a garnishing order issued by a court... . Seizure and sale of chattels under subsection 225(1) is a provision closely parallel to a writ of execution issued by a court.

By granting the power to effect the collection of tax debts in this manner, Parliament has provided the Minister with an efficient and expeditious alternative to bringing a court action. However, the court and non-court collection procedures are identical in purpose. Both are mechanisms by which the Minister is able to enforce the collection of tax debts and thereby carry into effect the legal rights of the Crown. It is evident that both kinds of procedures are appropriately characterized as legal proceedings.

26 The appellant's submission turns on whether these proceedings are undertaken "in respect of a cause of action". The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters. See *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39, *per* Dickson J. (as he then was):

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

In the context of s. 32, the words "in respect of" require only that the relevant proceedings have some connection to a cause of action.

27 A "cause of action" is only a set of facts that provides the basis for an action in court: see *Letang v. Cooper*, [1964] 2 All E.R. 929 (C.A.), at p. 934; *Domco Industries Ltd. v. Mannington Mills, Inc.* (1990), 29 C.P.R. (3d) 481 (F.C.A.), *per* Iacobucci C.J. (as he then was), at p. 496; and *Black's Law Dictionary, supra*, at p. 221. In this case, s. 222 of the *ITA* provides that unpaid taxes constitute a debt recoverable by means of a court action, subject to the stay of collection action prescribed by s. 225.1. As a result, as Rothstein J.A. notes at para. 37, the cause of action here involves "the existence of a tax debt and the expiry of the delay period entitling the Minister to take collection action".

28 In light of the above analysis, the ordinary meaning of the phrase "proceedings ... in respect of a cause of action" encompasses the statutory collection procedures of the Minister. The exercise of the statutory proceedings is entirely dependent upon a set of facts that would support action by the Minister, i.e., the existence of a tax debt and the expiry of the delay period prescribed by s. 225.1.

29 I now turn to the French version of s. 32, which states:

> Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

30 The words "*poursuite*", "*procédure*" and "*instance*" are all used to render the term "proceedings" in different contexts. "*Procédure*" is even used to describe a cause of action, as demonstrated by the wording of s. 32 of the *CLPA*. This can also be verified in some French publications on the translation of English law (see for instance Bouscaren, Greenstein & Cordahi, *Les bases du droit anglais* (1981)). It is therefore difficult to consider the definition of a single expression to determine the common meaning of the English and French versions of s. 32. Indeed, the legislative history of s. 32, beginning with s. 38(2) (R.S.C. 1970, c. 10 (2nd Supp.)) and later s. 39(3) (R.S.C. 1985, c. F-7) of the *Federal Court Act* ("*FCA*"), which as discussed below were its precursors, also denotes both that context matters and that changes in terminology are not necessarily meant to bring about a change in the substantive law.

31 If we were to confine our analysis to the word "*poursuite*", we would find that generally, in

Canada, that word excludes non-court proceedings: the term is defined in H. Reid, *Dictionnaire de droit québécois et canadien* (2nd ed. 2001), in the following way, at p. 425:

> [TRANSLATION]
>
> 1. Court action brought by a person in order to assert his right or obtain a sanction against the perpetrator of an offence. E.g.: A creditor's proceedings [*poursuite*] against his debtor.

But French dictionaries, which are also used in Canada, ascribe a broader definition to "*poursuite*". G. Cornu, in *Vocabulaire juridique* (8th ed. 2000), at p. 654, writes:

> [TRANSLATION] Exercise of a remedy [*voie de droit*] to compel someone to perform his obligations or submit to the orders of the law or of the public authority.

Cornu further defines "*voie de droit*" as follows (at p. 909):

> [TRANSLATION] Means given by the law to citizens to have their rights recognized and respected or to defend their interests; generic term encompassing court action, means (jurisdictional) of redress, executions, administrative recourses; by ext., any jurisdictional proceeding even initiated by the prosecution.

General dictionaries such as *Le Petit Larousse* (2003) define "*poursuite*" as a court proceeding, but also as [TRANSLATION] "[a]n action by the tax authorities to collect treasury debts".

32 It would therefore be difficult to conclude definitively that "*poursuite*" is more restrictive than "proceedings" and that this is determinative in the context of s. 32. It is then necessary, in this case, to conclude that the common meaning of the English and French versions of the provision is unclear and that resort to the other rules of statutory interpretation is necessary in order to discern Parliament's intent. Applying those rules, construing s. 32 in context, harmoniously with the purpose of the *CLPA*, I have concluded that it was meant to include administrative mechanisms that enable the Crown to achieve exactly the same result as it would through a formal action in court.

33 At common law, the Crown was not bound by limitation periods unless a federal statute expressly provided otherwise. On the other hand, the Crown was entitled to the benefit of a limitations defence in proceedings brought against it: see D. Sgayias et al., *The Annotated Crown Liability and Proceedings Act 1995* (1994), at pp. 135-36, and P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 71. The purpose of s. 32 is obviously, in the search for equity, to extend the same benefit of laws of prescription to subjects defending themselves against proceedings brought by the Crown.

34 A court action brought by the Minister to recover tax debt in this appeal would be subject to the limitation provisions in s. 32. It would be incongruous to find that s. 32 of the *CLPA* was intended to apply to the court action but not to the statutory collection procedures that serve the identical purpose. The certainty, evidentiary and diligence rationales that support the application of limitation provisions to Crown proceedings apply equally to both the court and non-court proceedings at issue here. See *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275, *per* Estey J., at p. 284:

> When one interpretation can be placed upon a statutory provision which would bring about a more workable and practical result, such an interpretation should be preferred if the words invoked by the Legislature can reasonably bear it ... .

There is no reason to infer that Parliament intended for s. 32's application to turn solely upon the

technicality of whether the relevant proceeding took place in court. To exclude s. 32's application to proceedings that are equivalent in purpose and effect to a court action would frustrate the object and aim of the provision.

35 The legislative history of s. 32 of the *CLPA* supports the inference that Parliament intended for its application to extend beyond proceedings in court. Section 38 of the *FCA* was enacted in 1971 (R.S.C. 1970, c. 10 (2nd Supp.)), and later renumbered as s. 39 of R.S.C. 1985, c. F-7. Section 38(2), which was succeeded by s. 39(3), applied limitation provisions to proceedings brought by or against the Crown. Section 39 of the *FCA* stated:

> **39.** (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in that province.
>
> (2) A proceeding in the Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.
>
> (3) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions referred to in subsections (1) and (2) apply to any proceedings brought by or against the Crown.

Prior to 1992, s. 32 of the *CLPA* (then entitled the *Crown Liability Act*), applied only to tort actions against the Crown. By S.C. 1990, c. 8, ss. 10, and 31, s. 39(3) of the *FCA* was repealed and s. 32 of the *CLPA* was amended to apply to all proceedings in respect of a cause of action brought both by and against the Crown.

36 It is readily apparent, as the Federal Court of Appeal notes at para. 49, that s. 38(2) and later s. 39 (3) were the predecessors to the current s. 32 of the *CLPA*. In determining the legislative intent behind the current wording in s. 32, it is useful to examine the judicial interpretation given to the provisions that came before it. In *E. H. Price Ltd. v. The Queen*, [1983] 2 F.C. 841, the Federal Court of Appeal considered whether s. 38(2) of the *FCA* applied to the Minister's registration of a certificate under the *Excise Tax Act*. In *obiter*, Clement D.J. held at pp. 847-48 that in the absence of the limiting words "in the Court" that were contained in s. 38(1), "proceedings" under s. 38(2) were not limited to court proceedings and included the Minister's registration of a certificate. In its subsequent amendment of s. 32 of the *CLPA*, Parliament did not include the words "in the court" or words of a similar limiting effect. As Rothstein J.A. found at para. 50, "it is a fair inference that Parliament, not having done so, meant to adopt the interpretation in *E. H. Price* so that 'proceedings' in section 32 include all legal processes in respect of a cause of action, whether court or otherwise". Although the words "in respect of a cause of action" were not included in s. 39(3), for the reasons I have outlined, the inclusion of these words in s. 32 does not have the effect of limiting the provision's application to proceedings in court.

37 I conclude that the English version best reflects the intent of the legislator. As a result, it should be determined which particular limitation period provided by s. 32 applies to these proceedings. This depends upon whether the cause of action on the federal tax debt arose in a province or otherwise than in a province.

(2) Does the Cause of Action Arise in a Province, or Otherwise than in a Province?

38 Section 32 applies provincial limitation laws to proceedings in respect of a cause of action arising in a province, and a six-year limitation period to those which arise otherwise than in a province. The

motions judge, at para. 59, would have found that the cause of action arose otherwise than in a province. The Court of Appeal applied the provincial limitation provision and so, implicitly at least, found that the cause of action arose in a province. In this appeal, the matter is of no particular consequence, because in either case the limitation period runs for six years from the date upon which the cause of action arose . Nonetheless, I conclude that the appellant's cause of action arose otherwise than in a province, and hence that the six-year limitation period provided by s. 32 applies.

39 Tax debts created under the *ITA* arise pursuant to federal legislation and create rights and duties between the federal Crown and residents of Canada or those who have earned income within Canada. The debt may arise from income earned in a combination of provinces or in a foreign jurisdiction. The debt is owed to the federal Crown, which is not located in any particular province and does not assume a provincial locale in its assessment of taxes. Consequently, on a plain reading of s. 32, the cause of action in this case arose "otherwise than in a province".

40 A purposive reading of s. 32 supports this finding. If the cause of action were found to arise in a province, the limitation period applicable to the federal Crown's collection of tax debts could vary considerably depending upon the province in which the income was earned and its limitation periods. In addition to the administrative difficulties that potentially arise from having to determine the specific portions of tax debts that arise in different provinces, the differential application of limitation periods to Canadian taxpayers could impair the equitable collection of taxes. Disparities amongst provincial limitation periods could foreseeably lead to more stringent tax collection in some provinces and more lenient collection in others. The Court can only presume that in providing for a limitation period of six years to apply to proceedings in respect of a cause of action arising otherwise than in a province, Parliament intended for limitation provisions to apply uniformly throughout the country with regard to proceedings of the kind at issue in this appeal.

41 I conclude that the collection proceedings under the *ITA* are subject to prescription six years after the cause of action arose. As noted above, the cause of action in this case comprised the respondent's tax debt and the expiry of the 90-day delay period after the mailing of the Notice of Assessment dated June 17, 1986. As a result, the cause of action arose on September 16, 1986. The Minister undertook no action in the six years after that date to effect a renewal of the limitation period. Consequently, as of September 16, 1992, s. 32 of the *CLPA* barred the Minister from collecting the respondent's 1986 federal tax debt. Limitation periods have traditionally been understood to bar a creditor's remedy but not his or her right to the underlying debt. In my view, this is a distinction without a difference. For all intents and purposes, the respondent's federal tax debt is extinguished.

B. *The Provincial Tax Debt*

42 The final issue is whether the Minister, in his or her role as agent of the province of British Columbia, is barred by the B.C. *Limitation Act* from collecting tax debts arising under the B.C. *ITA*.

43 Section 49 of the B.C. *ITA* provides that s. 222 of the *ITA* applies for the purposes of the B.C. *ITA*, subject, as *per* s. 1(7), to such modifications as the circumstances require to make it applicable to British Columbia. Accordingly, tax debts arising under the B.C. *ITA* are debts owed to the province.

44 Section 69 of the B.C. *ITA* authorizes British Columbia's Minister of Finance and Corporate Relations to enter into a collection agreement whereby the federal government agrees to collect taxes payable under the B.C. *ITA* and remit those taxes to the provincial government. A collection agreement of this kind between British Columbia and the Government of Canada has been in place since 1962: Memorandum of Agreement, January 28, 1962. Subsection 1(1) of this agreement states as follows:

> Canada, as agent of the Province, will collect for and on behalf of the Province

the income taxes imposed under the [B.C. *ITA*] ... . [Emphasis added.]

45 As a result, the provincial government, as principal, has delegated its right to collect tax debts to the federal government, its agent. It has long been accepted that the authority, express or implied, of every agent is confined within the limits of the powers of his or her principal: see F. M. B. Reynolds, *Bowstead and Reynolds on Agency* (16th ed. 1996), at p. 110. Accordingly, in order to determine the collection rights that are delegated to the federal government, it is necessary to determine the collection rights of the province.

46 The B.C. *Limitation Act* governs the law on limitations of actions within British Columbia. Section 14(1) of the British Columbia *Interpretation Act*, R.S.B.C. 1996, c. 238, states that unless an enactment specifically provides otherwise it is binding on the Government of British Columbia. The B.C. *Limitation Act* does not provide otherwise, and so its provisions apply to proceedings brought by and against the provincial government.

47 Section 3(5) of the B.C. *Limitation Act* applies a limitation period of six years to actions for which prescription is not "specifically provided for" in another Act. Under s. 1 of the B.C. *Limitation Act*, an action is defined as including "any proceeding in a court and any exercise of a self help remedy". I agree with both the motions judge and the Court of Appeal that the term "self help remedy" encompasses the statutory collection procedures available under the B.C. *ITA*. A statutory collection procedure is a self help mechanism by which the Minister is able to effect a result that could otherwise be achieved only through an action in court. As well, the B.C. *ITA* does not specifically provide for limitation periods in its collection provisions.

48 Consequently, the province's right to pursue collection proceedings under the B.C. *ITA* is subject to the limitation period set out in s. 3(5) of the B.C. *Limitation Act*. Moreover, pursuant to s. 9(1) of the B.C. *Limitation Act*, on the expiration of the limitation period, the province's right and title to the tax debt is extinguished, and pursuant to s. 9(3), the province's right and title to interest on the tax debt is extinguished.

49 As noted above, the federal Crown's right to collect provincial taxes in this case is no greater than the right delegated to it by the province. Since the province's collection rights are subject to expiry six years after the underlying cause of action arose, so too are the collection rights of the federal Crown as its agent.

50 The cause of action here consisted of the tax debt and the expiry of the delay period allowing collection action to be taken on September 16, 1986. The Minister undertook no action in the six years after that date to effect a renewal of the limitation period. Consequently, as of September 16, 1992, the federal Crown became statute-barred from collecting the provincial tax debt. As well, the right and title of any claimant to the respondent's provincial tax debt, and its accrued interest, were extinguished on that date.

VI. Conclusion

51 For the foregoing reasons, I would dismiss the appeal with costs.

The reasons of Gonthier and Deschamps JJ. were delivered by

52 DESCHAMPS J.:-- I agree with the reasons of my colleague, Justice Major, except on one point.

53 In determining where the cause of action arises under s. 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, Major J. focusses on the location of the federal government. The conclusion that the cause of action arises "otherwise than in a province" is, in my view, inappropriate in two ways. First, it emphasizes the residence of the creditor instead of relying on the connecting factors of the cause of action and second, it means that the federal government is not located anywhere in Canada or, as the French version of s. 32 reads, the federal government would be located "*ailleurs que dans une province*". Common sense, rather, would dictate that the federal Crown is located in every province and not "otherwise than in a province" .

54 The cause of action concept is more readily understood in negligence cases. Here, however, the claim has a statutory foundation. It may be characterized as a right *in personam*, i.e. the right of the Crown against the taxpayer. This Court, in *Williams v. Canada*, [1992] 1 S.C.R. 877, dealt with a similar problem in a case concerned with a tax exemption. Although the residence criterion was modified in favour of a test encompassing all connecting factors, the *situs* analysis was upheld to determine the location of the debt. This concept is also used in private international law in order to determine where enforcement of a claim can be pursued: J.-G. Castel and J. Walker, *Canadian Conflict of Laws* (5th ed. (loose-leaf)), at para. 22.2.

55 Applying the connecting factors test used in *Williams*, the factors would be the respondent's residence, his place of employment and the place where his income was received. All of these factors point to British Columbia. The British Columbia six-year limitation period should apply.

56 Since the federal government is, by virtue of its agreement with all of the provinces (except Quebec), responsible for collecting all provincial income taxes, it is sensible to bind its federal tax claim to the limits available on the provincial one. Efficiency is thus preserved by invoking one limitation for both the federal and provincial income tax debts arising in each province, other than Quebec.

Solicitors:

Solicitor for the appellant: Department of Justice, Vancouver.

Solicitors for the respondent: Legacy Tax & Trust Lawyers, Vancouver.

Solicitors for the intervener: McCarthy Tétrault, Vancouver.

cp/e/qw/qllls

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Case Name:

National Bank of Greece (Canada) v. Katsikonouris

Antonio Panzera, Giuseppe Valiante, Francesco Tatta and Andrea Barbiero, appellants;
v.
Simcoe & Erie Insurance Company, General Accident Insurance and Balboa Insurance Company, respondents.

[1990] S.C.J. No. 95

[1990] A.C.S. no 95

[1990] 2 S.C.R. 1029

[1990] 2 R.C.S. 1029

74 D.L.R. (4th) 197

115 N.R. 42

J.E. 90-1410

32 Q.A.C. 250

50 C.C.L.I. 1

[1990] I.L.R. 10478

[1990] I.L.R. para. 1-2663 at 10478

23 A.C.W.S. (3d) 74

File No.: 21341.

Supreme Court of Canada

1990: March 20 / 1990: October 4.

Present: La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC (105 paras.)

Insurance -- Fire insurance -- Nature and effect of hypothecary (mortgage) clause -- Misrepresentations by hypothecary debtor when insurance policy purchased -- Whether nullity ab initio of insurance policy

can be invoked against hypothecary creditors.

A businessman obtained a loan from appellants and hypothecated one of his properties to secure its repayment. The hypothecary deed of loan provided that the debtor undertook to insure the hypothecated property in favour of appellants and in fulfilment of this obligation the debtor later purchased a fire insurance policy from respondent insurers. This policy contained a standard mortgage clause (or standard hypothecary clause) which provided that "this insurance ... is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk". The debtor's property was destroyed by fire and the insurers refused to pay appellants the indemnity, alleging that the policy was void ab initio as the result of misrepresentations by the debtor when the policy was purchased. The latter allegedly did not disclose the occurrence of criminal fires on the insured premises and the refusal by the previous insurer to continue insuring the property. Relying on the mortgage clause, appellants then brought an action against the insurers for payment of the indemnity. The Superior Court allowed the action but the Court of Appeal reversed this judgment. This appeal is to determine whether the nullity ab initio of the insurance policy, resulting from misrepresentations by the hypothecary debtor at the time the policy was purchased, can be invoked against the hypothecary creditors.

Held (L'Heureux-Dubé and Gonthier JJ. dissenting): The appeal should be allowed.

Per La Forest, Cory and McLachlin JJ.: When insuring its own interest in the property, the hypothecary debtor also assumed a mandate to take out a separate and distinct contract of insurance to insure the hypothecary creditors' interest in the hypothecated property. The insurers cannot refuse to honour this independent contract (the standard mortgage clause) with the hypothecary creditors on discovering that their contract with the hypothecary debtor was issued on the basis of misrepresentations or omissions such that it was null ab initio. The standard mortgage clause makes no distinction between acts and neglects of the hypothecary debtor committed at the inception of the policy, and acts and neglects subsequent to its formation. The clause is written in clear and untechnical language and simply states that the insurance of the hypothecary creditors will not be invalidated by any omission or misrepresentation of the hypothecary debtor. In the face of this unequivocal representation, the courts should not import interpretive subtleties where none exist. Where the contract is unambiguous, and its meaning clear, there is no occasion for construction. The insurance of the hypothecary creditors cannot, therefore, be invalidated by any act or neglect of the hypothecary debtor, be it at the inception of the policy, or subsequent to its formation. The validity of this independent contract depends solely on the course of action between the hypothecary creditors and the insurers. To hold otherwise would distort the plain and ordinary language used in the clause.

