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JUDICIAL CENTRE	CALGARY
APPLICANTS	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 DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC AND DOMINION FINCO INC.
DOCUMENT	**REPLY BRIEF OF DIAVIK DIAMOND MINES (2012) INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Sean Collins / Walker W. MacLeod / Pantelis Kyriakakis / Nathan Stewart Tel: 403-260-3531 / 3710 / 3536 / 3534 Fax: 403-260-3501 Email: scollins@mccarthy.ca / wmacleod@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca

REPLY BRIEF OF DIAVIK DIAMOND MINES (2012) INC.

IN REPLY TO THE BENCH BRIEF SUBMITTED BY ARCTIC CANADIAN DIAMOND COMPANY LTD. OPPOSING THE APPLICATION TO APPROVE THE SALE OF THE DIAVIK MINE INTEREST TO BE HEARD BY THE HONOURABLE MADAM JUSTICE K.M. EIDSVIK

November 9, 2021 at 10:00 a.m.

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I. INTRODUCTION

1. This Reply Brief submitted by Diavik Diamond Mines (2012) Inc. ("**DDMI**") addresses the Bench Brief submitted by Arctic Canadian Diamond Company Ltd. ("**ACDC**") on October 25, 2021 (the "**ACDC Brief**"). The relevant facts and issues, concerning the AVO, remain set out in DDMI's initial Brief of Argument submitted on October 12, 2021 (the "**DDMI Brief**"), being whether: (i) the AVO Transaction should be approved, as proposed; and (ii) the Monitor, as part of the AVO Transaction, may deliver and execute the Discontinuance and Release, to and in favour of DDMI. This Reply Brief of Argument is limited to certain novel issues and arguments raised in the ACDC Brief. Capitalized terms used herein without express definition shall have the same meaning as ascribed to such terms in the DDMI Brief or the Sixteenth Report of the Monitor, dated October 6, 2021 (the "**Sixteenth Monitor's Report**"), as the context may require.

2. In its brief, ACDC attempts to obfuscate the relevant issues through: (i) baseless allegations that the parties, including DDMI, are acting in bad faith; (ii) impugning, through "beliefs" and "concerns", DDMI's conduct as Manager of the Diavik Joint Venture; and (iii) misinterpreting the Ekati APA and related documents to construe ownership interests with respect to the BC Civil Claim, the Cash Collateral, and the Dominion Production, which do not exist. With respect to ACDC's allegations concerning DDMI's conduct, ACDC offers no evidence, of any kind, beyond "beliefs" and "concerns" to substantiate its position. Furthermore, since the EMP Order, the Monitor has, *inter alia*: (i) been involved in the Diavik JVA as a Participant; (ii) attended meetings; (iii) engaged with environmental consultants; and (iv) reviewed cash calls. No complaints have been raised or communicated by the Monitor regarding whether DDMI is not acting in good faith. ACDC's ownership claims concerning the BC Civil Claim, the Cash Collateral, and the Dominion Production, are flawed and are either inaccurate or fail to account for the priority rights of DDMI and the 1L Lenders, the Monetization Process Order, and the fact that ACDC's interests are limited to those associated with a contingent, unsecured, net receivable claim; with no *in rem* rights.

II. ARGUMENT

A. DDMI Has Acted, And Continues To Act, In Good Faith

(i) ACDC's Complaints that DDMI Has Not Acted in Good Faith Are Unfounded Baseless Accusations.

3. ACDC's assertion that DDMI has breached its duty to act in good faith, in insolvency proceedings, strains credulity. ACDC's complaints *vis-à-vis* DDMI are summarized in (a) through (d), as follows.

(a) DDMI has not bargained with ACDC, a subordinate, out-of-the-money unsecured creditor, and has instead engaged in what ACDC calls "private negotiations";

4. DDMI has negotiated with all applicable parties, in good faith. DDMI's role, as purchaser and major secured creditor, frames whether DDMI has acted and negotiated in good faith. DDMI holds a first-ranking security interest against all Acquired Assets (other than the Cash Collateral, which DDMI is the beneficiary of). Following the insolvency of its joint venture counterparty, DDMI is the only party to have funded Dominion's obligations under the Diavik JVA to enable continued operation of the Diavik Mine during these proceedings; at DDMI's own risk and expense and for the benefit of Dominion's estate.

5. ACDC argues that the Support Agreement was entered into without "any prior consultation with ACDC or notice to ACDC"; and, "[t]he First Lien Lenders and DDMI negotiated and settled the AVO Transaction without ACDC's participation of its input …".

Bench Brief of Arctic Canadian Diamond Company Ltd., submitted on October 25, 2021, at paras. 47 and 38 ["ACDC Brief"].

6. The hypocrisy of ACDC's allegations, when viewed against ACDC's prior conduct in connection with the Ekati Sale, is readily apparent. ACDC negotiated its own deal, being the Ekati Sale, without including DDMI. Now ACDC complains of DDMI acting in a similar manner. ACDC's failure to include DDMI in the Ekati APA negotiations was not bad faith then; neither is DDMI's conduct now. Specifically, DDMI: (i) is not a party to the Mutual Support Agreement or the Transition Services Agreement; (ii) is not a counterparty of ACDC's under any relevant agreements; and, (iii) has no privity of contract with ACDC concerning the Acquired Assets or

AVO Transaction. Furthermore, DDMI has no independent obligation to voluntarily forego its rights and prejudice its position in these circumstances.

7. Additionally, ACDC is not the Diavik Joint Venture counterparty and has no *in rem* rights with respect to the Acquired Assets. DDMI, as a senior secured creditor and prospective purchaser has no duty, nor is it commonplace for a party in DDMI's position to negotiate with junior creditors who have unsecured contingent net receivable claims which are out of the money when attempting to purchase the Acquired Assets owned by Dominion and managed by the Monitor. When the Ekati APA is properly interpreted, it is apparent that ACDC's *claimed* interest in the Acquired Assets greatly exceeds the scope of what was actually conveyed under the Ekati APA. As the majority interest holder, DDMI is free to negotiate with its Diavik Joint Venture counterparty.

8. ACDC has referred to the *Callow* decision for the proposition that, "silence is a breach of good faith where it knowingly misleads a counterparty". As set out above, ACDC is **not** DDMI's counterparty; which sufficiently distinguishes *Callow* on just that basis. However, even beyond this, DDMI's conduct would not amount to bad faith, which as Justice Kasirer stated in *Callow*:

> "The specific legal doctrines derived from the organizing principle rest on a "requirement of justice" that a contracting party […] have appropriate regard to the legitimate contractual interests of their counterparty (*Bhasin*, at paras. 63-64). **It need not, according to *Bhasin*, subvert its own interests to those of Callow by acting as a fiduciary or in a selfless manner that would confer a benefit on Callow**. […]"

ACDC Brief, *supra* at para. 50, citing *C.M. Callow Inc. v Zollinger*, 2020 SCC 45, at para. 90 ["*Callow*"] [TAB 3]; *Callow*, *supra* at para. 47 [TAB 3].

9. DDMI has not acted dishonestly, unreasonably, capriciously, or arbitrarily, nor misled ACDC. In the circumstances, the duties of good faith and honesty did not require negotiating with unsecured, contingent creditors, like ACDC, in the purchase of the Acquired Assets, in respect of which ACDC has no: (i) secured interest against; (ii) obligations under the Diavik JVA; (iii) remediation and closure obligations; or (iv) *in rem* rights affected by such transaction. Indeed, the context here is critical; as indicated above, DDMI remains the only party which has funded Dominion's obligations under the Diavik JVA during these CCAA Proceedings.

(b) Requesting court approval of the Release and Discontinuance (the "**Court-Ordered Release**") allegedly indicates bad faith;

10. ACDC has stated that DDMI failed to act in good faith or with due diligence, because DDMI is seeking a Court-Ordered Release as a condition of the AVO Transaction.

ACDC Brief, *supra* at para. 56.

11. Firstly, ACDC has no interest in the BC Civil Claim. As a result, there is no need to consult ACDC on the BC Civil Claim. However, even if ACDC acquired an interest in the BC Civil Claim (which is not admitted and is specifically denied), pursuing the Court-Ordered Release as a portion of a transaction which will preserve go forward mining operations, in no way constitutes a lack of good faith on the part of the purchaser and Diavik Joint Venture party, or the secured creditor most affected by the Diavik Mine and the AVO Transaction.

12. Secondly, third-party releases in CCAA proceedings are common and have been held to be appropriate in numerous cases, including those in which the releasee does not have a claim for contribution or indemnity from the estate. For instance, in *Angiotech Pharmaceuticals Inc. (Re)*, a third-party release contained in a plan of arrangement was approved that released:

> "…the Petitioners, the Monitor, Blackstone, the Subordinated Note Indenture Trustee, the Advisors, Wells Fargo, the DIP Lender, the Subordinated Noteholders and, among others, present and former shareholders, affiliates, subsidiaries, directors, officers and employees of the foregoing…"

***Angiotech Pharmaceuticals Inc. (Re)*, 2011 BCSC 450, at para. 6(k) ["*Angiotech*"] [TAB 2]; Bench Brief of Diavik Diamond Mines (2012) Inc., filed on October 12, 2021, at paras. 75-81 ["DDMI Brief"], citing, *inter alia*, *Lydian International Limited (Re)*, 2020 ONSC 4006 [TAB 6]; *Skylink Aviation Inc. (Re)*, 2013 ONSC 2519 [TAB 9]; *Cline Mining Corporation (Re)*, 2015 ONSC 622 [TAB 4]; *Re Green Relief* Inc., 2020 ONSC 6837 ["*Re Green Relief*"] [TAB 8]; *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 [TAB 7].**

In approving the release in *Angiotech*, the Court concluded that:

> "The ***creditors*** who are protected by the the [sic] release were instrumental in facilitating the reorganization of the petitioners' affairs as a going concern. Further, their efforts led to the development of a plan that meets the objectives set out in the CCAA. [14] ***The reorganization facilitated by those creditors provides greater benefits to all of the creditors than would otherwise be realized if the petitioners had been liquidated.***" [emphasis added].

***Angiotech*, *supra* at paras. 13-14 [TAB 2]; see also DDMI Brief, *supra*, at paras. 73-82.**

The same factors apply to the appropriateness of the currently sought Court-Ordered Release, with respect to DDMI, regardless of whether the Court-Ordered Release is structured as a condition precedent; which is irrelevant to the analysis.

Re Green Relief Inc., 2020 ONSC 6837, at paras. 13-15 [TAB 8].

13. Thirdly, ACDC has overstated DDMI's position by referring to "all other claims" being released. The proposed form of AVO sets out the scope of the Court-Ordered Release, which, if granted, will apply to "…any and all present and future liability … based in whole or in part on any allegation that was or ought to have been pleaded by the Seller against the Purchaser in the [BC Civil Claim] ….".

Supplemental Report to the Sixteenth Report of the Monitor, dated October 19, 2021, at Appendix "K", para. 15(a) ["Supplemental Report"].

14. Fourthly, in addition to third-party releases, approval and vesting orders frequently vest and discharge claims against or in respect of purchased assets. For instance, the Alberta Template Approval and Vesting Order states:

> "… the Debtor and all persons who claim by, through or under the Debtor in respect of the Purchased Assets, and all persons or entities having any Claims of any kind whatsoever in respect of the Purchased Assets, save and except for persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely and forever barred, estopped and foreclosed from and permanently enjoined from pursuing, asserting or claiming any and all right, title, estate, interest, royalty, rental, equity of redemption or other Claim whatsoever in respect of or to the Purchased Assets …"

Alberta Template Approval and Vesting Order at para. 10 [TAB 12].

15. As is commonplace in court-approved sales, DDMI seeks comfort that it will not be subject to prior unsecured claims following the completion of the AVO Transaction; which is the best available transaction and will continue going concern operations while providing a viable plan for addressing the Diavik Mine's closure and remediation requirements. Ultimately, approval of the Release and Discontinuance serves a clear purpose: ensuring that DDMI can take title to the Acquired Assets free and clear of any claims concerning same, including the BC Civil Claim. There is nothing nefarious, nor novel, in such request.

(c) ACDC asserts that DDMI did not consult with or provide sufficient notice to ACDC regarding the proposed AVO Transaction;

16. This accusation is neither accurate nor relevant. ACDC has had ample time to consider and respond to the Application. The Application was adjourned from its original return date of October 15, 2021, to November 9, 2021. While a full notice period is not always possible, a full notice period in accordance with the *Rules of Court* was provided to ACDC with respect to the Application, at its original return date. By November 9, 2021, ACDC will have had the initial Application materials for 32 days, the longest notice period in these CCAA Proceedings.

***Alberta Rules of Court*, A.R. 124/2010, as amended, at Rule 6.3(3): a notice of application must be served five days or more before the application is scheduled to be heard or considered [TAB 11].**

(d) ACDC asserts that DDMI has refused to share information;

17. In light of the full factual context, ACDC's complaints regarding "refusal to share information", while seeking approval of the AVO Transaction are of ACDC's own making and a transparent attempt to construct an argument against DDMI.

ACDC Brief, *supra* at para. 57.

18. ACDC was advised on October 3, 2021, that DDMI consented to the provision of the requested information, subject to satisfactory confidentiality and use restrictions and the provision of certain existing non-disclosure agreements, executed by ACDC's counsel, DDJ, and Brigade in connection with the SISP (collectively, the "**NDAs**"). ACDC delayed their consent to the disclosure of the NDAs for twenty (20) calendar days, until Saturday, October 23, 2021. Upon receiving ACDC's confirmation, DDMI provided comments to the Monitor regarding same on Wednesday, October 27, 2021. DDMI should not be faulted for ACDC's failure to follow through on its own requests, nor ACDC's delay in doing so.

See the Sixteenth Report of the Monitor, dated October 6, 2021 at paras. 45-50 ["Sixteenth Monitor's Report"].

19. Parties disclosing confidential information in CCAA proceedings frequently request that the recipients enter into confidentiality agreements. ACDC is a direct competitor to DDMI. DDMI's requests with respect to the NDAs were reasonable in the circumstances.

(ii) Pursuing the AVO Transaction In No Way Constitutes Bad Faith

20. Each of ACDC's specific assertions concerning DDMI's conduct are inconsistent with the legal rights of the parties, the ordinary practice in CCAA proceedings, and the facts of this case. DDMI, the 1L Agent, and the Monitor have arrived at a solution which will lead to the successful completion of the CCAA Proceedings. Pursuing the AVO Transaction, which provides for the conclusion of Dominion's CCAA Proceedings and will ensure ongoing operations and the closure and remediation of the Diavik Mine, does not constitute bad faith. Neither does: (i) disputing ACDC's incorrect interpretation of the Ekati APA; (ii) disputing whether an asset may be vested as part of a Court-ordered sale; (iii) seeking third-party releases; (iv) not negotiating with a contingent, unsecured creditor who has a net receivable claim and no *in rem* rights, and who bears no ongoing financial obligations, risks, or duty to remediate with respect the Diavik Mine; or, (v) requesting that a competitor enter into an NDA to receive information.

21. ACDC's allegations that DDMI breached its duty of good faith are a mere smokescreen, intended to mask the weakness of its contractual interpretation arguments and to frustrate the AVO Transaction, for its own benefit. DDMI has acted, and continues to act, in a manner which satisfies the duty of good faith and is in accordance with commercial morality and the Orders issued in these CCAA Proceedings.

22. DDMI does not agree with ACDC's assertion that the 1L Agent or the Monitor acted in bad faith in responding to ACDC's information requests. DDMI adopts and supports the positions of the Monitor and the 1L Agent with respect to that issue.

B. <u>ACDC's Allegations Regarding DDMI's Conduct as Manager of the Diavik Joint Venture Are Speculative, Unfounded, and Meritless</u>

23. First, ACDC overstated the Monitor's "acknowledgement". ACDC cites the Monitor's counsel's October 19, 2021 letter (the "**Oct. 19 Letter**") as support for the proposition that the Monitor "…has not assessed the *bona fides* of the quantum of the cash calls…". However, the Oct. 19 letter referred to the security opinion issued by the Monitor's independent counsel, not a statement by the Monitor. Specifically, the letter states:

> "We will not provide you with **the opinion that our firm provided to the Monitor respecting the validity and enforceability of DDMI's security**, because that opinion is privileged (specifically, solicitor-client privilege). **We can confirm that**

> <u>**the opinion**</u> **did not address the "bona fides of the quantum of the cash calls".** The JVA, which is in evidence in these CCAA proceedings, and with which a number of ACDC's employees are fully familiar, sets out the basis on which DDMI is entitled to make cash calls to DDM, in its capacity as Manager of the Diavik Joint Venture."

Supplemental Report, *supra* at Appendix "F"; ACDC Brief, *supra* at para. 126.

24. The evidence is clear, the Monitor has and continues to comply with its duties and obligations concerning the ongoing operations of the Diavik Mine, as a Participant and the monitor of Dominion. Specifically, in the Fifteenth Report of the Monitor, dated August 30, 2021, the Monitor confirmed that:

> "15. **The activities of the Monitor since the granting of the EMP Order have included**: […]
>
> d. **preparing financial projections with respect to the Diavik JVA for the period ending December 31, 2021, including projected diamond collateral held by DDMI, cover payments made by DDMI for cash calls under the Diavik JVA**, dispositions of DDMI diamond collateral pursuant to the Monetization Order, projected DDMI diamond collateral surplus or shortfall **and projected diamond deliveries to Dominion and the illustrative net realizations from the Diavik JVA interest**;
>
> e. **attending quarterly Diavik JVA Committee meetings**;
>
> f. **reviewing the Diavik Mine Life of Mine Plan** prepared by DDMI;
>
> g. participating in calls and evaluating proposals from various environmental consulting firms to act as technical consultants to the Monitor in respect of the Diavik JVA; […]
>
> o. **reviewing monthly cash calls received from DDMI and corresponding cover payment notices**; […]"

Fifteenth Report of the Monitor, dated August 30, 2021, at paras. 15(d)-(g), (o).

25. Throughout: (i) DDMI's ongoing involvement and the sharing of information with the Monitor; and, (ii) the Monitor's ongoing involvement, analysis, and oversight, the Monitor has not raised any concerns with respect to DDMI's good faith. However, despite the lack of any such information or evidence, the Affidavit of Kristal Kaye, sworn on October 13, 2021, contains trivial and unsubstantiated allegations against DDMI. For clarity, ACDC's allegations against DDMI consist of mere "belie[fs]", and "concerns" on the part of ACDC' affiant, along with a reference to

the allegations made in the BC Civil Claim. “[C]concerns” and “belie[fs]” are mere bald assertions and not evidence of any misconduct; for which the Monitor has raised no similar concerns.

Affidavit of Kristal Kaye, sworn on October 13, 2021, at paras. 33-36.

26. Regarding the DICAN valuation issue raised by Ms. Kaye, numerous applications were made to address this matter. In rejecting DDMI’s application to permit it to hold back 100% of the Diavik Mine production, this Honourable Court held that:

> “[20] In terms of the value of the limited collateral, the DICAN evaluation was proposed by DDMI in the first place likely because it is the method that has been used for years between the parties to divide the diamond production. **The evidence in front of me does not convince me that it is unfair - or has changed since the parties both agreed to this method a few months back. I recognize that there is a difference between splitting diamonds and selling them - however based on the limited evidence in place, this independent evaluation method is a fair way to continue to proceed**.” [emphasis added].

Endorsement of the Honourable Madam Justice Eidsvik, dated November 4, 2020, at para. 20.

27. Similarly, the concerns raised in the ACDC Brief with respect to the *bona fides* of the quantum of the Cover Payment Indebtedness are allegations; nothing more. Dominion is clearly liable for the Cover Payment Indebtedness under the terms of the Diavik JVA and this Court very early in these proceedings lifted the stay of proceedings to permit DDMI to make the Cover Payments. The Monitor has, since the date of the EMP Order, been involved in the Diavik JVA as a Participant, and has attended meetings, engaged with environmental consultants, and reviewed cash calls. No complaints have been raised or communicated by the Monitor regarding DDMI’s good faith. No credible evidence has been submitted by ACDC in support of its position. ACDC’s allegations merely repeat those in the BC Civil Claim and, for the reasons set out above and outlined at paragraph 82 of the DDMI Brief (including that the BC Civil Claim is a contingent, unproven claim subject to a strong counterclaim), should not prevent or delay the AVO Transaction; particularly as while the BC Civil Claim has not progressed, the Diavik Joint Venture continues to incur real costs that need to be paid in order to, among other things, enable continued operations and ensure a responsible closure and remediation of the Diavik Mine, in accordance with good practice and applicable mining laws.

C. **<u>ACDC's Interpretation of the BC Civil Claim and It's Ownership Interests Under the Ekati APA are Incorrect and Should Be Rejected</u>**

28. DDMI's position with respect to the BC Civil Claim is set out in the DDMI Brief and only repeated here with respect to the following additional arguments raised in the ACDC Brief: (i) that the Disclosure Statement (as defined below) is evidence that ACDC purchased the BC Civil Claim; (ii) that DDMI failed to raise any concerns regarding the alleged purchase of the BC Civil Claim by ACDC; and, (iii) that ACDC purchased (a) the "**Cash Collateral**", as defined in the AVO Agreement, being approximately $51 million in cash held as collateral for the 1L Lenders' LCs; and, (b) the "**Dominion Production**", as defined in the AVO Agreement, being Dominion's legal and beneficial interest in all Products (as defined in the Diavik JVA), and other inventory of any kind or nature (including stockpiles and goods), if any, produced from the Diavik Mine, and that as a result neither may vest in DDMI.

Sixteenth Monitor's Report, *supra* at Appendix "B", s. 1.1 ["AVO Agreement"].

(i) The Disclosure Statement Is Irrelevant to the Interpretation of the Ekati APA

29. A disclosure statement (the "**Disclosure Statement**") in ACDC's credit agreement with the 1L Lenders (the "**ACDC Credit Agreement**"), which listed the BC Civil Claim as "material litigation", is irrelevant when determining whether the BC Civil Claim was purchased from Dominion. Albeit trite, the Ekati APA governs what ACDC purchased, not a separate agreement with its lenders.

30. The real issue in dispute is the proper interpretation of the Ekati APA; not what ACDC mistakenly *believes* it acquired. With respect to the Disclosure Statement: (i) the 1L Agent is also not bound by the Disclosure Statement, because: (a) the Disclosure Statement is not a covenant, agreement, or acknowledgement by the 1L Lenders; (b) the Disclosure Statement is a representation or warranty made by ACDC;[1] (c) the Disclosure Statement does not refer to the BC Civil Claim being <u>owned</u> by ACDC, but rather states that "DDM filed an action […] with respect to DDMI's breaches of the Diavik Joint Venture Agreement."; and, (d) Section 3.06 of the ACDC Credit Agreement discloses "…actions, suits or proceedings by or before any arbitrator or Governmental Authority **<u>pending against or</u>** […] **<u>affecting</u>** Parent, the Borrower, or any of their

[1] Specifically, the ACDC Credit Agreement states that "…Parent and the Borrower hereby <u>represent and warrant to the Lenders</u>… the Disclosed Matters …".

Subsidiaries that (i) would reasonably be expected, individually or in the aggregate, to result in a Material Adverse Effect (other than the Disclosed Matters) or (ii) involve this Agreement or the Transactions." [emphasis added]; and, (ii) DDMI is in no way bound by ACDC's erroneous representation in the Disclosure Statement that the BC Civil Claim is an action, suit or proceeding pending against or affecting ACDC.

ACDC Brief, *supra* at para. 22; Affidavit of Kristal Kaye, sworn on October 13, 2021, at para. 29 and Exhibit "J", s. 3.06 and Schedule 3.06; ["Kaye Affidavit"]; see also, DDMI Brief, *supra* at paras. 58-62.

(ii) DDMI's Alleged Silence Regarding the assignment BC Civil Claim Is Irrelevant, Because ACDC Did Not Purchase the BC Civil Claim

31. DDMI did not express any concerns about "…the assignment of the BC Civil Claim…" because DDMI did not, and does not, agree that the BC Civil Claim was assigned to ACDC. In fact, in advance of the hearing concerning the EMP Order, DDMI requested the addition of a provision ensuring that the Monitor would remain liable for any cost awards in litigation that is continued by the Monitor on Dominion's behalf. As explained by counsel to Dominion:

> "In paragraph 12, you can see we've made a change here to paragraph 12. Again, this was a change requested by counsel to DDMI, and so that change was -- was accepted. So paragraph 12 provides that **the Monitor shall incur no liability or obligation as a result of its appointment**; the carrying out of the provisions of this order; the exercise by the Monitor of any of its powers or the performance by the Monitor of any of its duties, **save and except for**, one, any gross negligence or wilful misconduct on its part, or, two, **any liability for any costs award made in connection with any proceeding joined, continued, or commenced by the Monitor on behalf of the applicants or any of them, save, as aforesaid, nothing in this order shall derogate from the rights and protections. So this was a change that DDMI requested that the parties have agreed to, including the Monitor**. So the Monitor has agreed to this -- this revised language, as well."

Transcript of Proceedings, Action No. 2001-05630, January 27, 2021 at 19:02-12 [TAB 1].

32. If the Monitor continues to be liable for the ongoing costs associated with pursuing the BC Civil Claim; the BC Civil Claim itself cannot have been intended to vest in ACDC. The result of such interpretation would be that the Monitor continues to be liable for the costs repercussions associated with ACDC's go forward actions and litigation strategy.

(iii) ACDC Purchased A Contingent Receivable Interest In the Net Cash Collateral and Dominion Production; Which Can Be Vested

33. ACDC's interests can be vested. The test to determine whether an interest, and in particular the BC Civil Claim, can be vested, as set out in *Dianor*, is addressed in the DDMI Brief and not repeated here. However, with respect to the Dominion Production and Cash Collateral, ACDC has raised the following new issues: (i) that ACDC is entitled to hold the "Acquired Assets" (as defined in the Ekati AVO) without interference by any person, pursuant to the Ekati AVO; and, (ii) that Dominion cannot convey title to the Acquired Assets (as defined in the AVO Agreement), as ACDC alleges that such assets were previously conveyed to it.

DDMI Brief, *supra* at paras. 68-71, citing *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 [TAB 10].

(a) <u>The Ekati AVO Does Not Prevent the Vesting of the Acquired Assets</u>

34. ACDC has conceded that to the extent it obtained an interest in the Dominion Production and the Cash Collateral, as part of the Diavik Realization Assets, such interest is subject to the encumbrances held by the 1L Lenders. Nonetheless, ACDC relies upon the paragraph 13 of the Ekati AVO, stating that it is "entitled to enter into and upon, hold and enjoy the Acquired Assets for their own use and benefit without any interference of or by any Person claiming by, through or against the Sellers".

ACDC Brief, *supra* at paras. 24-25; Ekati AVO, *supra* at para. 13.

35. Such submissions by ACDC fail to account for the nature of the Diavik Realization Assets as a contingent unsecured interest in any <u>net</u> receivables. The Ekati AVO clearly did not intend to vest out <u>all</u> claims concerning the Dominion Production. The Dominion Production remains subject to the waterfall established pursuant to the Monetization Process. ACDC has not claimed that it is entitled to 40% of <u>all</u> diamonds produced from the Diavik Mine, as a fully-performing JVA counterparty would be in the absence of the Monetization Process and SARIO.[2] Specifically, the Diavik Realization Assets purchased by ACDC include Dominion's "…rights and interests in

[2] Subject to the splitting and auction procedures set out in the Diavik JVA, and the provisions of the SARIO permitting DDMI to hold a portion of the Dominion Production.

relation to the receipt of realizations…". Dominion's rights and interests in this respect were, and continue to be, subject to the Monetization Process, which states, *inter alia*:

> "5. Upon the completion of a disposition of all or any portion of the DDMI Collateral by DDMI (each, a "Sale"), Dominion's and DDMI's interest in the DDMI Collateral that is subject to such Sale shall vest absolutely in the applicable purchaser, free and clear of and from any and all […] other claims […].
>
> 8. The proceeds resulting from any Sale shall be distributed by DDMI promptly after receipt thereof in accordance with the following:
>
> (a) first, and without prejudice to the rights of any claimants to make any potential arguments to the Court as to entitlement, towards all taxes or royalties applicable to DDMI Collateral that rank in priority to the security provided for in Article 9.4 of the JVA or which the Court otherwise determines ought to be paid from the proceeds;
>
> (b) second, to all reasonable and documented fees, costs and expenses incurred by or on behalf of DDMI in the implementation of the Realization Process […];
>
> (c) third, towards any amounts incurred on the Administration Charge and the Directors' Charge […]'
>
> (d) fourth, to DDMI, in satisfaction of outstanding Cover Payments (as such term is defined in the JVA) and interest thereon made by DDMI pursuant to Article 9.4 of the JVA […];
>
> (e) **fifth, to Dominion,** to be held in a segregated trust account at a chartered Canadian bank and distributed in accordance with a distribution order or other order of the Court." [emphasis added].

Ekati AVO, *supra* at Schedule "A", at s. 3.1(b) ["Ekati APA"]; Order (Approval of Monetization Process), dated November 4, 2020, at Schedule "A", paras. 5, 8.

36. As ACDC's interest in the Diavik Realization Assets is subject to the Monetization Process waterfall, ACDC has, at best, a contingent, unsecured receivable claim with no *in rem* rights; in a situation where the Monitor has opined that there will not be any expected future net receivables payable to Dominion.

(b) The Monitor, On Behalf of Dominion, Can Convey Title to the Acquired Assets, and Paragraph 13 of the Ekati AVO Is Irrelevant

37. No party disputes that a vendor cannot convey what they do not own; however, that is not what this case is about. There is no expropriation here. The Diavik Realization Assets are subject

to, among other things, the prior repayment of the Cover Payment Indebtedness, and the Cash Collateral remains subject to the 1L Agent's security.

See ACDC Brief, *supra* at paras. 69 and 73, citing *Hutchingame Gworth Capital Corporation v Independent Electricity System Operator*, 2020 ONCA 430, at paras. 57-58 [TAB 5]; Ekati APA, *supra* at s. 3.1(b).

38. Accordingly, what ACDC is entitled to "enter into and upon, hold and enjoy … without any interference", pursuant to paragraph 13 of the Ekati AVO, is whatever is left over after the completion of the Monetization Process, if - <u>and only if</u> - the LCs are fully cash collateralized and the Cover Payment Indebtedness is fully satisfied. ACDC's entitlement is entirely contingent upon the cash collateralization of the LCs, as well as the full satisfaction of the Cover Payment Indebtedness and other charges. Specifically, paragraph 56 of the Sixteenth Monitor's Report states:

> Both the Cash Collateral resulting from the diamonds that have been sold, and the Section 4 Diamonds that are still being held, comprise part of the "Diavik Realization Assets" that were purchased by ACDC. **However, since the LCs have not yet been fully cash collateralized or cancelled (as noted, there is currently a shortfall to the First Lien Lenders of approximately $53.6 million - which will be further reduced by the sale proceeds derived 24 from the Section 4 Diamonds), the First Lien Lenders are entitled to those assets, and ACDC is no**t. For these reasons, <u>**the Monitor is satisfied that ACDC has no entitlement to the "Diavik Realization Assets" that presently exist**</u>.

Sixteenth Monitor's Report, *supra*, at para. 56.

III. RELIEF REQUESTED

39. DDMI respectively requests that this Honourable Court grant the relief sought by the Monitor's Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of November, 2021

McCarthy Tétrault LLP

Per: *"McCarthy Tétrault LLP"*
Sean Collins / Walker W. MacLeod / Pantelis Kyriakakis / Nathan Stewart
Counsel for Diavik Diamond Mines (2012) Inc.

IV. INDEX OF AUTHORITIES AND MATERIALS

Evidence

1. Transcript of Proceedings, Action No. 2001-05630, January 27, 2021;

Cases

2. *Angiotech Pharmaceuticals Inc. (Re)*, 2011 BCSC 450;

3. *C.M. Callow Inc. v Zollinger*, 2020 SCC 45;

4. *Cline Mining Corporation (Re)*, 2015 ONSC 622;

5. *Hutchingame Gworth Capital Corporation v Independent Electricity System Operator*, 2020 ONCA 430;

6. *Lydian International Limited (Re)*, 2020 ONSC 4006;

7. *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587;

8. *Re Green Relief Inc.*, 2020 ONSC 6837;

9. *Skylink Aviation Inc. (Re)*, 2013 ONSC 2519;

10. *Third Eye Capital Corporation v Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508;

Legislation

11. *Alberta Rules of Court*, A.R. 124/2010, as amended (excerpts); and,

12. Alberta Template Approval and Vesting Order.

TAB 1

Action No.: 2001-05630
E-File Name: CVQ21DOMINION
Appeal No.: _________________

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC, DOMINION FINCO INC. AND DOMINION DIAMOND MARKETING CORPORATION

P R O C E E D I N G S

Calgary, Alberta
January 27, 2021

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Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

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January 27, 2021	Morning Session
The Honourable Madam Justice Eidsvik	Court of Queen's Bench of Alberta
P. L. Rubin (remote appearance)	For Dominion Diamond Mines ULC
K. J. Meyer (remote appearance)	For the Monitor
K. Kashuba (remote appearance)	For the Ad Hoc Group of Bondholders
S. F. Collins (remote appearance)	For Diavik Diamond Mines (2012) Inc.
M. Wasserman (remote appearance)	For Credit Suisse AG
E. Paplawski (remote appearance)	For Credit Suisse AG
J. Bellisimo (remote appearance)	Sandstorm Gold Ltd.
A. Taylor (remote appearance)	For C. Jennings
S. Mak	Court Clerk

Discussion

THE COURT: Good morning, Mr. Rubin.

MR. RUBIN: Good morning, My Lady. We have before us this morning three separate applications. The first application is one dealing with the Sandstorm and Jennings royalty holders. I think that's fairly quick. I propose to deal with that one first.

THE COURT: Okay.

MR. RUBIN: The second application is an application relating to the assignment of contracts.

THE COURT: M-hm.

MR. RUBIN: Again, I'm not aware of any opposition to that motion either. And then the third motion is for an order enhancing the powers of the Monitor, and I would propose deal with that one third. And so with your approval, I might just turn directly into the applications and I might start with the application on the -- related to the royaltyholders. (INDISCERNIBLE) could --

THE COURT: Before you do that -- sorry, go ahead.

MR. RUBIN: Yeah.

THE COURT: Go ahead.

MR. RUBIN: I was just going to say, before I get into that, I might just give you a sense of who's online and who might be speaking today.

THE COURT: Perfect. That's exactly what I was going to say so --

MR. RUBIN: Oh, great.

THE COURT: -- we're on the same page.

MR. RUBIN: So we have Ms. Meyer, Kelsey Meyer, who is counsel to Bennett Jones -- actually, counsel to FTI, from Bennett Jones. So she's on the line. I don’t think Mr. Simard is today, but Ms. Meyer is here.

THE COURT: Okay.

MR. RUBIN: We also have Mr. Wasserman and Ms. Paplawski who are here on behalf of the first lien lenders or the agent Credit Suisse.

THE COURT: Okay.

MR. RUBIN: We have Mr. Kashuba who is representing the purchasers. I think previously we called them the ad hoc group, but they are purchasers under the proposed transaction.

THE COURT: Okay.

MR. KASHUBA: Good morning, My Lady.

THE COURT: Good morning.

MR. RUBIN: We also have Mr. Collins who is counsel to DDMI. He is on the line as well.

THE COURT: All right.

MR. RUBIN: And in addition, we have counsel for both of the royalty holders, dealing with the first application, that's Mr. Bellisimo. He is counsel for Sandstorm. And, in addition, Ms. --

MR. WASSERMAN: (INDISCERNIBLE)

MR. RUBIN: -- Taylor is on the line as well and Ms. Taylor is counsel to Mr. Jennings.

UNIDENTIFIED SPEAKER: (INDISCERNIBLE) bring him back.

MR. RUBIN: I don't --

MR. WASSERMAN: Jay, you're killing me.

MR. RUBIN: Mr. Wasserman, could you put yourself on mute, please? I don't -- I don't know that all those people will be speaking, My Lady, but -- but those are sort of the -- the likely candidates, let me put it that way.

THE COURT: All right.

Submissions by Mr. Rubin (Sandstorm and Jennings)

MR. RUBIN: And so if I might turn and start with the Sandstorm and Jennings application and I will try to direct you to the application. And if I hit the direct others to the application, perhaps you could let me know if they have been directed to that page.

THE COURT: Yes, I have. Thank you.

MR. RUBIN: Great. So this, My Lady, is an application seeking an order to effectively preserve certain royalty rights held by these two royalty holders, being Sandstorm and Mr. Jennings. And if I can take you into the application and if I can start with paragraph 5 of that application, you can see that on December 11th, upon application by Dominion, this Court granted the sale and approval order. The next paragraph, we talk about the transaction expecting to close on January 29th. I should advise the Court that we don't believe we're going to be able to close on Friday. We expect the closing to occur next week. Not a matter that relates to -- to the application, but I thought I should advise the Court of that.

THE COURT: Okay.

MR. RUBIN: And in paragraph 7, Your Ladyship may recall that in the sale and approval order there was this particular paragraph which required the royalty holders to deliver an application to all counsel no later than January 15th and that was in the December 11th application. And then you may recall that on January 15th we sought an order that amended that January 15th date from paragraph 16 and you can see that we amended the date to January 29th, which is 2 days from now, and that's in paragraph 8 of the application. And that was an order that you granted on -- on our behest. And since that time, the parties have discussed a settlement or resolution to this and there have been discussion amongst Sandstorm, Jennings, the purchasers, as well as the first lien lenders and the result of that, they have come to a consensual agreement with respect to the payment or entitlement to the payment to certain royalty amounts.

THE COURT: Okay.

MR. RUBIN: And what I think I might do is I just take you to the form of order that has been agreed upon by the parties and I will direct you there in one moment. And so we delivered a form of order with our application, My Lady, and we have since amended that order and so what I have directed you to is the form of order that we're seeking to as amended and I'm hoping you're at page 19.2-233.

THE COURT: Right. I'm there. Thank you.

MR. RUBIN: And so this is the amended form order that we're seeking. You could see paragraph 1 is the same as previously sought and deals with service.

Paragraph 3 of the order confirms that the sale approval order and the transaction, you know, will not discharge either of the two royalty agreements, that's the Rapadre (phonetic) royalty agreement or the Jennings royalty agreement. And it confirms near the bottom of paragraph 3 that each of the Sandstorm and Jennings royalty agreements and our client's obligations shall remain in full force and effect against both us and DDMI.

Paragraph 4 of the order, turning over the page, provides that the assignment of the Diavik realization assets shall be subject to a net of the royalties payable under those two royalties and so those Diavik realization assets are previously dealt with and are referenced in the purchase agreement.

THE COURT: Right.

MR. RUBIN: And paragraph 4 confirms that those royalties shall be paid in full to each of Sandstorm and Jennings. So that was the arrangement that was reached.

And then paragraph 5 is the -- is a new paragraph. Mr. Collins' client, DDMI, had suggested some changes to the order and this language was agreed to and this new paragraph 5 which we've added confirms that nothing in this order shall constitute a determination of the relative priorities or payment entitlements as between DDMI and either Sandstorm or Jennings for the -- for the purposes of the monetization process order which you granted, which sets out certain rights and obligations and priorities. And so parties have agreed to that addition in paragraph 5 as well.

THE COURT: Okay.

MR. RUBIN: I don't have anything else to add, My Lady. I'm not aware of any opposition to this -- this order and, as I said, it has come to this form by -- by the involvement of a number of parties.

THE COURT: All right. Does anybody want to speak to this order in any way? Okay. Everybody's relatively quiet, Mr. Rubin, which is what you expected. Okay.

MR. RUBIN: Yes.

Decision (Sandstorm and Jennings)

THE COURT: So, good. We'll proceed then with granting this order as indicated in the blacklined paragraph 19.2-233 to 237.

Submissions by Mr. Rubin (Assignment of Contracts)

MR. RUBIN: Thank you, My Lady. If I can then turn -- I'll turn to the assignment application. And before I -- before I direct you to any documents, and just by way of summary, this is an application pursuant to section 11.3 of the CCAA to compel the assignment of certain contracts to the purchaser as part of the sale transaction that was previously approved by the Court.

In our application materials, we were actually only seeking an application or an order in respect of eight contracts, which is a very limited amount, but since delivery of our materials we are actually down to three contracts now that are forming part of the order which we're seeking.

Again, I'm not aware of any opposition to this application and the application is also supported by the Monitor. And I think that for this application, My Lady, what I might do is direct you to our bench brief.

THE COURT: Okay. I'm there already, actually. Number 10, there you go. Sent me there too. Okay. Thank you.

MR. RUBIN: Thank you. And so just turning a couple pages in on the -- on the first page in paragraph 2 of the bench brief on page 19.2-59.

THE COURT: M-hm.

MR. RUBIN: At paragraph 2, the relief that we are seeking today is contemplated, in fact required, to close the sale transaction so this is part of that transaction that was approved by the Court on December 11th. And at paragraph 5 of the bench brief we reference the fact that the acquired assets as set out in the purchase agreement to be acquired include certain assigned contracts, which of course is not at all unusual.

Paragraph 6, certain of the assigned contracts require the applicable counterparties' consent, which is again not unusual to be assigned and so we define those as the restricted assigned contracts.

Paragraph 7, we, Dominion, are required under the purchase agreement to use our commercially reasonable efforts to obtain all consents and Dominion has -- has done that and has attempted to obtain all the consents. And as I mentioned, we are down to three contracts at this point in time.

Paragraph 8, we state that the purchase agreement provides that where a required counterparty's consent has not been obtained prior to the closing date that we are required to take certain steps and that, in fact, we may seek this type of order and that the purchaser will accept this order related to the conveyance of those contracts.

At paragraph 9, the delivery of an assignment order is, as I mentioned earlier, a condition to closing the transaction which is why we're here today seeking this order.

And at paragraph 10, since the granting of the approval and vesting order, Dominion has used -- they continue to use commercially reasonable efforts to obtain all consents, which I think is evidenced by the fact that we're now down to three contracts. But, of course, despite those efforts, there are still three remaining restricted, signed contracts where consents have not been obtained.

Paragraph 14, we just simply reference the (INDISCERNIBLE) affidavit, which we delivered, which sets out the background facts but, of course, they're set out in this brief.

Paragraph 15, at that point (INDISCERNIBLE) point of delivery of these materials, there were eight assigned contracts and we set them out here. What I can advise the Court is that the only three contracts that we're seeking assignment for are the NorthwesTel contract, the Bradley Air Services contract and the Caterpillar contractor. Those are the only three. So NorthwesTel, Bradley Air and Caterpillar.

At paragraph 16, as indicated in the table and in the materials, there are no cure amounts payable in respect of these contracts, so they are paid up to date.

And while I appreciate that the application is, as far as I'm aware, unopposed, we have of course set out the -- the law starting at paragraph 18. And at paragraph 18 we do reference the specific section of the CCAA that grants the Court the authorization to -- to pronounce the order and that's 11.3(1) and it says that the debtor company and on notice to every other party can -- to the agreement and to the monitor, can make an order assigning the rights and obligations of the company pursuant to any agreement to any person who is specified by the court and who agrees to the assignment. And, of course, the purchaser has agreed to the assignment. I can advise that the counterparties were sent the court materials by email on January 20th.

Turning over to paragraph 21 of the brief, we reference the fact that this Court has recently exercised its jurisdiction under 11.3 to grant assignment orders in both *Bellatrix* and *JMB Crushing*. Your Ladyship may recall *JMB Crushing* is your file, you granted a similar order I think it was in October.

THE COURT: Right.

MR. RUBIN: In paragraph 22, there are specific agreements that cannot be assigned pursuant to 11.3. We don't fall within those categories.

And at paragraph 23 of the brief, we reference the three factors that are set out in the assignment -- excuse me, in the CCAA on such an application and that is whether the Monitor has approved of the proposed assignment, that -- we do have that in this case. (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations. And, of course, in this case we have the purchasers, and you're very familiar with those purchasers and, as indicated in the materials, those purchasers are providing at least $70 million US of financing to the business and in our submission they are capable of performing the obligations.

And then, finally, the third factor in paragraph 23 of the brief is whether it would be appropriate to assign the rights and obligations to that person and in our submission it is appropriate.

THE COURT: Well, can you just, with respect to the three that are left over, can you tell me why they haven't given consent yet? Is it just they haven't got around to it? I mean Northwest Telephone, Bradley Air and Caterpillar, they're all --

MR. RUBIN: Yeah. So -- yeah. It's hard for us to know. What I can tell you is we haven't been contacted by them, we haven't heard from them, they haven't opposed. As my -- and it's a bit of a guess, to be frank, but what the client has done is reached out to all of these counterparties, they've done that directly, and in many cases such as this it goes to individuals, they simply, you know, don’t respond. I'm not aware of any opposition by those parties, it's just simply you don’t hear from some of these people.

THE COURT: Okay.

MR. RUBIN: As you can appreciate, you know, which -- you know, given the numbers at stake here and how big this business is, the fact that we're down to three is actually probably remarkable.

THE COURT: Oh, I know, exactly. I agree and I know that you worked hard to -- with respect to some of them, the first few that are listed there --

MR. RUBIN: Yeah. The first three --

THE COURT: -- you got those sorted out.

MR. RUBIN: Yeah. The first three, we were able to come to an agreement with the counterparty and same with the Livingston one as well and so, just these three, we just haven't heard from them. So I --

THE COURT: Okay. All right. So perhaps they're just figuring this will just go through then, I presume.

MR. RUBIN: Yes. Yes. Absolutely.

THE COURT: Okay.

MR. RUBIN: There was one of them that we removed from the list, which is the last one, Somerset. We determined that we had a service problem with Somerset because we had an old email address so we made the decision to pull them off the list because we weren't confident that we had the proper email address for them, so that's why we pulled them off. But in any event --

THE COURT: Okay.

MR. RUBIN: -- so I think we have -- we have met the test. As I've mentioned earlier, we're not aware of any monetary defaults with respect to the three contracts and that is set out in our material, and we have given notice to those three parties.

I think what I would like to do is perhaps just turn to the form of order --

THE COURT: Okay.

MR. RUBIN: -- My Lady, that we're seeking and I will direct you to to that as well. And so this assignment order is attached to the application and what I will do is just go quickly through the form of order. I know Your Ladyship has seen these many times. But at paragraph 3 of the assignment order it provides that upon delivery of a Monitor's certificate, the agreements that are listed in schedule A will be assigned and conveyed. Now, of course, we will adjust schedule A to reference only the three contracts --

THE COURT: Okay.

MR. RUBIN: -- instead of the eight that are listed.

In paragraph 4, the assignment of those contracts is valid -- is declared valid and binding notwithstanding any restriction or prohibition which, again, is -- is standard.

Paragraph 5, the assignment of the contracts will be subject to the provisions of the approval and vesting order to make sure that we're consistent as between the orders.

Paragraph 6, following the assignment, all such assigned contracts shall remain in full force and effect, and the purchaser shall be entitled to the rights and benefits. And then it also provides that from the effective date that no counterparty can accelerate, terminate, rescind, et cetera, by reason of, and then lists out those reasons. So, for instance, in (a) any circumstance that existed prior to the effective date as a result of the insolvency, and (b) the Dominion vendors having obtained relief under the CCAA. So, again, these are mutual provisions in these types of orders. Paragraph (d) they can't terminate because of a change in control and, in addition, any failure by the Dominion vendors to perform a non-monetary obligation under any of the assigned contracts. And then what it does, and it goes on to say, but -- and all such counterparties and persons shall be forever barred and estopped from taking such action. For greater certainty, nothing herein shall limit or exempt a purchaser in respect of obligations accrued and arising or continuing after the closing. So, again, we've got the dichotomy between pre and post closing.

THE COURT: M-hm.

MR. RUBIN: And paragraph 7 provides that all monetary defaults shall be paid by the Dominion vendors as set forth in schedule A but, again, in this case we have no monetary defaults.

Paragraph 8, on the effective date of the assignment all counterparties to the assigned contract shall be deemed to have waived and any and all defaults then existing are (INDISCERNIBLE) so, again, a standard paragraph.

Paragraph 9, immediately following the assignment and transfer, no counterparty shall have any claim whatsoever against Dominion or the Monitor other than in respect to the cure amount.

Paragraph 10, notwithstanding any other provision of this order, if the cure amount payable is not paid, then the contract shall not be assigned. So, again, we've added a provision to make sure that the cure amount has to be paid. Now, in this case there are no cure amounts on the three contracts --

THE COURT: Right.

MR. RUBIN: -- but the paragraphs still matter because of the heading starting additional assigned contracts. This -- these are a series of paragraphs --

THE COURT: Right.

MR. RUBIN: -- that, again, we actually modelled this on your order in *JMB*. So this is the provision that allows Dominion to give notice to parties who aren't part of schedule A because, for instance, there's a contract that needs to be assigned, but it was missed so you -- you would be permitted to provide notice to the counterparty and -- of the applicable cure amount, that's paragraph 12. And then in paragraph 13, that counterparty then has 7 days from receipt of the notice to object to the assignment. And so they have 7 days to object.

And in paragraph 14, if the Monitor and the Dominion vendors don’t receive a notice of objection, then that additional assigned contract is then conveyed and this order then applies to those additional contracts.

And then paragraph 16 provides that, if an objection is sent by those counterparties, then the Dominion vendors are authorized to bring an application to resolve the objection. So, again, this is modelled on *JMB*. Also, a similar provision was in *Bellatrix* as well from last year as well.

THE COURT: Right.

MR. RUBIN: And then we just have the miscellaneous matters, My Lady, you know, paragraph 17 is the standard provision. Paragraph 18 provides that notwithstanding the order, the applicants shall continue to be entitled to exercise rights of setoff so that those aren't lost. And then paragraph 21, we have a paragraph dealing with service. Those are my submissions, subject to any questions you might have, My Lady. And if the order is granted, of course, we would -- we would deliver an amended, obviously, schedule A to delete the five contracts that I referenced and to leave the three that we are staying -- or need to be part of the order.

THE COURT: Okay. All right. Does anybody want to speak to this application?

Submissions by Mr. Kashuba (Assignment of Contracts)

MR. KASHUBA: Good morning, My Lady. Kashuba, initial K., for the record. My submissions are brief. Mr. Rubin touched on the position of the purchasers as well as the terms of the negotiated orders. I can advise the Court that the purchasers have been working very closely over the past 2 weeks with Dominion Diamond and the Monitor, the first lien lenders, as well as their counsel on the financial (INDISCERNIBLE). They've come to an agreement on the contracts to be assigned, the terms of that proposed assignment and we can confirm that the purchasers, as referenced by Mr. Rubin, are capable of performing the contracts in question.

We've been able to review and negotiate the term of the assignment contracts order and the comments and changes of the purchaser have been incorporated. The purchaser understands their obligations going forward under those contracts and the order so, in short, we do support fully the company's application under section 11.3 of the CCAA to order the assignment of these restricted assigned contracts. We are, of course, supportive of the royalty order in respect of Jennings and Sandstorm and we are supportive, while I have the -- the floor, of the enhanced Monitor's power of this order and we can speak further on that when the time comes, but I did want to put the position of the purchasers on the record given their involvement over the past 2 weeks.

THE COURT: Right. Okay. Thank you, Mr. Kashuba.

MR. KASHUBA: Thank you, My Lady.

THE COURT: Anybody else?