The ejusdem generis rule finds no application in the context of the standard mortgage clause. The precondition for application of the rule is not met, for in the clause under consideration the general words precede and do not follow the specific enumeration. The rationale for applying the rule is accordingly absent. Further, while the specific examples of omissions and misrepresentations found in the policy all relate to faults which the hypothecary debtor is in a position to commit only subsequent to the formation of a valid contract, these terms are found in a clause in which the insurer is enumerating faults of the hypothecary debtor which the insurer represents that it will not rely on in order to deny coverage to the hypothecary creditor. Far from intending to represent to the hypothecary creditor that only omissions and misrepresentations committed by the hypothecary debtor after the conclusion of a valid contract will not invalidate coverage, the insurer makes it clear that even omissions and misrepresentations of this nature will not invalidate the hypothecary creditor's coverage.

Additionally, insurance contracts must be interpreted as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law. If the insurer were reserving to itself the right to invalidate the coverage of the hypothecary creditor as a result of some misrepresentations and omissions of the hypothecary debtor, it was incumbent on the insurer, in drafting its insurance form, to make this known in clear, express and easily intelligible terms.

Finally, while the hypothecary debtor is acting as the mandatary of the hypothecary creditor when it insures the hypothecary creditor's interest, it does not follow that any false representations made by the hypothecary debtor in effecting its mandate should be held to be those of the hypothecary creditor. The law of mandate does not operate so as to have this effect in the context of the standard mortgage clause. This inference would run counter to what must be taken to be the understanding of the parties. When a hypothecary creditor elects to insure through the medium of the standard mortgage clause, it does so on the reasonable expectation that its interest will be protected in the same way as if it had entered into an independent contract evidenced by a separate piece of paper, and nothing in the wording of the clause supports the conclusion that the insurer is proceeding on any other understanding. To make the insurance of the hypothecary creditor dependent to a certain degree on the course of dealings between the hypothecary debtor and the insurer would strike at the very raison d'être of the standard mortgage clause.

Per L'Heureux-Dubé and Gonthier JJ. (dissenting): The insurance clause in the hypothecary loan contract is a contract of mandate, by which the hypothecary debtor undertakes to insure the hypothecated property on behalf of his hypothecary creditor. In accordance with that mandate, the hypothecary debtor purchased an insurance policy containing a standard mortgage clause. That policy thus sets out two separate insurance contracts, one between the hypothecary debtor and the insurers, and the other between the hypothecary creditors and the insurers. However, the hypothecary debtor's insurance contract is void ab initio because of the latter's misrepresentations when the policy was purchased. Since the debtor was acting in accordance with his mandate by purchasing the hypothecary creditors' insurance contract, the misrepresentations he made at that time must be regarded, for the purposes of considering the validity of this contract, as misrepresentations made by the hypothecary creditors themselves. These misrepresentations have, as to the insurance contract between the hypothecary creditors and the insurers, consequences similar to those produced on the hypothecary debtor's personal insurance contract. They have the effect of misrepresenting the risk to the insurers and thereby of vitiating their consent to the insurance contract purchased for the hypothecary creditors, in the same way as these misrepresentations vitiated the insurers' consent to the hypothecary debtor's insurance contract. The insurance contract between the insurers and the hypothecary creditors is thus also void ab initio.

Analysis of the language of the mortgage clause and its context indicate that the nullity ab initio of the insurance contract as a consequence of misrepresentation by the hypothecary debtor when the contract is purchased can be invoked against the hypothecary creditors. The examples given in the clause are not exhaustive but clearly indicate the type of act the parties intended to include in the expression "act, neglect, omission or misrepresentation". All these examples are a homogeneous group having as their common feature occurrence after the purchase of the policy. By application of the rule of interpretation noscitur a sociis or the ejusdem generis rule, we must therefore conclude that only misrepresentations subsequent to purchase are covered by the mortgage clause. Further, the insurance contract, like any other contract, rests on the presumed good faith of the parties. If the parties wished to cover the risk concerned here, they should have done so in clear and express language, which is not the case in the mortgage clause at issue here.

Cases Cited

By La Forest J.

Followed: Hastings v. Westchester Fire Insurance Co., 73 N.Y. 141 (1878); Syndicate Ins. Co. v. Bohn, 65 F. 165 (1894); Caisse populaire des Deux Rives v. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu, [1990] 2 S.C.R. 995; not followed: Imperial Building & Loan Ass'n v. Aetna Ins. Co., 166 S.E. 841 (1932); Hanover Fire Ins. Co. v. National Exchange Bank, 34 S.W. 333 (1896); Omnium Securities Co. v. Canada Fire and Mutual Insurance Co. (1882), 1 O.R. 494; Chenier v. Madill (1973), 2 O.R. (2d) 361; distinguished: Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co. (1903), 33 S.C.R. 94; referred to: London and Midland General Insurance Co. v. Bonser, [1973] S.C.R. 10; Madill v. Lirette, [1987] R.J.Q. 993; Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co. (1887), 12 App. Cas. 484; Renault v. Bell Asbestos Mines Ltd., [1980] C.A. 370; Scott v. Wawanesa Mutual Insurance Co., [1989] 1 S.C.R. 1445; Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888.

By L'Heureux-Dubé J. (dissenting)

Caisse populaire des Deux Rives v. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu, [1990] 2 S.C.R. 995, aff'g [1988] R.J.Q. 2355 (C.A.); Madill v. Lirette, [1987] R.J.Q. 993 (C.A.), rev'g [1982] C.S. 49 (sub nom. Great American Insurance Co. v. Lirette); Hastings v. Westchester Fire Insurance Co., 73 N.Y. 141 (1878); Syndicate Ins. Co. v. Bohn, 65 F. 165 (1894); Reed v. Firemen's Insurance Co. of Newark, 35 L.R.A. (N.S.) 343 (1911); Federal Land Bank of Columbia v. Atlas Assur. Co., 125 S.E. 631 (1924); Collins v. Michigan Commercial Underwriters, 6 Tenn. App. 528 (1928); Fayetteville Building & Loan Ass'n v. Mutual Fire Ins. Co. of West Virginia, 141 S.E. 634 (1928); National Union Fire Ins. Co. v. Short, 32 F.2d 631 (1929); Stockton v. Atlantic Fire Ins. Co., 175 S.E. 695 (1934); National Fire Ins. Co. of Hartford, Conn. v. Dallas Joint Stock Land Bank of Dallas, 50 P.2d 326 (1935); Western Assur. Co. v. Hughes, 66 P.2d 1056 (1937); Great American Insurance Co. of New York v. Southwestern Finance Co., 297 P.2d 403 (1956); Northwestern National Insurance Co. v. Mildenberger, 359 S.W.2d 380 (1962); Equality Savings and Loan Association v. Missouri Property Insurance Placement Facility, 537 S.W.2d 440 (1976); Meade v. North Country Co-Operative Insurance Co., 487 N.Y.S.2d 983 (1985); Hanover Fire Ins. Co. v. National Exchange Bank, 34 S.W. 333 (1896); Graham v. Fireman's Insurance Co., 87 N.Y. 69 (1881); Young Men's Lyceum of Tarrytown v. National Ben Franklin Fire Ins. Co. of Pittsburg, 163 N.Y.S. 226 (1917); Imperial Building & Loan Ass'n v. Aetna Ins. Co., 166 S.E. 841 (1932); Omnium Securities Co. v. Canada Fire and Mutual Insurance Co. (1882), 1 O.R. 494; Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co. (1903), 33 S.C.R. 94; Chenier v. Madill (1973), 2 O.R. (2d) 361; Canadian Imperial Bank of Commerce v. Dominion of Canada General Insurance Co. (1987), 29 C.C.L.I. 313; Renault v. Bell Asbestos Mines Ltd., [1980] C.A. 370; Duchesneau v. Great American Insurance Co., [1955] Que. Q.B. 120; Amin v. Cie d'assurance American Home, [1989] R.R.A. 151; Veilleux v. Victoria Insurance Co., [1989] R.J.Q. 1075.

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Stroud's Judicial Dictionary, vol. 3, 5th ed. By John S. James. London: Sweet & Maxwell, 1986, "include", "including".

APPEAL from a judgment of the Quebec Court of Appeal, [1989] R.D.I. 46, [1989] R.R.A. 145, 20 Q.A.C. 226, 36 C.C.L.I. 296, reversing a judgment of the Superior Court, [1985] C.S. 1263, 16 C.C.L.I. 126. Appeal allowed, L'Heureux-Dubé and Gonthier JJ. dissenting.

Jacques Fournier, for the appellants.
Émile Colas, Q.C., for the respondents.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of La Forest, Cory and McLachlin JJ. was delivered by

1 LA FOREST J.:-- I have had the advantage of reading the reasons of my colleague, Justice L'Heureux-Dubé. She has fully set forth the facts and judicial history of the case, and I need not repeat them. However, I am unable, with respect, to agree with her conclusions for the reasons that follow.

2 In its decision in Caisse populaire des Deux Rives v. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu, [1990] 2 S.C.R. 995 (hereinafter Caisse populaire), issued concurrently, this Court elaborated an explanation for the operation of the standard mortgage clause in light of civil law principles. For ease of reference, I set out the French and English versions of the clause as it appears in the policy issued by the respondent insurers:

IT IS HEREBY PROVIDED AND AGREED THAT:

1. This insurance and every documented renewal thereof

-- AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN

-- is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the

> property insured, including transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk.
>
> VIOLATIONS DU CONTRAT
>
> Ne sont pas opposables aux créanciers hypothécaires les actes, négligences ou déclarations des propriétaires, locataires ou occupants des biens assurés, notamment en ce qui concerne les transferts d'intérêts, la vacance ou l'inoccupation, ou l'affectation des lieux à des fins plus dangereuses que celles déclarées.

The clause, which with variations is used throughout North America, was obviously intended to have the same effect in both common law and civil law jurisdictions and reference will be made to cases arising under both judicial systems. To avoid terminological confusion, I have, consistently with the clause itself, used the word "mortgage" and related expressions in the English version of these reasons to include "hypothec" and related concepts.

3 In Caisse populaire, the Court held that the hypothecary debtor (or the mortgagor), when insuring its own interest in the property, also assumes a mandate to take out a separate and distinct contract of insurance to insure the hypothecary creditor's (or the mortgagee's) interest in the mortgaged property. This appeal now raises the important question whether the insurer can refuse to honour this independent contract with the hypothecary creditor or mortgagee on discovering that its contract with the hypothecary debtor or mortgagor was issued on the basis of misrepresentations or omissions such that it was null ab initio. Unlike my colleague, I am of the view that both the nature and the language of the standard mortgage clause, as well as compelling considerations of history and policy, militate against this conclusion.

The Nature and Interpretation of the Mortgage Clause

4 In her reasons in Caisse populaire, at p. 1021, L'Heureux-Dubé J. has drawn attention to the fact that the civil law explanation for the operation of the standard mortgage clause harmonizes with the interpretation that has emerged in the common law jurisprudence. My colleague has pointed out that the standard mortgage clause was first used in the United States. A review of the American authorities reveals an all but universal consensus to the effect that this clause evidences an independent contract between the insurer and the mortgagee. My colleague has also noted that the "two contract" theory is now well anchored in Canadian jurisprudence. Notably, in London and Midland General Insurance Co. v. Bonser, [1973] S.C.R. 10, a common law decision, this Court expressed approval of the two contract theory, and several recent lower court decisions have also adopted this approach to the operation of the standard mortgage clause; see Caisse populaire, at p. 1019-20.

5 It should also be noted that the American jurisprudence dealing with the narrow issue raised by this appeal is all but unanimous in concluding that by virtue of the two contract theory, the insurance of the mortgagee cannot be invalidated by any act or neglect of the mortgagor, be it at the inception of the policy, or subsequent to its formation; see Couch, Couch on Insurance (2nd ed. 1982), vol. 10A, para. 42:736. Thus the overwhelming majority of the decisions are in essential agreement with an interpretation of the clause that would seem to have first emerged in the decision of the New York Court of Appeal in Hastings v. Westchester Fire Insurance Co., 73 N.Y. 141 (1878). There Rapallo J. stated the following, at p. 153:

> To hold otherwise would, I think, defeat the purpose intended, and deprive the mortgagees of the protection upon which they had a right to rely. Although the clause

> might be construed so as to exempt the mortgagees from the consequences only of acts of the owners done after the making of the agreement, I do not think, in view of its apparent purpose, that any such distinction was intended.

I note that my colleague who cites a plethora of decisions that have followed the lead taken in Hastings can point to no decision since Imperial Building & Loan Ass'n v. Aetna Ins. Co., 166 S.E. 841 (W. Va. 1932), rejecting that approach.

6 As I view the matter, the contrary interpretation, which is to the effect that the clause only protects the mortgagee or hypothecary creditor from faults of the mortgagor or hypothecary debtor after the inception of a valid contract between the mortgagor and the insurer distorts the plain and ordinary language used in the standard clause.

7 In Syndicate Ins. Co. v. Bohn, 65 F. 165 (1894), the Eighth Circuit of the United States Court of Appeal was called on to interpret a standard mortgage clause that read "this insurance, as to the interests of the ... mortgagee ... only, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured", a text which is essentially of the same character as that in issue here. I find myself in full agreement with the analysis of Sanborn Cir. J. who concluded, at pp. 176-77:

> Was it that contract that the indemnity of the mortgagee should not be protected against any prior act or negligence of the mortgagors? There is no such restriction in the contract. It provides that the mortgagee's interest shall not be invalidated by any act or neglect of the mortgagors, by any occupancy or vacancy, or by any change of title or possession of the premises, provided that the mortgagee shall notify the insurance company of any change of ownership or increase of hazard that may come to its knowledge, shall have permission therefor indorsed on the policy, and shall pay for it... . What apter terms could be chosen to effect a separate insurance on the interest of the mortgagee, to free that insurance from any possible influence of any act or neglect of the mortgagors, and to make it dependent solely on the course of action of the mortgagee and the insurance company? None occur to us. [Emphasis added.]

8 These comments remind one that it is important in interpreting a contract of insurance to give words their ordinary meanings. In the version of the standard mortgage clause under consideration here, no distinction is made between the "act", "neglect", "omission" or "misrepresentation" that a mortgagor might commit. The clause merely states, in simple and untechnical language, that the insurance, as to the interest of the mortgagee, is and shall be in force notwithstanding any act, neglect, omission or misrepresentation committed by the mortgagor. Given this unequivocal representation, it is unclear to me on what grounds one may seek to limit the application of the word "any", which, of course, is commonly understood as meaning "no matter which". I respectfully share the conclusion of the trial judge, Lamb J., who stated:

> The express renunciation of the insurers must therefore be read as intending to refer to absolute as well as relative nullity, in the absence of any words imposing a restrictive distinction between the two.
>
> ([1985] C.S. 1263, at p. 1269.)

9 The Court of Appeal, [1989] R.D.I. 46, relying in great part on its earlier decision in Madill v. Lirette, [1987] R.J.Q. 993, downplayed the fact that the clause does not expressly distinguish between the "act", "neglect", "omission" or "misrepresentation". It accorded great importance to the fact that the omissions and misrepresentations specifically mentioned in the clause all relate to acts which the

mortgagor is only in a position to commit following the inception of a valid contract. As put by Desmeules J. (ad hoc), at p. 50:

> [TRANSLATION] The wording of the present hypothecary (mortgage) clause, in effect since 1972, refers to certain situations such as transfers of interest, vacancy or non-occupancy or the occupation of the property for purposes more hazardous than those specified, and it subjects creditors to an obligation to inform the insurer as soon as they are aware of such situations.
>
> These events are subsequent to the issuing of the insurance policy, and this leads me to conclude that it is such situations that the insurers sought to provide for in their hypothecary (mortgage) clause.

In his concurring judgment, Beauregard J.A. added, at p. 47:

> [TRANSLATION] Despite the use of the adverb "including", by application of the "rule" of interpretation noscitur a sociis or the ejusdem generis rule, we must conclude that "any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured" is an "act, neglect, omission or misrepresentation" which took place or was made after the policy was issued, just as "transfer of interest, vacancy or non-occupancy or the occupation of the property for purposes more hazardous than those specified".

10 I am unable to agree with the Court of Appeal's view that it is clear, by application of the ejusdem generis rule, that the reference in the clause to "omission[s] or misrepresentation[s]" is to be taken as limited to omissions and misrepresentations subsequent to the inception of the policy. I am of the view that this rule of construction finds no application in the context of the standard mortgage clause.

11 At page 111 of his book Construction of Statutes (2nd ed. 1983), Professor Driedger points to the definition of the rule given by Lord Halsbury L.C. in Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co. (1887), 12 App. Cas. 484, at p. 490. Lord Halsbury L.C. observes that the rule is predicated on the notion that "general words may be restricted to the same genus as the specific words that precede them". I would also cite from an illustration of the working of the rule provided by Professor Côté in The Interpretation of Legislation in Canada (1984), at p. 243. Professor Côté quotes from the observations of Turgeon J.A. in Renault v. Bell Asbestos Mines Ltd., [1980] C.A. 370, at p. 372. The remarks are to the same effect as those of Lord Halsbury L.C., though I would draw attention to Turgeon J.A.'s important observation:

> [TRANSLATION] In other words, for the rule to apply it is absolutely necessary that there be a class or category preceding the general terms, if the intent is to limit them to that class or category. [Emphasis added.]

12 Here, of course, this precondition for application of the rule is not met, for in the clause under consideration the general words precede and do not follow the specific enumeration. The clause states that coverage as to the interest of the mortgagee is valid notwithstanding "omission[s] or misrepresentation[s]", and then provides illustrative examples of such omissions and misrepresentations. The rationale for applying the ejusdem generis rule is accordingly absent. Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it. But it would be illogical to proceed in the same manner when a general term precedes an enumeration of specific examples. In this situation, it is logical to infer that the purpose

of providing specific examples from within a broad general category is to remove any ambiguity as to whether those examples are in fact included in the category. It would defeat the intention of the person drafting the document if one were to view the specific illustrations as an exhaustive definition of the larger category of which they form a part.

13 Moreover, in this instance, the very language used to introduce the list of omissions and misrepresentations confirms that it would be erroneous to view them as exhaustive. In the English version of the clause, the term "including" precedes the list of examples of omissions and misrepresentations, while the term "notamment" is used in the French text. I note that the Concise Oxford Dictionary (7th ed. 1982) defines "include" as "comprise or embrace (thing etc.) as part of a whole", while the Petit Robert 1 (1987) says of "notamment" that it "sert le plus souvent à attirer l'attention sur un ou plusieurs objets particuliers faisant partie d'un ensemble précédemment désigné ou sous-entendu". This meaning finds confirmation in legal lexicons as well: the entries under "include" and "including" in Stroud's Judicial Dictionary (5th ed. 1986) to take but one example, again make it clear that these words are terms of extension, designed to enlarge the meaning of preceding words, and, not, to limit them.