Submissions by Ms. Meyer (Assignment of Contracts)

MS. MEYER: Good morning, My Lady. Kelsey Meyer from Bennett Jones appearing on behalf of the Monitor, FTI Consulting Canada. As you'll have heard from Mr. Rubin, the Monitor does support the application for the assignment order and, considering that the factors that the Court considers under section 11.3(3) involve whether the Monitor --

THE COURT: Right.

MS. MEYER: -- supports the application, I wanted to make that clear on the record.

My Lady, we had provided to the service list and Your Ladyship the 13th report of the Monitor dated January 25th. I will direct you to that document, which starts at page 4-580, I believe, on CaseLines.

THE COURT: Okay.

MS. MEYER: Do you have that?

THE COURT: Yes. Thank you.

MS. MEYER: Thank you. And in particular, on page 4-586, that is the portion of the report that deals with the assignment order in particular and I'll direct you there. Paragraph 22, in particular, sets out the Monitor's comments with respect to the applicant's application for the assignment order. There we've set out that the assignment of the restricted assigned contracts, of which there are now only three left and any additional restricted assigned contracts that are required to complete the transaction, that the applicants report no cure amounts owing and that, of course, the contracts will only be assigned if any cure amounts are paid with respect to additional restricted assigned contracts for which they're may be cure amounts.

The form of order does include the objection opportunity for counterparties to additional restricted assigned contracts to the extent any are identified, including a reasonable process and period of time to object.

THE COURT: M-hm.

MS. MEYER: There is US $70 million of new money available to be provided to the purchaser under the transaction and it is expected that the purchaser will have the financial ability to perform the obligations under the contracts being assigned. This, of course, goes to one of the factors to be considered by the Court under section 11.3(3)(b) of the *Companies' Creditors Arrangement Act* which is whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations. The Monitor's view based on that $70 million is that the purchaser will be able to perform those obligations.

The Monitor has indicated in its report that the parties to the contracts to be assigned will not be materially prejudiced and that none of the restricted assigned contracts fall within the exceptions to section 11.3, being that none of them constitute an eligible financial contract, a collective agreement or an agreement entered into after the CCAA proceedings began.

You'll have seen that section 11.3(3)(a) involves a consideration of whether the Monitor approves the proposed assignments. As per the reasons I've just stated, the Monitor does --

THE COURT: M-hm.

MS. MEYER: -- with respect to the third factor to be considered by the Court as to whether it would be appropriate to assign the rights and obligations to that person, here being the purchaser, the Monitor is supportive of that and is not aware of any evidence to indicate otherwise, nor is the Monitor aware of any objections to this application. Those are my submissions, subject to any questions you may have, My Lady.

THE COURT: No, that's great. I read your report. Thank you very much.

MS. MEYER: Thank you, My Lady.

THE COURT: And heard your submissions, of course, so thank you very much. All right.

MS. MEYER: Thank you.

Decision (Assignment of Contracts)

THE COURT: Anybody else? Okay then. Well, let me just deal with this application then. It's obviously fairly straightforward this time. In terms of this assignment, the test under 11.3 has clearly been met. The Monitor has approved, as we've all just heard, and is set out clearly in paragraph 22 of their 13th report. It's obvious based on the evidence that the purchasers will be able to perform their obligations of the assigned contracts, including those that -- where they haven't received consent to date and it appears appropriate that these contracts be assigned and there is a method to deal with any assigned contracts that aren't sort of listed, which is also appropriate and gives them an opportunity to make any objections if there's other ones that are left over. So I will grant you your order, as you will amend schedule A, Mr. Rubin, so I will look for that, along with the other one and possibly the next one that you're going to get into now.

Submissions by Mr. Rubin (Enhancement of Monitor's Power)

MR. RUBIN: Thank you, My Lady. Turning then to the third application, again just by way of summary, this is an application to enhance the powers of the Monitor or sometimes referred to as the EMP order, enhancement of Monitor's power order. The -- the application for the EMP order is structured in such a way that it would take effect upon the closing of the transaction, so it would not take effect today, if granted, but would take effect upon closing. The application is, not surprisingly, supported by the Monitor. We did talk to them prior to --

THE COURT: Right.

MR. RUBIN: -- delivering this material. It's also supported by the -- by Credit Suisse, the first lien lenders, as well as the purchasers.

There were some discussions with Mr. Collins on behalf of DDMI related to certain amendments to this order. We have made certain amendments. I will take you to those at the end of the submissions. There may still be another paragraph that Mr. Collins' client may wish be added, but I'll let him, obviously, to deal with that if indeed there is an issue.

THE COURT: Okay.

MR. RUBIN: As Your Ladyship is fully aware, EMP orders, if I can use that terminology, are granted regularly so this is not an unusual application. And, again, I think what I might do is just perhaps start with the -- with the bench brief that we have filed. It's on CaseLines and I will direct you to our bench brief.

THE COURT: All right. It's number 12, underneath -- okay. 19.2114.

MR. RUBIN: Yes.

THE COURT: Okay.

MR. RUBIN: Great. Thank you, My Lady. So just scrolling down to the beginning of the bench brief, this is an application. It's made -- well, pursuant to section 11 but, in particular, section 23(1)(k). So 23(1)(k) is the provision specifically that grants the Court authority to -- to grant these orders. And we set out some of the backgrounds facts starting at paragraph 2. As Your Ladyship is aware and on April 22nd we obtained the initial order and that's set out in paragraph 2. And then on June 19th there was the second amended and restated initial order or the SARIO as we have been referring to it on this file. So that was on June 19th.

And then in paragraph 5, in early December the first lien lenders with certain members of an ad hoc group entered into a mutual support agreement. You're alive to the mutual support agreement or MSA as it's sometimes referred to and, of course, there's the asset purchase agreement. Both those documents were dated December 6th. So that's set out in paragraph 5.

At paragraph 6, we say that consistent with our restructuring objectives, the purchase agreement contemplates a going concern outcome for the applicant's business and you're very, very familiar with that, obviously. It's the purchaser will assume, subject to the terms as set out in the purchase agreement, substantially all of the go forward operating liabilities of the Dominion vendors related to the Ekati mine, including substantial obligations (a) of the Dominion vendors and their go forward operational contracts, (b) to employees and unions, (c) to indigenous groups, and (d) to the Government of the Northwest Territories. And as Your Ladyship is aware, at paragraph 7, on December 11th granted the approval and vesting order that approved the transaction.

And, of course, upon closing the transaction, this is at paragraph 8, the -- the applicants and our clients will have sold substantially all of their operating business and will have assigned all of our clients' rights and interests in relation to the receipt and realization recoveries in respect of the Diavik joint venture. You've heard about those, the receivables that -- that may be coming back to Dominion.

In addition, upon closing the transaction, this is at 8(b), substantially all of Dominion's employees will have received offers of employment from the purchaser and any remaining employees not offered employment are likely to be terminated or -- or move on to other opportunities.

In paragraph 9, what we've set out is certain provisions of the purchase agreement that require additional steps to be taken post closing. So I won't go through them, but as you can see there are a number of things that need to happen post closing. And, of course, as I mentioned earlier, given the fact that we are selling substantially all of our business and substantially all of the employees, the Dominion entity is not going to have the capability to do what needs to be done post closing.

THE COURT: M-hm.

MR. RUBIN: At paragraph 10 we discuss the fact that the approval and vesting order also authorizes and directs the Dominion vendors to complete the transaction. It also authorizes and directs us to take such additional steps as may be necessary to complete the transaction, and that's in paragraph 10.

At paragraph 11, we mention again the mutual support agreement or the MSA, which is attached to the purchase agreement. That MSA, as Your Ladyship may recall, it contemplates that there will be an independent official that's funded and retained to pursue any of the Dominion vendors' rights and interest in respect of the realization or recoveries from the Diavik joint venture because there may be recoveries and we need someone to monitor that.

Then you may also recall, this is at paragraph 12, that there is the monetization process order from November 4th and so that order provides that Dominion and -- Dominion and the Monitor are to (a) receive reporting, so Dominion and the Monitor also may seek advice and directions from the Court in respect of that order that you granted. And in addition, at 12(c), Dominion and the Monitor are to provide the applicants, first lien lenders with information, documents, et cetera. So, again, under your prior order there are further things that need to be done post closing.

Paragraph 13 is a point which I've already made which is, given that there's a sale of substantially all the business and all -- substantially all the employees will be transferred, the remaining Dominion entity just simply won't have the capability to do what needs to be done.

Paragraph 15, we say that in the circumstances in order for the estate to be wound down, this is paragraph 15(a), in order for the estate to be wound down, in order for the obligations of Dominion to be met under the purchase agreement, in order for the Monitor to carry out its duties as set out in the MSA and in order for the Monitor and Dominion to carry out their duties in the monetization order, enhanced powers need to be given to the Monitor.

So that is the -- the basis for why we're seeking the order. We set out the law and analysis and, in particular, you can see in paragraph 19, section 23(1)(k), this is the section I referenced of the CCAA, directs that a Monitor shall carry out "any other functions in relation to the company that the Court may direct." So this is the specific authority and, of course, there's section 11 as well.

Turning over to the next page, paragraph 24, I'm not going to go through all these, but we've listed a number of cases. I think the first eight of these are Alberta cases in which enhanced monitor power orders have been granted. We've also included some cases from Ontario and from British Columbia as well. So, again, these are not unusual orders.

I think what I might do, My Lady, is direct you to the form of order that we're seeking and, again, this is the blacklined form of order that we -- that we circulated yesterday which contains some additional comments from parties, including some -- some from DDMI's counsel.

THE COURT: Okay. Thank you.

MR. RUBIN: Okay. So this, again, I will -- we'll go through this order. And, again, I'll start at paragraph 3. So, as I mentioned earlier, the order is intended to take effect upon the closing of the transaction, so that is delivery of the Monitor certificate as set out in your prior order, that's paragraph 3.

Paragraph 4 set out a list of enhanced powers and they include things like, you know, paragraph 4(a) permit the Monitor to cause Dominion to take any action permitted pursuant to the SARIO, paragraph (b) permits the Monitor to preserve, protect and maintain control of the property of the applicants, (c) receive, collect, take possession of all monies, (d) execute any agreement, document or instrument on behalf of Dominion, (e) take any actions and steps in the name on behalf of the applicants, (f) market any property. And, again, this one is with the consent of the first lien lenders until their letters of credit have been cash collateralized. Paragraph (h) give them access, that is the Monitor, access to the books and records that are the property of the applicants. In (i) they can cause -- or cause to be assigned the applicants into bankruptcy, (j) execute, assign, issue and endorse documents in whatever nature or respect on behalf of the applicants. In (k) conduct, supervise, and direct the continuation or commencement of any process to recover property. (n) They can engage, retain, terminate officers, employees, consultants, agents. In paragraph (q) exercise any shareholder, partnership, joint venture, or other rights of the applicants. In (s) disclaim in accordance with the CCAA any contracts, and (t) they can apply to the Court for directions, and (u) take any steps reasonably incidental to the exercise of those powers.

In paragraph 5, provides that the applicants and their consultants, agents, and advisors shall cooperate with the Monitor.

In paragraph 6, the Monitor is authorized and empowered to operate, control on behalf of the applicants all of the applicants' existing bank accounts, and those include the specific Diavik realization accounts and wind-down accounts that have been previously referenced.

Paragraph 7, the Monitor can open up new accounts in its own name if it wants to.

Paragraph 9, the Monitor is authorized to take any actions that they deem appropriate in relation to the transactions completed pursuant to the APA.

Paragraph 10 is a provision that provides that the Monitor is authorized to execute a transition services agreement on behalf of the applicants, concurrent with their -- after the closing. So the transition services agreement would be an agreement to deal with the orderly administration of various post-closing matters, and so the Monitor is specifically authorized to -- to do that, as well, as it sees fit.

In paragraph 10, we set out specific examples that might be included in a transition services agreement, and I'm just going to stop at paragraph 10(d). So 10(d) originally provided that the Monitor may, among other things -- and again subject to the payment of or resolution with private or government royalty holders, making disbursements of all monetized Diavik realization assets to the 1L agent, the cash collateralized, the letters of credit in respect of the Diavik diamond mine until all those LLCs have been fully cash collateralized. So this is a paragraph that says that subject to resolution of private or government royalty holders, the Monitor can make disbursement. You can see there that we have deleted certain language. Again, that was at the request of counsel for DDMI. They were concerned, as I understood it, they didn't want a -- there to be a suggestion that letters of credit could be amended if it -- they relate to them without their consent. That certainly wasn't the intent, but we've taken that comment and simply deleted that. So that's what the blackline shows, a deletion of the -- at the request or to accommodate DDMI.

Monitor's additional protections. So these are provisions, obviously, as set out for the protection of the Monitor. The first one at paragraph 11 says that on 5 business days' notice, the Monitor can resign from its role, and, of course, the reason for that is, you know, to the extent there is no funding for the Monitor, the Monitor needs to otherwise resign. There needs to be a provision allowing the Monitor to do that and so we have attached a form that they would deliver at schedule A.

In paragraph 12, you can see we've made a change here to paragraph 12. Again, this was a change requested by counsel to DDMI, and so that change was -- was accepted. So paragraph 12 provides that the Monitor shall incur no liability or obligation as a result of its appointment; the carrying out of the provisions of this order; the exercise by the Monitor of any of its powers or the performance by the Monitor of any of its duties, save and except for, one, any gross negligence or wilful misconduct on its part, or, two, any liability for any costs award made in connection with any proceeding joined, continued, or commenced by the Monitor on behalf of the applicants or any of them, save, as aforesaid, nothing in this order shall derogate from the rights and protections. So this was a change that DDMI requested that the parties have agreed to, including the Monitor. So the Monitor has agreed to this -- this revised language, as well.

The next couple of paragraphs deal primarily with protection for the Monitor related to environmental legislation. You know, obviously, given we're dealing with a diamond mind, there are potential environmental issues, so paragraphs 13 through 16 deal with that. These were modelled on the North American Tungsten order, which we've included in our materials, and paragraph 16 says that notwithstanding any enhancement of the Monitor's powers, the Monitor shall not be deemed to be an owner of any of the property, including, without limitation, for the purposes of environmental legislation.

Paragraph 14 provides that the Monitor shall not be liable under any environmental legislation in respect of any adverse environmental condition, and you can see at the end of paragraph 14 this is for a period that arose before the date of the SARIO. So 14 deals with before the date and then paragraph 15 deals with after the date of this order. But you can see in paragraph 15 that the Monitor is not liable for any environment -- under any environmental legislation after the date of this order unless that condition is caused by the gross negligence or wilful misconduct of the Monitor. So there's a difference between pre and post, and that's set out in paragraphs 14 and 15.

Paragraph 16 provides that, notwithstanding the above paragraph, the Monitor shall not be liable beyond the net realized cash value received and available to the Monitor from the property under any environmental legislation. So, again, those are the paragraphs that were modelled on the North American Tungsten order.

And then paragraph 17, continuing on to deal with, you know, ensuring that the Monitor, you know, is not deemed to have care, ownership, or control of -- of the property, again for the purposes of environmental matters.

Paragraph 18 and 19 deal with successor and employee-related liabilities, and paragraph 18 provides that the Monitor is not liable for those employment-related liabilities under the

BIA. And paragraph 19 is a similar paragraph but provides -- or, excuse me, relates to, you know, other municipal or common law issues related to the governing -- government of -- excuse me, governing employees, not just the BIA.

Paragraph 20 I did want to stop at. So I just want to read paragraph 20. So paragraph 20 says: (as read)

> The Monitor shall continue to have the benefit of all of the indemnities, charges, protections, and priorities as set out in the CCAA, the SARIO, and any other order of this Court, and all such indemnities, charges, protections, and priorities shall apply and extend to the Monitor to the full ...

Excuse me: (as read)

> ... in the fulfillment of its duties or the carrying out of the provisions of its order.

So this was a paragraph that I'm not sure if -- if DDMI will have comments related to paragraph 20, but this was -- well, we'll wait to hear what they say, but the intent of paragraph 20 is, for instance, that the Monitor continues to have the benefit of, in particular, the admin charge that Your Ladyship had -- had ordered. I think what I'd do is I just might finish with this order and I just might turn back to paragraph 20 for a moment.

Paragraph 21, the Monitor is not deemed to be a director or officer or employee of the applicants, and then paragraph 22, nothing in this order shall constitute or be deemed to constitute the Monitor as a receiver, assignee, liquidator, administrator, receiver, or manager within the meaning of the *Income Tax Act*. So those are -- and, sorry -- and then schedule A. I should just direct you forward a couple of pages to schedule A. So this is the form of -- of document that the -- the discharge certificate, it's called, that the Monitor would deliver, pursuant to the paragraph earlier that I mentioned.

My -- my last comment, I guess, I'm just going to turn back to paragraph 20, My Lady, just so I can kind of complete my submissions on -- on this order. And I guess what I did want to say about paragraph 20, and -- and I appreciate this is really perhaps an issue involving the Monitor, but I just wanted to provide a bit more background to paragraph 20. So as I mentioned, paragraph 20 contemplates that the Monitor retains the benefit of, in particular, the -- the charges that were previously ordered by Your Ladyship, and I think what I might do is I might just -- just to remind everyone, perhaps even including myself, is I might just take you back to the initial order that was granted on April 22nd. And I'll just direct you to that.

And I'm hoping you are there, at page 3-52.

THE COURT: Yes, I am. Thank you.

MR. RUBIN: So as you can see here, this is the initial order that was granted by Your Ladyship. You can see in paragraph 27 -- paragraph 20 sets out -- at this point, we only had an admin charge and a directors' charge, and first it was the admin charge, then it was -- second was the directors' charge. And so that's originally how, when we first came to court, the directors' charge and the admin charge were charges that ranked ahead of all -- all property. So it had a ranking ahead of everybody over effectively everything. And you can see that in paragraph 29. So those two charges constitute a charge on the property and shall rank in priority to all other security interests, et cetera. So where we started with was the admin charge had priority over everything. We then came back and there was the SARIO on June 19th. And if I can direct you to the relevant provisions of the SARIO, and that is -- excuse me.

That should be page 3-80.

THE COURT: Okay.

MR. RUBIN: Okay. And you can see paragraph 40. At this point, we have additional charges. So at paragraph 54, we have the admin, the directors' charge, then we have a KERP charge, we have a break-up fee and expense charge, we have an interim lenders charge and a financial advisors charge. So you can see in paragraph 54 there --

THE COURT: Right.

MR. RUBIN: -- are 1, 2 -- there are four additional charges, and then turning to paragraph 56, at this point we can see -- again, this is the charging language. Each of the charges is a charge on the property. It ranks in priority to all other security interests. That's the -- the usual language, in favour of any other person, provided that -- and then you can see 56(a). At this point, the KERP charge, the break-up fee, the expense charge, and the interim lenders charge and the financial advisors charge shall rank subordinate to any encumbrances under article 9 of the JVA. You may recall --

THE COURT: Right.

MR. RUBIN: -- at this point, right, we had a discussion with DDMI and there was agreement at this point in time that the admin charge would rank ahead of the -- of the interest under the Diavik JVA, but the other charges would all rank after. And so that's what we did back in -- in June.

And then the last order I wanted to take you to, just to give you the history of this, is the monetization order, which I will direct you to now, and that was the order of November 4th, the approval of the monetization process order.

THE COURT: Okay.

MR. RUBIN: And so, if you have that order, that's page 3-258, and if I could just turn to paragraph 8 of that order.

THE COURT: You mean into the schedule A, paragraph 8?

MR. RUBIN: Yeah, it is in the -- it is in the schedule, My Lady. It's --

THE COURT: Right.

MR. RUBIN: And so this was the last one I was going to take you to. You can see in paragraph 8 that if there are proceeds resulting from a sale related to those diamonds, and this is the order in which the -- the proceeds are to be distributed, first, potentially to all taxes or royalties applicable to the DDMI collateral that rank in priority.

THE COURT: Right.

MR. RUBIN: Then (b) second, to all reasonable and documented fees incurred by DDMI, the implementation of the real process -- excuse me, the realization process, including, without limitation, the 1 percent fee that you ordered, and then (c) third, towards any amount incurred on the administration charge. So there is the administration charge. It sits after the expenses.

THE COURT: M-hm.

MR. RUBIN: And then fourth, to DDMI in satisfaction of cover payments. So you can see the admin charge is after the fees for the sale but ahead of cover payments. So that's where the admin charge sat at that point in time.

And I just wanted to give that background for Your Ladyship so we could understand where the admin sat at the beginning and how it came to where -- where it is today. And then obviously paragraph 20 of the EMP order that we're seeking, our suggestion is that the admin charge sits as it currently sits and that it's not changed and that the Monitor retains the benefit of that admin charge in accordance with your prior orders --

THE COURT: Okay.

MR. RUBIN: -- and in accordance with the priorities as set out in those prior orders.

My Lady, those are my submissions on the EMP application, subject to any questions, of course.

THE COURT: Okay. That's fine. All right. So does anybody else want to speak to this application?

Submissions by Mr. Wasserman (Enhancement of Monitor's Power)

MR. WASSERMAN: Yeah. My Lady, it's Marc Wasserman, M. Wasserman, for the agent, Credit Suisse --

THE COURT: Okay.

MR. WASSERMAN: -- as agent for first lien lenders. I just quickly want to support Mr. Rubin's submissions. This is obviously important, from our perspective, in order to ensure that there is a mechanism to enforce your previous orders and work with my friends at McCarthy's and his clients to ensure that, you know, we get the delivery of the diamonds and the monetization order and so on and so forth are appropriately dealt with. So we believe that the conduit through the Monitor is necessary, given that the joint venture agreement is not being assumed by the purchaser. Also, you know, I realized my mic was off at the beginning of the hearing, so if you're interested, I was trying to get my son a PlayStation 5 on Amazon but it didn't work. So that's what it was. I -- I apologize. I should have known better than to have a hearing during lunch.

THE COURT: Right. That's what happens.

MR. WASSERMAN: Okay. Thanks --

THE COURT: It's lunchtime your time, anyways.

MR. WASSERMAN: Yeah, exactly. Thank you very much.

THE COURT: All right. Okay. Thank you. Anyone else? I know that, Mr. Collins, you obviously will want to speak to this.

Submissions by Mr. Collins (Enhancement of Monitor's Power)

MR. COLLINS: I -- yeah, I do, My Lady. It's Collins, initial S., for DDMI. I'm not certain if -- if there's others that wish to speak, you know, generally in support or not --

THE COURT: Right.

MR. COLLINS: -- but I can make brief submissions on behalf of DDMI now.

THE COURT: Well, why don't you go ahead? That's okay.

MR. COLLINS: All right. Okay. So -- so thank you, My Lady, and good morning. With respect to the enhanced Monitor's power order, there is an agreement among the parties that we agreed could be read into the record today with respect to the effect of this order going. So, happily, we're not going to have a debate today about the appropriateness of the -- the enhanced powers as they pertain to Diavik. That debate may come, and I use the word "may" advisedly, My Lady. The parties are in discussions, you know, with respect to a further stay extension application and a consideration as to whether the remedial purposes of the CCAA are being engaged such that a further stay of extension should be granted following the closing of the Ekati transaction. And right -- for now -- for now, the other parties should rightly focus their attention on getting to closing on Ekati, and so the agreement as -- My Lady, is -- is that, you know, by virtue of the enhanced Monitor power order going, that is without prejudice to any position that DDMI may take in respect of a stay extension application or in respect of an application relative to the appropriateness of the CCAA continuing. Right. And -- and I don't, you know -- parties can -- can weigh in, I suppose, as -- as they feel free, but that's certainly, you know, the -- the understanding that DDMI has -- has with respect to -- to this order going.

THE COURT: All right. I understand. That makes perfect sense. Okay.

MR. COLLINS: All right. Thank you. Thank you, My Lady. And then, you know, to really narrow the issues today, you know, DDMI had -- had -- you know, in addition to the reservation of rights, have, you know, the three -- the three points in connection with this order, which becomes effective only on closing and then is effective for so long as -- as Your Ladyship determines to continue the CCAA proceedings. And --

and so the -- the only point that's really an issue, then, is the priority of the admin charge, My Lady.

THE COURT: M-hm.

MR. COLLINS: You know, and -- and what DDMI has to say about that, My Lady, is -- is that post-closing, you know, there is no benefit to any party really beyond, in the first instance, the first lien lenders with respect to the Monitor's continued engagement, and that's something that's manifest and made clear in the mutual support agreement. And I want to just draw Your Ladyship's attention to a critical provision in the mutual support agreement, and I can direct -- direct you to the -- the -- just one provision in the MSA.

Has that come up, the mutual support agreement, My Lady?

THE COURT: Yes, it has. Thank you.

MR. COLLINS: So this -- this is -- this is the mutual support agreement that was -- and it's appended to the -- the asset purchase agreement. This is the -- the agreement, you know, as and between the first lien lenders, you know, Dominion Diamond and -- and the purchasers, and I'll just scan -- take Your Ladyship down, then, to page 4 or 5, 63. And I can direct or -- or perhaps Your Ladyship can -- can scan down.

THE COURT: Yeah, I'll scan down. It's at that part. Okay.

MR. COLLINS: Paragraph -- it's paragraph 6, My Lady, under the heading Transaction Process Structure, and -- and so the enhanced Monitor's power order is what was contemplated as between Dominion, the first lien lenders, and -- and the purchasers. Of course, none of the other parties, you know, impacted by this are party to the -- the MSA, but in any event, My Lady, if -- if you have a look, it's about -- right after the definition of collectively the -- the Diavik assets.

THE COURT: Right.

MR. COLLINS: So it's the sentence starting:

> The parties shall agree to a mechanism for the pursuit of the realization and recovery for the Diavik assets, which among other things shall provide for a duly authorized independent official to have control and carriage thereof and for the costs thereof to be funded initially by the company ...

That's the purchaser:

> ... payment at closing of the transaction of -- of US 1 million from the transaction proceeds ...

Or those moneys will flow from the purchaser through to Dominion:

> ... at NewCo's direction to such official and thereafter to be funded at the cost of the 1L lenders if they so elect in their sole direction.

So at the time that the sale approval and vesting order in this transaction was conceived, My Lady, it was contemplated clearly that -- that, you know, while they didn't name the Monitor, you know, one can reasonably anticipate that that was the process that -- that was sought -- that was contemplated, rather, that's being sought today, and the funding of that was addressed in the mutual support agreement. There's going to be a million dollars in the first instance put into trust from the sale proceeds, moneys that don't go to satisfy other creditor claims, My Lady, you know, and -- and moreover in recognition of -- of really, you know, the fact that, you know, dealing with the Diavik realization assets in the first instance as being designed to -- to attempt to assure that there's cash collateralization provided for the $105 million and letters of credit, which is really for the sole benefit of the lenders. The other parties directed their mind to the fact that if the $1 million is insufficient, then it should be the -- the first lien lenders that pay. So in this circumstance, given that, you know, what we're looking at here is a prospective order that will spring into effect following close -- closing of Ekati, DDMI's submission is -- is that the admin charge of $3.5 million should be subordinate in its entirety to the section 9 JVA security.

THE COURT: Well, there are matters that the Monitor has to do beyond this aspect, the realization aspect. I mean, there's a lot of duties that are leftover. Maybe not a lot, but there's a few things that need to be done that is really -- that has to do with the whole of the estate. And then there's -- the Monitor can hire, is the way I read this order, an independent official to take care of reviewing the Diamond situation - let's put it like that - the splitting, the sales, the monetization, et cetera. So I get your point, but there are, you know, other things that they have to do that would presumably normally be -- should rank above the DDMI security as it is now. Like, that's the situation as it is now. So there will be a time when -- I can see when really the work that they're doing is making sure that DDMI is doing their part and that there's an agreement of, you know -- and there's been quite a bit, as you know, debate about how things should work. So it (INDISCERNIBLE) right? So I can see at some point obviously DDMI doesn't want a fund -- or have their assets be subordinate to the funding of that potential fight, and hopefully there won't be. But, you know, it's a lot of money and there's big swings in different ways to manage things. Anyways, so I can sort of see your point to a certain extent. I guess it's really a matter of timing. You have a million dollars set aside now, right? That's how I'm reading this. As of closing the transaction, there's a million dollars, and then afterwards the -- it will -- the admin charge will continue to be above the DDMI charge. So at some point, I can see that that might be problematic for DDMI. I understand your position there. So in terms of timing, does that have to be put in now or can we deal with this again at a later point? Do you see what I mean? Because we have to come back anyways about the stay. Like, what's the stay? Until the end of May, I think it is.

MR. COLLINS: March 1st, I believe, My Lady.

THE COURT: March 1st? Oh, okay. I've lost track. I've got a lot of -- like you, I've got a lot of files going on, stays all over the place, and anyways -- okay. So perhaps we can deal with it at that stay application, because it sort of all flows into the same issue in some ways, doesn't it?

MR. COLLINS: To a certain extent. I -- I think what I heard Your Ladyship saying is there's two components to this. One is, you know, matters related to the closing of the Ekati transaction and then -- and then matters with respect to, you know, the ongoing administration of, you know, the 40 percent interest -- Dominion's 40 percent interest in the joint venture agreement.

THE COURT: Right.

MR. COLLINS: With respect to former payment of transactional costs and the like, that can easily be dealt with commercially with respect to holdbacks and -- and from -- from the cash purchase price. That should be a cost that's funded out of the cash payments with respect to DD -- with respect to the ongoing administration of the joint venture agreement, My Lady, again, you know, with -- without prejudice and reserving rights with respect to the appropriateness of the continuation --

THE COURT: M-hm.

MR. COLLINS: -- of the CCAA proceedings in these circumstances.

THE COURT: All right.

MR. COLLINS: You know, in the ordinary course, what you would have in terms of a party policing -- or ensuring -- assuring compliance, I think is probably a better turn -- turn of phrase --

THE COURT: Right.

MR. COLLINS: -- with provisions of an agreement is you'd have -- you'd have a solid counterparty on the other side that would be able to engage with -- with the other counterparty to determine disputes in accordance with the -- with the terms of the joint venture agreement. You know, that solid counterparty would also make its joint venture billing payments, not rely on receiving its share of the production from its counterparty making cover payments, and -- and so in this circumstance, I mean, having regard to the fact that, yes, there's the million dollars and then the commitment on the part of the first lien lenders to pay in their sole discretion, you know, what -- what DDMI is saying is -- is that it -- it ought not be subordinate, then, to the administration charge at all.

If what Your Ladyship is saying, I think, you know -- I think this is what the Court is recommending, is -- is that that -- that, you know, the priority of the admin -- administrative charge then, you know, be reserved for a subsequent application, like, it stays today but, again, it just -- we come back on it in its entirety, you know, then that would also be a sensible suggestion. You know, we don't want to end up in a circumstance like we were in relation to the SARIO where parties opposite were alleging that we didn't appeal the order and that there wasn't jurisdiction reserved to Your Ladyship to consider that, and just so long as it's expressly clear that we have that ability, you know, should -- should DDMI determine to make that argument again in the future, that -- that the matter is reserved, then, for determination on a subsequent hearing.

THE COURT: Okay. Good. Well, I'll hear from the other parties, but that might be a good solution for today, certainly. All right. Mr. Rubins (sic), do you have an issue with that? We'd just sort of -- we'll keep the order as is for now, but if you can add maybe a line and say it's without prejudice to having this come back with respect to the priority of the administration -- administrative fees?

MR. RUBIN: Sure. It may be appropriate to hear from Ms. Meyer, since this issue is really going to be a Monitor issue, My Lady. You know, upon closing the transaction, our role may be severely limited, if at all, so it may be appropriate to just hear from Ms. Meyer, if that's --

THE COURT: Okay. All right. Let me hear from her, then. Thank you.

Submissions by Ms. Meyer (Enhancement of Monitor's Power)

MS. MEYER: Thank you, My Lady. The Monitor does support the enhanced Monitor power order. I think with respect to Mr. Collins' submissions just now on the administration charge, we support the submissions that have been made by Mr. Rubin. I wanted to note, though, that there is no application brought by DDMI to vary the SARIO or the monetization order, both of which, as Mr. Rubin has pointed out, set out the priority of the administration charge. DDMI has not brought an application to vary those and I submit that that would be the process that would be required to vary the priority of the administration charge --

THE COURT: I guess what he's --

MS. MEYER: -- to Your Ladyship's --

THE COURT: I guess -- sorry. I -- sorry to interrupt.

MS. MEYER: Go ahead. No, go ahead.

THE COURT: I guess what he's sort of saying is that he doesn't want to be met with a situation that if this -- if he didn't object now, then he forever should hold his peace on this issue, and, you know, if you're fine with that, i.e. that the -- that this order -- I hear what you're saying about the SARIO and the monetization order that's already there, but that it gives them the opportunity to bring an application with respect to changing the priorities for the admin charge, because it does continue it in this order. So -- right? If you're all right with that, we can reserve that issue for another day, and perhaps you'll be able to sort it out, too, just by miracle. You've actually sorted out quite a bit since the last time, so that's heartening. If we could do it like that, what's your view on that?

MS. MEYER: My Lady, I don't think there's anything that prevents DDMI from bringing an application to vary the priority of the administration charge, but my submission is that it would be appropriate, if DDMI wants to do that, to actually bring an application to do so and that that could be heard at another date, whether that be at the same time as the stay extension or otherwise. My submission is that nothing in the order sought today, the enhanced Monitor's power order, really addresses the administration charge or the priority of the administration charge. What Mr. Collins is seeking to do is to vary earlier orders that are just carried forward by way of this enhanced Monitor's powers order that is proposed. There's nothing in this order that actually changes anything that's already been granted and so --

THE COURT: Yeah. Fair enough.

MS. MEYER: -- I don't think it's -- I don't think it's necessary to specifically state in today's form of order that it is without prejudice to DDMI's right to bring an application to vary the priority of the administration charge. DDMI can do that whenever it wishes to do so and we will respond to such an application.

THE COURT: Okay.

MS. MEYER: Thank you.

THE COURT: All right.

MS. MEYER: A couple of points I did want to note, as well, My Lady, is with respect to the various powers set out in the enhanced Monitor's powers order, there are precedents for all of those powers. In particular, the *Entrec* order that is included in the brief provided by Dominion includes a number of those enhanced Monitor's powers. Mr. Rubin had already done a fairly thorough summary of the proposed order and so I don't intend to go through that, but as Your Ladyship has noted, it isn't just to deal with the DDMI joint venture matter. There's -- there's other continuing matters, as well, such as the change of name of Dominion Diamonds, the purchase price allocation, other matters as are set out in the form of order.

I thought, in fact, that it was a bit of a curious comment when Mr. Collins said that there is no benefit to any party other than the 1Ls with respect to the Monitor's continuing engagement post-closing in the circumstances where Dominion does remain a party to the JVA with DDMI and there will be no personnel left at -- at Dominion to carry out Dominion's role, absent the Monitor's enhanced powers. And so the Monitor, of course, is in a position where it needs to ensure that its fees will be paid in order for it to continue to act, and there is a provision included in the form of order that allows the Monitor to resign on 5 days' written notice in the event that there isn't sufficient funding for it to continue to carry out its obligations under the form of order.

I can -- other comments with respect to the DDMI position on the administration charge. I had actually made a note of the same orders and provisions of the orders that Mr. Rubin has already taken you to. Of course, the admin charge included in the initial order; the subsequent amendments of that, including the SARIO and the monetization order; and that -- that particularly in the circumstance where a considerable amount of the professional fees that have been incurred that are secured by the administration charge relate to issues that have been raised by or dealt with as between the parties and DDMI, including recent hearings on September 25th, October 30th, November 4th, the appeal to the Alberta Court of Appeal by DDMI, DDMI's submissions at the application for the approval and vesting order, and the January 15th hearing, let alone all of the professional fees incurred in relation to issues involving DDMI earlier in 2020. So in those circumstances where there is that history and the Monitor is taking on an enhanced role if this order is granted, it is our concern that the Monitor continue to have priority with respect to the administration charge securing its professional fees. Otherwise --

THE COURT: Okay.

MS. MEYER: -- generally we submit that, in our view, the enhanced Monitor's powers order is appropriate in the circumstances, as it will allow the estate of the applicants to be wound down and the applicants to meet their remaining obligations under the transaction, the approval and vesting order, and the monetization order. And those are my submissions.

THE COURT: Great. Okay. Thank you, Ms. Meyer.

MS. MEYER: Thank you, My Lady.

THE COURT: Is there anything further that you wanted to add, Mr. Collins, or reply?

MR. COLLINS: Thank you, My Lady. The -- the paragraph with respect to continuation of the admin charge is being sought today.

THE COURT: Right.

MR. COLLINS: You know, DDMI was trying -- is attempting to find an elegant solution to not opposing the order in its entirety and -- and that was the -- the nature of the -- the submissions made. I think -- I think it's clear, but it might be of assistance for Your Ladyship to -- to make -- make a declaration just with respect to that which is being put over to another day. You know, DDMI would observe that, you know, we have the court officer here, the independent court officer, and it will perform the functions that the Court is asking it to do and -- but in respect of -- of its independent role, as well, you know, DDMI would note that there seems to be some finger-wagging with respect to DDMI's role in these proceedings coming from -- from the court officer and others, and, you know, just simply wish to reiterate the fact that the -- the Diavik mine continued to operate and continues to operate through these proceedings because of extraordinary funding, and now approaching $150 million being made by DDMI, to continue to employ the 1,400 employees and the like. You know, commercial parties go into agreements on the expectation that their counterparties are going to perform their obligations. Dominion has performed none of its obligations in respect of the Diavik joint venture post-filing, My Lady, and I just, you know, think it's important if we're going to have a dialogue around what is appropriate and what is not appropriate in the future, that we continue to frame it through, you know, DDMI's lens, as well. Thank you.

THE COURT: Okay. Thank you very much. Is there anybody else who wants to speak to this application?

MR. WASSERMAN: My Lady, it's -- it's Marc Wasserman again. So just -- I only want to say one thing, which is, you know, we worked with Mr. Collins on the enhanced Monitor power order, and the only thing that was at issue was the administrative charge point, which I don't think we're talking about. We have no issue with the reservation of rights that Mr. Collins has asked for with respect to the stay extension and we understand, you know, that issue will be brought before you at some point in the near term, before the beginning of March. And, again, you know, we support the positions taken by Mr. Rubin and Ms. Meyer with respect to the admin charge, although it's really not an issue for us in the sense of an economic burden on us. So we really don't have a real economic interest in the outcome of that issue, but we understand the position taken by the company and by the -- by the Monitor.

You know, the only point that I would like to make and, you know, not losing sight of it, and I know you haven't, you know, the -- there's lots of counterparties that have signed contracts with Dominion that did not want their counterparty to be insolvent, including my clients, who have a significant LLC outstanding, for the benefit of Mr. Collins' client and, you know, that's the balance that you've been addressing in your -- in your decision. So although, you know, this will be an issue for later on, I just don't think we should let the record for this hearing go on the basis of, you know, sort of a one-sided view on how counterparties are affected by the insolvency of Dominion, because obviously the -- it impacts, you know, not just Mr. -- Mr. Collins' client.

Decision (Enhancement of Monitor's Power)

THE COURT: Okay. All right. Anybody else?

Okay. Hearing no one else, I will allow the order for the enhanced Monitor powers in the form that it's drafted. I think it's appropriate -- certainly pursuant to section 23(1)(k) and section 11, it's appropriate in this situation to enhance the Monitor's powers, and they will be necessary. The ongoing administration costs priority can be debated in due course. If DDMI wants to amend what has been granted previously in light of these changes, I'd suggest that DDMI bring an application so it's clearly on the record, but I won't -- and we'll just put it on the record that this order will not prejudice their ability to bring that application. So that's that for the order.

Then what we should do, Mr. Rubins and others, is that we -- I was just checking and you're right, March 1st is the deadline for the stay application. So we need to get some time to deal with the stay application, especially if it's going to be opposed. So I am sitting in commercial the week of the 22nd of February, but it's got a lot of other matters in there already that have been booked. It's pretty busy, and at the end of that week, the 26th is actually the ARIL conference, which I was planning to attend. I'm sure many of you will be attending, so probably not the best day to book this, even though it will be virtual, unfortunately. It's the one chance you actually get to see people in person, have a coffee, but there you go. It'll have to be another year.

MR. WASSERMAN: Yeah. I think -- I think Mr. Collins and I are both speaking at the conference, so I think we'd probably both prefer that it not happen on the 26th. So perhaps we're in your hands, and, like I said, it may not be me on that date. But since we don't have access to your calendar, is there a date -- you know, whether it's the 25th or 24th, is there a day that is preferrable from your calendar, and perhaps we just -- you just tell us the date and we'll --

THE COURT: Well, how much time will you need? That's the question. There's lots of little bits and pieces in there, but every day is booked with something already. In fact, I have two applications every day and a large one on the 24th.

Submissions by Mr. Wasserman (Stay Extension)

MR. WASSERMAN: I mean, perhaps --

THE COURT: So --

MR. WASSERMAN: -- perhaps, My Lady, to the extent that the timing is an issue before the beginning of March, maybe the parties can talk and we just go for a short stay extension, which can be done on consent, you know, for a couple of weeks if Mr. Collins' client wants to oppose, and then we can come back sort of mid-March, if you have more time, if that last week of February -- maybe I'm being presumptuous, but I'm just --

THE COURT: You are, because my calendar is -- I don't know. They've put -- got me into two -- the problem is I'm in two long criminal trials. One is a jury trial and I heard yesterday that they had -- in one of the cases, they have 10 pretrial applications to bring, and I just looked at them like, Are you guys insane? Anyways, they're not, it's just trying to fit things in. I do know that I'm having to be -- because I'm booked, right? It's some -- I'm booked -- the way that our calendars work, you know, we're booked up until the end of June, but some of them I'm assigned, like, I'm seized with and others I'm not. So the things that I'm not seized with, the trial coordinator can change my time around so that I deal with other matters that I am seized with, like this one, for instance, and others. So it looks like the week of March 1st, in fact, I was supposed to be in Red Deer, and already it looks like I'm going to probably have to -- the first 2 days are going to be devoted to some of the applications on this other criminal trial. So -- but later in that week, 3rd, 4th, 5th, since my week is going to be probably reassigned, I could do it, like, the 4th or 5th, depending on -- that would actually probably work out fairly well for me, because I'm being reassigned anyways. So ...

MR. WASSERMAN: Does it make sense, Mr. Collins -- I mean, I don't know whether you're intending to object or not. I know you're leaving the option open, but does it make sense to proceed with a consent stay extension to, say, the 8th of March and then use the time on the 3rd, 4th or 5th if you're going to -- you're going to have instructions to -- to oppose any longer stay extension, because I -- I expect, just to be transparent, we're going to be seeking a relatively long stay extension.

Submissions by Mr. Collins (Stay Extension)

MR. COLLINS: Yeah. (INDISCERNIBLE) My Lady --

THE COURT: M-hm.

MR. COLLINS: -- if we may indulge the Court and other counsel with a bit of a case management meeting here, I'd like to -- to reply to that, because it makes good sense to do that and -- and, you know, speaking without express instructions on the point, it would -- I would go so far as it would make sense if there's no objection today to extend the stay to March 8th, thus to avoid the time and expense to bring back another stay extension application. And -- and then -- and then, as my friend, Mr. Wasserman, you know, notes, you know, no determination has been made yet and -- and so, you know, that stay extension application -- subsequent stay extension application may -- may be a complete non-event or it may be, you know, something more akin to what Your Ladyship is accustomed to on this file.

THE COURT: Right. Okay. So are you all right with that, Mr. Rubins, that we -- I order today a stay extension to May 8th?

Submissions by Mr. Rubin (Stay Extension)

MR. RUBIN: That makes -- that makes sense. I think we have to be practical here, so absolutely, I think that makes sense.

THE COURT: Okay. So why don't, barring any objections -- does the Monitor have any problem with that? Ms. Kelsey?

MS. MEYER: Ms. Meyer.

THE COURT: Oh, sorry, Ms. Meyer. Kelsey Meyer, sorry.

Submissions by Ms. Meyer (Stay Extension)

MS. MEYER: No problem. And no, My Lady, that sounds sensible.

THE COURT: Okay.

MS. MEYER: Thank you.

Decision (Stay Extension)

THE COURT: So why don't I extend -- if you could draft, Mr. Rubins, just a simple stay extension order to March 8th, clearly it is reasonable in the circumstances and the best interests of the CCAA. And the parties have been working in good faith, so I can easily extend this stay to March 8th. And then if you can as soon as possible, Mr. Collins, let me know if those days -- because I know my schedule is being rearranged right now. I'm double-booked with another trial in Red Deer, but -- so anyways -- so if -- but I -- because it's in flux right now, if we want to pin a day down in there, if you could let me know ASAP, that would be helpful --

MR. COLLINS: You want --

THE COURT: -- even by way of letter --

MR. COLLINS: Yeah. Okay.

THE COURT: -- or email.

MR. COLLINS: I was going to say either of those days work for me and, I mean, for the purpose of scheduling, you know -- I mean, I know resources are scarce and -- and perhaps we don't want to take a -- take a half day, which I think this would take, for it not to be used, although we're in Your Ladyship's hands. It might be -- if we took a -- if we tried to block a half day now and then we'd get back to you as soon as we could -- can to advise, you know, if the half day is necessary so it can be deployed for -- for other things or to allow Your Ladyship --

THE COURT: Okay.

MR. COLLINS: -- to enjoy a day in Red Deer.

THE COURT: Okay. What do -- well, (INDISCERNIBLE) matter to me. I don't mind Red Deer. Nice -- they're nice people up there. We're getting a new courthouse up in Red Deer one day.

UNIDENTIFIED SPEAKER: I like Red Deer, as well.

THE COURT: All right. So what are the parties' availability? I think it's not a bad idea if we sort of booked a half day, I don't know, March 4th in the afternoon or March 5th in the afternoon or in the morning. It doesn't matter to me. Is there some time that's preferable for the main parties here who would be speaking on this?

MR. WASSERMAN: We would -- certainly the afternoon of the 4th or the morning of the 5th would be our preference rather than the afternoon of the 5th.

THE COURT: Yeah. I know for you the afternoon of Fridays is tough, because you're already 2 hours later --

MR. WASSERMAN: Yeah.

THE COURT: -- anyways.

MR. WASSERMAN: Yes, but, I mean, if it has to be that day, if others are available on that day, we'll make ourselves available.

THE COURT: Okay. What about others?

MR. KASHUBA: My Lady, from the purchaser's perspective, either March 4th or March 5th will work at any point in time.

THE COURT: Okay.

MR. RUBIN: Afternoon of March 4th or morning of March 5th work for Dominion, My Lady. I think it's just up to Mr. Collins and Ms. Meyer.

MS. MEYER: My Lady, Kelsey Meyer. For myself, the afternoon of March 5th works -- actually, either day works for me. I'm just looking at Mr. Simard's schedule, as I anticipate he may wish to attend the application, as well. It appears he's available on the morning of March 4th and the afternoon of March 5th, if I'm reading this correctly.

THE COURT: Okay.

MR. RUBIN: Morning, My Lady -- the morning of March 4th, if that works for you and for others, is -- is fine with us, as well.

THE COURT: Okay. So it looks like morning of March 4th works, so I'll try to ask the trial coordinator, in his machinations, if we can set aside the morning of March 4th. It's always better in the morning anyway (INDISCERNIBLE) but -- and for you to confirm, Mr. Collins, can I give you, like, 24 hours, if you can let us know by tomorrow?

MR. COLLINS: Oh --

THE COURT: What's today?

MR. COLLINS: That works for me, My Lady.

THE COURT: Okay. And I'll try to confirm if I'm available. Well, let's do it this way. You confirm -- I'll check right now, but you confirm whether you need that time or not by way of letter, which is fine, or email to everybody. And it looks like the morning of March 4th works for everybody, so if everybody could just pencil that aside, subject to confirmation, I think it's smart to do that.

MR. COLLINS: All right. And -- and I wish there to be no misunderstanding. You know, we won't be able to confirm in a day, you know -- I think there's going, you know -- likely to be discussions, you know, among the parties following closing of Ekati and -- and just to see if there's, you know, a basis for, you know, an unopposed stay extension application.

THE COURT: Right. Fair enough. There's things that need to be sorted out here and if we do set aside the time -- and, of course, if you manage to sort things out, we're always ecstatic. So, you know -- so that won't be a problem on my end. Okay. Okay. Good. Well, we'll just leave it like that for now. Thank you, everyone. By some miracle, I had the day set aside here and we're finished before the morning break. It's tremendous. We all deserve a break on this one, so -- good.

MR. RUBIN: And, My Lady, if I can just confirm one thing? So the form of order for the EMP, the form of order is the form that I took you through --

THE COURT: Yes.

MR. RUBIN: -- with no other changes or additions?

THE COURT: I won't put those in. We've put it on the record that it's --

MR. RUBIN: Understood.

THE COURT: -- without prejudice, and it will be before me, so I have a pretty good memory --

MR. RUBIN: Okay.

THE COURT: -- on these points.

MR. RUBIN: Thank you, My Lady. I don't think that was a direction for us to continue on to take a full day. I didn't understand that, but I think we're done, subject to any comments you have, of course.

THE COURT: Good. Tremendous. Thank you, everyone. We'll see you again --

UNIDENTIFIED SPEAKER: Thank you, My Lady.

THE COURT: -- in a couple weeks, possibly. All right.

MR. WASSERMAN: Thank you, My Lady.

THE COURT: Thank you.

MR. KASHUBA: Thank you, My Lady.

MS. MEYER: Thank you, My Lady.

THE COURT: Bye bye now.

PROCEEDINGS ADJOURNED

Certificate of Record

I, Paul Mak, certify that this recording is the record made of the evidence in proceedings, in the Court of Queen's Bench, held in courtroom 1003, virtual courtroom 89, at Calgary, Alberta, on the 27th day of January, 2021, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Victoria Winning, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Pro-to-type Word Processing
Order: AL8905
Dated: February 11, 2021

TAB 2

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Angiotech Pharmaceuticals, Inc. (Re),* 2011 BCSC 450

Date: 20110406
Docket: S110587
Registry: Vancouver

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 Angiotech Pharmaceuticals, Inc. and the other Petitioners Listed on Schedule "A"

Petitioners

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

In Chambers

Counsel for Angiotech Pharmaceutics, Inc.:	J. Dacks M. Wasserman D. Gruber R. Morse
U.S. Counsel for Angiotech Pharmaceutics, Inc. appearing by telephone:	S. Jones
Counsel for Alvarez & Marsal Canada Inc.:	J. Grieve K. Jackson
Counsel for Consenting Noteholders:	R. Chadwick L. Willis
Counsel for U.S. Bank National Association:	M. Buttery
Place and Date of Hearing:	Vancouver, B.C. April 6, 2011
Place and Date of Judgment:	Vancouver, B.C. April 6, 2011

[1] **THE COURT:** The application before me is for an order to sanction the plan (as amended) proposed by the petitioners and approved by the monitor in the Angiotech CCAA proceeding.

[2] I find that the proposed plan has several purposes, which include:

(a) effecting a compromise, settlement, and payment of all affected claims;

(b) implementing a recapitalization of subordinated notes; and

(c) enabling the petitioners to sustain sufficient current and future liquidity in order to enhance their short and long term viability.

[3] The plan was unanimously approved at a plan approval meeting of the creditors (“creditors’ meeting”) held and conducted by the monitor in Vancouver on April 4, 2011. I am satisfied that notice of the plan, the amended plan, and the creditors’ meeting was widely disseminated in accordance with my previous orders.

[4] The total value of the notes held by subordinated noteholders is approximately $266 million. It is noteworthy that the noteholders which held subordinated notes having a value of approximately $234 million voted in favour of the plan at the creditors’ meeting.