14 As I have noted, the natural inference is that the drafter will provide a specific illustration of a subset of a given category of things in order to make it clear that that category extends to things that might otherwise be expected to fall outside it. As I see it, it is precisely this reasoning which explains the reference to specific omissions and misrepresentations in the standard mortgage clause. The Court of Appeal was correct in pointing out that the specific examples of omissions and misrepresentations found in the policy all relate to faults which the mortgagor is in a position to commit only subsequent to the formation of a valid contract. It is important to bear in mind, however, that these terms are found in a clause in which the insurer is enumerating faults of the mortgagor which the insurer represents that it will not rely on in order to deny coverage to the mortgagee. When due account is taken of this fact, it becomes apparent that the insurer, far from intending to represent to the mortgagee that only omissions and misrepresentations committed by the mortgagor after the conclusion of a valid contract will not invalidate coverage, is, instead, at pains to make it clear that even omissions and misrepresentations of this nature will not invalidate the mortgagee's coverage. For from the perspective of the insurer by far the greater risk is posed precisely by omissions and misrepresentations the mortgagor may commit after a validly formed contract is entered into. In his article "L'opposabilité des exceptions à différents intéressés dans un contrat d'assurance" (1987), 47 R. du B. 933, Professor Bergeron puts the matter convincingly when he argues, at p. 988:

> [TRANSLATION] When one reflects carefully about it, one realizes that there is in this list one exception, the transfer of interest, which is of much greater concern to the insurer than nullity for misrepresentation. In the first case the assignee is a new insured, unknown to the insurer, about whom he has been unable to make any inquiries in order to determine the risk. It is thus all the more reasonable that misrepresentations by an insured from whom the insurer has had an opportunity of obtaining all relevant information cannot be pleaded. [Emphasis in original.]

15 The same could, of course, be said with respect to the occupation of the property for purposes more hazardous than specified in the description of the risk. If the mortgagor concludes a valid contract and then, unbeknownst to the insurer, transforms the property into a depository for flammable liquids, an omission to convey this change in the vocation of the property may be infinitely more prejudicial to the insurer than a simple misrepresentation at the time of concluding the contract.

16 In the result, considerations of a practical commercial nature militate strongly against the interpretation advanced by the Court of Appeal. It defies rational explanation to suppose that the insurer

would agree not to invalidate coverage of the mortgagee with respect to the very omissions and misrepresentations of the mortgagor that stand to affect most radically the risk it has agreed to assume, while at the same time reserving to itself the right to invalidate coverage in respect of the omissions and misrepresentations it had a reasonable opportunity to investigate before agreeing to issue a policy.

17 I respectfully conclude therefore that the Court of Appeal has misconstrued the reference to specific omissions and misrepresentations in the standard mortgage clause. The interpretation of the Court of Appeal ignores commercial practicalities, and gives a strained and unnatural meaning to the language used.

18 Additionally, I am of the view that to adopt the interpretation of the Court of Appeal would be to ignore the well-recognized principle that it is necessary to interpret insurance contracts as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law. I have elaborated (in dissent) on this principle in Scott v. Wawanesa Mutual Insurance Co., [1989] 1 S.C.R. 1445, at pp. 1454-55. Here, in the absence of clear and explicit language pointing to a different meaning in the policy itself, I am at a loss to see how mortgagee purchasers of fire insurance, on reading that their coverage will not be denied for "any" misrepresentations or omissions of their mortgagor, could be expected to do other than take this statement at face value. If, in fact, the insurer were reserving to itself the right to invalidate the coverage of the mortgagee as a result of some misrepresentations and omissions of the mortgagor (i.e., those made at the inception of the contract between the insurer and the mortgagor), I would hold that it was incumbent on the insurer, in drafting its insurance form, to make this known in clear, express and easily intelligible terms. It can hardly be expected that a mortgagee deduce, on the basis of the type of subtle analysis engaged in by the Court of Appeal, that the insurer, despite expressly saying that coverage will not be denied for "any" omissions and misrepresentations of the mortgagor, has, in fact, meant to say that coverage will not be denied for "some" omissions and misrepresentations.

19 In short, there is little mystery to me why the overwhelming majority of the American decisions reject the notion that the standard mortgage clause makes a distinction between acts and neglects of the mortgagor committed at the inception of the policy, and acts and neglects subsequent to its formation. The standard mortgage clause is written in clear and untechnical language and simply states that the insurance of the mortgagee will not be invalidated because of anything the mortgagor might do. As I see it, in the face of this unequivocal representation, the courts have shied from importing interpretive subtleties where none exist. In a word, the American courts have applied the principle that where the contract is unambiguous, and its meaning clear, there is no occasion for construction; see 43 Am. Jur. 2d Insurance para. 271 (1982).

20 It is true that the clause under consideration here differs somewhat from that which was the object of consideration in the American decisions. But when one looks to the substance of the differences, I conclude that they, if anything, only reinforce the case for adopting the interpretation of the standard mortgage clause advanced in the overwhelming majority of the American decisions.

21 For ease of comparison, I set out first the relevant portion of the American clause:

> ... and this insurance shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property ...

and, once again, its counterpart in use in Canada:

> IT IS HEREBY PROVIDED AND AGREED THAT:
>
> 1. This insurance and every documented renewal thereof

-- AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN

-- is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk.

VIOLATIONS DU CONTRAT

Ne sont pas opposables aux créanciers hypothécaires les actes, négligences ou déclarations des propriétaires, locataires ou occupants des biens assurés, notamment en ce qui concerne les transferts d'intérêts, la vacance ou l'inoccupation, ou l'affectation des lieux à des fins plus dangereuses que celles déclarées.

22 It is clear that the substance of the difference between the Canadian and American versions of the clause lies in the fact that the text used in Canada incorporates a distinct and pointed reference to "omission" and "misrepresentation" of the mortgagor, over and above the mention of "act" and "neglect".

23 I have already drawn attention to the fact that there is today all but unanimous agreement in the American decisions that a mortgagee insuring its interest through the medium of the standard mortgage clause will not be denied coverage because of anything that its mortgagor may do, be it at the inception of the contract or subsequent to its formation. It is clear, therefore, that the American courts have proceeded on the basis that the terms "act" and "neglect" in the clause include breaches of warranty or fraudulent concealments mortgagors may commit on taking out their policy. I am firmly of the view that that particular interpretation is sound given the wide sweep of the words used in the clause. It is difficult to understand on what basis one could argue that an omission or misrepresentation is not included within the meaning of the open-ended terms "act" and "neglect". But whatever view one might hold on the matter, the effect of the additions in the clause in question here make the issue moot, for in that clause the insurer has expressly undertaken not to refuse coverage on the basis of any omission or misrepresentation of the mortgagor. In effect, the additions in the Canadian version of the clause make all the more compelling the case for following the lead of the American courts and concluding that by virtue of the standard mortgage clause the insurer is representing to the mortgagee that the contract between them is meant to be unaffected by anything the mortgagor might do before or after the inception of the policies. It would be paradoxical indeed if one were to compare the Canadian and American versions of the clause and then conclude that, here, the insurer is in fact cutting down on the scope of the protection afforded the mortgagee because it has added terms that explicitly expand on the list of actions of the mortgagor that will not invalidate the insurance of the mortgagee.

24 In summary, when the standard mortgage clause is interpreted in the light of the settled principles that govern the construction of insurance contracts, there can be no doubt that the insurer, by virtue of this clause, is representing to the mortgagee that a separate and distinct contract exists between them, and that the validity of this independent contract depends solely on the course of action between the mortgagee and the insurer. Moreover, even if the language of the clause was ambiguous, art. 2499 C.C.L.C. reminds us that it would be necessary to resolve this ambiguity against the insurer. No mortgagee would wish that the validity of its "separate and distinct" contract with the insurer rest on the question whether its mortgagor dealt in good faith in effecting coverage on its (the mortgagor's) insurable interest. From the perspective of the mortgagee, this would stand to defeat the very purpose of relying on the standard mortgage clause in the first place.

25 I therefore conclude that to adopt the interpretation of the standard mortgage clause proposed by the Court of Appeal would turn the clause into a sort of trap for the mortgagee. By ostensibly holding out to the mortgagee that the validity of its insurance contract was unaffected by the course of action between the mortgagor and the insurer, the clause would induce the mortgagee to rely on the standard mortgage clause, only to belie this expectation if a loss occurred and the insurer discovered that the mortgagor had, in fact, made a misrepresentation when effecting its policy. I alluded in Scott v. Wawanesa Mutual Insurance Co., supra, at p. 1459, to the burden that rests on an insurer when it is offering insurance on terms that can reasonably be supposed to defeat the very objective of the coverage sought by the purchaser of insurance. By application of this principle it is clear that the insurer has, in this instance, failed to use the requisite degree of clarity if it has indeed wished to represent to the mortgagees who choose to rely on the standard mortgage clause that their coverage was in fact subject to defeat, in certain circumstances, solely because of the acts of the mortgagor.

The Historical Record

26 I turn next to a consideration of other factors that militate against the conclusion that the insurer may deny recovery to a mortgagee who has insured his interest through the medium of the standard mortgage clause solely because of the course of action of the mortgagor. I begin with a brief historical overview of the development of the standard mortgage clause, and a consideration of early judicial reaction to it.

27 As my colleague has noted, insurance companies would seem to have first incorporated the standard mortgage clause into their policies in the State of New York in the 1860s. Since that time, the clause has become, as its name reflects, the standard vehicle by which mortgagees insure their interest in encumbered property. However, it is important for present purposes to bear in mind that the standard mortgage clause, in gaining this ascendancy, eclipsed the use of what is known as the "loss payable" or "open mortgage" clause. As explained in Couch, op. cit., para. 42:702, by the terms of the latter clause, no privity of contract exists between the insurer and the mortgagee: the mortgagee is simply designated as the person who is to be paid in the case of a loss. In the result, there is an almost universal consensus in the authorities that the mortgagee, as a simple beneficiary, can recover solely on the same terms as the mortgagor. Accordingly, if the mortgagor is precluded from recovering on the policy by reason of a breach of its conditions, this breach will also preclude recovery on the part of the mortgagee.

28 It is precisely this feature of the "loss payable" or "open mortgage" clause that determined its fall into desuetude. As explained by Dwyer and Barney in their study entitled "Analysis of Standard Mortgage Clause and Selected Provisions of the New York Standard Fire Policy" (1984), 19 Forum 639, at p. 640:

> Because the loss payable clause did not adequately protect the mortgagee's interest in insured property, use of the standard or union mortgage clause became more prevalent over time. In contrast to the simple loss payable clause, the standard mortgage clause generally has been construed by the courts as a separate insurance contract between the insurer and mortgagee. The most important consequence of interpreting the standard mortgage clause as independent insurance of the mortgagee's interest is that a mortgagee protected by this clause, in contrast to a mortgagee named in a loss payable clause, will not be denied recovery under a fire insurance policy solely because of the acts of the mortgagor.

29 The two clauses are clearly creatures of a different stripe, and it was only to be expected that a period of transition would be required before it was universally appreciated that under the new clause the mortgagee could no longer be equated to a simple beneficiary of the mortgagor. A reading of early

judicial reaction to the clause confirms this. Hanover Fire Ins. Co. v. National Exchange Bank, 34 S.W. 333 (Tex. Civ. App. 1896), the decision which may be regarded as the fountainhead of the meagre line of authority rejecting the view advanced in Hastings, supra, provides a convenient example of the difficulties encountered by the courts in their efforts to come to terms with the purpose of the standard mortgage clause, and to appreciate the salient difference between it and the "loss payable" clause. The following excerpts from the decision leaves no doubt that the court essentially viewed the standard mortgage clause in the same manner as a "loss payable" clause, and was unwilling to accept that the standard mortgage clause is itself a vehicle by which the mortgagee obtains a separate and distinct contract of insurance with the insurer. Thus, at p. 334, Lightfoot C.J. says:

> The doctrine is well established in this state that A., for a consideration paid by him, may make a contract with B., for the benefit of C., and the latter will have a right of action to enforce it. [...] But, if the contract was obtained by a fraudulent device of A., the person for whose benefit he fraudulently obtained it can gain no higher right than A. held, and, if the contract is void as to him, it is void as to his beneficiary.

30 At page 335, Lightfoot C.J. goes on to make this revealing concession:

> We can readily see that a difference might arise in a case where the mortgage company, on its own behalf and for a separate consideration, procures a policy of insurance for its own benefit, unaffected by any act or concealment on the part of the owner of the property.

31 An examination of the early Canadian decisions also reveals that the courts remained fettered by the traditional view of the mortgagee as beneficiary of the mortgagor. Thus in one of the earliest Canadian decisions dealing with the problem of the nullity ab initio of the mortgagor's contract, Omnium Securities Co. v. Canada Fire and Mutual Insurance Co. (1882), 1 O.R. 494, the Ontario Court of Queen's Bench expressly repudiated the two contract theory as an explanation for the working of the standard mortgage clause, and again chose to view the mortgagee as a beneficiary of the mortgagor. Thus, at p. 496, Hagarty C.J. said:

> It remains to consider the very serious question whether the defendants have the right to prove that the policy was obtained by fraud on [the mortgagor's] part. I must consider it as his insurance of his own interest, and although he makes the loss payable to the mortgagees, it does not thereby become the insurance of a mere mortgage interest.
>
> Plaintiffs contend that the effect of the agreement between the parties by this subrogation clause, to which [the mortgagor] was no party, was in effect a new insurance as between them and the underwriters, and that the latter conclusively adopt and confirm it as such, irrespective of any fraud committed by [the mortgagor]. I do not think that the subsequent clause strengthens that view.
>
> Without entering into that not very clear subject of "subrogation," we may treat it on the intelligible ground of a special bargain made, after [the mortgagor] had insured his premises, with his mortgagees, to whom he had made the loss payable.

32 In Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co. (1903), 33 S.C.R. 94, this Court was called on to deal with another instance where, as in this appeal, the contract with the mortgagor was found to be void ab initio. As pointed out by my colleague at p. 1018-19 of her reasons in Caisse populaire, although the Court of Appeal had affirmed that the standard mortgage

clause evidenced a separate contract between the insurer and the mortgagee, this Court evinced a reluctance to enter into a detailed examination of the workings of the clause. This is particularly clear in the following obiter remarks of Davies J., at p. 110:

> I have already stated that it is not necessary on this appeal for us to determine, and we do not determine, whether such a mortgage clause as was inserted in this policy gave the mortgagees such a beneficial right and interest or constituted such a direct contract between the mortgagees and the insurance company as would enable the former to sue in their own name alone and irrespective of [the mortgagor]. But we are all of the opinion that whether there was or was not such a direct contract, it did not cover or relate to the statements or omissions made by the applicant, [the mortgagor], in his application for insurance ... .

33 Given that the Court decided the matter before it on other grounds, and expressly declined to consider the implications that flow from viewing the mortgage clause as providing for a separate and distinct contract between the mortgagee and the insurer, as opposed to making the mortgagee a simple beneficiary of the mortgagor, this decision becomes essentially irrelevant for present purposes. This Court first in London and Midland General Insurance Co. v. Bonser, supra, and then in Caisse populaire has expressed approval of the two contract theory as an explanation for the operation of the standard mortgage clause. Faced now with the problem of sounding out the consequences that flow from its adoption of that viewpoint, the Court is accordingly called on to deal with the very question it declined to consider in Liverpool and London, supra.

34 Turning from this consideration of the conceptual difficulties encountered by the courts in early attempts to understand the nature of the standard mortgage clause, I would observe that a historical overview of the introduction of the standard mortgage clause makes it clear that it became an all but universal feature of fire insurance policies precisely because it was perceived as providing for the creation of a separate and independent contract of insurance between the mortgagee and the insurer. To borrow the formulation of Sanborn Cir. J. in Syndicate Insurance Co. v. Bohn, supra, at p. 178, mortgagees renounced the use of the "loss payable" clause and elected to rely on the standard mortgage clause because that clause was perceived as constituting a representation by the insurer to the mortgagee that its interests were insured in a separate contract from those of the mortgagor, that the mortgagee's insurance was dependent for its validity solely upon the course of action of the insurance company and the mortgagee, and thus unaffected by any act or neglect of the mortgagor of which the mortgagee is ignorant.

The Advantages to the Use of the Standard Mortgage Clause

35 The advantages to all parties in insuring through the medium of the standard mortgage clause are obvious. First, it saves time and hence money. The underwriter need not issue two separate policies: by the simple expedient of the standard mortgage clause the insurer represents to the mortgagee that the one policy it issues in favour of the mortgagor in fact evidences two separate contracts, that between the mortgagee and the insurer being "engrafted" on that between the mortgagor and the insurer, to borrow the apt term found in Couch, op. cit., para. 42:728. Moreover, as explained by Professor Bergeron, op. cit., at p. 975, there are other advantages for the insurer:

> [TRANSLATION] The insurer probably has most to benefit from proceeding through the debtor. It is in its interest to determine the risk as accurately as possible by dealing with the person directly associated with the property to be insured: that person is the owner, the hypothecary debtor. Otherwise there will be a great number of persons with whom the insurer must check, increasing both his expense and the delay.

36 It is, of course, at the instance of the insurer that mortgagees effect their coverage through the standard mortgage clause, and I share the conclusions of Professor Bergeron as to the advantages to the insurer in proceeding in this way. It would seem to be a commercial strategy well calculated to permit insurance companies to draw, in the most effective and economical manner possible, on their vast expertise in the assessment of the risk posed by a given application for insurance.

37 The expertise of lenders lies elsewhere: they are concerned with assessing the solvency of their borrowers, not their assurability. That being the case, I can, with respect, see little merit to the suggestion that mortgagees, on granting a mortgage, should bear the burden of guaranteeing the assurability of their mortgagors and that, as a result, the insurer should be entitled to hold up against the mortgagee any omissions or misrepresentations made by the mortgagor at the moment of effecting its own separate contract of insurance; see the observations of Bisson J.A. in Madill v. Lirette, supra, at p. 1002. In my respectful view, this would be an unfair delegation of responsibility on the part of insurers, all the more so since it is the insurer who represents to the mortgagee that it wishes to effect the insurance of both mortgagee and mortgagor through the agency of the mortgagor. I share the reservations expressed by Professor Bergeron, op. cit., at p. 988, to the effect that:

> [TRANSLATION] We admit our surprise and it will be shared by the business community, including the risk industry. It is surprising to see given to the solvency specialists, if we may use the expression, a task which naturally belongs to risk specialists.

38 The standard mortgage clause has stood the test of time, and I am left with no doubt that it represents the most economical, rational, and fair procedure for effecting insurance on the interest of mortgagees. Its all but universal presence in fire insurance policies also attests to the fact that its use does not cut down in an unfair manner on the profits insurers recoup from the sale of fire insurance. Moreover, the American experience confirms that this is no less true if one proceeds on the assumption that the standard mortgage clause constitutes a representation by the insurer to the mortgagee that the validity of its policy is unaffected by the acts, neglects, omissions, and misrepresentations that the mortgagor may commit, whether they be committed by the mortgagor at the inception of its separate contract, or subsequent to its formation. In a word, once it is accepted that by the medium of the standard mortgage clause two separate and distinct contracts are issued in the one policy, it follows that any alternative to the use of the clause would seem guaranteed merely to arrive at the same end result (i.e., a separate contract for the mortgagee, and another for the mortgagor), but at the cost of generating needless delays, a flurry of paper, and a goodly amount of ultimately unproductive activity.