[5] No objection to the plan has been taken by any employee, past or present, or the existing common shareholders whose interests will be extinguished by the plan.

[6] The plan as amended contains the following key elements, which are set out in the affidavit of K. Thomas Bailey sworn on March 31, 2011 at para. 31:

> (a) New Common Shares will be issued to Affected Creditors with Distribution Claims who have not made valid Cash Elections or Liquidity Elections (as defined below) and distributions of cash will be made to Convenience Class Creditors and Affected Creditors that have made valid Liquidity Elections;
>
> (b) the Subordinated Notes, the Subordinated Note Indenture and all Subordinated Note Obligations will be irrevocably and

finally cancelled and eliminated except for the limited purposes provided in section 4.5 of the Plan;

(c) all Affected Claims will be discharged and released;

(d) the Existing Shares and options and the Shareholder Rights Agreement will be cancelled without any liability, payment or other compensation to Existing Shareholders in respect thereof;

(e) Angiotech US will repay to Wells Fargo and the DIP Lender, as applicable, any and all outstanding Secured Lender Obligations;

(f) Angiotech will make payment to the KEIP Participants of amounts owing under the KEIP at the time specified and in accordance with the terms of the KEIP;

(g) Angiotech will make grants of New Common Shares and options to acquire New Common Shares pursuant to the terms of the MIP;

(h) Angiotech's Notice of Articles will be amended to, among other things, create an unlimited number of New Common Shares in order to provide flexibility for the recapitalized Angiotech on a going forward basis;

(i) Angiotech will transfer to the Monitor the aggregate of all Cash Elected Amounts and Liquidity Election Payments (as defined below) to be held in escrow in one or more separate interest-bearing accounts for distributions to Convenience Class Creditors and Affected Creditors that have made valid Liquidity Elections, as applicable;

(j) the Board of Directors of Angiotech will be replaced by a new Board of Directors; and

(k) the Petitioners, the Monitor, Blackstone, the Subordinated Note Indenture Trustee, the Advisors, Wells Fargo, the DIP Lender, the Subordinated Noteholders and, among others, present and former shareholders, affiliates, subsidiaries, directors, officers and employees of the foregoing will be granted a release and discharge from liability in connection with, among other things, the CCAA proceeding and the Plan.

[7] I am satisfied from my review of the evidence that the plan, if implemented, would:

(a) enable the petitioners to continue to operate as going concerns;

(b) facilitate and promote continued employment of a substantial number of the petitioners' employees;

(c) allow creditors and other persons with an economic interest in the petitioners to derive a far greater benefit than would result from a bankruptcy or liquidation; and

(c) permit important medical products sold and distributed by the petitioners to continue to be made available to the public worldwide.

[8] The amendments to the plan that now contemplate distribution of newly issued common shares in an aggregate amount of 3.5% afford greater benefit to all affected creditors who choose to and are qualified to take them.

[9] As well, the amendments to the plan calling for a liquidity election provide greater benefits to creditors who are not able, or choose not, to participate in the share offering.

[10] I am also satisfied that the Court has jurisdiction to dispense with the calling of a meeting of existing shareholders in order to amend the articles of the Canadian petitioner. I am satisfied that I have that jurisdiction pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") and the *Business Corporations Act*, S.B.C. 2002, c. 57. I say that because I am of the view that s. 6(8) of the *CCAA* prohibits a plan that calls for a distribution to pay an equity claim where non-equity claims cannot be paid in full: *Re Canadian Airlines Corp.*, 2000 ABQB 442 at paras. 143 and 145, aff'd at 2000 ABCA. The evidence discloses that this is not possible in this case.

[11] Even if it could be said that the combined effect of ss. 6(8) and 6(2) of the *CCAA* do not remove the requirement for a shareholders' meeting, I am satisfied that the requirement should be dispensed with in the circumstances of this case. To do otherwise, so that a meeting is held, would cause persons who no longer have an economic interest in the company to acquire a functional veto: *Re Xillix Technologies Corp. et al* (21 June 2007), Vancouver No. S066835 (S.C.).

[12] I am also satisfied that the proposed release contained in the plan is rationally connected to the purpose of the plan, it is necessary for the implementation of the

plan, and it meets the tests set out in *Re Muscletech Research and Developments Inc.*, (2006) 25 C.B.R. (5th) 231 (Ont. S.C.J.); *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.); and *Re Canwest Global Communications Corp.*, 2010 ONSC 4209.

[13] The creditors who are protected by the the release were instrumental in facilitating the reorganization of the petitioners' affairs as a going concern. Further, their efforts led to the development of a plan that meets the objectives set out in the *CCAA*.

[14] The reorganization facilitated by those creditors provides greater benefits to all of the creditors than would otherwise be realized if the petitioners had been liquidated.

[15] In conclusion, I am satisfied that the plan should be sanctioned because:

(a) it meets the statutory criteria set out in s. 61 of the *CCAA*;

(b) it is fair and reasonable; and

(c) it is in the best interests of the creditors and the public.

"P. Walker J."

The Honourable Mr. Justice Paul Walker

TAB 3

SUPREME COURT OF CANADA

CITATION: C.M. Callow Inc. *v.* Zollinger, 2020 SCC 45

APPEAL HEARD: December 6, 2019
JUDGMENT RENDERED: December 18, 2020
DOCKET: 38463

BETWEEN:

C.M. Callow Inc.
Appellant

and

Tammy Zollinger, Condominium Management Group, Carleton Condominium Corporation No. 703, Carleton Condominium Corporation No. 726, Carleton Condominium Corporation No. 742, Carleton Condominium Corporation No. 765, Carleton Condominium Corporation No. 783, Carleton Condominium Corporation No. 791, Carleton Condominium Corporation No. 806, Carleton Condominium Corporation No. 826, Carleton Condominium Corporation No. 839 and Carleton Condominium Corporation No. 877
Respondents

- and -

Canadian Federation of Independent Business and Canadian Chamber of Commerce
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 120) — Kasirer J. (Wagner C.J. and Abella, Karakatsanis and Martin JJ. concurring)

CONCURRING REASONS: (paras. 121 to 182)	Brown J. (Moldaver and Rowe JJ. concurring)
DISSENTING REASONS: (paras. 183 to 238)	Côté J.

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C.M. Callow Inc. *Appellant*

v.

Tammy Zollinger,
Condominium Management Group,
Carleton Condominium Corporation No. 703,
Carleton Condominium Corporation No. 726,
Carleton Condominium Corporation No. 742,
Carleton Condominium Corporation No. 765,
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Indexed as: C.M. Callow Inc. *v.* Zollinger

2020 SCC 45

File No.: 38463.

2019: December 6; 2020: December 18.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Breach — Performance — Duty of honest performance — Clause in winter maintenance agreement permitting unilateral termination of contract without cause upon 10 days' notice — Contract terminated by condominium corporations with required notice to contractor — Contractor suing for breach of contract — Trial judge finding that statements and conduct by condominium corporations actively deceived contractor and led it to believe contract would not be terminated — Trial judge awarding damages for breach of contract — Whether exercise of termination clause constituted breach of duty of honest performance.

In 2012, a group of condominium corporations ("Baycrest") entered into a two-year winter maintenance contract and into a separate summer maintenance contract with C.M. Callow Inc. ("Callow"). Pursuant to clause 9 of the winter maintenance contract, Baycrest was entitled to terminate that agreement if Callow failed to give satisfactory service in accordance with its terms. Clause 9 also provided that if, for any other reason, Callow's services were no longer required, Baycrest could terminate the contract upon giving 10 days' written notice.

In early 2013, Baycrest decided to terminate the winter maintenance agreement but chose not to inform Callow of its decision at that time. Throughout the spring and summer of 2013, Callow had discussions with Baycrest regarding a renewal of the winter maintenance agreement. Following those discussions, Callow thought that it was likely to get a two-year renewal of the winter maintenance contract and that Baycrest was satisfied with its services. During the summer of 2013, Callow performed work above and beyond the summer maintenance contract at no charge, which it hoped would act as an incentive for Baycrest to renew the winter maintenance agreement.

Baycrest informed Callow of its decision to terminate the winter maintenance agreement in September 2013. Callow filed a statement of claim for breach of contract, alleging that Baycrest acted in bad faith. The trial judge held that the organizing principle of good faith performance and the duty of honest performance were engaged. She was satisfied that Baycrest actively deceived Callow from the time the termination decision was made to September 2013, and found that Baycrest acted in bad faith by withholding that information to ensure Callow performed the summer maintenance contract and by continuing to represent that the contract was not in danger despite knowing that Callow was taking on extra tasks to bolster the chances of the winter maintenance contract being renewed. She awarded damages to Callow in order to place it in the same position as if the breach had not occurred. The Court of Appeal set aside the judgment at first instance, holding that the trial judge erred by improperly expanding the duty of honest performance beyond the terms of the winter maintenance agreement. Further, it held that any deception in the communications during the summer of 2013 related to a new contract not yet in existence, namely the renewal that

Callow hoped to negotiate, and therefore was not directly linked to the performance of the winter contract.

Held (Côté J. dissenting): The appeal should be allowed and the judgment of the trial judge reinstated.

Per Wagner C.J. and Abella, Karakatsanis, Martin and **Kasirer** JJ. : The duty to act honestly in the performance of the contract precluded the active deception by Baycrest by which it knowingly misled Callow into believing that the winter maintenance agreement would not be terminated. By exercising the termination clause dishonestly, it breached the duty of honesty on a matter directly linked to the performance of the contract, even if the 10-day notice period was satisfied. Accordingly, the Court of Appeal should not have interfered with the conclusions of the trial judge.

The duty of honest performance in contract, formulated in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, applies to all contracts and requires that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. In determining whether dishonesty is connected to a given contract, the relevant question is whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly. While the duty of honest performance is not to be equated with a positive obligation of disclosure, in circumstances where a contracting party lies to or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to correct a false impression created through that party's own actions.

The organizing principle of good faith recognized in *Bhasin* is not a free-standing rule, but instead manifests itself through existing good faith doctrines. While the duty of honest performance and the duty to exercise discretionary powers in good faith are distinct, like each of the different manifestations of the organizing principle, they should not be thought of as disconnected from one another. The duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by fixing on the wrongful exercise of a contractual prerogative. Each of the specific legal doctrines derived from the organizing principle rest on a requirement of justice that a contracting party have appropriate regard to the legitimate contractual interests of their counterparty. They need not subvert their own interests to those of the counterparty by acting as a fiduciary or in a selfless manner. This requirement of justice reflects the notion that the bargain, the rights and obligations agreed to, is the first source of fairness between parties to a contract. Those rights and obligations must be exercised and performed honestly and reasonably and not capriciously or arbitrarily where recognized by law.

The duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right since the duty, irrespective of the intention of the parties, applies to the performance of all contracts, and by extension, to all contractual obligations and rights. Instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest. This focus on the manner in which the termination right was exercised should not be confused with whether the right could be exercised. No contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith.

The requirements of honesty in performance can go further than prohibiting outright lies. Whether or not a party has knowingly misled its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. One can mislead through action, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct.

The duty of honest performance is a contract law doctrine, not a tort and therefore a nexus with the contractual relationship is required. A breach must be directly linked to the performance of the contract. The framework for abuse of rights in Quebec is useful to illustrate the required direct link between dishonesty and performance from *Bhasin*. Authorities from Quebec serve as persuasive authority and comparison between the common law and civil law as they evolve in Canada is a particularly useful and familiar exercise for the Court. Like in the Quebec civil law, no contractual right may be exercised dishonestly and therefore contrary to the requirements of good faith. The direct link exists when the party performs their obligation or exercises their right under the contract dishonestly. While the duty of honest performance has similarities with civil fraud and estoppel, it is not subsumed by them. Unlike estoppel and civil fraud, the duty of honest performance does not require a defendant to intend that the plaintiff rely on their representation or false statement.

The duty of honest performance attracts damages according to the ordinary contractual measure. The ordinary approach is to award contractual damages corresponding to the expectation interest. That is, damages should put the injured party in the position that it would have been in had the duty been performed. Although reliance damages, which are the ordinary measure of damages in tort, and expectation damages will be the same in many if not most cases, they are conceptually distinct, and there is no basis to hold that a breach of the duty of honest performance should in general be compensated by way of reliance damages.

In the instant case, Baycrest knowingly misled Callow in the manner in which it exercised clause 9 of the winter maintenance agreement and this wrongful exercise of the termination clause amounts to a breach of contract. Even though Baycrest had what was, on its face, an unfettered right to terminate the winter maintenance agreement on 10 days' notice, the right had to be exercised in keeping with the duty to act honestly. Baycrest's deception was directly linked to this contract, because its exercise of the termination clause was dishonest. It may not have had a free-standing obligation to disclose its intention to terminate, but it nonetheless had an obligation to refrain from misleading Callow in the exercise of that clause. Baycrest had to refrain from false representations in anticipation of the notice period. If someone is led to believe that their counterparty is content with their work and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early. Having failed to correct Callow's misapprehension that arose due to these false representations, Baycrest breached its duty of good faith in the exercise of its right of termination. Damages thus flow for the consequential loss of opportunity. While damages are to be measured against a defendant's least onerous means of performance, the least onerous means of performance in this case would have been to correct the misrepresentation once Baycrest knew Callow had drawn a false inference. Had it done so, Callow would have had the opportunity to secure another contract for the upcoming winter.

Per Moldaver, **Brown** and Rowe JJ.: As a universally applicable minimum standard, all contracts must be performed honestly. Contracting parties may therefore not lie to, or otherwise knowingly mislead, each other about matters directly linked to performance. If a plaintiff suffers loss in reliance on its counterparty's misleading conduct, the duty of honest performance serves to make the plaintiff whole. It does not, however, impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract. The dividing line between (1) actively misleading conduct, and (2) permissible non-disclosure has been clearly demarcated by cases addressing misrepresentation and the same settled principles apply to the duty of honest performance, although it also applies (unlike misrepresentation) to representations made after contract formation.

There is, in the context of misrepresentation, a rich law accepting that sometimes silence or half-truths amount to a statement. Although contracting parties have no duty to disclose material information, a contracting party may not create a misleading picture about its contractual performance by relying on half-truths or partial disclosure. Representations need not take the form of an express statement. So long as it is clearly communicated, it may comprise other acts or conduct on the part of the defendant. The entire context, which includes the nature of the parties' relationship, is to be considered in determining, objectively, whether the defendant made a representation to the plaintiff. The question is whether the defendant's active conduct contributed to a misapprehension that could be corrected only by disclosing additional information. Contracting parties are required to correct representations that are subsequently rendered false, or which the representor later discovers were erroneous. The question of whether a representation has been made is a question of mixed fact and law, subject to appellate review only for palpable and overriding error.

The legal aim in remedying a breach of contract is to give the innocent party the full benefit of the bargain by placing it in the position it would have occupied had the contract been performed. But the justification for awarding expectation damages does not apply to breach of the duty of honest performance. In such cases, the issue is not that the defendant has failed to perform the contract, thereby defeating the plaintiff's expectations. It is, rather, that the defendant has performed the contract, but has also caused the plaintiff loss by making dishonest extra-contractual misrepresentations concerning that performance, upon which the plaintiff relied to its detriment. The plaintiff's complaint is not lost value of performance, but detrimental reliance on dishonest misrepresentations. The interest being protected is not an expectation interest, but a reliance interest. And just as these are unrelated interests, an expectation measure of damage is unrelated to the breach of the duty of honest performance.

Much like estoppel and civil fraud, the duty of honest performance vindicates the plaintiff's reliance interest. A contracting party that breaches this duty will be liable to compensate its counterparty for any foreseeable losses suffered in reliance on the misleading representations. The duty of honest performance is not subsumed by estoppel and civil fraud; rather, it protects the reliance interest in a distinct and broader manner since the defendant may be held liable even where it does not intend for the plaintiff to rely on the misleading representation. Irrespective of the defendant's intention, all a plaintiff need show is that, but for its reliance on the misleading representation, it would not have sustained the loss.

Disposing of the present case is a simple matter of applying the Court's decision in *Bhasin*; Callow's claim should be resolved by applying only the duty of honest performance. There is no basis for disturbing the trial judge's conclusions. Baycrest's conduct did not fall on the side of innocent non-disclosure. The trial judge found that active communications between the parties deceived Callow. Baycrest identifies no palpable and overriding error to justify overturning these conclusions. The proper measure of damages represents the loss Callow suffered in reliance on Baycrest's misleading representations.

The majority relies on the civilian concept of "abuse of rights" in its analysis. In so doing, it departs from the Court's accepted practice in respect of comparative legal analysis. The principles that apply to this appeal are determinative and settled. Canada's common law and civil law systems have adopted very different approaches to the place of good faith in contract law. The majority's reliance on the civilian doctrine of abuse of a right distorts the analysis in *Bhasin* and elides the distinction between honest performance and good faith in the exercise of a contractual discretion.

Courts should draw on external legal concepts only where domestic law does not provide an answer or where it is necessary to modify or otherwise develop an existing legal rule. Courts may also look to the experience of other legal systems in considering whether a potential solution to a legal problem will result in negative consequences, or to observe that a domestic legal concept mirrors one found in another system. Even where comparative analysis is appropriate, it must be undertaken with care and circumspection. The golden rule in using concepts from one of Canada's legal systems to modify the other is that the proposed solution must be able to completely and coherently integrate into the adopting system's structure.

Per **Côté** J. (dissenting): The appeal should be dismissed. Callow's recourse cannot be based on a breach of the duty of honest performance. Although

Baycrest's conduct may not be laudable, it does not fall within the category of active dishonesty prohibited by that duty.

The duty of honest performance is described in *Bhasin* as a simple requirement not to lie or knowingly mislead about matters directly linked to performance of the contract. The requirement that parties not lie is straightforward; however, the kind of conduct covered by the requirement that they not otherwise knowingly mislead each other is not. The law imposes neither a duty of loyalty or of disclosure nor a requirement to forego advantages flowing from the contract on a contracting party. Absent a duty to disclose, it is far from obvious when exactly one's silence will knowingly mislead the other contracting party or at what point a permissible silence turns into a non-permissible silence that may constitute a breach of contract. In any event, the duty of honest performance should remain clear and easy to apply.

The obligations flowing from the duty of honest performance are negative obligations. Extending the duty beyond that scope would detract from certainty in commercial dealings. Therefore, silence cannot be considered dishonest within the meaning of *Bhasin* unless there is a positive obligation to speak. Such an obligation does not arise simply because a party to a contract realizes that his counterparty is operating under a mistaken belief. Absent a duty of disclosure, a party to a contract has no obligation to correct his counterparty's mistaken belief unless the party's active conduct has materially contributed to it. What constitutes a material contribution will obviously depend upon the context, which includes the nature of the parties' relationship as well as the relevant provisions of the contract. Parties that prefer not to disclose certain information — which they are entitled not to do — are not required to adopt a new line of conduct in their contractual relationship simply because they chose silence over speech.

In the context of a right to terminate a contract without cause, a party that intends to end an agreement does not have to convey hints in order to alert his counterparty that their business relationship is in danger. No obligation to speak arises when a party becomes aware of his counterparty's mistaken belief that the contract will not be terminated unless the party has taken positive action that materially contributed to that belief. If one party leads another to believe that their contract will be renewed, it follows that the other party can reasonably expect their business relationship to be extended rather than terminated. But an inference to that effect cannot be drawn in the abstract. In order to infer that one party, through discussions about renewal, led the other party to think that there was no risk their existing agreement would be terminated, the inference-drawing process must obviously take into account the nature of the risk at stake and what was actually communicated during those discussions. Otherwise, the inference would entail a palpable and overriding error that would be subject to appellate review.

In the present case, Baycrest bargained for a right to terminate its winter agreement for any reason and at any time upon giving 10 days' notice. In her assessment of Baycrest's conduct, the trial judge did not ask herself if Baycrest lied or otherwise knowingly misled Callow about the exercise of its right to terminate the winter agreement for any other reason than unsatisfactory services. She wrongfully insisted on addressing alleged performance issues despite the fact that the winter agreement could be terminated even if Callow's services were satisfactory. The trial judge also did not consider that the active deception had to be directly linked to the performance of the contract. It is clear that the representations she found had been made by Baycrest were not directly linked to the performance of the winter agreement. The trial judge's misunderstanding of the applicable legal principles vitiated the fact-finding process.

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APPEAL from a judgment of the Ontario Court of Appeal (Lauwers, Huscroft and Trotter JJ.A.), 2018 ONCA 896, 429 D.L.R. (4th) 704, 86 B.L.R. (5th) 53, [2018] O.J. No. 5855 (QL), 2018 CarswellOnt 18697 (WL Can.), setting aside a decision of O’Bonsawin J., 2017 ONSC 7095, [2017] O.J. No. 6176 (QL), 2017 CarswellOnt 18587 (WL Can.). Appeal allowed, Côté J. dissenting.

Brandon Kain, *Adam Goldenberg*, *Vivian Ntiri* and *Miriam Vale Peters*, for the appellant.

Anne Tardif, *Rodrigue Escayola* and *David Plotkin*, for the respondents.

Catherine Beagan Flood and *Nicole Henderson*, for the intervener the Canadian Federation of Independent Business.

Jeremy Opolsky and *Winston Gee*, for the intervener the Canadian Chamber of Commerce.

The judgment of Wagner C.J. and Abella, Karakatsanis, Martin and Kasirer JJ. was delivered by

KASIRER J. —

I. <u>Introduction</u>

[1] This appeal concerns a clause in a commercial winter maintenance agreement that permitted the clients to terminate the contract unilaterally, without cause, upon giving the contractor 10 days' notice. The dispute does not turn on whether the clause represented a fair bargain between the parties. There is also no issue about the meaning of the termination clause. The dispute turns rather on the manner in which the respondents (collectively "Baycrest") exercised the termination clause. Acknowledging that 10 days' notice was given the appellant, C.M. Callow Inc. ("Callow"), argues that Baycrest exercised the termination clause contrary to the requirements of good faith set forth by this Court in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, in particular the duty to perform the contract honestly.

[2] In *Bhasin*, Cromwell J. recognized a general organizing principle of good faith, which means that "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (para. 63). This organizing principle, he explained, "is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in

different situations" (para. 64). The organizing principle of good faith manifests itself through "existing doctrines" addressing "the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance" (para. 66).

[3] In this appeal, the applicable good faith doctrine is the duty of honesty in contractual performance. As Cromwell J. explained in *Bhasin*, at para. 73, the duty of honesty applies to all contracts as a matter of contractual doctrine, and means "simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract". Callow says Baycrest's failure to exercise its right to terminate in keeping with the mandatory duty of honest performance amounted to a breach of contract. It points to the trial judge's findings that Baycrest withheld the information that the contract was in danger of termination. Baycrest then continued to represent that the contract was not in danger and knowingly declined to correct the false impression it had created and under which Callow was operating. This dishonesty continued for several months, "in anticipation of the notice period" wrote the trial judge and, claims Callow, resulted in it foregoing the opportunity to bid on other winter contracts and thereby justifies an award of damages (2017 ONSC 7095, at para. 67 (CanLII)).

[4] Baycrest, for its part, recalling that Cromwell J. explicitly stated in *Bhasin* that the duty of honest performance does not amount to a duty to disclose, argues that its silence did not constitute dishonesty. It also says the alleged dishonesty was not

connected to the contract in place at the time because, in its submission, the impugned communications related to the possibility of a future contract not yet executed. The Court of Appeal agreed and overturned the trial judge's decision (2018 ONCA 896, 429 D.L.R. (4th) 704).

[5] I respectfully disagree with the Court of Appeal on whether the manner in which the termination clause was exercised ran afoul of the minimum standard of honesty. The duty to act honestly in the performance of the contract precludes active deception. Baycrest breached its duty by knowingly misleading Callow into believing the winter maintenance agreement would not be terminated. By exercising the termination clause dishonestly, it breached the duty of honesty on a matter directly linked to the performance of the contract, even if the 10-day notice period was satisfied and irrespective of their motive for termination. For the reasons that follow, I would allow the appeal and restore the judgment of the Ontario Superior Court of Justice.

II. Background

[6] Baycrest includes 10 condominium corporations managed by Condominium Management Group and a designated property manager. Each corporation has its own board of directors to manage its affairs and, collectively, they established a Joint Use Committee ("JUC"). The JUC makes decisions regarding the joint and shared assets of the condominiums. In 2010, the condominium corporations entered into a two-year winter maintenance agreement with Callow, a corporation owned and operated by Christopher Callow. Pursuant to the terms of the agreement,

Callow provided winter services, including snow removal, to the condominium corporations.

[7] At the conclusion of the two-year term in 2012, the corporations entered into two new agreements with Callow. Joseph Peixoto — president of one of the condominium corporations, and representative on the JUC — negotiated the main pricing terms with Mr. Callow for the renewal of the winter maintenance contract, which also added a separate summer maintenance services contract.

[8] At issue in this appeal is the winter maintenance agreement, which had a new two-winter term from November 1, 2012 to April 30, 2014. Pursuant to clause 9, the corporations were entitled to terminate the winter maintenance agreement if Callow failed to give satisfactory service in accordance with the terms of this Agreement. Moreover, clause 9 provided that "if for any other reason [Callow's] services are no longer required for the whole or part of the property covered by this Agreement, then the [condominium corporations] may terminate this contract upon giving ten (10) days' notice in writing to [Callow]" (A.R., vol. III, at p. 10).

[9] During the first winter of the two-winter term, there were complaints from occupants of various condominiums, many of which related to snow removal from individual parking stalls. In January 2013, Mr. Callow attended a JUC meeting to address the concerns. The minutes reflected the positive nature of this meeting, recording that "[t]he Committee confirmed that [Callow] has been diligent in addressing this issue as best as could be expected considering the nature of the storms

recently experienced" (A.R., vol. III, at p. 35). After the meeting, the property manager at the time also sent a follow-up email to the JUC members: "I know that your Board has been generally satisfied with the snow removal — so there is nothing outstanding to report here" (p. 39).

[10] A few months later — still in the first year of the agreement — respondent Tammy Zollinger became the property manager. About three weeks after Ms. Zollinger's arrival, another JUC meeting was held, this time without Mr. Callow present. During the meeting, Ms. Zollinger advised the JUC to terminate the winter maintenance agreement with Callow "due to poor workmanship in the 2012-13 winter" (A.R., vol. III, at p. 43). The minutes went on to indicate that Ms. Zollinger had reviewed the contract and advised the JUC members that they could terminate the contract with Callow with no financial penalty. Ms. Zollinger further advised that she would get quotes from other snow removal contractors. The JUC voted to terminate the winter maintenance agreement shortly thereafter, "in either March or April" of 2013 (trial reasons, at para. 51). Baycrest chose not to inform Mr. Callow of its decision to terminate the winter maintenance agreement at that time.

[11] Although only one winter of the two-winter term had been completed, Callow began discussions throughout the spring and summer of 2013 with Baycrest regarding a renewal of the winter maintenance agreement. Specifically, Mr. Callow had various exchanges with two condominium corporations' board members, one of whom was Mr. Peixoto. Following these conversations, wrote the trial judge, "Mr. Callow

thought that he was likely to get a two-year renewal of his winter maintenance services contract and they were satisfied with his services" (para. 41).

[12] Meanwhile, Callow continued to fulfill its obligations under the winter and summer maintenance agreements including, pursuant to the latter arrangement, finishing "spring cleanup", cutting grass on a weekly basis and conducting garbage pick-up. Furthermore, during the summer of 2013, Callow "performed work above and beyond [its] summer maintenance services contract" (para. 42), even doing what Mr. Callow described as some "freebie" work, which he hoped would act as an incentive for Baycrest to renew the winter maintenance agreement at the end of the upcoming winter.

[13] Conversations between Callow and Mr. Peixoto continued into July 2013, at which time Callow decided to improve the appearance of two gardens. In an email dated July 17, 2013, Mr. Peixoto wrote to another condominium corporation board member regarding this "freebie" work, writing in part: "It's nice he's doing it but I am sure it's an attempt at us keeping him. Btw, I was talking to him last week as well and he is under the impression we're keeping him for winter again. I didn't say a word to him cuz I don't wanna get involved but I did tell [Ms. Zollinger] that [Mr. Callow] thinks we're keeping him for winter" (A.R., vol. III, at p. 73).

[14] Baycrest did not inform Callow about the decision to terminate the winter maintenance agreement until September 12, 2013. At that point, Ms. Zollinger advised Callow by way of email "that Baycrest will not be requiring your services for the winter

contract for the 2013/2014 season, as per section 9 of the contract, Baycrest needs to provide the contractor with 10 days' notice" (A.R., vol. III, at p. 49).

[15] Callow consequently filed a statement of claim for breach of contract, alleging that Baycrest acted in bad faith by accepting free services while knowing Callow was offering them in order to maintain their future contractual relationship. Moreover, Callow alleged that Baycrest knew or ought to have known that Callow would not seek other winter maintenance contracts in reliance on the representations that Callow was providing satisfactory service and the contract would not be prematurely terminated. Accordingly, "[a]s a result of these misrepresentations and/or bad faith conduct, [Mr. Callow on behalf of Callow] did not bid on other tenders for winter maintenance contracts. [Baycrest is] now liable for Callow's damages for loss of opportunity" (A.R., vol. I, p. 45, at para. 30). Finally, Callow alleged that Baycrest was unjustly enriched by the free services it provided in the summer of 2013.

[16] Callow sought damages in the amount of $81,383.68 for breach of contract, an amount equivalent to the one year remaining on the winter maintenance agreement, damages for intentional interference with contractual relations, inducing breach of contract, and negligent misrepresentation. It also asked for damages in the amount of $5,000.00 for unjust enrichment, an amount equivalent to the "freebie" work, and pre- and post-judgment interest and costs on a substantial indemnity basis.

III. Prior Decisions

A. *Ontario Superior Court of Justice (O'Bonsawin J.)*

[17] In her review of the circumstances of the dispute, the trial judge commented on the testimony of several key witnesses, concluding that Mr. Callow was a credible witness. In contrast, she found that Baycrest's witnesses — including a former property manager, as well as Ms. Zollinger and Mr. Peixoto — had "provided many exaggerations, over-statements and constantly provided comments contrary to the written evidence" (para. 11). The trial judge thus preferred Mr. Callow's version of events to that of Baycrest.

[18] At trial, Baycrest advanced two main submissions. First, it argued that, as a matter of simple contractual interpretation, clause 9 clearly and unambiguously states that it could terminate the contract for any reason by providing Callow with 10 days' notice in writing. Second, even though no cause had to be shown to invoke clause 9, Baycrest nonetheless argued that the evidence before the trial judge demonstrated that Callow's level of service did not comply with the contractual specifications and was not to its complete satisfaction.

[19] The trial judge dismissed both arguments. First, she found that Callow's work met the requisite standard. While there were complaints about Callow's work, she observed that "a significant portion related to the clearing of parking stalls, which was the fault of owners/tenants who did not move their vehicles". "Was the quality of Callow's work below standard?" asked the trial judge, "The evidence leads me", she wrote, "to answer no" (para. 55).

[20] Second, the trial judge held that this was not a simple contractual interpretation case. In her view, the organizing principle of good faith performance and the duty of honest performance were engaged. The trial judge explained that, as Cromwell J. noted in *Bhasin*, the duty of honest performance should not be confused with a duty of disclosure. “However,” she wrote, “contracting parties must be able to rely on a minimum standard of honesty” to ensure “that parties will have a fair opportunity to protect their interests if the contract does not work out” (para. 60, citing *Bhasin*, at para. 86). For the purposes of drawing a distinction between the failure to disclose a material fact and active dishonesty, the trial judge observed that “[u]nless there is active deception, there is no unilateral duty to disclose information before the notice period” (para. 61).

[21] The trial judge was satisfied that Baycrest “actively deceived” Callow from the time the termination decision was made in March or April 2013 to the time when notice was given on September 12, 2013. Specifically, she found that Baycrest “acted in bad faith by (1) withholding the information to ensure Callow performed the summer maintenance services contract; and (2) continuing to represent that the contract was not in danger despite [Baycrest’s] knowledge that Callow was taking on extra tasks to bolster the chances of renewing the winter maintenance services contract” (para. 65). Given the active communications between the parties during the summer of 2013, “which deceived Callow”, the trial judge “[did] not accept [Baycrest’s] argument that no duty was owed to disclose the decision to terminate the contract before the notice” (para. 66). “The minimum standard of honesty”, she concluded, “would have been to

address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period" (para. 67).

[22] The trial judge tied Baycrest's dishonesty to the way in which it delayed invocation of the 10-day notice period set out in clause 9, while it actively deceived Callow that the contract was not in jeopardy. Her reasons relied upon, by analogy, the law recognizing a duty to exercise good faith in the manner of dismissal when terminating an employee. She noted that Baycrest "intentionally withheld the information in bad faith" (para. 69). She expressly acknowledged that exercising a termination clause is not, in itself, evidence of a breach of good faith. However, in this case, Baycrest deliberately deceived Callow about termination, which was a breach of the duty of honest performance.

[23] By reason of this contractual breach, the trial judge awarded damages to Callow, in order to place it in the same position as if the breach had not occurred. These damages amounted to $64,306.96, a sum equivalent to the value of the winter maintenance agreement for one year, minus expenses that Callow would typically incur; a further amount of $14,835.14, representing the value of one year of a lease of equipment that Callow would not have leased if it had known the winter maintenance was to be terminated; and $1,600.00 for the final invoice for the summer work, which Baycrest had failed to pay to Callow. Costs were awarded to Callow.

[24] The trial judge was also satisfied that Baycrest was unjustly enriched due to the "freebie" work performed by Callow during the summer of 2013. She declined,

however, to award damages for the unjust enrichment since Callow failed to provide evidence of its expenses.

B. *Court of Appeal for Ontario (Lauwers, Huscroft and Trotter JJ.A.)*

[25] Baycrest appealed, arguing that the trial judge erred in two respects. First, it alleged she erred by improperly expanding the duty of honest performance beyond the terms of the winter maintenance agreement. Second, it argued the trial judge erred in assessing damages.

[26] The Court of Appeal unanimously agreed with Baycrest on the first point, and set aside the judgment at first instance. The Court of Appeal recognized, as the trial judge had found, that the "[d]irectors of two of the condominium corporations and members of the JUC were aware that Mr. Callow was performing 'freebie' work, and knew he was under the impression that the contracts were likely to be renewed" (para. 5). Nonetheless, the court stressed that *Bhasin* was a modest, incremental step, and good faith is to be applied in a manner so as to avoid commercial uncertainty. As such, the duty of honesty "does not impose a duty of loyalty or of disclosure or to require a party to forego advantages flowing from the contract" (para. 12, citing *Bhasin*, at para. 73).

[27] The Court of Appeal further emphasized that Callow had made two concessions in its factum. First, Callow acknowledged that Baycrest was not contractually required to disclose its decision to terminate the winter maintenance

agreement prior to the 10-day notice period. Second, Callow acknowledged that the failure to provide notice on a more timely basis was not, in and of itself, evidence of bad faith. Because there is "no unilateral duty to disclose information relevant to termination", the court reasoned Baycrest "[was] free to terminate the winter contract with [Callow] provided only that [it] informed him of [its] intention to do so and gave the required notice. That is all that [Callow] bargained for, and all that he was entitled to" (para. 17). While the trial judge's findings "may well suggest a failure to act honourably," the Court of Appeal expressed its view that the findings "do not rise to the high level required to establish a breach of the duty of honest performance" (para. 16).

[28] In any event, the Court of Appeal said that any deception in the communications during the summer of 2013 related to a new contract not yet in existence, namely the renewal that Callow hoped to negotiate. Accordingly, in its view, any deception could not be said to be directly linked to the performance of the winter contract (para. 18).

[29] Given the Court of Appeal's conclusion, it did not address damages.

IV. Analysis

A. *Overview of the Appeal*

[30] This appeal presents this Court with an opportunity to clarify what constitutes a breach of the duty of honest performance where it manifests itself in connection with the exercise of a seemingly unfettered, unilateral termination clause. Pointing to what it calls Baycrest's active deception in the exercise of the clause, Callow says this conduct was a breach of the duty of honest performance recognized in *Bhasin*.

[31] Before this Court, Callow does not dispute the meaning of clause 9. Nor does Callow's argument on appeal concern the adequacy of the bargain struck with Baycrest or whether the termination was unjustified. Callow is not saying, for instance, that it should have been afforded more notice because the 10-day period was unfair in the circumstances. I recognize that, at trial, there was some question as to whether the termination was fitting given Callow's work record. Indeed, the trial judge found in Callow's favour on this point, concluding that it had provided satisfactory services. But the suggestions that Callow was terminated for some improper purpose or motive, or even that the termination was unreasonable, need not be determined on this appeal. The narrow question addressed here is whether Baycrest failed to satisfy its duty not to lie or knowingly deceive Callow about matters directly linked to the performance of the winter maintenance agreement, specifically by exercising the termination clause as it did.

[32] In the present circumstances, Callow says Baycrest misled Mr. Callow about the possible renewal of the winter maintenance agreement and, as a result, it

knowingly deceived him into thinking it was satisfied with Callow's performance of the agreement then in force for the upcoming winter season. Callow says it mistakenly inferred, as a consequence of this dishonesty, that there was no danger of the existing winter contract being terminated pursuant to clause 9 of the contract. This, Callow submits, was to the full knowledge of Baycrest, who failed to correct its false impression which amounted to a breach of the duty of honest performance. In short, Callow says this deceitful conduct meant the exercise of the termination clause was wrongful in that it was breached even if, strictly speaking, the required notice was given. This should give rise, claims Callow, to compensatory damages on the ordinary measure as the trial judge had ordered: damages for lost profits, wasted expenditures and an unpaid invoice.

[33] In addition to the duty of honest performance, Callow invokes a free-standing duty to exercise contractual discretionary powers in good faith, which, it argues, Cromwell J. also recognized in *Bhasin* and which would justify the same award in damages. Furthermore, in the event the Court disagrees that there has been a breach of one or another of those existing duties, Callow submits, alternatively, that this Court should recognize a new duty of good faith, which would prohibit "active non-disclosure".

[34] In answer, Baycrest notes the concessions made by Callow before the Court of Appeal, specifically that clause 9 on its face did not require it to give more notice. Baycrest agrees with the Court of Appeal that whatever communications took place

between the parties, those communications concerned a future contract and were not directly related to the performance of the winter contract then in force. The agreement granted Baycrest an unqualified right to terminate the contract on notice for any reason, which is precisely what occurred. Recalling that the duty to act honestly in performance is not a duty of disclosure and does not impose a duty of loyalty akin to that of a fiduciary, Baycrest says that Callow seeks to have it subvert its own interest by requiring it to inform Callow of its intention to end the winter maintenance agreement before the stipulated 10 days' notice. The Court of Appeal was thus correct in concluding that the bargain struck by the parties entitled Baycrest to end the contract as it did. In a similar vein, with respect to the duty to exercise discretionary powers in good faith, Baycrest says that because it respected the terms of the contract, the issue of abuse of contractual discretion does not arise on the facts of this case.

[35] In any event, Baycrest emphasizes the conclusion reached by the Court of Appeal that any discussions in the spring and summer of 2013 that may have misled Callow were connected to pre-contractual negotiations. Thus, any dishonesty cannot be said to be directly linked to the performance of the winter maintenance agreement.

[36] The appeal should be allowed. I respectfully disagree with the Court of Appeal on two main points.

[37] First, *Bhasin* is clear that even though Baycrest had what was, on its face, an unfettered right to terminate the winter maintenance agreement on 10 days' notice, the right had to be exercised in keeping with the duty to act honestly, i.e. Baycrest could

not "lie or otherwise knowingly mislead" Callow "about matters directly linked to the performance of the contract". According to the Court of Appeal, any dishonesty was about a renewal, which was in turn connected to pre-contractual negotiations to which the duty as stated in *Bhasin* does not apply. I respectfully disagree. In my view, the Court of Appeal may have erroneously framed the trial judge's findings at paragraph 6, writing that she found that Baycrest had represented "that the winter contract was not in danger <u>of non-renewal</u>" (emphasis added). Referring instead to the ongoing winter services agreement, the trial judge had found Baycrest misrepresented "that the contract was not in danger despite [Baycrest's] knowledge that Callow was taking on extra tasks to bolster the chances of renewing the winter maintenance services contract" (para. 65). In determining whether dishonesty is connected to a given contract, the relevant question is generally whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly. As I understand it, the trial judge's finding was that the dishonesty in this case was related not to a future contract but to the termination of the winter maintenance agreement. If someone is led to believe that their counterparty is content with their work and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early. This is what the trial judge found. Simply said, Baycrest's alleged deception was directly linked to this contract because its exercise of the termination clause in this contract was dishonest.

[38] Second, the Court of Appeal erred when it concluded that the trial judge's findings did not amount to a breach of the duty of honest performance. While the duty

of honest performance is not to be equated with a positive obligation of disclosure, this too does not exhaust the question as to whether Baycrest's conduct constituted, as a breach of the duty of honesty, a wrongful exercise of the termination clause. Baycrest may not have had a free-standing obligation to disclose its intention to terminate the contract before the mandated 10 days' notice, but it nonetheless had an obligation to refrain from misleading Callow in the exercise of that clause. In circumstances where a party lies to or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to correct the false impression created through its own actions.

[39] In light of these points, it is my view that this is not a simple contractual interpretation case bearing on the meaning to be given to clause 9. Nor is this a case involving passive failure to disclose a material fact. Instead, as recognized by the Court of Appeal, "[n]ot only did [Baycrest] fail to inform [Callow] of [its] decision to terminate, . . . [it] <u>actively deceived</u> Callow as to [its] intentions and accepted the 'freebie' work [it] performed, in the knowledge that this extra work was performed with the intention/hope of persuading [Baycrest] to award [Callow] additional contracts once the present contracts expired" (para. 15 (emphasis added)). While Baycrest was not required to subvert its legitimate contractual interests to those of Callow in respect of the existing winter services agreement, it could not, as it did, "undermine those interests in bad faith" (*Bhasin*, at para. 65).

[40] For the reasons that follow, this dispute can be resolved on the basis of the first ground of appeal relating to the duty of honest performance. Baycrest knowingly misled Callow in the manner in which it exercised clause 9 of the agreement and this wrongful exercise of the termination clause amounts to a breach of contract under *Bhasin*. In the circumstances, I find it unnecessary to answer Callow's argument that, irrespective of the question of honesty, Baycrest breached a duty to exercise a discretionary power in good faith. Nor is it necessary to extend *Bhasin* to recognize a new duty of good faith relating to what Callow has described as "active non-disclosure" of information germane to performance.

B. *The Duty of Honest Performance*

(1) The Dishonesty Is Directly Linked to the Performance of the Contract

[41] I turn first to Callow's submission that the Court of Appeal erred in concluding that the dishonesty was not connected to the contract "then in effect" (C.A. reasons, at para. 18). As I will endeavour to explain, while Baycrest had the right to terminate, it breached the duty of honest performance in exercising the right as it did.

[42] Callow relies on the duty of honest performance in contract formulated in *Bhasin*. This duty, which applies to all contracts, "requires the parties to be honest with each other in relation to the performance of their contractual obligations" (para. 93). While this formulation of the duty refers explicitly to the performance of contractual

obligations, it applies, of course, both to the performance of one's obligations and to the exercise of one's rights under the contract. Cromwell J. concluded, at paragraphs 94 and 103, that the finding that the non-renewal clause had been exercised dishonestly made out a breach of the duty:

> The trial judge made a clear finding of fact that Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause": para. 261; see also para. 271. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly.
>
> . . .
>
> As the trial judge found, this dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision. I conclude that Can-Am breached the 1998 Agreement when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause. [Emphasis added.]

This same framework for analysis applies to this appeal. The trial judge here made a clear finding of fact that Baycrest acted dishonestly toward Callow by representing that the contract was not in danger even though a decision to terminate the contract had already been made (paras. 65 and 67). There is no basis to interfere with that finding on appeal. As I will explain, it follows that Baycrest deceived Callow and thereby breached its duty of honest performance.

[43] I begin by recognizing the debate as to the extent to which good faith, beyond the duty of honesty, should substantively constrain a right to terminate, in particular one found in a contract (see, e.g., W. Courtney, "Good Faith and

Termination: The English and Australian Experience" (2019), 1 *Journal of Commonwealth Law* 185, at p. 189; M. Bridge, "The Exercise of Contractual Discretion" (2019), 135 *L.Q.R.* 227, at p. 247). For some, the right to terminate is in the nature of an "absolute right" insulated from judicial oversight, unlike the exercise of contractual discretion (see E. Peel, *The Law of Contract* (15th ed. 2020), at para. 18-088). To this end, I recall that Cromwell J. observed that "[c]lassifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation" (*Bhasin*, at para. 72). I need not and do not seek to resolve this debate in this case. I emphasize that Cromwell J. himself recognized that, regardless of this debate, the non-renewal clause could not be exercised dishonestly (para. 94). Whatever the full range of circumstances to which good faith is relevant to contract law in common law Canada, it is beyond question that the duty of honesty is germane to the performance of this contract, in particular to the way in which the unilateral right to terminate for convenience set forth in clause 9 was exercised.

[44] As a further preliminary matter, I recall that the organizing principle of good faith recognized by Cromwell J. is not a free-standing rule, but instead manifests itself through existing good faith doctrines, and that this list may be incrementally expanded where appropriate. In this case, Callow invokes two existing doctrines: the duty of honest performance and the duty to exercise discretionary powers in good faith. In my view, properly understood, the duty to act honestly about matters directly linked to the performance of the contract — the exercise of the termination clause — is

sufficient to dispose of this appeal. No expansion of the law set forth in *Bhasin* is necessary to find in favour of Callow. Rather, this appeal provides an opportunity to illustrate this existing doctrine that, I say respectfully, was misconstrued by the Court of Appeal.

[45] While these two existing doctrines are indeed distinct, like each of the different manifestations of the organizing principle, they should not be thought of as disconnected from one another. Cromwell J. explained that good faith contractual performance is a shared "requirement of justice" that underpins and informs the various rules recognized by the common law on obligations of good faith contractual performance (*Bhasin*, at para. 64). The organizing principle of good faith was intended to correct the "piecemeal" approach to good faith in the common law, which too often failed to take a consistent or principled approach to similar problems and, instead, develop the law in this area in a "coherent and principled way" (paras. 59 and 64).

[46] By insisting upon the thread that ties the good faith doctrines together — expressed through the organizing principle — courts will put an end to the very piecemeal and incoherent development of good faith doctrine in the common law against which Cromwell J. sought to guard. While the duty of honest performance might bear some resemblance to the law of misrepresentation, for example, in a way that good faith in other settings may not, *Bhasin* encourages us to examine how other existing good faith doctrines, distinct but nonetheless connected, can be used as helpful

analytical tools in understanding how the relatively new duty of honest performance operates in practice.

[47] The specific legal doctrines derived from the organizing principle rest on a "requirement of justice" that a contracting party, like Baycrest here in respect of the contractual duty of honest performance, have appropriate regard to the legitimate contractual interests of their counterparty (*Bhasin*, at paras. 63-64). It need not, according to *Bhasin*, subvert its own interests to those of Callow by acting as a fiduciary or in a selfless manner that would confer a benefit on Callow. To be sure, this requirement of justice reflects the notion that the bargain, the rights and obligations agreed to, is the first source of fairness between parties to a contract. But by the same token, those rights and obligations must be exercised and performed, as stated by the organizing principle, honestly and reasonably and not capriciously or arbitrarily where recognized by law. This requirement of justice, rooted in a contractual ideal of corrective justice, ties the existing doctrines of good faith, including the duty to act honestly, together. The duty of honest performance is but an exemplification of this ideal. Here, based on its failure to perform clause 9 honestly, Baycrest committed a breach of contract, a civil wrong, for which it has to answer.

[48] When, in *Bhasin*, Cromwell J. recognized a duty to act honestly in the performance of contracts, he explained that this duty "should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance" (para. 74). Characterizing this

new duty as a matter of contractual doctrine was appropriate, Cromwell J. wrote, "since parties will rarely expect that their contracts permit dishonest performance of their obligations" (para. 76). The duty therefore applies even where — as in our case — the parties have expressly provided for the modalities of termination given that the duty of good faith "operates irrespective of the intentions of the parties" (para. 74). No contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith.

[49] Cromwell J.'s choice of language is telling. It is not enough to say that, temporally speaking, dishonesty occurred while both parties were performing their obligations under the contract; rather, the dishonest or misleading conduct must be directly linked to performance. Otherwise, there would simply be a duty not to tell a lie, with little to limit the potentially wide scope of liability.

[50] The duty of honest performance is a contract law doctrine, setting it apart from other areas of the law that address the legal consequences of deceit with which it may share certain similarities. One could imagine analyzing the facts giving rise to a duty of honest performance claim through the lens of other existing legal doctrines, such as fraudulent misrepresentation giving rise to rescission of the contract or the tort of civil fraud (see, e.g., B. MacDougall, *Misrepresentation* (2016), at §1.144-1.145). However, in *Bhasin*, Cromwell J. wrote explicitly that while the duty of honest performance has similarities with civil fraud and estoppel "it is not subsumed by them" (para. 88). For instance, unlike estoppel and civil fraud, the duty of honest performance

does not require a defendant to intend that the plaintiff rely on their representation or false statement. Cromwell J. explicitly defined the duty as a new and distinct doctrine of contract law, not giving rise to tort liability or tort damages but rather resulting in a breach of contract when violated (paras. 72-74, 90, 93 and 103). We are not asked by the parties to depart from this approach.

[51] In light of *Bhasin*, then, how is the duty of honest performance appropriately limited? The breach must be directly linked to the performance of the contract. Cromwell J. observed a contractual breach because Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause" (para. 94). He pointed, in particular, to the trial judge's conclusion that Can-Am "acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause" (para. 98; see also para. 103). Accordingly, it is a link to the performance of obligations under a contract, or to the exercise of rights set forth therein, that controls the scope of the duty. In a comment on *Bhasin*, Professor McCamus underscored this connection: "Cromwell J was of the view that the new duty of honesty could be breached in the context of the exercise of a right of non-renewal. That was the holding in *Bhasin*" ("The New General 'Principle' of Good Faith Performance and the New 'Rule' of Honesty in Performance in Canadian Contract Law" (2015), 32 *J.C.L.* 103, at p. 115). While the abuse of discretion was not the basis of the damages awarded in *Bhasin*, the duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by fixing, at least in circumstances like ours, on the wrongful exercise of a contractual prerogative.

[52] Importantly, Callow does not seek to bar Baycrest from exercising the termination clause here; like in *Bhasin*, it only seeks damages flowing from the fact that the clause was exercised dishonestly. In other words, Callow's argument, properly framed, is that Baycrest could not exercise clause 9 in a manner that breached the duty of honesty, however absolute that right appeared on its face.

[53] Good faith is thus not relied upon here to provide, by implication, a new contractual term or a guide to interpretation of language that was somehow an unclear statement of parties' intent. Instead, the duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right because the duty, irrespective of the intention of the parties, applies to the performance of all contracts and, by extension, to all contractual obligations and rights. This means, simply, that instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest.

[54] The issue, then, is not whether the clause was properly interpreted, or whether the bargain itself is inadequate. Moreover, what is important is not the failure to act honestly in the abstract but whether Baycrest failed to act honestly in exercising clause 9. Stated simply, no contractual right can be exercised in a dishonest manner because, pursuant to *Bhasin*, that would be contrary to an imperative requirement of good faith, i.e. not to lie or knowingly deceive one's counterparty in a matter directly linked to the performance of the contract.