39 On this point, it is worth noting that the decisions that decline to follow Hastings, supra, and thus reject the thesis that the standard mortgage clause is designed to extend protection to the mortgagee in respect of omissions and misrepresentations made by the mortgagor at the inception of the contract, are all but unanimous in recommending that the mortgagee, when insuring its interest, adopt this alternative course of action and effect a separate policy on a separate piece of paper. Thus Galligan J. in Chenier v. Madill (1973), 2 O.R. (2d) 361 (H.C.), notes, at p. 365:

> ... it is to be observed that there is nothing which prevents a mortgagee from obtaining his own insurance to protect his security. If a mortgagee relies upon the insurance obtained by the mortgagor, he subjects himself to the risk that such a policy may be voidable if the mortgagor has violated stat. con. 1 of the policy.

As we have already seen, Lightfoot C.J. in Hanover, supra, at p. 335, also observes that the situation would be an entirely different one if the mortgagee had effected a separate and independent policy of

insurance to protect his own interest. To the same effect is the following suggestion made by Bisson J.A. in Madill v. Lirette, supra, at p. 1002:

> [TRANSLATION] If the hypothecary creditor does not have faith in the actions and the words of his insured before the policy is issued, all he has to do is take out a separate policy in his own name.

40 Academic literature also provides an echo of this line of reasoning. In his article "La faute intentionnelle de l'assuré et la clause de garantie hypothécaire" (1987), 21 R.J.T. 335, Simard explicitly endorses the view expressed by Bisson J.A.

41 However, in my respectful view, this notion that mortgagees who declined to rely on the standard mortgage clause and insured their interest by means of a separate policy would gain a measure of protection over and above the protection afforded by the standard mortgage clause cannot fail but be otiose once it is concluded that this clause itself evidences two separate and distinct contracts of insurance, one between the mortgagor and the insurer and a second (engrafted on the first contract) between the mortgagee and the insurer. In the final analysis, the authorities I have just reviewed reject the view espoused in Hastings because they, again, have chosen to view the mortgagee whose interest is insured through the standard mortgage clause on the same terms as a simple beneficiary of the mortgagor. (I note that Galligan J. in Chenier v. Madill, supra, relies on Omnium Securities, supra, which, as we have seen, did not adopt the two contract theory.) Once that view is put aside, and it is recognized that the mortgagee whose interest is insured by the standard mortgage clause is, in fact, a party to a separate and distinct contract with the insurer, the question of how the mortgagee effects that separate and distinct contract must, in my view, become one of form, and not of substance.

42 This is the view L'Heureux-Dubé J. expresses at p. 1027 of her reasons in Caisse populaire. There she observes:

> There would not seem to be any valid reason for distinguishing between a policy taken out by the hypothecary creditor personally and one taken out by the latter through a mandatary, in the person of the hypothecary debtor. They are both separate insurance contracts in which the insured is the hypothecary creditor.

The Mortgagor as Mandator of the Mortgagee

43 I noted earlier that by the terms of the standard mortgage clause the mortgagor, when insuring its own interest in the property, assumes a mandate to take out a separate contract of insurance to insure the mortgagee's interest. This raises the question whether it could be argued that because the mortgagor is acting as the mandatary of the mortgagee when it insures the mortgagee's interest, it therefore follows that any false representations made by the mortgagor in effecting its mandate should be held to be those of the mortgagee. On this logic, the invalidity of the mortgagor's contract would entrain the invalidity of the mortgagee's contract as well.

44 I do not see how one can reasonably infer that the law of mandate operates so as to have this effect in the context of the standard mortgage clause. This inference would run counter to what must be taken to be the understanding of the parties when agreeing to insure through the medium of the standard mortgage clause, for, as was explained above, it was precisely because the standard mortgage clause held out the promise of making the mortgagee's insurance dependent solely on the course of action between the mortgagee and the insurance company that it supplanted the use of the "open mortgage" clause in the insurance industry. As put by Miller J. in Hastings, supra, at p. 150:

> The mortgage clause was agreed upon for this very purpose, and created an

> independent and a new contract, which removes the mortgagees beyond the control or the effect of any act or neglect of the owner of the property, and renders such mortgagees parties who have a distinct interest separate from the owner, embraced in another and a different contract.

45 Accordingly, to hold that the law of mandate would have the result mentioned above would defeat the very purpose of the clause by again making the right of the mortgagee to recover on its policy derivative of the right of the mortgagor, provided only that the insurer could establish that the mortgagor had made any omissions or misrepresentations on taking out coverage to insure its (the mortgagor's) separate interest.

46 In discussing the principles governing the construction of contracts of insurance in Scott v. Wawanesa Mutual Insurance Co., supra, at p. 1454, I adverted to the approach set out by this Court in Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888. There it was made clear that in the construction of a contract of insurance a court must seek the interpretation which most fairly reflects what can reasonably be supposed to have been the intention of the parties when entering into the contract. Applying these principles here, I can only conclude that the notion that the insurer should be free to deny coverage to the mortgagee on the basis of a misrepresentation made by the mortgagor when insuring its interest would fly in the face of the mortgagee's reasonable perception of the very purpose of the standard mortgage clause.

47 As intimated above, it is only a matter of common sense that mortgagees will wish to effect insurance on their insurable interest so as to ensure that the validity of their contract with the insurer does not stand to be affected by anything the mortgagor might do, and as we have seen, clearly one option for the mortgagee who wishes to effect such coverage is to take out a separate policy on a separate piece of paper. It is, of course, at the instance of the insurer that mortgagees do not, in fact, make this trip to their insurer's office to effect independent policies on separate pieces of paper. In effect, the insurer represents to mortgagees that they can save themselves the trouble since the insurer will "engraft" this separate and distinct contract on the policy of the mortgagor. Given this representation on the part of the insurer, it is only fair to conclude that mortgagees will assume that insuring by means of the standard mortgage clause offers all the advantages of a separate and distinct contract evidenced by a separate piece of paper (the separate and distinct contract all the cases rejecting Hastings counsel mortgagees to obtain) but without any of its disadvantages, i.e, the trouble of having to obtain and deal with that separate piece of paper.

48 As noted by Professor Bergeron, op. cit., at p. 974, it cannot be the case that mortgagees accept to insure by means of the standard mortgage clause because they wish [TRANSLATION] "in so doing to protect their interest less". That conclusion would be to take mortgagees for fools; it would be tantamount to proceeding on the basis that mortgagees, in accepting to insure by means of the standard mortgage clause, were somehow resigned to settling for second rate coverage, i.e., coverage that did not offer the same protection as the separate and distinct contract they could effect without relying on the standard mortgage clause. It is, of course, the converse that must be true, for, clearly, if mortgagees elect to insure through the medium of the standard mortgage clause, they can only be doing so on the reasonable expectation that their interests will be protected in the same way as if they had entered into an independent contract evidenced by a separate piece of paper.

49 Moreover, as already demonstrated, nothing in the wording of the standard mortgage clause supports the conclusion that the insurer is proceeding on any other understanding. There is no language such as would indicate an unequivocal and manifest intention on the part of the insurer to offer insurance on the understanding that the coverage of the mortgagee was in any way dependent on the course of action between the insurer and the mortgagor. Rather, the language is to the opposite effect: it

states in simple and unambiguous terms that the mortgagee's insurance will not be invalidated by any fault of the mortgagor. The terms used in making this representation are so clear, in my view, that there is no need to invoke the principle that is necessary to resolve any ambiguity on this point in favour of the insured. I have already drawn attention to the fact that insurers cannot rely on anything short of the clearest language when offering coverage on terms that would go to frustrating the legitimate expectations as to coverage of those purchasing the policy.

50 I conclude that by the terms of the standard mortgage clause the insurer has represented to the mortgagee that it will decline to set up as against the mortgagee any omissions and misrepresentations made by the mortgagor in effecting coverage for the mortgagee and which, by the ordinary application of the law of mandate, might otherwise be imputable to the mortgagee. Any other interpretation would, in my view, fail to concord with the reasonable expectations of the parties as to the coverage offered by the standard mortgage clause, and, indeed, by making the insurance of the mortgagee derivative to a certain degree on the course of dealings between the mortgagor and the insurer, would strike at the very raison d'être of the standard mortgage clause.

Disposition

51 For these reasons, I would allow the appeal with costs throughout, reverse the judgment of the Court of Appeal, and restore judgment of the trial judge.

English version of the reasons of L'Heureux-Dubé and Gonthier JJ. delivered by

52 L'HEUREUX-DUBÉ J. (dissenting):-- This appeal was heard at the same time as Caisse populaire des Deux Rives v. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu, [1990] 2 S.C.R. 995 (hereinafter referred to as "Caisse populaire"), judgment rendered concurrently. In Caisse populaire, the issue concerned the legal relationship between an insurer and a hypothecary creditor where the debtor of the hypothecary creditor purchased an insurance contract containing a hypothecary (mortgage) clause and committed an intentional fault. In the present appeal, the issue is whether the nullity ab initio of an insurance policy, resulting from misrepresentations by the hypothecary debtor at the time the policy was bought, can be invoked against the hypothecary creditor.

Facts

53 In 1977 one Dimitrios (Jimmy) Katsikonouris borrowed $80,000 from the National Bank of Greece (Canada) and $21,800 from the appellants, who were doing business in partnership under the name Tava Enregistré. As security for these loans, Katsikonouris granted a first hypothec to the National Bank of Greece (Canada) and a second hypothec to the appellants, on properties owned by him at 2100-2102-2104 rue Bélanger est, in Montréal.

54 In the succeeding years six fires of varying size occurred in the buildings subject to the hypothecs. Those buildings were covered by an insurance policy issued by previous insurers. On January 24, 1983, following notice that his policy had been cancelled, Katsikonouris purchased a fire insurance policy from the respondents. At the time this policy was taken out, the broker acting for Katsikonouris answered "no" to the following three questions:

1. Does the applicant have other insurance?
2. Have there been losses in the last three years?
3. Has an insurer refused or cancelled a policy in the last three years?

The insurance policy issued by the respondents, providing coverage of $350,000, contained a hypothecary (mortgage) clause approved by the Insurance Bureau of Canada and used in fire insurance

policies issued in Quebec and in the rest of Canada.

55 After the properties in question were completely destroyed by arson on June 25, 1983, the respondents refused to pay the indemnity to the hypothecary creditors, alleging that the policy was void ab initio because of the misrepresentations by Katsikonouris at the time the policy was purchased. The appellants and the National Bank of Greece (Canada) brought actions against Katsikonouris's insurers to claim the indemnity.

56 In a judgment on the actions brought by the hypothecary creditors, which actions were joined for hearing, the trial judge held, on the evidence presented to him, that the policy issued by the respondents was void ab initio as a consequence of the misrepresentations and omissions by the insured or his representative. He concluded, however, that the hypothecary (mortgage) clause prevented the respondents from relying on this nullity ab initio against the hypothecary creditors, and therefore that the latter were entitled to payment of the insurance indemnity. He accordingly allowed their action. The Court of Appeal allowed the appeal, reversed the Superior Court judgment and dismissed the actions of the hypothecary creditors, the appellants in this Court (the National Bank of Greece (Canada), plaintiff in the Superior Court, is not a party to the appeal in this Court).

Judgments

Superior Court, [1985] C.S. 1263 (Lamb J.)

57 The trial judge first noted that, through his broker, the hypothecary debtor had made numerous misrepresentations to the respondents so as to conceal from them the cancellation of an earlier insurance policy and the occurence of several fires of criminal origin on the insured property. He was of the view that these misrepresentations were such as to entail the nullity ab initio of the insurance contract between the hypothecary debtor and the respondents.

58 Proceeding to consider the argument of the insurance companies, which sought to invoke the nullity of the policy against the hypothecary creditors, the judge wrote (at pp. 1268-69):

> The wording of paragraph 1 of the mortgage clause which reads
>
> This insurance and every documented renewal thereof
>
> -- AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN
>
> -- is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured,
>
> is so broad that it can only be interpreted as a clear and unqualified renunciation by the insurers of their right to raise against the mortgage creditors a defence of nullity resulting from any act or neglect of the insured, whether the result of that act or neglect is a nullity ab initio or a nullity resulting from a cause arising after the policy had validly attached. Nothing in the clause purports specifically to limit or restrict the application of the word "any". The express renunciation of the insurers must therefore be read as intending to refer to absolute as well as relative nullity, in the absence of any words imposing a restrictive distinction between the two.
>
> The meaning of the mortgage clause is unambiguous, but if any further evidence is needed as to the insurers' intent to renounce their rights to invoke as

> against the mortgagees both absolute as well as relative nullity, such evidence can be found in the inclusion in the clause of the words "omission or misrepresentation", words clearly contemplating nullity ab initio as well as relative. [Emphasis in original.]

As to the nature of the contractual relationship between the insurers and the hypothecary creditors, he added (at p. 1269):

> Furthermore the language of the mortgage clause is such that it can only be regarded as a separate contract between the insurers and the mortgate [sic] creditors, wholly unaffected, as indeed its terms make clear, by the absolute or relative nullity of the policy vis-à-vis the insured.
>
> This was the conclusion reached by Laflamme J. in the case of Lirette c. Great American Insurance Co., [1982] C.S. 49, and by Biron J. in the case of Caisse populaire des deux rives c. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu, [1984] C.S. 1180. Both were carefully reasoned decisions with which this Court agrees. While they concern the effect to be given to the second paragraph of 2563 C.C. and thus do not involve the question of nullity ab initio, the principle of the separate contract which these decisions endorse is nevertheless applicable to this case.

He therefore concluded that the insurers were liable to the hypothecary creditors and allowed the actions by the appellants and the National Bank of Greece (Canada).

Court of Appeal, [1989] R.D.I. 46 (Monet and Beauregard JJ.A. and Desmeules J. (ad hoc))

Desmeules J. (ad hoc)

59 Desmeules J., with his two colleagues concurring, noted that the trial judge had relied inter alia on the Superior Court's decision in Lirette v. Great American Insurance Co., [1982] C.S. 49, reversed by the Court of Appeal since the judgment a quo was rendered, [1987] R.J.Q. 993 (sub nom. Madill v. Lirette). As the wording of the hypothecary (mortgage) clause considered by the Court of Appeal in Madill was the same as that which is at issue before this Court, Desmeules J. relied on that decision, from which he quoted at length. In that case, Bisson J.A. held for the majority that the nullity ab initio of the policy obtained by the insured carried with it the termination of the benefits conferred on the hypothecary creditor (at p. 49):

> [TRANSLATION] I consider that a hypothecary (mortgage) clause, like the one appearing in policy P-4, only protects the creditor once the contract has come into being, and from that time, for subsequent acts, neglect, omissions or misrepresentations by the owners of the insured property.

Desmeules J. noted that Bisson J.A. would have come to the same conclusion even had he recognized the existence of two separate contracts in an insurance policy containing a hypothecary (mortgage) clause. He further cited the Quebec Court of Appeal's decision in Vallée du Richelieu, Compagnie mutuelle d'assurance de dommages v. Caisse populaire des Deux Rives, [1988] R.J.Q. 2355, where Gendreau J.A., who had taken part in the Madill judgment, restated the Court of Appeal's position (at p. 50):

> [TRANSLATION] ... that is why we held that the hypothecary creditor's protection existed only if the insurance contract had actually and really been formed between the

> insured who had in fact requested it and the insurer who was preparing to undertake it. In deciding that there was no completed contract, that it was void ab initio, we rejected the recognition of the guarantee conferred by the hypothecary (mortgage) clause.

60 The conclusion of Desmeules J. conforms in all aspects to this jurisprudence of the Court of Appeal (at pp. 50-51):

> [TRANSLATION] The wording of the present hypothecary (mortgage) clause, in effect since 1972, refers to certain situations such as transfers of interest, vacancy or non-occupancy or the occupation of the property for purposes more hazardous than those specified, and it subjects creditors to an obligation to inform the insurer as soon as they are aware of such situations.
>
> These events are subsequent to the issuing of the insurance policy, and this leads me to conclude that it is such situations that the insurers sought to provide for in their hypothecary (mortgage) clause.
>
> With respect, I consider that the nullity ab initio of the insurance policy issued by [the respondents] has the effect of invalidating the hypothecary (mortgage) clause contained in that policy as well, and that there is no reason to depart from the existing precedents.

61 He accordingly allowed the appeal and denied the appellants and the National Bank of Greece (Canada) the right to the insurance indemnity.

Beauregard J.A.

62 Beauregard J.A. was also of the view that the appeals should be allowed. The gist of his brief reasons reads as follows (at p. 47):

> [TRANSLATION] Despite the use of the adverb "including", by application of the "rule" of interpretation noscitur a sociis or the ejusdem generis rule, we must conclude that "any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured" is an "act, neglect, omission or misrepresentation" which took place or was made after the policy was issued, just as "transfer of interest, vacancy or non-occupancy or the occupation of the property for purposes more hazardous than those specified".

Analysis

63 As in the Caisse populaire appeal, supra, the present case concerns an insurance contract purchased by the hypothecary debtor, pursuant to an undertaking made in hypothecary loan contracts to keep the hypothecated property insured for the benefit of the hypothecary creditors. The insurance policy purchased from the respondents contains the standard hypothecary (mortgage) clause approved by the Insurance Bureau of Canada. I have set out the clause below.

64 The judgment of this Court in Caisse populaire is to the effect that the insurance clause in a hypothecary loan contract is a contract of mandate, by which the hypothecary debtor undertakes to insure the hypothecated property on behalf of his hypothecary creditor. The insurance policy taken out in accordance with this mandate contains a standard hypothecary (mortgage) clause which thus sets out two separate insurance contracts, one between the insurer and the hypothecary debtor and the other

between the insurer and the hypothecary creditor. I refer to the reasons I gave in Caisse populaire in this regard and adopt them for these purposes.

65 Given these premises, this appeal must deal with the consequences of the alleged misrepresentations by the hypothecary debtor, first on his own insurance contract and then on the insurance contract between the hypothecary creditors and the insurers, in light of the existence of a standard hypothecary (mortgage) clause in the contract.

1. Nullity ab initio of the Hypothecary Debtor's Insurance Contract

66 Under arts. 2485 and 2486 C.C.L.C., the holder of an insurance policy must disclose to the insurer, in the utmost good faith, all the circumstances relevant to determining the risk, otherwise the contract may be cancelled at the insurer's request under art. 2487 C.C.L.C.:

> 2485. The policyholder, and the insured if the insurer requires it, is bound to represent all the facts known to him which are likely to influence a reasonable insurer materially in the setting of the premium, the appraisal of the risk or the decision to cover it.
>
> 2486. The obligation respecting representations is deemed met if the facts are substantially as represented and there is no material concealment.
>
> There is no obligation to represent the facts known to the insurer or which from their notoriety he is presumed to know, except in answer to inquiries.
>
> Misrepresentation or deceitful concealment by the insurer is in all cases a cause of nullity of the contract that the party acting in good faith may invoke.
>
> 2487. Subject to articles 2510 to 2515, misrepresentation or concealment by either the policyholder or the insured, in regard to the facts contemplated in articles 2485 and 2486, nullifies the contract at the instance of the insurer, even for losses not connected with the risks so misrepresented.

(Articles 2510 to 2515 C.C.L.C., mentioned in art. 2487 C.C.L.C., being concerned exclusively with life insurance, are not relevant here.)