[55] This argument invites this Court to explain if and how Baycrest wrongfully exercised the termination clause, quite apart from any notice requirement. I would add that this focus on the *manner* in which the termination right was exercised should not be confused with *whether* the right could be exercised. Callow does not allege that Baycrest did not have the right to terminate the agreement — this entitlement to do so on 10 days' notice, pursuant to clause 9, is not at issue here. However, according to Callow, that right was exercised dishonestly, in breach of the duty in *Bhasin*, obliging Baycrest to pay damages as a consequence of its behaviour. Accordingly, I would draw the same distinction made by Cromwell J. in *Bhasin* regarding the exercise of the non-renewal clause at issue in that case: Can-Am acted dishonestly towards Mr. Bhasin in exercising the non-renewal clause as it did, and was liable for damages as a result, but it was not precluded from exercising its prerogative not to renew the contract.

[56] In service of its argument that Baycrest breached the duty of honest performance in its exercise of clause 9 of the contract, Callow points to references in *Bhasin* to Quebec law (at paras. 32, 35, 41, 44, 82 and 85) and in particular to Cromwell J.'s reference to the theory of the abuse of contractual rights set forth in arts. 6, 7 and 1375 of the *Civil Code of Québec* ("*C.C.Q.*" or "*Civil Code*") (para. 83). Callow observes that the requirement not to abuse contractual rights is recognized as a feature of good faith performance in Quebec. It submits that the allusion to the doctrine of abuse of rights was an indication of the requirements of good faith in *Bhasin* and argues that the same framework can usefully illustrate how the common law duty of honesty constrains the termination clause in this case.

[57] I agree that looking to Quebec law is useful here. The direct link between the dishonest conduct and the exercise of clause 9 was not properly identified by the Court of Appeal in this case and Quebec law helps illustrate the requirement that there be such a link from *Bhasin*. In my view, Baycrest's dishonest conduct is not a wrong independent of the termination clause but a breach of contract that, properly understood, manifested itself upon the exercise of clause 9. Through that direct link between the dishonesty and the exercise of the clause, the conduct is understood as contrary to the requirements of good faith. This emerges more plainly when considered in light of the civilian doctrine of contractual good faith alluded to in *Bhasin*, specifically the fact that, in Quebec "[t]he notion of good faith includes (but is not limited to) the requirement of honesty in performing the contract" (para. 83). Thus, like in Quebec civil law, no contractual right may be exercised dishonestly and therefore contrary to the requirements of good faith. Properly raised by Cromwell J., this framework for connecting the exercise of a contractual clause and the requirements of good faith is helpful to illustrate, for the common law, the link made in *Bhasin* that the Court of Appeal failed to identify here.

[58] Mindful no doubt of its unique vantage point which offers an occasion to observe developments in both the common law and the civil law in its work, this Court has often drawn on this country's bijural environment to inform its decisions, principally in private law appeals. While this practice has varied over time and has been most prevalent in civil law cases in which common law authorities are considered, the influence of bijuralism is not and need not be confined to appeals from Quebec or to

matters relating to federal legislation (see J.-F. Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada* (2007), at pp. 7-22). In its modern jurisprudence, this Court has recognized the value of looking to legal sources from Quebec in common law appeals, and has often observed how these sources resolve similar legal issues to those faced by the common law (see, e.g., *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at pp. 1143-44; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 138; see also *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at para. 41). Used in this way, authorities from Quebec do not, of course, bind this Court in its disposition of a private law appeal from a common law province, but rather serve as persuasive authority, in particular, by shedding light on how the jurisdictionally applicable rules work. In my respectful view, it is uncontroversial that, when done carefully, sources of law may be used in this way (*Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 32, citing J.-L. Baudouin, "L'interprétation du Code civil québécois par la Cour suprême du Canada" (1975), 53 *Can. Bar Rev.* 715, at p. 726). As Robert J. Sharpe put it, writing extra-judicially, judges "should strive to maintain the coherence and integrity of the law as defined by the binding authorities, using persuasive authority to elaborate and flesh out its basic structure" (*Good Judgment: Making Judicial Decisions* (2018), at pp. 171-72).

[59] This does not mean the appropriate use of these sources is limited to cases where there is a gap in the law of the jurisdiction in which the appeal originates, in the sense that there is no answer to the legal problem in that law, or where a court

contemplates modifying an existing rule. Respectfully said, I am aware of no authority of this Court supporting so restrictive an approach and note that, while unresolved, there are serious debates in both the common law and the civil law as to what exactly a “gap” in the law might be (see, e.g., J. Gardner, “Concerning Permissive Sources and Gaps” (1988), 8 *Oxford J. Leg. Stud.* 457; J. E. C. Brierley, “Quebec’s ‘Common Laws’ (*Droits communs*): How Many Are There?”, in E. Caparros et al., eds., *Mélanges Louis-Philippe Pigeon* (1989), 109). Taking this approach would unduly inhibit the ability of this Court to understand the law better in reference to how comparable problems are addressed elsewhere in Canada. It would be wrong to disregard potentially helpful material in this way merely because of its origin.

[60] In private law, comparison between the common law and civil law as they evolve in Canada is a particularly useful and familiar exercise for this Court. This exercise of comparison between legal traditions for the purposes of “explanation” and “illustration” has been described as “worthwhile”, “useful” and “helpful” (*Farber*, at para. 32 and 35; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 76; *Norsk*, at p. 1174, per Stevenson J. (concurring)). Principles from the common law or the civil law may serve as a “source of inspiration” for the other, precisely because these “two legal communities have the same broad social values” (*Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 38). The common law and the civil law are not the only legal traditions relevant to the work of the Court; yet, the opportunity for dialogue between these legal traditions is arguably a special mandate for this Court given the breadth and responsibilities of its

bijural jurisdiction. This opportunity has been underscored in scholarly commentary, including in the field of good faith performance of contracts (e.g., L. LeBel and P.-L. Le Saunier, "L'interaction du droit civil et de la common law à la Cour suprême du Canada" (2006), 47 *C. de D.* 179, at p. 206; R. Jukier, "Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec" (2019), 1 *Journal of Commonwealth Law* 83).

[61] Writing extra-judicially, LeBel J. has observed that this exercise is part of the function of this Court, as a national appellate court, adding that [TRANSLATION] "because it has the ability to do so today, thanks to its institutional resources, the Supreme Court now assumes the symbolic responsibility of embracing a culture of dialogue between the two major legal traditions" ("Les cultures de la Cour suprême du Canada : vers l'émergence d'une culture dialogique?", in J.-F. Gaudreault-DesBiens et al., eds., *Convergence, concurrence et harmonisation des systèmes juridiques* (2009), 1, at p. 7). This Court's unique institutional capacity as the apex court of common law and civil law appeals in Canada allows it to engage in dialogue that makes it "more than a court of appeal for each of the provinces" (F. Allard, *The Supreme Court of Canada and its Impact on the Expression of Bijuralism* (2001), at p. 21). The opportunity for dialogue presents itself specifically in the context of the common law good faith doctrines. Pointing to the writing of LeBel J. and to how Quebec sources were deployed in *Bhasin*, one comparative law scholar wrote recently that while the distinctiveness of Canada's legal traditions must be "maintained and jealously protected, [this] need not prevent [them] from learning from [one another]" (R. Jukier,

"The Legacy of Justice Louis LeBel: The Civilian Tradition and Procedural Law" (2015), 70 *S.C.L.R.* (2d) 27, at p. 45). Professor Waddams has remarked that the reference to Quebec law in *Bhasin* is an "invitation" to consider civil law concepts, including abuse of rights, in the development of the common law relating to good faith (see "Unfairness and Good Faith in Contract Law: A New Approach" (2017), 80 *S.C.L.R.* (2d) 309, at pp. 330-31). This would be consistent with a broader pattern of "more pronounced reciprocal influence between traditions as comparative analysis becomes increasingly prominent in [this Court's] judgments" (Allard, at p. 22).

[62] Indeed, this Court has undertaken this exercise in some common law and civil law appeals in which good faith principles are engaged, including *Bhasin* itself (see also *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, at para. 30; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at paras. 75 and 96, citing *Farber*). Cromwell J. pointed to the comfort that can be drawn from the experience of the civil law of Quebec, for example, by those common lawyers who fear that a new duty of honest performance would "create uncertainty or impede freedom of contract" (*Bhasin*, at para. 82). Cromwell J. also pointed to substantive points of comparison in support of his analysis on the similarity between implied terms in the common law and good faith in Quebec as well as on the fact that good faith in Quebec law also includes a requirement of honesty in performing contracts (paras. 44 and 83). Strikingly, in one recent Quebec example that is especially relevant here, Gascon J., writing for a majority of this Court, quoted *Bhasin* on the degree to which the organizing principle of good faith exemplifies the notion that a

contracting party should have "appropriate regard" to the legitimate contractual interests of their counterparty. He noted that "[t]his statement applies equally to the duty of good faith in Quebec civil law" (*Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, at para. 117). I note this only as an instance of accepted judicial reasoning in this field, where comparisons are rightly said to be difficult. A majority of the Court nevertheless invoked a leading common law authority on good faith to illuminate the civil law's distinct treatment as both helpful and persuasive.

[63] In the same way, I draw on Quebec civil law in this appeal to illustrate what it means for dishonesty to be directly linked to contractual performance. As I will explain, the civil law framework of abuse of rights helps to focus the analysis of whether the common law duty of honest performance has been breached on what might be called the wrongful exercise of a contractual right.

[64] This appeal makes plain a need for clarification on the question of when dishonesty is directly linked to the performance of a contract. The Court of Appeal recognized the duty of honest performance, but concluded that the communications at issue were not directly linked to performance of the existing contract: "Communications between the parties may have led Mr. Callow to believe that there would be a new contract, but those communications did not preclude [Baycrest] from exercising their right to terminate the winter contract then in effect" (para. 18). The Court's reasons also conclude that Baycrest could exercise the termination clause

“provided only that [it] informed him of [its] intention to do so and gave the required notice. That is all [Callow] bargained for, and all that [it] was entitled to” (para. 17). The Court of Appeal apparently did not consider that the manner in which the termination right was exercised amounted to a breach of the duty to act honestly. This was, for the trial judge in the present appeal, the matter directly linked to the performance of the contract in the dispute with Callow.

[65] These diverging conclusions in this case are unsurprising given that this Court recognized the duty of honest performance as a “new” good faith doctrine relatively recently (*Bhasin*, at para. 93). Nevertheless, the reasons in *Bhasin* indicate how the required connection between the dishonesty and performance is made manifest. When Cromwell J. summarized the new duty, he suggested that it required honesty “about matters directly linked to the performance of the contract” and, later, “in relation to the performance of their contractual obligations” (paras. 73 and 92). But this latter formulation does not of course comprehensively describe the required link, not least of all because it speaks of honesty in the performance of an obligation, and says nothing about the exercise of a right. Yet, in applying the duty to the facts in *Bhasin*, this Court concluded that there was a breach of the duty on the basis of the trial judge’s finding that Can-Am acted dishonestly in the exercise of the non-renewal clause (paras. 94 and 103).

[66] Further, I note that while the duty of honest performance has similarities with the pre-existing common law doctrines of civil fraud and estoppel, these doctrines

do not assist in our analysis of the required link to the performance of the contract. The duty of honest performance is a contract law doctrine (*Bhasin*, at para. 74). It is not a tort. It is its nature as a contract law doctrine that gives rise to the requirement of a nexus with the contractual relationship. While other areas of the law involving dishonesty may be useful to understand what it means to be dishonest, they provide no obvious assistance in determining what is and is not directly linked to the performance of a contract.

[67] In my view, the required direct link between dishonesty and performance from *Bhasin* is made plain, by way of simple comparison, when one considers how the framework for abuse of rights in Quebec connects the manner in which a contractual right is exercised to the requirements of good faith. Specifically, the direct link exists when the party performs their obligation or exercises their right under the contract dishonestly. When read together, arts. 6, 7 and 1375 *C.C.Q.* point to this connection by providing that no contractual right may be exercised abusively without violating the requirements of good faith. Article 7 in particular provides "[n]o right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith." While the substantive content of this article is not relevant to the common law analysis, the framework is illustrative. This article shows how the requirements of good faith can be tied to the exercise of a right, including a right under a contract. It is the exercise of the right that is scrutinized to assess whether the action has been contrary to good faith.

[68] Under the civil law framework of abuse of rights, it is no answer to say that, because a right is unfettered on its face, it is insulated from review as to the manner in which it was exercised. Moreover, the doctrine of abuse of right does not preclude the holder from exercising the contractual right in question. As Professors Jobin and Vézina have written on abuse of contractual rights in Quebec, [TRANSLATION] "[t]he doctrine of abuse of right does not lead to the negation of the right as such; rather, it addresses the use made of the right by its holder" (J.-L. Baudouin and P.-G. Jobin, *Les* obligations (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 156). It has been said that good faith in the civil law has a [TRANSLATION] "*limiting function*" in directing standards of ethical conduct to which parties must conform, as a matter of imperative law, when performing the contract: [TRANSLATION] "It [i.e. the limiting function of good faith] thus seeks to sanction a party's improper conduct in the exercise of the party's contractual prerogatives." (M. A. Grégoire, *Liberté, responsabilité et utilité : la bonne foi comme instrument de justice* (2010), at p. 225). That is what is at stake here: whether the ethical standard expressed in the common law duty to act honestly in performance, as a manifestation of the organizing principle of good faith recognized in *Bhasin*, limits the manner in which Baycrest can exercise its right to terminate the winter maintenance agreement. By focusing attention on the exercise of a particular right under a particular contract, a direct link to the performance of that contract is helpfully drawn.

[69] Thus, in *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122 — a Quebec case cited in *Bhasin*, at para. 85 — the contracting party's right to demand

repayment of the loan, as stipulated in the contract, was upheld (p. 169). The "abuse of right" identified by the Court was the manner in which the right was exercised. This is, as I have noted, broadly similar to *Bhasin*. There, Can-Am had a contractual right of non-renewal, but Can-Am nonetheless exercised that right in a dishonest manner, and thus breached the duty of honest performance (para. 94). This was a wrongful exercise of the right in that it was exercised contrary to the mandatory requirement of good faith performance.

[70] There are special reasons, of course, to be cautious in undertaking the comparative exercise to which Callow invites us here. One is that there are important differences between the civilian treatment of abuse of contractual rights and the current state of the common law. The *Civil Code* provides that no right may be exercised with the intent to injure another or in an excessive and unreasonable manner and therefore contrary to the requirements of good faith requiring that parties conduct themselves in good faith, in particular at the time an obligation is performed. Insofar as the organizing principle in *Bhasin* speaks to a related idea that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily, this principle, unlike Quebec law, is not a free-standing rule but rather a standard that underpins and manifests itself in more specific doctrines. Further, in *Bhasin*, positive law was only formally extended by recognizing a general duty of honesty in contractual performance.

[71] An additional reason is the common law's fabled reluctance to embrace the standard associated with the civilian idea of "abuse of rights", including abuse of contractual rights, a doctrine to which *Bhasin* alluded in para. 83 (see, e.g., the survey in H. C. Gutteridge, "Abuse of Rights" (1933), 5 *Cambridge L.J.* 22, at pp. 22 and 30-31).[1] Mindful of this, Cromwell J. recalled the "fundamental commitments of the common law of contract" to the "freedom of contracting parties to pursue their individual self-interest" and — importantly to the theory of abuse of rights — that the organizing principle he recognized "should not be used as a pretext for scrutinizing the motives of contracting parties" (para. 70). Others have observed that the civilian conception of legal rights — *droits subjectifs* in the French tradition — are conceptually different from "rights" in the common law, or even that the preoccupation with the "social" dimension of limits to rights, as opposed to a purely "economic" aspect of a freely-negotiated bargain, is peculiar to the civil law (see, e.g., F. H. Lawson, *Negligence in the Civil Law* (1950), at pp. 15-20). Still others have observed the differing techniques for the genesis of new rules of law according to the common law and civil law methods (see, e.g., P. Daly, "La bonne foi et la common law: l'arrêt *Bhasin* c. *Hrynew*", in J. Torres-Ceyte, G.-A. Berthold and C.-A. M. Péladeau, eds., *Le dialogue en droit civil* (2018), 89, at pp. 101-2). One should not lose sight of the fact

[1] Professor Gutteridge pointed in particular to the influence of *Mayor of Bradford v. Pickles*, [1895] A.C. 587 (H.L.) and, in the contractual setting, *Allen v. Flood*, [1898] A.C. 1 (H.L.), quoting from p. 46 of the latter judgment: ". . . any right given by contract may be exercised as against the giver by the person to whom it is granted, no matter how wicked, cruel, or mean the motive may be which determines the enforcement of the right".

that, as intellectual and historical traditions, the common law and the civil law represent, in many respects, distinctive ways of knowing the law.

[72] It is true that LeBel J., writing extra-judicially prior to this Court's decision in *Bhasin*, in which he concurred, noted that in the dialogue between the common law and the civil law in this Court's jurisprudence, good faith offered an example of [TRANSLATION] "coexistence" rather than "convergence" or "divergence" (LeBel, at pp. 12-15). Yet as he noted, comparison in this field that respects the "intellectual integrity" of distinctive traditions remains a viable part of the dialogue between common law and the civil law at this Court (p. 15). While the requirements of honest contractual performance in the two legal traditions may be rooted in distinct histories, they have come together to address similar issues, at least in the context of dishonest performance (*Bhasin*, at para. 83). The civil law provides a useful analytical guide to illustrating the relatively recent common law duty. Two reasons in particular underlie the usefulness of the comparative exercise here.

[73] First, I stress that I do not rely on the civil law here for the specific rules that would govern a similar claim in Quebec. Rather, within the constraints imposed on this Court by the precedent in *Bhasin* and the wider common law context, I draw on abuse of rights as a framework to understand the common law duty of honest performance. Second, there is no serious concern here that looking to Quebec law will throw the common law into a state of uncertainty. As Cromwell J. did in *Bhasin*, this Court can take comfort from the experience of Quebec to allay fears that applying this

general framework of wrongful exercise of rights will result in commercial uncertainty or inappropriately constrain freedom of contract. Notwithstanding their differences, the common law and the civil law in Quebec share, in respect of good faith, some of the "same broad social values" that justify comparison generally (*Bou Malhab*, at para. 38). As noted, this Court pointed to a shared concern for the proper compass of good faith in that it "does not require acting to serve [the other contracting party's] interests in all cases" and both anchor remedies in corrective, not distributive justice (*Churchill Falls*, at para. 117, citing *Bhasin*, at para. 65). As Professor Moore wrote, prior to his appointment as a judge [TRANSLATION] "the value of individual autonomy, and the fear that good faith is an imprecise concept, are not exclusive to the common law. They are discussed at length in civil law commentary and jurisprudence" ("Brèves remarques spontanées sur l'arrêt *Bhasin c. Hrynew*", in J. Torres-Ceyte, G.-A. Berthold and C.-A. M. Péladeau, eds., *Le dialogue en droit civil* (2018), 81, at p. 84). For these reasons, it is not inappropriate to illustrate the duty of honest performance using the framework of the wrongful exercise of a right. Dishonesty is directly linked to the performance of a given contract where it can be said that the exercise of a right or the performance of an obligation under that contract has been dishonest.

[74] Applying *Bhasin* to this case, and drawing on the illustration provided by the Quebec civil law sources Cromwell J. himself cites, I am of the respectful view that the Court of Appeal erred when it concluded that the dishonesty here was only about a future contract. Properly understood, the alleged dishonesty in this case was directly

linked to the performance of the contract because Baycrest's exercise of the termination right provided to it under the contract was dishonest.

[75] The termination right was exercised dishonestly according to the trial judge in our case, notwithstanding the fact that its terms — the 10-day notice — were otherwise respected. Pointing to the dishonest representations, regarding the danger to the contract and made in anticipation of the notice period, she held that the duty to act honestly was linked to the termination of the contract and the exercise of that right in the circumstances was a breach of contract. The trial judge did not deny the right of Baycrest to terminate the contract, but the manner in which it did so was wrongful — in breach of the duty of honesty — and for that it owed Callow damages. Importantly, this does not deny the existence of the termination right but fixes on the wrongful manner in which it was exercised.

(2) Baycrest's Conduct Constitutes Dishonesty

[76] The second issue to be resolved is whether Baycrest's conduct amounts to dishonesty within the meaning of the duty of honest performance in *Bhasin*. Callow takes issue with the Court of Appeal's conclusion that while the facts may have suggested a failure to act honourably, they did not rise to the level of a breach of this duty. To dispose of this appeal, then, we must determine what standard of honesty was expected of Baycrest in its exercise of clause 9.

[77] There is common ground that parties to a contract cannot outright lie or tell half-truths in a manner that knowingly misleads a counterparty. It is also agreed here that the failure to disclose a material fact, without more, would not be contrary to the standard. Beyond this, however, the parties continue to disagree about what might constitute knowingly misleading conduct as that idea was alluded to in *Bhasin*.

[78] Callow argues that while this Court in *Bhasin* held that the duty of honest performance does not impose a duty of disclosure, it left open the possibility that an omission to inform can nonetheless be knowingly misleading in certain circumstances. Callow acknowledges that the line between a misrepresentation and the innocent failure to disclose is not always easy to draw. But by "positively misleading" Mr. Callow that the winter maintenance agreement was likely to be renewed in 2014, he was led to infer, mistakenly and to the knowledge of Baycrest, that a decision had not been made to terminate the existing contract in 2013. Failing to correct this false impression, in Callow's view, was a breach of its obligation to act honestly in the performance of the winter maintenance agreement. It meant that clause 9 was not exercised in keeping with the obligatory duty to perform the contract honestly imposed in *Bhasin*.

[79] Baycrest submits that "active deception" — a term invoked by the trial judge, as well as both parties — requires actual dishonesty, in the sense that an outright lie is necessary. "Silence", said its counsel at the hearing, "can only constitute misrepresentation when there is a duty to speak". Since the duty of honest performance does not bring with it a duty of disclosure, "silence cannot constitute dishonesty or an

act of misrepresentation, whether done intentionally or, I suppose, accidentally" (transcript, at p. 37).

[80] Baycrest is right to say that the duty to act honestly "does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract" (*Bhasin*, at para. 73; see also A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at p. 347). Cromwell J. referred to *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981), in support of his conclusion that the duty of honest performance is distinct from a free-standing duty to disclose information (para. 87). In *United Roasters*, the terminating party had decided in advance of the required notice period to terminate the contract. The court held that no disclosure of that intention was required other than what was stipulated in the contract. In Cromwell J.'s view, this made "it clear that there is no unilateral duty to disclose information relevant to termination" (para. 87).

[81] One might well understand that courts would shy away from imposing a free-standing positive duty to disclose information to a counterparty where it would serve to upset the corrective justice orientation of contract law. Whether or not a positive duty to cooperate of this character should be associated with the principle of good faith performance in the common law, a party to a contract has no general duty to subordinate their interests to that of the other party in the law as it now stands (see *Bhasin*, at para. 86). Requiring a party to speak up in service of the requirements of good faith where nothing in the parties' contractual relationship brings a duty to do so

could be understood to confer an unbargained-for benefit on the other that would stand outside the usual compass of contractual justice. Yet where the failure to speak out amounts to active dishonesty in a manner directly related to the performance of the contract, a wrong has been committed and correcting it does not serve to confer a benefit on the party who has been wronged. To this end, Cromwell J. clarified that the "situation is quite different . . . when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract" (para. 87). In such circumstances, contractual parties should be mindful to correct misapprehensions, lest a contractual breach of the *Bhasin* duty be found.

[82] By noting that liability flowed from active dishonesty and not a unilateral duty to disclose, Cromwell J. indicated that the duty of honesty is consonant with the ordinary principles of contractual justice: that *Bhasin* does not impose a duty to disclose or a fiduciary-type obligation means that performing a contract honestly is not a selfless or altruistic act. One might well say that performing one's own end of a bargain honestly is in keeping with the pursuit of self-interest as long as the law can be counted on to require the same honest conduct from one's counterparty. Whatever constraints it justifies on Baycrest's ability to terminate the contract based on values of honesty associated with good faith, it does not require it to confer a benefit on Callow in exercising that right. As Cromwell J. explained, having appropriate regard for the legitimate contractual interests of the contracting parties "does not require acting to serve those interests in all cases" (para. 65). This explains, to my mind, the limited character of the duty of honesty: it is not a device that allows a court, in the name of a

conception of good faith resting on distributive justice, to require the party that has to exercise a contractual right or power "to serve" the other party's interest at the expense of their own.

[83] This emphasis on the corrective justice foundation of the duty to act honestly in performance is, in my view, helpful to understanding why a facially unfettered right is nonetheless constrained by the imperative requirement of good faith explained in *Bhasin*. I recall that Cromwell J. sought to reassure those who feared commercial uncertainty resulting from the recognition of this new duty by explaining that the requirement of honest performance "interferes very little with freedom of contract" (para. 76). After all, the expectation that a contract would be performed without lies or deception can already be thought of as a minimum standard that is part of the bargain. I agree with the sentiment expressed by the Chief Justice of Alberta in a case that relied on *Bhasin* and *Potter*: "Companies are entitled to expect that the parties with whom they contract will be honest" in their contractual dealings (*IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157, 53 Alta. L.R. (6th) 96, at para. 4). In that sense, while the duty is one of mandatory law, in most cases it can be thought of as leaving the agreement and both parties' expectations — the first source of justice between the parties — in place. By extension, requiring that a party exercise a right under the contract in keeping with this minimum standard only precludes the commission of a wrong and thus repairing that breach, where damage resulted, may be thought of as consonant with the principles of corrective justice. Where a party has lied or otherwise knowingly misled the other

contracting party in respect of a matter that is directly linked to the performance of the contract, it amounts to breach of contract that must be set right, but the benefits of the bargain need not be otherwise reallocated between the parties involved.