67 According to the evidence, the hypothecary debtor or his representative did not disclose to the insurers various facts of importance in the insurers' determination of the risk, concerning inter alia previous insurance coverage, the occurrences of criminal fires on the insured premises and the refusal by the previous insurers to continue insuring the property. This non-disclosure surely constitutes misrepresentation, as the trial judge found (at p. 1268):

> The existence of the Pelletier, Symons policy, the decision of that insurer to cancel that policy, and the previous fires, all of criminal origin, which occurred in the building housing the insured's restaurant Athens by Night and in the Bélanger St. building, were facts known to Katsikonouris and which were material to the risk. Hofman's [Katsikonouris's broker's] failure to disclose these facts therefore nullifies the contract ab initio between the insured Katsikonouris and the Defendant Insurers. [Emphasis added.]

The Superior Court judge's conclusion in this regard and the resulting nullity of the insurance contract

between the hypothecary debtor and the insurers were not disputed in the Quebec Court of Appeal and were not the subject of argument in this Court.

68 It thus seems clear that the hypothecary debtor's insurance contract is void ab initio because of the latter's misrepresentations when the policy was purchased.

2. Nullity of the Hypothecary Creditors' Insurance Contract

69 The hypothecary creditors purchased their insurance contract from the insurers through their mandatary, the hypothecary debtor. The mandate, set out in the insurance clause of the hypothecary loan contracts, provides that the hypothecary debtor must keep the hypothecated property insured for the lenders' benefit. Accordingly, by purchasing the insurance contract, the hypothecary debtor performed his mandate in accordance with his undertaking.

70 Under art. 1727 C.C.L.C. mandators, in this case the lenders, are bound by the acts of their mandatary in the performance of the mandate:

> 1727. The mandator is bound in favour of third persons for all the acts of his mandatary, done in execution and within the powers of the mandate, except in the case provided for in article 1738 of this title, and the cases wherein by agreement or the usage of trade the latter alone is bound.
>
> The mandator is also answerable for acts which exceed such power, if he have ratified them either expressly or tacitly. [Emphasis added.]

As Rodière puts it, [TRANSLATION] "a mandatary [cannot] be regarded as a third party vis-à-vis the mandator" (Encyclopédie juridique Dalloz: Répertoire de droit civil, vol. 5, 2nd ed., "Mandat", at p. 26, No. 337). Domenget (Du mandat, de la commission et de la gestion d'affaires, vol. 1, Du mandat (1862)) specifically mentions the case of bad faith by the mandatary, stating that it cannot be invoked against third parties (at p. 257, No. 405):

> [TRANSLATION] Bad faith by the mandatary could not even be invoked against third parties by the mandator, if indeed those third parties were not in bad faith, in accordance with the rule qui mandavit ipse fecisse videtur.

Since the hypothecary debtor was acting in accordance with his mandate by purchasing the hypothecary creditors' insurance contract, the misrepresentations he made at that time must therefore be regarded, for the purposes of considering the validity of this contract, as misrepresentations made by the hypothecary creditors themselves.

71 These misrepresentations by the broker will have, as to the insurance contract between the hypothecary creditors and the insurers, consequences similar to those produced on the hypothecary debtor's personal insurance contract. Thus, the misrepresentations of the hypothecary debtor, acting as mandatary of the hypothecary creditors, had the effect of misrepresenting the risk to the insurers and thereby vitiating their consent to the insurance contract purchased for the hypothecary creditors, in the same way as these misrepresentations vitiated the insurers' consent to the hypothecary debtor's insurance contract. The insurance contract between the insurers and the hypothecary creditors is thus also void ab initio.

3. Whether the Nullity ab initio Can Be Invoked Against the Hypothecary Creditors

72 The appellants argue, however, that the nullity of the hypothecary creditors' insurance contract,

whether ab initio or otherwise, cannot be invoked against them on account of the undertakings made by the insurers and set forth in the hypothecary (mortgage) clause of this insurance contract. The content of this clause, which reads as follows, must therefore be considered:

(For use with Quebec Policy Forms only)

STANDARD MORTGAGE CLAUSE
(approved by the Insurance Bureau of Canada)

IT IS HEREBY PROVIDED AND AGREED THAT:

BREACH OF CONDITIONS BY MORTGAGOR, OWNER OR OCCUPANT

This insurance and every documented renewal thereof

-- AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN

-- is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk.

PROVIDED ALWAYS that the Mortgagee shall notify forthwith the Insurer (if known) of any vacancy or non-occupancy extending beyond thirty (30) consecutive days, or of any transfer of interest or increased hazard THAT SHALL COME TO HIS KNOWLEDGE, and that every increase of hazard (not permitted by the policy) shall be paid for by the Mortgagee -- on reasonable demand -- from the date such hazard existed, according to the established scale of rates for the acceptance of such increased hazard, during the continuance of this insurance.

RIGHT OF SUBROGATION

Whenever the Insurer pays the Mortgagee any loss award under this policy and claims that -- as to the Mortgagor or Owner -- no liability therefor existed, it shall be legally subrogated to all rights of the Mortgagee against the Insured, but any subrogation shall be limited to the amount of such loss payment and shall be subordinate and subject to the basic right of the Mortgagee to recover the full amount of its mortgage equity in priority to the Insurer, or the Insurer may at its option pay the Mortgagee all amounts due or to become due under the mortgage or on the security thereof, and shall thereupon receive a full assignment and transfer of the mortgage together with all securities held as collateral to the mortgage debt.

OTHER INSURANCE

If there be other valid and collectible insurance upon the property with loss payable to the Mortgagee

-- at law or in equity -- then any amount payable thereunder shall be

taken into account in determining the amount payable to the Mortgagee.

WHO MAY GIVE PROOF OF LOSS

In the absence of the Insured, or the inability, refusal or neglect of the Insured to give notice of loss or deliver the required Proof of Loss under the policy, then the Mortgagee may give the notice upon becoming aware of the loss and deliver as soon as practicable the Proof of Loss.

TERMINATION

The term of this Mortgage Clause coincides with the term of the policy;

PROVIDED ALWAYS that the Insurer reserves the right to cancel the policy as provided by Articles 2567 and 2568 of the Civil Code of the Province of Quebec, but agrees that the insurer will neither terminate nor alter the policy to the prejudice of the Mortgagee without 15 days' notice to the Mortgagee by registered letter.

FORECLOSURE

Should title or ownership to said property become vested in the Mortgagee and/or assigns as owner or purchaser under foreclosure or otherwise, this insurance shall continue until expiry or cancellation for the benefit of the said Mortgagee and/or assigns.

SUBJECT TO THE TERMS OF THIS MORTGAGE CLAUSE (and these shall supersede any policy provisions in conflict therewith BUT ONLY AS TO THE INTEREST OF THE MORTGAGEE), loss under this policy is made payable to the Mortgagee. [Emphasis added.]

The wording of this clause is very similar to the one considered in Caisse populaire, supra.

73 Before proceeding with the analysis of this clause as such, however, it may be worth taking a comparative look at the interpretation in other jurisdictions of clauses similarly worded to see whether the nullity ab initio of the insurance contract, as a consequence of misrepresentations by the hypothecary debtor, can be invoked against the hypothecary creditor.

A. Comparative Analysis

74 The hypothecary (mortgage) clause at issue here is in fact derived from clauses of the same type developed in the State of New York in the 1860s. This clause became widely used over the years throughout the United States and in Canada. Although known in France, it is seldom used there.

(i) France

75 The writers Picard and Besson in their classic treatise give an example of a hypothecary (mortgage) clause under which, according to them, the nullity ab initio of the insurance contract as a consequence of misrepresentation by the hypothecary debtor could not be invoked against the hypothecary creditor:

> [TRANSLATION] This clause -- known as the standard hypothecary or mortgage clause -- has been in widespread use in America since the late 19th century. It is however quite rare in French practice. The guarantee it provides creditors of course varies according to the policy. The following is an example of the standard hypothecary clause:
>
> > "At the request of the insured, the Company agrees not to take advantage of (but only as to hypothecary creditors registered against the immovable pursuant to a deed recorded by Mr. X, a notary) the failure to make the declarations prescribed by the general conditions of the policy, but only to the extent that their debts fall in the correct order on the indemnity to which the insured would have been entitled if his position had been in order ... ."
>
> With a clause of this kind, hypothecary creditors whose names are given to the insurer cannot be affected by nullities or disqualifications incurred by the insured, in particular as the result of an incorrect declaration of risk, even if they knew of such irregularities before the loss. [Emphasis added.]
>
> (Traité général des assurances terrestres en droit français, vol. 2, Assurances de dommages -- Règles générales (1940), at pp. 471-73.)

This clause is clearly specific and provides that an inaccurate initial statement of risk will not invalidate the hypothecary creditor's right to indemnification. It is interesting to note that it was thought necessary to use a very specific formula so as to cover nullity of the contract resulting from the absence of consent by one of the parties. The hypothecary (mortgage) clause at issue here is different and contains no specific mention of an "incorrect declaration of risk".

(ii) United States

76 The mortgage clause used in insurance policies in the United States usually reads as follows, with regard to waiver of the right to raise the mortgagor's actions against the mortgagee:

> It is hereby specially agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. [Emphasis added.]

77 Unlike the case of the existence of a second separate contract in the same policy containing a hypothecary (mortgage) clause, discussed in Caisse populaire, the specific question of whether the nullity ab initio of an insurance contract because of the mortgagor's misrepresentations can be invoked against the mortgagee has not been dealt with by the U.S. Supreme Court. The plethora of judgments in various states on this point does however disclose two trends: the majority of the decisions hold that such nullity cannot be invoked against the mortgagee, and the minority hold that it can.

78 The first judgment of the majority view is probably the decision by the New York Court of Appeal in Hastings v. Westchester Fire Insurance Co., 73 N.Y. 141 (1878). In that case, the mortgagor had bought such insurance. One of the conditions was that any other insurance was to be disclosed to the insurer. The mortgagor, however did not reveal that he had other insurance. The mortgagor's wrongful act thus occurred at the very time the policy was bought. The New York Court of Appeal found this policy to be null and void with respect to the mortgagor, but rejected the insurer's defence that this nullity extended to the mortgage clause. In his judgment Rapallo J. found that there were two separate

insurance contracts in the policy and went on to say (at p. 153):

> To hold otherwise would, I think, defeat the purpose intended, and deprive the mortgagees of the protection upon which they had a right to rely. Although the clause might be construed so as to exempt the mortgagees from the consequences only of acts of the owners done after the making of the agreement, I do not think, in view of its apparent purpose, that any such distinction was intended. [Emphasis added.]

This case was followed by a long line of decisions by other courts, in which the refusal to allow the nullity ab initio of the insurance contract to be invoked against the mortgagee was justified either by referring to the intent of the parties or by interpreting the mortgage clause as a sufficiently express waiver by the insurer of its right to invoke the nullity: Syndicate Ins. Co. v. Bohn, 65 F. 165 (8th Cir. 1894); Reed v. Firemen's Insurance Co. of Newark, 35 L.R.A. (N.S.) 343 (N.J. 1911); Federal Land Bank of Columbia v. Atlas Assur. Co., 125 S.E. 631 (N.C. 1924); Collins v. Michigan Commercial Underwriters, 6 Tenn. App. 528 (1928); Fayetteville Building & Loan Ass'n v. Mutual Fire Ins. Co. of West Virginia, 141 S.E. 634 (W. Va. 1928); National Union Fire Ins. Co. v. Short, 32 F.2d 631 (6th Cir. 1929); Stockton v. Atlantic Fire Ins. Co., 175 S.E. 695 (N.C. 1934); National Fire Ins. Co. of Hartford, Conn. v. Dallas Joint Stock Land Bank of Dallas, 50 P.2d 326 (Okla. 1935); Western Assur. Co. v. Hughes, 66 P.2d 1056 (Okla. 1937); Great American Insurance Co. of New York v. Southwestern Finance Co., 297 P.2d 403 (Okla. 1956); Northwestern National Insurance Co. v. Mildenberger, 359 S.W.2d 380 (Mo. Ct. App. 1962); Equality Savings and Loan Association v. Missouri Property Insurance Placement Facility, 537 S.W.2d 440 (Mo. Ct. App. 1976); Meade v. North County Co-Operative Insurance Co., 487 N.Y.S.2d 983 (Sup. Ct. 1985).

79 Despite these precedents, another line of authority, though less weighty, has taken the contrary view and denied the mortgagee the right to be indemnified where there have been misrepresentations by the mortgagor prior to or at the time the policy was bought. A specific example of this approach is found in Hanover Fire Ins. Co. v. National Exchange Bank, 34 S.W. 333 (Tex. Civ. App. 1896). In that case the insurance policy was vitiated ab initio because of a fraud committed when it was purchased. The trial court, in conformity with Hastings, held that the mortgagee had the right to be indemnified under the "standard" mortgage clause. In allowing the appeal the Court of Appeal said (Lightfoot C.J. for the court, at p. 334):

> The fraudulent concealment of a fact so material to the risk itself, which fact was expressly provided against on the face of the policy, and a knowledge of which would have stopped the issuance of the policy, prevented it from becoming a valid contract in favor of the assured, or the party for whose security it provided. The doctrine is well established in this state that A., for a consideration paid by him, may make a contract with B., for the benefit of C., and the latter will have a right of action to enforce it ... . But, if the contract was obtained by a fraudulent device of A., the person for whose benefit he fraudulently obtained it can gain no higher right than A. held, and, if the contract is void as to him, it is void as to his beneficiary. [Emphasis added.]

The court thus interpreted the formation of the second contract as the performance of a contract of agency between the mortgagee and the mortgagor. It went on to expressly reject the applicability of Hastings, concluding that the mortgagee could not validly claim both the benefits of the agency and immunity from its disadvantages. The court accordingly concluded that, in a case of fraud at the very time the policy is purchased (at p. 335): "The contract, as a whole, in such a case, must stand or fall" (see to the same effect, Graham v. Fireman's Insurance Co., 87 N.Y. 69 (1881); Young Men's Lyceum of Tarrytown v. National Ben Franklin Fire Ins. Co. of Pittsburgh, 163 N.Y.S. 226 (Sup. Ct.,

App. Div. 1917); Imperial Building and Loan Ass'n v. Aetna Ins. Co., 166 S.E. 841 (W. Va. 1932).)

80 Since the case law is thus divided and there is no ruling by the U.S. Supreme Court on the point, and as the wording of the clause in question differs from that at issue in the present appeal in a crucial respect, the U.S. precedents are of limited assistance.

(iii) Canada (common law)

81 The courts in the common law jurisdictions of Canada, including this Court, have on various occasions considered the question of whether the nullity ab initio of an insurance contract as the result of misrepresentations by the mortgagor when the contract was purchased can be invoked against the mortgagee.

82 In Omnium Securities Co. v. Canada Fire and Mutual Insurance Co. (1882), 1 O.R. 494, the Ontario Court of Queen's Bench rejected the solution put forward in the United States in Hastings four years earlier. Hagarty C.J. wrote (at pp. 496-97):

> It seems to me that this provision only points to the future, and that insurers are not thereby debarred from setting up that the insurance had been effected by fraud.
>
> ...
>
> I do not think they [the insurers] thereby guarantee to him [the mortgagee] that his mortgagor has committed no such fraud upon them in effecting the insurance -- they do not warrant it to be an indisputable risk.
>
> ...
>
> I repeat, I do not see how the insurers can be held to condone undiscovered fraud, or warrant the policy to be conclusively binding at the time of this bargain, any more than they could insist that the mortgagees warranted the validity of the mortgage as to title, value, &c., &c. [Emphasis added.]

The mortgage clause at issue in that case was similar in all respects to that used in the U.S. at the time. The judge accordingly rejected both the argument based on the apparent intent of the parties and the argument holding that, by giving the mortgagee the insurance contract found in the mortgage clause, the insurer had undertaken to guarantee the validity of the policy purchased by the mortgagor.

83 The same clause was involved in the judgment of this Court in Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co. (1903), 33 S.C.R. 94. The policy was found to be void ab initio, and the Court held per Davis J., with whom the majority concurred, that this invalidity could be invoked against the mortgagee (at p. 110):

> I have already stated that it is not necessary on this appeal for us to determine, and we do not determine, whether such a mortgage clause as was inserted in this policy gave the mortgagees such a beneficial right and interest or constituted such a direct contract between the mortgagees and the insurance company as would enable the former to sue in their own name alone and irrespective of [the mortgagor]. But we are all of the opinion that whether there was or was not such a direct contract, it did not cover or relate to the statements or omissions made by the applicant [the mortgagor], in his application for insurance and which were expressly made

> the basis of the liability of the company, and a part and a condition of the insurance contract.
>
> In our opinion the provision in the mortgage clause already quoted in words by me to the effect that
>
> > the insurance should not be invalidated by any act or neglect of the mortgagor or owner of the property insured, etc.
>
> had reference to the subsequent acts or neglects of the mortgagor and did not apply to his application for insurance or his statements or omissions therein. [Emphasis added.]

84 This interpretation was again recently adopted by the Ontario High Court in Chenier v. Madill (1973), 2 O.R. (2d) 361, where Galligan J., citing Omnium Securities, supra, noted (at p. 365):

> It is clear that the mortgage clause provides only against future acts by the insured. It has no relation to misrepresentation or fraudulent omissions by the insured affecting the validity of the contract of insurance ... . Accordingly, if either of the defences of misrepresentation or fraudulent omission to disclose circumstances material to the risk succeed, the defendant [the insurer] would be justified in denying liability to the mortgagees. [Emphasis added.]

85 The judgment of the British Columbia Supreme Court in Canadian Imperial Bank of Commerce v. Dominion of Canada General Insurance Co. (1987), 29 C.C.L.I. 313, is to the contrary. In a short oral decision on a motion, Huddart J. held that the fact the policy was void ab initio could not be invoked against the mortgagee (at p. 316):

> In my view, the only reasonable interpretation of the mortgage clause is that Mr. Dley suggests. By it the insurers are in effect entering into a separate contract with the mortgagee as an insured, a contract whose validity is independent of the acts or omissions of the owner.

86 Like the American precedents, most of the Canadian decisions on this point deal with hypothecary (mortgage) clauses whose wording is not in all respects identical to the one at issue here. In particular, they do not contain the words "omission or misrepresentation", which are present in the clause we are concerned with here. It is nonetheless interesting to note that these decisions almost unanimously hold that nullity ab initio resulting from misrepresentations by the hypothecary debtor at the time the insurance contract is purchased can be invoked against the hypothecary creditor.

87 This background does not dispense with the necessity of considering the wording of the hypothecary (mortgage) clause at issue in the present appeal so as to determine its true scope.

B. Analysis of the Words "Omission or Misrepresentation" in the Hypothecary (Mortgage) Clause: Wording and Context

88 The hypothecary (mortgage) clause in the insurance contract between the insurers and the hypothecary creditors is, as I have already mentioned, the standard formula approved by the Insurance Bureau of Canada, and is found in a great many insurance contracts throughout the country. The contract indeed contains both a French and an English version of this clause.

89 The crux of the problem is to define the exact meaning of the words "omission or

misrepresentation" in subclause one of the hypothecary (mortgage) clause, by analysing first the words themselves and then their context.

(i) Wording

90 The appellants relied in particular on subclause one of the hypothecary (mortgage) clause, which states that "omission or misrepresentation" ("déclarations" in the French version) by the owner of the insured property cannot be invoked against the hypothecary creditors. For the sake of convenience, I shall set out the French and English texts of the first paragraph of subclause one of the hypothecary (mortgage) clause:

> VIOLATIONS DU CONTRAT
>
> Ne sont pas opposables aux créanciers hypothécaires les actes, négligences ou déclarations des propriétaires, locataires ou occupants des biens assurés, notamment en ce qui concerne les transferts d'intérêts, la vacance ou l'inoccupation, ou l'affectation des lieux à des fins plus dangereuses que celles déclarées.
>
> BREACH OF CONDITIONS BY MORTGAGOR, OWNER OR OCCUPANT
>
> This insurance and every documented renewal thereof -- AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN -- is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk. [Emphasis added.]

91 The appellants first contended that the term "omission or misrepresentation" can only apply to omissions or misrepresentations by the policyholder at the time the policy is purchased. With respect, it is not clear that this term has such a wide meaning here. If this term can in fact be applied to the initial declaration of the risk (arts. 2485 and 2486 C.C.L.C. and condition one of the insurance contract), it can equally apply to other situations: the owner (or tenant or occupant) of the insured property has an obligation to notify the insurer of any aggravation of risk (art. 2566 C.C.L.C.), as well as any loss affecting that property (arts. 2572 and 2573 C.C.L.C.). In particular, that part of the Civil Code of Lower Canada dealing with notification of loss is titled "Of the notification of loss". Further, the clause does not mention the concept of "concealment", the word used in art. 2487 C.C.L.C. in connection with the concealment of information at the time of purchase, which is one of the actions alleged against the hypothecary debtor in the present case. Accordingly, the words "omission or misrepresentation" by themselves are ambiguous. In view of this vague wording, it is necessary to examine the context in which the words "omission or misrepresentation" occur, so as to determine the meaning by an analysis of the other provisions of the insurance contract.

(ii) Context

92 The appellants base an argument on the use, in the English text of the hypothecary (mortgage) clause, of the present and future tenses of the verb "to be" ("is and shall be in force"), and conclude that the insurance contract is stated to be valid at the time it is purchased. In the appellants' submission, this immediate validation, concurrent with the formation of the insurance contract, is specifically designed to cover any misrepresentation by the policyholder. This argument is somewhat circular, however, since the policy could only be confirmed if it already exists. Thus, the present tense in the contract would apply to actions occurring at the time of formation, which are therefore subsequent to the purchase,

preceding formation of the contract. This argument therefore does not appear to have the weight given to it by the appellants.

93 The wording of the first paragraph of the hypothecary (mortgage) clause contains a list of acts that will not affect the rights of hypothecary creditors. While this list is not in any way exhaustive, as indicated by the adverb "including", it indicates the type of acts the parties intended to include in the expression "act, neglect, omission or misrepresentation". All the items contained in this list ("transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk") can only take place after the policy has been purchased. As we know, in accordance with the rule of interpretation noscitur a sociis and its particular application, the ejusdem generis rule, the generality of a term can be limited by a series of more specific terms which precede or follow it. Professor Côté writes in this regard (The Interpretation of Legislation in Canada (1984), at p. 242):

> Noscitur a sociis helpfully draws attention to the fact that a statute's context can indicate a meaning far more restrictive than that found in the dictionary.

Professor Côté further cites the following passage from Renault v. Bell Asbestos Mines Ltd., [1980] C.A. 370, concerning the ejusdem generis rule (at p. 372 of that judgment, per Turgeon J.A. for the court):

> [TRANSLATION] The ejusdem generis rule means that a generic or collective term that completes an enumeration of terms should be restricted to the same genus as those words, even though the generic or collective term may ordinarily have a much broader meaning.

He added the following caveat, however (at pp. 244-45):

> Certain conditions must be satisfied for ejusdem generis to apply. According to some cases, the general expression must be preceded by several specific terms; otherwise there would be no genus permitting its restriction. But this condition is not universally respected, and its [sic] does not seem unreasonable to restrict the meaning of a broad expression even if it is preceded by only one specific term. Instead of ejusdem generis, the rule of noscitur a sociis could be invoked. Sometimes the courts have refused to apply ejusdem generis when a general term is preceded by only one specific term. However, such decisions have been based on ordinary principles of interpretation, and not simply on the fact that a single specific term preceded a general one.
>
> A second condition for application of the rule, according to some authorities, is that the general term follow rather than precede the specific ones. But these cases do not eliminate the possibility of attenuating the meaning of generic terms with less general terms which follow. Even if strictly speaking ejusdem generis doesn't apply, the principle of contextual interpretation set forth by noscitur a sociis holds in any case.
>
> As a third condition, the specific terms must have a significant common denominator to be considered within one given category. If this is lacking, ejusdem generis doesn't apply. [References omitted. Emphasis added.]

The acts listed in the present case, as mentioned above, are a homogeneous group having as their

common feature occurrence after the purchase of the contract. I adopt in this regard the reasoning of Beauregard J.A. in the Court of Appeal when he wrote (at p. 47):

> [TRANSLATION] Despite the use of the adverb "including", by application of the "rule" of interpretation noscitur a sociis or the ejusdem generis rule, we must conclude that "any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured" is an "act, neglect, omission or misrepresentation" which took place or was made after the policy was issued, just as "transfer of interest, any vacancy or non-occupancy or the occupation of the property for purposes more hazardous than specified".

According to this interpretation, the words "omission or misrepresentation" would thus apply only to omissions or misrepresentations subsequent to the formation of a valid insurance contract between the hypothecary creditor and the insurer.

94 This interpretation in my opinion is confirmed by the wording of the second paragraph of subclause one of the hypothecary (mortgage) clause, which provides that the hypothecary creditor shall be liable for increased premiums resulting from increases in the risk. In this connection one must differentiate between an increase in the risk and a different risk resulting from misrepresentations by the holder of the insurance. In the case of misrepresentations when the risk was initially declared, there is not necessarily an increase in the risk since the insurer may simply refuse to insure the risk. Additionally, when these misrepresentations that aggravate the risk are subsequently discovered, an additional premium may be due the insurer to reflect the risk actually insured. Coverage of a different risk, on the other hand, is not a situation contemplated by the second paragraph of subclause one of the hypothecary (mortgage) clause, which makes the hypothecary creditor liable for additional premiums that may be due on account of an increase in the risk, but which could not apply to a different risk. This is a further indication supporting the conclusion that only omissions or misrepresentations subsequent to purchase are covered by the hypothecary (mortgage) clause.

95 The apparent generality of the words "omission or misrepresentation" is thus actually limited by what follows the first paragraph of subclause one of the hypothecary (mortgage) clause. This seems to indicate that the parties did not intend to cover the insurer's defect of consent resulting from misrepresentations by the hypothecary debtor when the insurance contract was taken out on behalf of the hypothecary creditors.

96 The word "any" in the English text, on which the trial judge relied, only qualifies the words "act, neglect" and it will differ in scope depending on the definition and scope of the words "act, neglect" in the English text, or "déclarations" in the French text, so that no conclusion can be drawn from this. If the "déclarations" or "act[s], neglect[s]" apply only to "déclarations" or "act[s]" subsequent to a valid contract, the word "any" cannot have the meaning given to it by the trial judge. Similarly, the words "is and shall be" seem to me to seal the fate of the meaning of the hypothecary (mortgage) clause only if it is assumed that the parties intended to guarantee insurance that is void ab initio, an intention which I do not impute to the parties.

97 The intent of the parties as indicated by the wording and context of the hypothecary (mortgage) clause seems to me to be all the clearer as the logic of the system requires that the mandator be bound by the misrepresentations of his mandatary, who himself has taken out a separate insurance policy with the insurers on behalf of the hypothecary creditors. In such a case, the second insurance contract thus entered into is in principle void ab initio. If that is the case, it seems to me that much more specific language than that in the hypothecary (mortgage) clause at issue would be needed to conclude that the parties intended to cover this nullity ab initio, as is the case in France for example.

98 Additionally, bearing in mind that Quebec insurance law is based on the [TRANSLATION] "genius of the French language" and [TRANSLATION] "North American practice" (Faribault, "Du papillon à la chrysalide ou l'étrange métamorphose de l'assurance de responsabilité" (1987), 55 Assurances 300, at p. 308) in accordance with the opinion of the codifiers (see Caisse populaire), it would be surprising if the standard hypothecary (mortgage) clause at issue here were to be given a different interpretation here, as it is purely a question of the application of the rules of interpretation of contracts in either system, rules which are very similar. A clause to the same effect, though worded differently, is in use throughout Canada and has been interpreted on numerous occasions in the common law provinces as denying mortgagees the protection of an insurance contract that is void ab initio. If the parties intended to circumvent these precedents, which are not recent, they could easily have adopted a wording specifically designed to do so. In this connection the simple addition of the words "déclarations" in French and "omission or misrepresentation" in English, without further qualification, was not intended in my opinion to make it impossible to invoke against the hypothecary creditor "déclarations" or "omission[s] or misrepresentation[s]" made when the policy was purchased. I would instead interpret this addition as being intended solely to cover a possible lacuna in the earlier hypothecary (mortgage) clause, the language of which might suggest that the hypothecary debtor's "omission[s] or misrepresentation[s]" during the life of the contract could be invoked against the hypothecary creditor. It must be remembered that in our legal system it is the intent of the parties that governs and it was thus open to the contracting parties to indicate clearly their common intention to cover nullity ab initio of the insurance contract toward the hypothecary creditor if they could legally do so. In view of the wording and context of the hypothecary (mortgage) clause, in my opinion, such an intent has not been established.

99 This result is also consistent with the unanimous jurisprudence of the Quebec Court of Appeal: Duchesneau v. Great American Insurance Co., [1955] Que. Q.B. 120; Madill v. Lirette, supra; Amin v. Cie d'assurance American Home, [1989] R.R.A. 151; Veilleux v. Victoria Insurance Co., [1989] R.J.Q. 1075. This result is also in accord with the presumption of good faith implicit in any contract (art. 1024 C.C.L.C.), according to which the insurance contract, like any other contract, was concluded. Assuming, as it was entitled to do, the good faith of its insured when the insurance contract was formed, the insurer could not have had any reservations regarding the second contract attached to it in favour of the insured's hypothecary creditor. It has to be asked whether, in the absence of such good faith on the part of the insured, the insurer would have assumed the risk towards the hypothecary creditor, a risk which it agreed to run precisely because of the assumed good faith of its insured. In other words, in practical terms I find it hard to understand how an insurer, knowing before issuing the policy of the facts not declared or misrepresented here by the insured, would have concluded an insurance contract with that insured. Moreover, this contract has been declared void ab initio for this reason. The second contract, attached to the one concluded between the hypothecary debtor and the insurer under the mandate conferred by the hypothecary creditor, would thus not have been made in those circumstances. The position of the hypothecary creditor is accordingly no different here from what it would have been there.

100 If the parties did intend the hypothecary creditor to benefit from the policy's protection, even in a case where the insurer would have refused to issue a policy to the hypothecary debtor, they were obviously free to agree to this, subject of course to the validity of such an agreement. However, it seems to me that such an agreement, the effect of which would be to negate, with respect to the hypothecary creditor, the provisions in the policy (and the provisions of the law) regarding the initial misrepresentations of the insured hypothecary debtor, must be written in clear and express language. In my opinion, the hypothecary (mortgage) clause at issue here does not meet these requirements.

101 Additionally, the obvious advantage for the insurer and insured as well as for the hypothecary creditor in covering the insured risk in a single policy instead of using two separate contracts does not

seem to me to be threatened by the conclusions at which I arrive. First, there is nothing to indicate that a second contract between the hypothecary creditor and the insurer could not have included restrictions regarding the initial statements by the insured so as to make the policy void ab initio with respect to protection of the hypothecary creditor. Second, the hypothecary (mortgage) clause attached to the policy issued to the hypothecary debtor retains its full value without any need to resort to the procedure of a second contract, so long as the parties expressly indicate the extent of the risk which the hypothecary (mortgage) clause is to cover.

102 Having found that the meaning of the hypothecary (mortgage) clause is free of ambiguity, it is not necessary to refer to the rule of interpretation contained in art. 2499 C.C.L.C.

Conclusion

103 I therefore conclude that the nullity ab initio of the insurance contract entered into by the appellants and the respondents, as a consequence of misrepresentations by the hypothecary debtor when this contract was purchased, is not covered by the wording of this clause. This conclusion, based on an analysis of the clause itself and its context, is in keeping with the majority interpretations given to various versions of the hypothecary (mortgage) clause by decisions of this Court and the Quebec Court of Appeal.

104 If, however, one had to conclude that the parties intended in the hypothecary (mortgage) clause that the insurers would waive their right to have the insurance contract invalidated ab initio, it would then be necessary to consider the validity of such a waiver (in this regard reference can be made, in particular, to Bouzat, "De la clause par laquelle une partie dans une convention s'engage à ne pas en demander la nullité" (1934), 54 Rev. crit. lég. et jur. 350). However, in view of the conclusion at which I have arrived it is not necessary to discuss this question here.

105 Accordingly, for all these reasons I would affirm the judgment of the Quebec Court of Appeal and dismiss the appeal, with costs throughout.

Solicitors for the appellants: Mondor, Fournier, Montréal.
Solicitors for the respondents: Colas & Associés, Montréal.

qp/i/qlplh

8

Case Name:

Nelson Financial Group Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Nelson Financial Group Ltd.

[2010] O.J. No. 4903

2010 ONSC 6229

75 B.L.R. (4th) 302

71 C.B.R. (5th) 153

2010 CarswellOnt 8655

Court File No. 10-8630-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

November 16, 2010.

(36 paras.)

Bankruptcy and insolvency law -- Companies' Creditors' Arrangement Act (CCAA) -- Compromises and arrangements -- Claims -- Priority -- Motion by the holders of promissory notes from the debtor company for an order that all claims and potential claims of the preferred shareholders against the company be classified as equity claims within the meaning of the Companies' Creditors Arrangement Act allowed -- Claims of preferred shareholders for unpaid dividends, redemption, compensatory damages and rescission fell within s. 2 of the Companies' Creditors Arrangement Act and were thus equity claims.

Motion by the holders of promissory notes from the debtor company for an order that all claims and potential claims of the preferred shareholders against the company be classified as equity claims within the meaning of the Companies' Creditors Arrangement Act. The company raised money from investors and then used those funds to extend credit to customers in vendor assisted financing programmes. It issued promissory notes or preference shares to the investors. The preferred shareholders were entered on the share register and received share certificates. They were treated as equity in the company's financial statements. The claims of the preferred shareholders against the company were for declared but unpaid dividends, unperformed requests for redemption, compensatory damages for negligent or fraudulent misrepresentation and payment of the amounts due upon the rescission or annulment of the

purchase or subscription for preferred shares.

HELD: Motion allowed. The preferred shareholders were shareholders of the company, not creditors. The substance of the arrangement between the preferred shareholders and the company was a relationship based on equity and not debt. The claims of the preferred shareholder in the present case did not constitute a claim provable for the purposes of the Companies' Creditors Arrangement Act. The language of s. 2 of the Act was clear and unambiguous and equity claims included a claim in respect of an equity interest and a claim for a dividend or similar payment and a claim for rescission. This encompassed the claims of all of the preferred shareholders.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 2, s. 121(1)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 6(8), s. 22.1

Counsel:

Richard B. Jones and Douglas Turner, Q.C., Representative Counsel for Noteholders/Moving Party.

J.H. Grout and S. Aggarwal, for the Monitor.

Pamela Foy, for the Ontario Securities Commission.

Frank Lamie, for Nelson Financial Group Ltd.

Robert Benjamin Mills and Harold Van Winssen for Clifford Styles, Jackie Styles and Play Investments Ltd., Respondents.

Michael Beardsley, Self Represented Respondent.

Clifford Holland, Self Represented Respondent.

Arnold Bolliger, Self Represented Respondent.

John McVey, Self Represented Respondent.

Joan Frederick, Self Represented Respondent.

Rakesh Sharma, Self Represented Respondent.

Larry Debono, Self Represented Respondent.

Keith McClear, Self Represented Respondent.

REASONS FOR DECISION

1 **S.E. PEPALL J.**:-- This motion addresses the legal characterization of claims of holders of preferred shares in the capital stock of the applicant, Nelson Financial Group Ltd. ("Nelson"). The issue before me is to determine whether such claims constitute equity claims for the purposes of sections 6(8)

and 22.1 of the *Companies' Creditors Arrangement Act* ("*CCAA*").

Background Facts

2 Nelson was incorporated pursuant to the *Business Corporations Act* of Ontario in September, 1990. Nelson raised money from investors and then used those funds to extend credit to customers in vendor assisted financing programmes. It raised money in two ways. It issued promissory notes bearing a rate of return of 12% per annum and also issued preference shares typically with an annual dividend of 10%.[1] The funds were then lent out at significantly higher rates of interest.

3 The Monitor reported that Nelson placed ads in selected publications. The ads outlined the nature of the various investment options. Term sheets for the promissory notes or the preferred shares were then provided to the investors by Nelson together with an outline of the proposed tax treatment for the investment. No funds have been raised from investors since January 29, 2010.

(a) Noteholders

4 As of the date of the *CCAA* filing on March 23, 2010, Nelson had issued 685 promissory notes in the aggregate principal amount of $36,583,422.89. The notes are held by approximately 321 people.

(b) Preferred Shareholders

5 Nelson was authorized to issue two classes of common shares and 2,800,000 Series A preferred shares and 2,000,000 Series B preferred shares, each with a stated capital of $25.00. The president and sole director of Nelson, Marc Boutet, is the owner of all of the issued and outstanding common shares. By July 31, 2007, Nelson had issued to investors 176,675 Series A preferred shares for an aggregate consideration of $4,416,925. During the subsequent fiscal year ended July 31, 2008, Nelson issued a further 172,545 Series A preferred shares and 27,080 Series B preferred shares. These shares were issued for an aggregate consideration of $4,672,383 net of share issue costs.

6 The preferred shares are non-voting and take priority over the common shares. The company's articles of amendment provide that the preferred shareholders are entitled to receive fixed preferential cumulative cash dividends at the rate of 10% per annum. Nelson had the unilateral right to redeem the shares on payment of the purchase price plus accrued dividends. At least one investor negotiated a right of redemption. Two redemption requests were outstanding as of the *CCAA* filing date.

7 As of the *CCAA* filing date of March 23, 2010, Nelson had issued and outstanding 585,916.6 Series A and Series B preferred shares with an aggregate stated capital of $14,647,914. The preferred shares are held by approximately 82 people. As of the date of filing of these *CCAA* proceedings, there were approximately $53,632 of declared but unpaid dividends outstanding with respect to the preferred shares and $73,652.51 of accumulated dividends.

8 Investors subscribing for preferred shares entered into subscription agreements described as term sheets. These were executed by the investor and by Nelson. Nelson issued share certificates to the investors and maintained a share register recording the name of each preferred shareholder and the number of shares held by each shareholder.

9 As reported by the Monitor, notwithstanding that Nelson issued two different series of preferred shares, the principal terms of the term sheets signed by the investors were almost identical and generally provided as follows:

- the issuer was Nelson;

- the par value was fixed at $25.00;
- the purpose was to finance Nelson's business operations;
- the dividend was 10% per annum, payable monthly, commencing one month after the investment was made;
- preferred shareholders were eligible for a dividend tax credit;
- Nelson issued annual T-3 slips on account of dividend income to the preferred shareholders;
- the preferred shares were non-voting (except where voting as a class was required), redeemable at the option of Nelson and ranked ahead of common shares; and
- dividends were cumulative and no dividends were to be paid on common shares if preferred share dividends were in arrears.

10 In addition, the Series B term sheet provided that the monthly dividend could be reinvested pursuant to a Dividend Reinvestment Plan ("DRIP").

11 The preferred shareholders were entered on the share register and received share certificates. They were treated as equity in the company's financial statements. Dividends were received by the preferred shareholders and they took the benefit of the advantageous tax treatment.

(c) Insolvency

12 Mr. Boutet knew that Nelson was insolvent since at least its financial year ended July 31, 2007. Nelson did not provide financial statements to any of the preferred shareholders prior to, or subsequent to, the making of the investment.

(d) Ontario Securities Commission

13 On May 12, 2010, the Ontario Securities Commission ("OSC") issued a Notice of Hearing and Statement of Allegations alleging that Nelson and its affiliate, Nelson Investment Group Ltd., and various officers and directors of those corporations committed breaches of the *Ontario Securities Act* in the course of selling preferred shares. The allegations include non-compliance with the prospectus requirements, the sale of shares in reliance upon exemptions that were inapplicable, the sale of shares to persons who were not accredited investors, and fraudulent and negligent misrepresentations made in the course of the sale of shares. The OSC hearing has been scheduled for the end of February, 2011.

(e) Legal Opinion

14 Based on the Monitor's review, the preferred shareholders were documented as equity on Nelson's books and records and financial statements. Pursuant to court order, the Monitor retained Stikeman Elliott LLP as independent counsel to provide an opinion on the characterization of the claims and potential claims of the preferred shareholders. The opinion concluded that the claims were equity claims. The Monitor posted the opinion on its website and also advised the preferred shareholders of the opinion and conclusions by letter. The opinion was not to constitute evidence, issue estoppel or res judicata with respect to any matters of fact or law referred to therein. The opinion, at least in part, informed Nelson's position which was supported by the Monitor, that independent counsel for the preferred shareholders was unwarranted in the circumstances.

(f) Development of Plan

15 The Monitor reported in its Eighth Report that a plan is in the process of being developed and that preferred shareholders would have their existing preference shares cancelled and would then be able to

claim a tax loss on their investment or be given a new form of preference shares with rights to be determined.

Motion

16 The holders of promissory notes are represented by Representative Counsel appointed pursuant to my order of June 15, 2010. Representative Counsel wishes to have some clarity as to the characterization of the preferred shareholders' claims. Accordingly, Representative Counsel has brought a motion for an order that all claims and potential claims of the preferred shareholders against Nelson be classified as equity claims within the meaning of the *CCAA*. In addition, Representative Counsel requests that the unsecured creditors, which include the noteholders, be entitled to be paid in full before any claim of a preferred shareholder and that the preferred shareholders form a separate class that is not entitled to vote at any meeting of creditors. Nelson and the Monitor support the position of Representative Counsel. The OSC is unopposed.

17 On the return of the motion, some preferred shareholders were represented by counsel from Templeman Menninga LLP and some were self-represented. It was agreed that the letters and affidavits of preferred shareholders that were filed with the court would constitute their evidence. Oral submissions were made by legal counsel and by approximately eight individuals. They had many complaints. Their allegations against Nelson and Mr. Boutet range from theft, fraud, misrepresentation including promises that their funds would be secured, operation of a Ponzi scheme, breach of trust, dividend payments to some that exceeded the rate set forth in Nelson's articles, conversion of notes into preferred shares at a time when Nelson was insolvent, non-disclosure, absence of a prospectus or offering memorandum disclosure, oppression, violation of section 23(3) of the *OBCA* and of the *Securities Act* such that the issuance of the preferred shares was a nullity, and breach of fiduciary duties.

18 The stories described by the investors are most unfortunate. Many are seniors and pensioners who have invested their savings with Nelson. Some investors had notes that were rolled over and replaced with preference shares. Mr. McVey alleges that he made an original promissory note investment which was then converted arbitrarily and without his knowledge into preference shares. He alleges that the documents effecting the conversion did not contain his authentic signature.

19 Mr. Styles states that he and his company invested approximately $4.5 million in Nelson. He states that Mr. Boutet persuaded him to convert his promissory notes into preference shares by promising a 13.75% dividend rate, assuring him that the obligation of Nelson to repay would be treated the same or better than the promissory notes, and that they would have the same or a priority position to the promissory notes. He then received dividends at the 13.75% rate contrary to the 10% rate found in the company's articles. In addition, at the time of the conversion, Nelson was insolvent.

20 In brief, Mr. Styles submits that:

(a) the investment transactions were void because there was no prospectus contrary to the provisions of the *Securities Act* and the Styles were not accredited investors; the preferred shares were issued contrary to section 23(3) of the *OBCA* in that Nelson was insolvent at the relevant time and as such, the issuance was a nullity; and the conduct of the company and its principal was oppressive contrary to section 248 of the *OBCA*; and that

(b) the Styles' claim is in respect of an undisputed agreement relating to the conversion of their promissory notes into preferred shares which agreement is enforceable separate and apart from any claim relating to the preferred shares.

The Issue

21 Are any of the claims advanced by the preferred shareholders equity claims within section 2 of the *CCAA* such that they are to be placed in a separate class and are subordinated to the full recovery of all other creditors?

The Law

22 The relevant provisions of the *CCAA* are as follows.

Section 2 of the *CCAA* states:

> In this Act,
>
> "Claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;
>
> "Equity Claim" means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (a) a dividend or similar payment,
> (b) a return of capital,
> (c) a redemption or retraction obligation,
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (*a*) to (*d*);"
>
> "Equity Interest" means
>
> (a) in the case of a corporation other than an income trust, a share in the corporation -- or a warrant or option or another right to acquire a share in the corporation -- other than one that is derived from a convertible debt, and
> (b) in the case of an income trust, a unit in the income trust -- or a warrant or option or another right to acquire a unit in the income trust -- other than one that is derived from a convertible debt;

Section 6(8) states:

> No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Section 22.1 states:

> Despite subsection 22(1) creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

23 Section 2 of the *Bankruptcy and Insolvency Act* ("*BIA*") which is referenced in section 2 of the

CCAA provides that a claim provable includes any claim or liability provable in proceedings under the Act by a creditor. Creditor is then defined as a person having a claim provable as a claim under the Act.

24 Section 121(1) of the *BIA* describes claims provable. It states:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

25 Historically, the claims and rights of shareholders were not treated as provable claims and ranked after creditors of an insolvent corporation in a liquidation. As noted by Laskin J.A. in *Re Central Capital Corporation*[2], on the insolvency of a company, the claims of creditors have always ranked ahead of the claims of shareholders for the return of their capital. This principle is premised on the notion that shareholders are understood to be higher risk participants who have chosen to tie their investment to the fortunes of the corporation. In contrast, creditors choose a lower level of exposure, the assumption being that they will rank ahead of shareholders in an insolvency. Put differently, amongst other things, equity investors bear the risk relating to the integrity and character of management.

26 This treatment also has been held to encompass fraudulent misrepresentation claims advanced by a shareholder seeking to recover his investment: *Re Blue Range Resource Corp.*[3] In that case, Romaine J. held that the alleged loss derived from and was inextricably intertwined with the shareholder interest. Similarly, in the United States, the Second Circuit Court of Appeal in *Re Stirling Homex Corp.*[4] concluded that shareholders, including those who had allegedly been defrauded, were subordinate to the general creditors when the company was insolvent. The Court stated that "the real party against which [the shareholders] are seeking relief is the body of general creditors of their corporation. Whatever relief may be granted to them in this case will reduce the percentage which the general creditors will ultimately realize upon their claims." *National Bank of Canada v. Merit Energy Ltd.*[5] and *Earthfirst Canada Inc.*[6] both treated claims relating to agreements that were collateral to equity claims as equity claims. These cases dealt with separate indemnification agreements and the issuance of flow through shares. The separate agreements and the ensuing claims were treated as part of one integrated transaction in respect of an equity interest. The case law has also recognized the complications and delay that would ensue if *CCAA* proceedings were mired in shareholder claims.

27 The amendments to the *CCAA* came into force on September 18, 2009. It is clear that the amendments incorporated the historical treatment of equity claims. The language of section 2 is clear and broad. Equity claim means a claim in respect of an equity interest and includes, amongst other things, a claim for rescission of a purchase or sale of an equity interest. Pursuant to sections 6(8) and 22.1, equity claims are rendered subordinate to those of creditors.

28 The Nelson filing took place after the amendments and therefore the new provisions apply to this case. Therefore, if the claims of the preferred shareholders are properly characterized as equity claims, the relief requested by Representative Counsel in his notice of motion should be granted.

29 Guidance on the appropriate approach to the issue of characterization was provided by the Ontario Court of Appeal in *Re Central Capital Corporation*[7]. Central Capital was insolvent and sought protection pursuant to the provisions of the *CCAA*. The appellants held preferred shares of Central Capital. The shares each contained a right of retraction, that is, a right to require Central Capital to redeem the shares on a fixed date and for a fixed price. One shareholder exercised his right of retraction and the other shareholder did not but both filed proofs of claim in the *CCAA* proceedings. In considering whether the two shareholders had provable debt claims, Laskin J.A. considered the substance of the

relationship between the company and the shareholders. If the governing instrument contained features of both debt and equity, that is, it was hybrid in character, the court must determine the substance of the relationship between the company and the holder of the certificate. The Court examined the parties' intentions.

30 In *Central Capital*, Laskin J.A. looked to the share purchase agreements, the conditions attaching to the shares, the articles of incorporation and the treatment given to the shares in the company's financial statements to ascertain the parties' intentions and determined that the claims were equity and not debt claims.

31 In this case, there are characteristics that are suggestive of a debt claim and of an equity claim. That said, in my view, the preferred shareholders are, as their description implies, shareholders of Nelson and not creditors. In this regard, I note the following.

(a) Investors were given the option of investing in promissory notes or preference shares and opted to invest in shares. Had they taken promissory notes, they obviously would have been creditors. The preference shares carried many attractions including income tax advantages.
(b) The investors had the right to receive dividends, a well recognized right of a shareholder.
(c) The preference share conditions provided that on a liquidation, dissolution or winding up, the preferred shareholders ranked ahead of common shareholders. As in *Central Capital*, it is implicit that they therefore would rank behind creditors.
(d) Although I acknowledge that the preferred shareholders did not receive copies of the financial statements, nonetheless, the shares were treated as equity in Nelson's financial statements and in its books and records.

32 The substance of the arrangement between the preferred shareholders and Nelson was a relationship based on equity and not debt. Having said that, as I observed in *I. Waxman & Sons.*[8], there is support in the case law for the proposition that equity may become debt. For instance, in that case, I held that a judgment obtained at the suit of a shareholder constituted debt. An analysis of the nature of the claims is therefore required. If the claims fall within the parameters of section 2 of the *CCAA*, clearly they are to be treated as equity claims and not as debt claims.

33 In this case, in essence the claims of the preferred shareholders are for one or a combination of the following:

(a) declared but unpaid dividends;
(b) unperformed requests for redemption;
(c) compensatory damages for the loss resulting in the purchased preferred shares now being worthless and claimed to have been caused by the negligent or fraudulent misrepresentation of Nelson or of persons for whom Nelson is legally responsible; and
(d) payment of the amounts due upon the rescission or annulment of the purchase or subscription for preferred shares.

34 In my view, all of these claims fall within the ambit of section 2, are governed by sections 6(8) and 22.1 of the *CCAA,* and therefore do not constitute a claim provable for the purposes of the statute. The language of section 2 is clear and unambiguous and equity claims include "a claim that is in respect of an equity interest" and a claim for a dividend or similar payment and a claim for rescission. This

encompasses the claims of all of the preferred shareholders including the Styles whose claim largely amounts to a request for rescission or is in respect of an equity interest. The case of *National Bank of Canada v. Merit Energy Ltd.*[9] is applicable in regard to the latter. In substance, the Styles' claim is for an equity obligation. At a minimum, it is a claim in respect of an equity interest as described in section 2 of the CCAA. Parliament's intention is clear and the types of claims advanced in this case by the preferred shareholders are captured by the language of the amended statute. While some, and most notably Professor Janis Sarra[10], advocated a statutory amendment that provided for some judicial flexibility in cases involving damages arising from egregious conduct on the part of a debtor corporation and its officers, Parliament opted not to include such a provision. Sections 6(8) and 22.1 allow for little if any flexibility. That said, they do provide for greater certainty in the appropriate treatment to be accorded equity claims.

35 There are two possible exceptions. Mr. McVey claims that his promissory note should never have been converted into preference shares, the conversion was unauthorized and that the signatures on the term sheets are not his own. If Mr. McVey's evidence is accepted, his claim would be qua creditor and not preferred shareholder. Secondly, it is possible that monthly dividends that may have been lent to Nelson by Larry Debono constitute debt claims. The factual record on these two possible exceptions is incomplete. The Monitor is to investigate both scenarios, consider a resolution of same, and report back to the court on notice to any affected parties.

36 Additionally, the claims procedure will have to be amended. The Monitor should consider an appropriate approach and make a recommendation to the court to accommodate the needs of the stakeholders. The relief requested in the notice of motion is therefore granted subject to the two aforesaid possible exceptions.

S.E. PEPALL J.

cp/e/qlafr/qlvxw/qlana

1 The Monitor is aware of six preferred shareholders with dividends that ranged from 10.5% to 13.75% per annum.

2 (1996), 38 C.B.R. (3d) 1 (Ont. C.A.).

3 (2000), 15 C.B.R. (4th) 169.

4 (1978) 579 F. 2d 206 (2nd Cir. Ct. of App.).

5 [2001] A.J. No. 918, (2001), 2001 CarswellAlta 913, aff'd [2002] A.J. no. 6, 2002 CarswellAlta 23 (Alta C.A.).

6 [2009] A.J. No. 749, (2009) 2009 CarswellAlta 1069.

7 Supra, note 2.

8 [2008] O.J. No. 885, (2008), 2008 CarswellOnt 1245.

9 Supra, note 5.

10 "From Subordination to Parity: An International Comparison of Equity Securities Law Claims in Insolvency Proceedings" (2007) 16 Int. Insolv. Re., 181.

9

** Preliminary Version **

Case Name:

Century Services Inc. v. Canada (Attorney General)

Century Services Inc., Appellant;
v.
Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada, Respondent.

[2010] S.C.J. No. 60

[2010] A.C.S. no 60

2010 SCC 60

[2010] 3 S.C.R. 379

[2010] 3 R.C.S. 379

2011 D.T.C. 5006

409 N.R. 201

296 B.C.A.C. 1

12 B.C.L.R. (5th) 1

2010 CarswellBC 3419

326 D.L.R. (4th) 577

EYB 2010-183759

2011EXP-9

J.E. 2011-5

2011 G.T.C. 2006

[2011] 2 W.W.R. 383

72 C.B.R. (5th) 170

[2010] G.S.T.C. 186

File No.: 33239.

Supreme Court of Canada

Heard: May 11, 2010;
Judgment: December 16, 2010.

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

(136 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Compromises and arrangements -- Where Crown affected -- Effect of related legislation -- Bankruptcy and Insolvency Act -- Appeal by Century Services Inc. from judgment of British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies allowed -- Section 222(3) of the Excise Tax Act evinced no explicit intention of Parliament to repeal s. 18.3 of CCAA -- Parliament's intent with respect to GST deemed trusts was to be found in the CCAA -- Judge had the discretion under the CCAA to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit debtor company to make an assignment in bankruptcy.

Appeal by Century Services Inc. from a judgment of the British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies. The debtor company commenced proceedings under the Companies' Creditors Arrangement Act (CCAA), obtaining a stay of proceedings with a view to reorganizing its financial affairs. Among the debts owed by the debtor company at the commencement of the reorganization was an amount of GST collected but unremitted to the Crown. The Excise Tax Act (ETA) created a deemed trust in favour of the Crown for amounts collected in respect of GST. The ETA provided that the deemed trust operated despite any other enactment of Canada except the Bankruptcy and Insolvency Act (BIA). However, the CCAA also provided that subject to certain exceptions, none of which mentioned GST, deemed trusts in favour of the Crown did not operate under the CCAA. In the context of the CCAA proceedings, a chambers judge approved a payment not exceeding $5 million to the debtor company's major secured creditor, Century Services. The judge agreed to the debtor company's proposal to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. After concluding that reorganization was not possible, the debtor company sought leave to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the Bankruptcy and Insolvency Act (BIA). The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. The judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal found two independent bases for allowing the Crown's appeal. First, the court's authority under s. 11 of the CCAA was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the CCAA and the court was bound under the priority scheme provided by the

ETA to allow payment to the Crown. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes.

HELD: Appeal allowed. Section 222(3) of the ETA evinced no explicit intention of Parliament to repeal CCAA s. 18.3. Had Parliament sought to give the Crown a priority for GST claims, it could have done so explicitly, as it did for source deductions. There was no express statutory basis for concluding that GST claims enjoyed a preferred treatment under the CCAA or the BIA. Parliament's intent with respect to GST deemed trusts was to be found in the CCAA. With respect to the scope of a court's discretion when supervising reorganization, the broad discretionary jurisdiction conferred on the supervising judge had to be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. The question was whether the order advanced the underlying purpose of the CCAA. The judge's order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the CCAA. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the CCAA's objectives to the extent that it allowed a bridge between the CCAA and BIA proceedings. The order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that was common to both statutes. The breadth of the court's discretion under the CCAA was sufficient to lift the stay to allow entry into liquidation. No express trust was created by the judge's order because there was no certainty of object inferrable from his order. Further, no deemed trust was created.

Statutes, Regulations and Rules Cited:

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, s. 69, s. 128, s. 131

Bank Act, S.C. 1991, c. 46,

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-, s. 67, s. 86

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23

Cities and Towns Act, R.S.Q., c. C-19,

Civil Code of QuÚbec, S.Q. 1991, c. 64, art. 2930

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.4, s. 18.3, s. 18.4, s. 20, s. 21

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36,

Employment Insurance Act, S.C. 1996, c. 23, s. 86(2), s. 86(2.1)

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4), s. 227(4.1)

Interpretation Act, R.S.C. 1985, c. I-21, s. 2, s. 44(f)

Personal Property Security Act, S.A. 1988, c. P-4.05,

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

Subsequent History:

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

Court Catchwords:

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

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

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

Court Summary:

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

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

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

Per McLachlin C.J., Binnie, LeBel, **Deschamps**, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp.(Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222 (3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require

the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

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

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

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

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18(3) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act,* that discretion is not liberated from the

operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

Cases Cited

By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to**: *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp, Re* (1992), 19 B.C.AC. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

Referred to: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

Statutes and Regulations Cited

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, ss. 69, 128, 131.

Bank Act, S.C. 1991, c. 46.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 86 [am. 2005, c. 47, s. 69].

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History and Disposition:

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

Counsel:

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

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

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and

Cromwell JJ. was delivered by

1 **DESCHAMPS J.**:-- For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

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

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

emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

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

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

2. Issues

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

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

3. Analysis

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

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

3.1 *Purpose and Scope of Insolvency Law*

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

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

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

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

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

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

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

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

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

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

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of

the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

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

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

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

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

3.2 *GST Deemed Trust Under the CCAA*

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

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the

CCAA to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

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

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

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

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

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

amendment").

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

> **222...** .
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ... .

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

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

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

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

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

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

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

deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** ...
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*... .

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

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

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

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

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

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

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

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

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

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

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

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

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

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

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

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

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

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

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

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

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

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

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

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

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

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The

remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282 , at para. 57, *per* Doherty J.A., dissenting)

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

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

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

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

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

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

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

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

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

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

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

treated as advantageously and fairly as the circumstances permit.

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

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

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

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

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

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

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

between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

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

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

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

3.4 *Express Trust*

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

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

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

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

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

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

4. Conclusion

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

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

The following are the reasons delivered by

FISH J.:--

I

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

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

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

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

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

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

II

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

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

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

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

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

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and*

> *Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

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

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

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

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

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

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

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the

CPP and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

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

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

> **222**. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and InsolvencyAct*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
>
> ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

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

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

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without

considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

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

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

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

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

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

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

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

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

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

> be held in trust, is deemed
>
> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

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

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

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

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

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were

also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

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

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

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

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

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

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

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

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

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

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

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

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

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C.

1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

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

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

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

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

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

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

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

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

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

136 I would dismiss the appeal.

Appeal allowed with costs, ABELLA J. *dissenting.*

* * * * *

APPENDIX

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

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

...

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

> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

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

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

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

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

...

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

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

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

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

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

(i) the expiration of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or arrangement,
(iv) the default by the company on any term of a compromise or arrangement, or
(v) the performance of a compromise or arrangement in respect of the company; and

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

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time

referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

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

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

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

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

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

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to

in subsection (1) of this section, does not affect the operation of

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

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

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

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

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

order that it considers appropriate in the circumstances.

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

> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

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

> (*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

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

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

...

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

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

(iii) six months following the court sanction of a compromise or an arrangement,
(iv) the default by the company on any term of a compromise or an arrangement, or

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

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

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

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

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

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

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

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that

could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

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

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

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

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

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

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

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

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

> (*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
>
> (*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

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

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

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

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

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

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

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

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

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

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

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

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

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Exceptions] Subsection (1) does not affect the operation of

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

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

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

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

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

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

Solicitors:

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Department of Justice, Vancouver.

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

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

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

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Case Name:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Plan of Compromise and Arrangement involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 4446372 Canada Inc. and 6932819 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto

Between

The Investors represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper listed in Schedule "B" hereto, Applicants (Respondents in Appeal), and Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits listed in Schedule "A" hereto, Respondents (Respondents in Appeal), and Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal Inc., Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Domtar Inc., Domtar Pulp and Paper Products Inc., GIRO Inc., Vêtements de sports R.G.R. Inc., 131519 Canada Inc., Air Jazz LP, Petrifond Foundation Company Limited, Petrifond Foundation Midwest Limited, Services hypothécaires la patrimoniale Inc., TECSYS Inc., Société générale de financement du Québec, VibroSystM Inc., Interquisa Canada L.P., Redcorp Ventures Ltd., Jura Energy Corporation, Ivanhoe Mines Ltd., WebTech Wireless Inc., Wynn Capital Corporation Inc., Hy Bloom Inc., Cardacian Mortgage Services, Inc., West Energy Ltd., Sabre Enerty Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd. and Standard Energy Inc., Respondents (Appellants)

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Docket: C48969 (M36489)

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, E.A. Cronk and R.A. Blair JJ.A.

Heard: June 25-26, 2008.
Judgment: August 18, 2008.

(121 paras.)

Bankruptcy and insolvency law -- Proceedings in bankruptcy and insolvency -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Courts -- Jurisdiction -- Federal -- Companies' Creditors Arrangement Act -- Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal sanctioning of that Plan -- Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings -- Plan dealt with liquidity crisis threatening Canadian market in Asset Backed Commercial Paper -- Plan was sanctioned by court -- Leave to appeal allowed and appeal dismissed -- CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court -- Companies' Creditors Arrangement Act, ss. 4, 6.

Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal the sanctioning of that Plan. In August 2007, a liquidity crisis threatened the Canadian market in Asset Backed Commercial Paper (ABCP). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on US sub-prime mortgages. By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings. The Plan was sanctioned on June 5, 2008. The applicants raised an important point regarding the permissible scope of restructuring under the Companies' Creditors Arrangement Act: could the court sanction a Plan that called for creditors to provide releases to third parties who were themselves insolvent and not creditors

of the debtor company? They also argued that if the answer to that question was yes, the application judge erred in holding that the Plan, with its particular releases (which barred some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

HELD: Application for leave to appeal allowed and appeal dismissed. The appeal raised issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There were serious and arguable grounds of appeal and the appeal would not unduly delay the progress of the proceedings. In the circumstances, the criteria for granting leave to appeal were met. Respecting the appeal, the CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where the releases were reasonably connected to the proposed restructuring. The wording of the CCAA, construed in light of the purpose, objects and scheme of the Act, supported the court's jurisdiction and authority to sanction the Plan proposed in this case, including the contested third-party releases contained in it. The Plan was fair and reasonable in all the circumstances.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 4, s. 6

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 91(21), s. 92(13)

Appeal From:

On appeal from the sanction order of Justice Colin L. Campbell of the Superior Court of Justice, dated June 5, 2008, with reasons reported at [2008] O.J. No. 2265.

Counsel:

See Schedule "A" for the list of counsel.

The judgment of the Court was delivered by

R.A. BLAIR J.A.:--

A. INTRODUCTION

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited time-table -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 21 (Ont. C.A.), and *Re Country Style Food Services* (2002), 158 O.A.C. 30, are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. FACTS

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over $1 billion -- represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of

the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of

certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montréal Protocol -- the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABCP collapse.

b) The Releases

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
b) Sponsors -- who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
c) The Canadian banks provide below-cost financing for the margin funding facility and,
d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25th. The vote was overwhelmingly in support of the Plan -- 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. LAW AND ANALYSIS

39 There are two principal questions for determination on this appeal:

1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

40 The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.[1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

a) on a proper interpretation, the CCAA does not permit such releases;
b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
d) the releases are invalid under Quebec rules of public order; and because
e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.). As Farley J. noted in *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 at 111 (Ont. Gen. Div.), "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent

jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction -- it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell Expressvu Ltd. Partnership v. R.*, [2002] 2 S.C.R. 559 at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 at 318 (B.C.C.A.), Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary -- as the then Secretary of State noted in introducing the Bill on First Reading -- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Elan Corp. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.), *per* Doherty J.A. in dissent; *Re Skydome Corp.* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div.); *Re Anvil Range Mining Corp.* (1998), 3 C.B.R. (4th) 93 (Ont. Gen. Div.).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan, supra,* at pp. 306-307:

> ... [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.* [Emphasis added.]

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

a) the skeletal nature of the CCAA;
b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or

liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(*b*) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N para. 10. It has been said to be "a very wide and indefinite [word]": *Re Refund of Dues under Timber Regulations*, [1935] A.C. 184 at 197 (P.C.), affirming S.C.C. [1933] S.C.R. 616. See also, *Re Guardian Assur. Co.*, [1917] 1 Ch. 431 at 448, 450; *Re T&N Ltd. and Others (No. 3)*, [2007] 1 All E.R. 851 (Ch.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. Ltd. v. Ideal Petroleum* (1959) Ltd. [1978] 1 S.C.R. 230 at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 at para. 11 (C.A.). In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Re Air Canada* (2004), 2 C.B.R. (5th) 4 at para. 6 (Ont. S.C.J.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 at 518 (Gen. Div.).

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor

and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

64 *Re T&N Ltd. and Others, supra,* is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement.[4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s. 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s. 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for

what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[6] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
c) The Plan cannot succeed without the releases;
d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then -- as was the case in *T&N* -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Re Canadian Airlines Corp.* (2000), 265 A.R. 201, leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.* (2000), 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, (2001) 293 A.R. 351 (S.C.C.). In *Re Muscle Tech Research and Development Inc.* (2006), 25 C.B.R (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Re Canadian Airlines*, however, the releases in those restructurings -- including *Muscle Tech* -- were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Re Canadian Airlines* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Michaud v. Steinberg,*[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Michaud v. Steinberg, supra*; *NBD Bank, Canada v. Dofasco Inc.*, (1999), 46 O.R. (3d) 514 (C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C.S.C.); and *Re Stelco Inc.* (2005), 78 O.R. (3d) 241 (C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, *NBD Bank* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to

another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]
>
> See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J.) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Re Stelco Inc.*, (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... *[H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process*. [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec Court of Appeal in *Michaud v. Steinberg, supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> ...

> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> ...
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act -- an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this

Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> Exception
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (*a*) relate to contractual rights of one or more creditors; or
>
> (*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> Powers of court
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> Resignation or removal of directors
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would

Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted:[8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, *supra*, at 2-144, Es.11A; *Le Royal Penfield Inc. (Syndic de)*, [2003] R.J.Q. 2157 at paras. 44-46 (C.S.).

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra,* at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re: Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659. As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Royal Bank of Canada v. Larue* [1928] A.C. 187, "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Re Ravelston Corp. Ltd.* (2007), 31 C.B.R. (5th) 233 (Ont. C.A.).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the

end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd.* (1998), 38 B.L.R. (2d) 251 at paras. 9 and 18 (B.C.S.C.). There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
c) The Plan cannot succeed without the releases;
d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. DISPOSITION

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

R.A. BLAIR J.A.
J.I. LASKIN J.A.:-- I agree.
E.A. CRONK J.A.:-- I agree.

* * * * *

SCHEDULE "A" - CONDUITS

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

* * * * *

SCHEDULE "B" - APPLICANTS

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

* * * * *

SCHEDULE "A" - COUNSEL

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3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG.
4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.
5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals).
6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor.

7) Mario J. Forte for Caisse de Dépôt et Placement du Québec.
8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada.
9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al).
10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank.
12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees.
13) Usman Sheikh for Coventree Capital Inc.
14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
15) Neil C. Saxe for Dominion Bond Rating Service.
16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP.
17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

cp/e/ln/qlkxl/qllkb/qlltl/qlrxg/qlhcs/qlcas/qlhcs/qlhcs

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

3 Citing Gibbs J.A. in *Chef Ready Foods, supra,* at pp. 319-320.

4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard), supra.*

5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business*

Corporations Act, R.S.O. 1990, c. B.16, s. 182.

6 A majority in number representing two-thirds in value of the creditors (s. 6).

7 *Steinberg* was originally reported in French: [1993] R.J.Q. 1684 (C.A.). All paragraph references to *Steinberg* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp. 234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

Court of Appeal File Nos. C56115, C56118, C56125
Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

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11

Case Name:

Earthfirst Canada Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36, as Amended AND IN THE MATTER OF a Plan of Compromise or Arrangement of Earthfirst Canada Inc.

[2009] A.J. No. 749

2009 ABQB 316

56 C.B.R. (5th) 102

2009 CarswellAlta 1069

Docket: 0801 13559

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

B.E.C. Romaine J.

Heard: May 13, 2009.
Judgment: May 27, 2009.

(5 paras.)

Counsel:

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Howard A. Gorman, for Earthfirst Canada Inc.

A. Robert Anderson, Q.C. and Eric D. Stearns, for the Monitor, Ernst & Young Inc.

[Editor's note: A corrigendum was released by the Court on July 8, 2009; the corrections have been made to the text and the corrigendum is appended to this document.]

Reasons for Judgment

B.E.C. ROMAINE J.:--

INTRODUCTION

1 Earthfirst Canada Inc. seeks a declaration as the proper characterization of potential claims of holders of its flow-through common shares for the purpose of a proposed plan of arrangement under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended. The issue is whether contingent claims that the flow-through subscribers may have are, at their core, equity obligations rather than debt or creditor obligations and, as such, necessarily rank behind claims made by the creditors of Earthfirst. I decided that the potential claims are in substance equity obligations and these are my reasons.

FACTS

2 The flow-through shares at issue were distributed in December, 2007 as part of an initial public offering of common shares and flow-through shares. The common shares plus one-half of a warrant were offered at a price of $2.25 per unit. The flow-through shares were offered at a price of $2.60 per share. Investors who wished to purchase flow-through shares were required to execute a subscription agreement which included the following covenants of Earthfirst:

> 6.(b) to incur, during the Expenditure Period, Qualifying Expenditures in such amount as enables the Corporation to renounce to each Subscriber, Qualifying Expenditures in an amount equal to the Commitment Amount of such Subscriber;
>
> (c) to renounce to each Subscriber, pursuant to subsection 66(12.6) and 66(12.66) of the Tax Act and this Subscription Agreement, effective on or before December 31, 2007, Qualifying Expenditures incurred during the Expenditure Period in an amount equal to the Commitment Amount of such Subscriber;
>
> ...
>
> (g) if the Corporation does not renounce to the Subscriber, Qualifying Expenditures equal to the Commitment Amount of such Subscriber effective on or before December 31, 2007 and as the sole recourse to the Subscriber for such failure, the Corporation shall indemnify the Subscriber as to, and pay to the Subscriber, an amount equal to the amount of any tax payable under the Tax Act (and under any corresponding provincial legislation) by the Subscriber (or if the Subscriber is a partnership, by the partners thereof) as a consequence of such failure, such payment to be made on a timely basis once the amount is definitively determined, provided that for certainty the limitation of the Corporation's obligation to indemnify the Subscriber pursuant to this Section shall not apply to limit the Corporation's liability in the event of a breach by the Corporation of any other covenant, representation or warranty pursuant to this Agreement or the Underwriting Agreement;

3 Certain conditions were required to be satisfied before expenditures made by Earthfirst would qualify as "Qualifying Expenditures" pursuant to the *Income Tax Act* and the associated regulations. Because construction of Earthfirst's Dokie 1 wind power project was interrupted by events triggered by the CCAA filing, it may be that Earthfirst will not be able to satisfy some of these conditions. While Earthfirst is seeking a purchaser of the Dokie 1 project assets, and that purchaser may complete the necessary requirements for expenditures to be considered "Qualifying Expenditures", there is presently no guarantee that the necessary conditions will be met. The subscribers for flow-through shares may therefore have a claim under the indemnity set out in the subscription agreement.

ISSUE

Are the claims under the indemnity debt claims or claims for the return of an equity investment?

ANALYSIS

The flow-through share subscribers submit that their indemnity claims are not claims for the return of capital. Counsel for the flow-through share subscribers makes some persuasive arguments in that regard, including:

(a) that the underlying rights that form the basis of the claims are severable and distinct from the status of subscribers as shareholders of Earthfirst, in that the flow-through shares are composed of two distinct components, being common shares and the subscriber's right to the renunciation of a certain amount of tax credit or the right to be indemnified for tax credit not so renounced. It is submitted that further evidence of the distinct and severable nature of the indemnity claim can be found in the fact that, while the common share component of the flow-through shares can be transferred, the flow-through benefits accrue only to original subscribers;

(b) that the claimants in advancing a claim under the indemnity are not advancing a claim for the return of their investment in common shares;

(c) that the rights and obligations that form the basis of the indemnity claim are set out in the subscription agreement, which indicates an intention to create a debt obligation in the indemnity provisions; and

(d) that the claim under the indemnity is limited to a specific amount as compared to the unlimited upside potential of any equity investment, and that thus one of the policy reasons for drawing a distinction between debt and equity in the context of insolvency does not apply to an indemnity claim.

4 On the other side of the argument, it is clear that the indemnity claim derives from the original status of the subscribers as subscribers of shares, that the claim was acquired as part of an investment in shares, and that any recovery on the indemnity would serve to recoup a portion of what the subscriber originally invested, primarily qua shareholder. While it may be true that equity may become debt, as, for instance, in the case of declared dividends or a claim reduced to a judgment debt (Re I. Waxman & Sons Ltd. [2008] O.J. No. 885 at para 24 and 25), the indemnity claim has not undergone a transformation from its original purpose as a "sweetener" to the offering of common shares, even if individual subscribers have since sold the shares to which it was attached. The renunciation of flow-through tax credits, despite the payment of a premium for this feature, can be characterized as incidental or secondary to the equity features of the investment, a marketing feature that provided an alternative to the share plus warrant tranche of the public offering for investors who found the feature attractive: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* [1992] S.C.J. No. 96 at para. 54.

5 This type of indemnity skirts close to the line that courts are attempting to draw with respect to the characterization and ranking of equity and equity-type investments in the insolvency context. In Alberta, that line is drawn by the decision of LoVecchio, J. in *National Bank of Canada v. Merit Energy Ltd.*, [2001] A.J. No. 918, upheld by the Court of Appeal at [2002] A.J. No. 6. The indemnity at issue in Merit Energy was substantially identical to the one at issue in this case. While Lovecchio, J. appeared to refer to elements of misrepresentation arising from prospectus disclosure with respect to the Merit indemnity claim at para. 29 of the decision, it is clear that he considered the debt features of the indemnity in his later analysis, and noted at para. 54 that:

> While the Flow-Through Shareholders paid a premium for the shares (albeit to get the deductions), in my view the debt features associated with the CEE indemnity from Merit do not "transform' that part of the relationship from a shareholder relationship into a debt relationship. That part of the relationship remains "incidental" to being a shareholder.

The Court of Appeal in dismissing the appeal commented:

> Counsel for the appellant stresses the express indemnity covenant here, but in our view, it is ancillary to the underlying right, as found by the chambers judge. Characterization flows from the underlying right, not from the mechanism for its enforcement, nor from its non-performance.

The decision in Merit Energy thus determines the issue in this case, which is not distinguishable on any basis that is relevant to the issue. I also note that, while it is not determinative of the issue as the legislation has not yet been proclaimed, section 49 of Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act,* the *Companies' Creditors Act*, the *Wage Protection Program Act* and Chapter 47 of the *Statues of Canada*, 2005, 2nd Sess., 39th Parl., 2007, ss. 49, 71 [Statute c.36] provides that a creditor is not entitled to a dividend in respect of any equity claim until all other claims are satisfied. Equity Claims are defined as including:

(a) a dividend or similar payment,
(b) a return of capital,
(c) a redemption or retraction obligation,
(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
(e) contribution or indemnity in respect of a claim referred to in any paragraphs (a) to (d) [emphasis added].

CONCLUSION

I therefore grant:

a) a declaration that potential claims that holders of flow-through common shares in Earthfirst may have against Earthfirst, if any, are at their core equity obligations rather than debt or creditor obligations, and, as such, necessarily rank behind in priority to claims made by creditors of Earthfirst and will not participate in any creditor plan or distribution; and
b) an order permitting Earthfirst to make certain payment to its creditors pursuant to a Plan of Arrangement in an amount and upon such terms to be determined by this Honourable Court at the date of this application without regard to any contingent or other claims of the flow-through shareholders or subscribers.

B.E.C. ROMAINE J.

* * * * *

Corrigendum
Released: July 8, 2009

The citation "Earthfirst Canada Inc. *(Companies' Creditors Arrangement Act)* 2009 ABQB 316" was corrected to read "Earthfirst Canada Inc. (Re) 2009 ABQB 316"

cp/e/qlcct/qlpwb/qlltl/qlaxr

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File Nos. C56115, C56118, C56125
Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE RESPONDENTS, THE AD HOC COMMITTEE OF NOTEHOLDERS OF SINO-FOREST CORPORATION
VOLUME 1 OF 2

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