[84] That said, I emphasize once again that it is unquestionable that the duty is imposed as a matter of contractual doctrine rather than by implication or interpretation, and, by virtue of its status as contractual doctrine, parties are "not free to exclude" the duty altogether (*Bhasin*, at para. 75). Even if the parties, as here, have agreed to a term that provides for an apparently unfettered right to terminate the contract for convenience, that right cannot be exercised in a manner that transgresses the core expectations of honesty required by good faith in the performance of contracts.

[85] This framework for measuring the wrongful exercise of the termination right does not turn on Baycrest's motive in exercising clause 9 beyond the observation that it did so dishonestly. The right of termination was, on its face, one without cause: Baycrest may have had legitimate grievances against Callow or some ulterior motive for its knowing deception — it is of no moment. The negative view that the property manager may have had of Callow, alluded to by the trial judge (at para. 14), is not the source of the breach of the duty of honest performance.

[86] Moreover, I note that Cromwell J. described the requirements of the duty of honesty negatively: while the duty of honest performance does not require parties to act angelically by subordinating their own interests to that of their counterparty (*Bhasin*, at para. 86), they must *refrain* from lying or knowingly misleading their

counterparty (para. 73). As a "negative" obligation — that is, in the absence of a recognized duty to act, the injunction it imposes is one not to act dishonestly — it sits more plainly with the ordinary objectives of corrective justice and what one scholar sees as the traditional posture of the common law in favour of contractual autonomy and individual freedom in private law. [TRANSLATION] "It is clear", wrote Professor Daly in a comment on the common law method consecrated in *Bhasin*, "that the duty of honesty recognized in *Bhasin* is a negative obligation — not to lie — rather than a positive obligation — to act in good faith" (pp. 101-2). This same orientation has been observed as animating the analogous contractual duty of good faith in the civil law. While positive obligations to cooperate in performance may be otherwise required by the law of good faith, scholars have observed that the notional equivalent of the duty of honest performance in Quebec civil law most typically imposes negative obligations — to refrain from lying, for example — in the measure of the abuse of a contractual right (Baudouin and Jobin, at No. 161). Care must be taken, I hasten to say, not to confuse the [TRANSLATION] "duty to act faithfully" recognized in this regard, with the fiduciary duty of loyalty that stands outside of good faith in both legal traditions.

[87] I would add that, as Cromwell J. made plain, the recognition of the duty to act honestly in performance does not necessarily mean that the ideal spoken to in the organizing principle of good faith set forth in *Bhasin* might not manifest itself otherwise. Even within the limited compass of corrective justice, circumstances may arise in which the organizing principle would encourage the view that contractual rights must be exercised in a manner that was neither capricious nor arbitrary, for example,

or that some duty to cooperate between the parties be imposed, though recognizing that, contrary to fiduciary duties, "good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first" (*Bhasin*, at para. 65). But for present purposes, it is not necessary to go that further step: I am of the view that where the exercise of a contractual right is undertaken dishonestly, the exercise is in breach of contract and this wrong must be corrected. That is what happened here.

[88] The question that remains is whether Baycrest lied to or knowingly misled Callow and thus breached the duty to act honestly.

[89] I recognize that in cases where there is no outright lie present, like the case before us, it is not always obvious whether a party "knowingly misled" its counterparty. Yet, Baycrest is wrong to suggest that nothing stands between the outright lie and silence. Elsewhere, as in the law of misrepresentation, for instance, one encounters examples of courts determining whether a misrepresentation was present, regardless of whether there was some direct lie (see A. Swan, "The Obligation to Perform in Good Faith: Comment on *Bhasin v. Hrynew*" (2015), 56 *Can. Bus. L.J.* 395, at p. 402). As Professor Waddams has written, "[a]n incomplete statement may be as misleading as a false one, and such half-truths have frequently been treated as legally significant misrepresentations." Ultimately, he wrote, "it is open to the court to hold that the concealment of the material facts can, when taken with general statements, true in themselves but incomplete, turn those statements into misrepresentations" (*The Law of*

Contracts (7th ed. 2017), at No. 441). Similarly, where a party makes a statement it believes to be true, but later circumstances affect the truth of that earlier statement, courts have found, in various contexts, that the party has an obligation to correct the misrepresentation (see *Xerex Exploration Ltd. v. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6, at para. 58; see also C. Mummé, "*Bhasin v. Hrynew*: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins?" (2016), 32 *Intl J. Comp. Lab. L. & Ind. Rel.* 117, at p. 123).

[90] These examples encourage the view that the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of "misleading" one's counterparty — the term invoked separately by Cromwell J. — will in some circumstances capture forms of silence or omissions. One can mislead through action, for example, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct. To me these are close cousins in the catalogue of deceptive contractual practices (see, e.g., *Yam Seng Pte Ltd. v. International Trade Corp. Ltd.*, [2013] E.W.H.C. 111, [2013] 1 All E.R. (Comm.) 1321 (Q.B.), at para. 141).

[91] At the end of the day, whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined

to direct lies. No reviewable error has been shown in the finding of dishonesty that took place in anticipation of the exercise of clause 9 here. I would not interfere with the trial judge's view here on a matter that is owed deference. Deference should be shown to the trial judge in reviewing her discretionary exercise of weighing the evidence, especially given credibility played a part in her analysis, as she explained.

[92] Reading the whole of the first instance judgment, I see no consequential error in the account given by the trial judge of the law on the duty of honest performance. She did not base her conclusions on some free-standing duty to disclose information. Instead, she examined whether Baycrest knowingly misled Callow as to the standing of the winter maintenance agreement, and thus wrongfully exercised its right of termination. Despite this, however, Baycrest argues that the trial judge erred in failing to recognize that its conduct did not reach the "much higher standard" spoken to in *Bhasin*. I disagree. No such error has been shown.

[93] It is helpful for our purposes to recall that on the facts in *Bhasin*, part of the dishonest conduct concerned the respondent Can-Am's plans to reorganize its activities in Alberta. Its plan contemplated invoking its contractual right of non-renewal to force a merger between Mr. Bhasin and his competitor, Mr. Hrynew. In effect, this reorganization would have given Mr. Bhasin's business to Mr. Hrynew. Can-Am, however, had said nothing of its plan to Mr. Bhasin. When Mr. Bhasin first heard of the merger plans he questioned an official of Can-Am about its intentions. "[T]he official 'equivocated'", Cromwell J. explained, "and did not tell him the truth that from

Can-Am's perspective this was a 'done deal'" (para. 100). Cromwell J. later concluded that "Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal" (para. 108). Cromwell J. wrote: "The trial judge made a clear finding of fact that Can-Am 'acted dishonestly toward Bhasin in exercising the non-renewal clause'. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly" (para. 94 (references omitted)).

[94] It is true that Baycrest remained silent about its decision to terminate Callow's contract and that clause 9, on its face, did not impose on it a duty to disclose its intention except for on the 10-day notice requirement. That said, it had to refrain, as the trial judge said, from "deceiv[ing] Callow" through a series of "active communications" (para. 66). When it failed to refrain from doing so in anticipation of exercising its termination right, it deceived Callow into thinking it would leave the existing winter services agreement intact.

[95] These "active communications", as I understand the trial judge's findings of fact, came in two forms. First, Mr. Peixoto made statements to Mr. Callow suggesting that a renewal of the winter maintenance agreement was likely. As the trial judge found, "[a]fter his discussions with Mr. Peixoto and Mr. Campbell, Mr. Callow thought that he was likely to get a two-year renewal of his winter maintenance services contract and [it was] satisfied with his services [under the existing agreement which

had one winter to run]. This assumption is also supported by the documentary evidence, especially by the private e-mails between Mr. Peixoto and Mr. Campbell" (para. 41).

[96] Baycrest attempts to recast the significance of this finding, arguing that Mr. Callow only had casual discussions with two of the JUC members — Mr. Peixoto and Mr. Campbell — about the possibility of a contract renewal. Such casual discussions, it says, cannot rise to the level of a lie. This position ignores the key finding in the trial judge's reasons that it was Mr. Peixoto — the JUC member who negotiated the main pricing terms with Callow for the winter maintenance agreement — who made statements to Mr. Callow suggesting that a renewal was likely (paras. 23 and 40-43). After making credibility findings against Mr. Peixoto, the trial judge found that he had "led Mr. Callow to believe that all was fine with the winter [contract]" and that Baycrest was "interested in a future extension of Callow's contracts" (para. 47). This dishonesty did not take place in the abstract: the trial judge found it to be relevant to the exercise of clause 9.

[97] The second form of "active communications" that deceived Callow was related to the "freebies" Callow had offered Baycrest in the summer of 2013. As the trial judge found, Callow performed this free work because Mr. Callow wanted to provide an incentive for Baycrest to renew the winter maintenance agreement. Baycrest, for its part, gladly accepted the services offered by Callow.

[98] Again, Baycrest attempts to recast the significance of these findings, arguing that "there is nothing inherently unlawful or unfair about accepting a

contractor's incentives offered in the hopes of securing a new contract or the renewal of an existing contract" (R.F., at para. 112). Whether or not that is the case, I again stress that Mr. Peixoto "understood that the work performed by Callow was a 'freebie' to add an incentive for the boards to renew his winter maintenance services contract" and "advised Mr. Callow that he would tell the other board members about this work" (trial reasons, at para. 43). These active communications by Baycrest suggested, deceptively, that there was hope for renewal and, perforce, the current contract would not be terminated.

[99] Considering Baycrest's conduct as a whole over those few months, it was certainly reasonable for Mr. Callow, who was led to believe that a renewal was likely, to infer that Baycrest had not decided to terminate the ongoing contract. Moreover, Baycrest knew Mr. Callow was under this false impression, as shown by the email sent by Mr. Peixoto on July 17, 2013 and, nonetheless, continued to give him the impression that a renewal was likely even though the decision to terminate him was made (see trial reasons, at para. 48). Upon realizing that Mr. Callow was under this false impression, Baycrest should have corrected the misapprehension; in the circumstances, its conduct misled Callow.

[100] I respectfully disagree with the idea that the deception in this case only concerned termination for unsatisfactory services and did not extend to termination for any other reason. The trial judge found that the dishonest conduct involved

representations that the contract was not in danger at all when Baycrest knew it would be terminated (para. 65).

[101] The Court of Appeal did not interfere with these findings, nor has Baycrest argued that the trial judge made any palpable and overriding errors. Accordingly, in light of the trial judge's findings of fact, I agree that Baycrest intentionally withheld information in anticipation of exercising clause 9, knowing that such silence, when combined with its active communications, had deceived Callow. By failing to correct Mr. Callow's misapprehension thereafter, Baycrest breached its contractual duty of honest performance. This is in stark contrast to *United Roasters*, where the defendant merely withheld its decision to terminate the agreement. Unlike in this case, the defendant there did not engage in a series of acts that it knew would cause the plaintiff to draw an incorrect inference and then fail to correct the plaintiff's misapprehension.

[102] In this sense, this case is broadly similar to *Dunning v. Royal Bank* (1996), 23 C.C.E.L. (2d) 71 (Ont. C.J. (Gen. Div.)), one of the examples of breaches of the duty to exercise good faith in the manner of dismissal provided by Iacobucci J. in support of his conclusions in *Wallace*. While it was decided in the distinctive good faith setting of the employment context, *Dunning* is an appropriate analogy to the present case because in *Bhasin* Cromwell J. explicitly recognized that "the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts" (*Bhasin*, at para. 73, citing *Wallace*, at para. 98; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 58).

It seems to me that if the duty of honest performance was a key component of the good faith requirements spoken to in *Wallace* and *Keays*, a similar framework applies, again bound together through the organizing principle. As Iacobucci J. explained, the employee's job in *Dunning* had been eliminated, but the employer told him another position would probably be found for him and the new assignment would necessitate a transfer. While the employee was being reassured about his future, the employer was contemplating his termination. Eventually, the employer chose to terminate the employee but withheld that information from the employee for some time, despite knowing the employee was in the process of selling his home in anticipation of the transfer. News of the termination only came after the employee had sold his home. Such conduct, Iacobucci J. observed, clearly violated the expected standard of good faith in the manner of dismissal.

[103] As *Dunning*, *Wallace* and *Keays* make plain, an employer has the right to terminate an employment contract without cause, subject to the duty to provide reasonable notice. However broad that right may be, however, an unhappy employee can allege a distinct contractual breach when the employer has mistreated them in the manner of dismissal. In the end, as Cromwell J. noted, "contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests" (*Bhasin*, at para. 86). When Baycrest deliberately remained silent, while knowing that Mr. Callow had drawn the mistaken inference the contract was in good standing because it was likely to be

renewed, it breached the duty to act honestly. In my view, the trial judge did not create a new duty of disclosure in correcting that wrong but rather sought to denounce the Baycrest's conduct. Remedying that with an order for damages to repair Baycrest's failure to exercise clause 9 in accordance with the requirements of the duty of honest performance did not confer a benefit on Callow; it merely set matters right on the usual measure of corrective justice following this breach of contract. Respectfully stated, it is therefore my view that the Court of Appeal erred in concluding that Baycrest's conduct was dishonourable but not dishonest.

[104] I would note, however, that I do agree in part with the Court of Appeal's observation that the trial judge went too far in concluding that "[t]he minimum standard of honesty would have been to address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period" (trial reasons, at para. 67). In my respectful view, to impute these first two requirements would amount to altering the bargain struck between the parties substantively, a conclusion not sought by Callow before this Court. That said, I agree with the trial judge that, at a minimum, Baycrest had to refrain from false representations in anticipation of the notice period. Having failed to correct Mr. Callow's misapprehension that arose due to these false representations, I too would recognize a contractual breach on the part of Baycrest in the exercise of its right of termination in clause 9. Damages thus flow for the consequential loss of opportunity, a matter to which I now turn.

C. *Damages*

[105] Baycrest submits that Callow is not entitled to any damages for the breach. Baycrest argues that the trial judge erred in fixing the quantum of damages, first, by awarding Callow its expected profits over the full balance of the contract; second, by misapprehending the evidence relating to Callow's expenses; and, finally, by awarding both the loss of profit and the expenses incurred.

[106] On the first point, I note that the trial judge correctly proceeded on the premise that, "[d]ue to the breach of contract, [Callow] is entitled to be placed in the same position as if the breach had not occurred" (para. 79). Indeed, as Cromwell J. explained in *Bhasin*, breach of the duty of honest contractual performance supports a claim for damages according to the ordinary contractual measure (para. 88).

[107] The ordinary approach is to award contractual damages corresponding to the expectation interest (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para. 108). That is, damages should put Callow in the position that it would have been in had the duty been performed.

[108] While it has rightly been observed that reliance damages and expectation damages will be the same in many if not most cases, they are nevertheless conceptually distinct. As Professor Stephen Smith wrote: "Defendants are ordered to do what they promised to do, not to do whatever is necessary to ensure the claimant is not harmed by relying on the promise" (*Atiyah's Introduction to the Law of Contract*

(6th ed. 2006), at p. 405). Damages corresponding to the reliance interest are the ordinary measure of damages in tort (*PreMD Inc. v. Ogilvy Renault LLP*, 2013 ONCA 412, 309 O.A.C. 139, at para. 65). This measure may be appropriate where it would be difficult for the plaintiff to prove the position they would have been in had the contract been performed. Reliance damages in contract mean putting the injured party in the position it would have been in had it not entered into the contract at all (para. 66).

[109] I see no basis to hold that a breach of the duty of honest performance should in general be compensated by way of reliance damages. I recall that the duty of honest performance is a doctrine of contract law. Its breach is not a tort. Not only would basing damages in this case on the reliance interest set this contractual breach apart from the ordinary measure of contractual damages, but it would depart from the measure as it was applied in *Bhasin* (para. 108; see also MacDougall, at §1.130). In my respectful view, there is no basis to depart from *Bhasin* on this point which, in any event, was not argued by the parties. Further, I note that this view is shared by authors who have written that the duty of honest performance protects a party's expectation interest, rather than reliance interest (see, e.g., McCamus (2015), at pp. 112-13). Finally, while reliance damages and expectation damages coincide on the facts here, there is good reason to retain, in my view, the ordinarily applicable measure of contractual damages that seeks to provide the plaintiff with what they had expected. Professor Waddams has written that this can have a positive deterrent effect: "One of the legitimate arguments in favour of the current rule and against a rule measuring damages only by the plaintiff's reliance is that a rule protecting only reliance would fail to deter breach in a

large number of cases where the defendant calculated that the plaintiff's provable losses were less tha[n] the cost of performance" ("Breach of Contract and the Concept of Wrongdoing" (2000), 12 *S.C.L.R.* (2d) 1, at pp. 18-19).

[110] Baycrest nevertheless argues that the trial judge did not actually consider what position Callow would be in if it had fulfilled the duty and instead awarded the value of the balance of the winter maintenance agreement. In so doing, it argues, she fell into the same error as the trial judge in *Bhasin*, who simply awarded damages as though the contract had been renewed. Baycrest says that this Court has appropriately condemned this approach because the parties did not intend or presume a perpetual contract.

[111] Moreover, Baycrest points to *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, for the proposition that damages are assessed by that mode of performance which is least burdensome to the defendant. Callow, it is said, is entitled to no more than the minimum that Baycrest was obligated to do pursuant to the contract. Since clause 9 allowed it to terminate the winter maintenance agreement at any point on 10 days' notice, no damages should flow.

[112] In my view, *Hamilton* is of no assistance to Baycrest in this case. While Cromwell J. referenced this principle in *Bhasin*, he did so in the context of whether the Court should recognize a broad, free-standing duty of good faith, for which the appellant there had argued. Briefly stated, the appellant's position was that the respondent, Can-Am, would have been in breach of such a duty since it had attempted

to use the non-renewal clause to force Mr. Bhasin into a merger. Cromwell J. declined to recognize such a broad duty, reasoning that "Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract" (*Bhasin*, at para. 90; see also J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at pp. 23-25). Because no damages would have flowed from this breach, it was unnecessary for the Court to decide whether a broad, free-standing duty of good faith should be recognized.

[113] It bears emphasizing that, despite Cromwell J.'s comments related to *Hamilton*, he nonetheless awarded damages to the appellant flowing from the breach of the respondents' obligation to perform the contract honestly. Damages were awarded using the ordinary measure of contractual expectation damages, namely to put Mr. Bhasin in the position he would have been in had Can-Am not breached its obligation to behave honestly in the exercise of the non-renewal clause (*Bhasin*, at paras. 88 and 108). This resulted in Mr. Bhasin being compensated for the value of his business that eroded (paras. 108-10). As Professors O'Byrne and Cohen helpfully explain, "if Can-Am had dealt with Bhasin honestly on all fronts (though without requiring it to disclose its intention not to renew), Bhasin would have realized much sooner that his relationship with Can-Am was in tremendous jeopardy and reaching a breaking point. He could have taken proactive steps to protect his business, instead of seeing it 'in effect, expropriated and turned over to Mr. Hrynew'" ("The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v. Hrynew*" (2015), 53 *Alta. L.R.* 1, at p. 8 (footnotes omitted)).

[114] How is it that damages were awarded for a breach of the duty of honest performance despite the principle outlined in *Hamilton*? While damages are to be measured against a defendant's least onerous means of performance, the least onerous means of performance in this case would have been to correct the misrepresentation once Baycrest knew Callow had drawn a false inference. Had it done so, Callow would have had the opportunity to secure another contract for the upcoming winter. As Callow explained at the hearing, "since this dishonesty caused Callow a loss by inducing it not to bid on other contracts during the summer of 2013 for the winter of 2013 to 2014, the condos are liable to it for damages" (transcript, at p. 5), which reflect its lost opportunity arising out of its abuse of clause 9.

[115] It may be true that the trial judge could have explained her rationale for awarding damages more plainly. But even if the trial judge fell into the same error that the trial judge in *Bhasin* committed, so as to award damages as though the contract had carried on, it was one of no consequence.

[116] As the trial judge found, Baycrest "failed to provide a fair opportunity for [Callow] to protect its interests" (para. 67). Had Baycrest acted honestly in exercising its right of termination, and thus corrected Mr. Callow's false impression, Callow would have taken proactive steps to bid on other contracts for the upcoming winter (A.F., at paras. 91-95). Indeed, there was ample evidence before the trial judge that Callow had opportunities to bid on other winter maintenance contracts in the summer of 2013, but chose to forego those opportunities due to Mr. Callow's misapprehension

as to the status of the contract with Baycrest. In any event, even if I were to conclude that the trial judge did not make an explicit finding as to whether Callow lost an opportunity, it may be presumed as a matter of law that it did, since it was Baycrest's own dishonesty that now precludes Callow from conclusively proving what would have happened if Baycrest had been honest (see *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at pp. 539-40).

[117] In the result, I see no palpable and overriding error. I am satisfied that, if Baycrest's dishonesty had not deprived Callow of the opportunity to bid on other contracts, then Callow would have made an amount that was at least equal to the profit it lost under the winter maintenance agreement. The trial judge found that, once expenses are deducted, that award amounts to $64,306.96. I see no reason to interfere with her fact finding as to the estimation of expenses. Consequently, I see no basis for overturning this portion of the trial judge's award of damages.

[118] The trial judge also awarded Callow $14,835.14, representing the cost of leasing a piece of machinery for one year. Mr. Callow testified that he had leased the machinery specifically for the winter maintenance agreement, but would not have had he known the contract would be terminated (para. 81). Baycrest submits that the trial judge erred by awarding these expenses because it amounts to double recovery.

[119] I see no issue of double recovery in this case. The trial judge awarded the $64,306.96 as lost profit, not lost revenue. This is appropriate because Callow was not actually hired for the other contract on which it did not bid and therefore did not

necessarily have to undertake all the expenses that would have been required to fulfill that contract. However, as Callow had already committed to this expense, the lease of the machinery, it too should be compensated for along with the lost profit. The trial judge was entitled to decide this point as she did, having the advantage of measuring losses first hand. I see no reviewable error in the trial judge's approach on this issue.

V. Disposition

[120] I would allow the appeal, set aside the order of the Court of Appeal and reinstate the judgment of the trial judge, with costs throughout.

The reasons of Moldaver, Brown and Rowe JJ. were delivered by

BROWN J. —

I. Introduction

[121] This appeal invites us to affirm the scope and operation of the duty of honest performance, recognized in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, by clarifying the distinction between actively misleading conduct and innocent non-disclosure. Applying that distinction to the facts of this appeal, is a straightforward matter. As the trial judge found, the respondents (collectively, "Baycrest") represented to Callow (referring interchangeably in these reasons to the appellant and its principal)

that its contract would not be terminated (2017 ONSC 7095). By relying on Baycrest's representations, Callow lost the opportunity to secure other work for the contract's term. Callow's complaint therefore does not relate to Baycrest's *silence* but rather to its positive representations, which can clearly ground a claim based on the duty of honest performance.

[122] Given that Baycrest did not identify any palpable and overriding errors in the trial judge's findings, I agree with the majority that the appeal should be allowed and the trial judge's award restored. Regrettably, however, I am compelled to express my respectful objection to the majority's view that the doctrine of abuse of right in the civil law of Quebec is "useful" and "helpful" in understanding the application of *Bhasin* to this appeal (para. 57). Again respectfully, I see this digression as neither "useful" nor "helpful" to the judges and lawyers who must try to understand the common law principles of good faith as developed in this judgment. Indeed, it will only inject uncertainty and confusion into the law.

[123] This is not to suggest that comparative legal analysis is not an important tool or that its use should somehow be unduly limited at this Court. As the majority's reasons amply document, the Court has a longstanding tradition of looking to Quebec's civil law in developing the common law — whether to answer a question that the common law does not answer (that is, to fill a "gap") or where it is necessary to modify or otherwise develop existing rules. In addition, where concerns are raised about the effects of moving the common law in one direction or another, this Court has

considered the experience in Quebec and elsewhere, often for reassurance that the posited concerns are unfounded or overstated. What this Court has refrained from doing, however, is deploying comparative legal analysis that serves none of these purposes or, even worse, renders the law obscure to those who must know and apply it. But by invoking the civilian abuse of right framework to clarify when "[d]ishonesty is directly linked to the performance of a given contract" (para. 73) — a question requiring no "clarification" — the majority does exactly that.

[124] While, therefore, my objection is fundamentally methodological, it also speaks to the substantive consequences that follow. As the majority acknowledges, this appeal concerns the duty of honest performance, not the duty to exercise discretionary powers in good faith. And yet, its digression into the notion of "wrongful exercise of a right", in substance, pulls it into that very territory, since it ties *dishonesty* to *the manner in which contractual discretion is exercised*. Effectively, then, the majority's reliance on a civil law concept leads it to conflate, or at least obscure the distinction between what are distinct common law concepts. This is both unnecessary and undesirable, since the exercise of discretion — apart from being a matter of performance that may be misrepresented — has little to do with the duty of honest performance. Rather, the duty to exercise discretionary powers in good faith — or, expressed with the civilian terminology the majority adds, in a manner that is not "abusive" or "wrongful" — is a distinct concept that has no application to this appeal.

[125] Our aim in deciding this appeal should be to develop the common law's organizing principle of good faith carefully, and in a coherent manner, and more particularly in a manner that gives clear guidance by taking care to distinguish among the distinct doctrines identified by this Court in *Bhasin*. Respectfully, I say that the majority has not done so here.

II. Background

[126] Baycrest comprises ten condominium corporations with shared assets, for which decisions are made by a Joint Use Committee. In April 2012, Baycrest entered into two separate two-year agreements with Callow to provide summer landscaping and winter snow removal services. The terms of the winter service agreement stipulated that Baycrest could terminate the agreement, without cause, upon giving 10 days' notice.

[127] In March or April 2013, the Joint Use Committee voted to terminate the winter service agreement earlier than its scheduled expiry in April 2014. Baycrest opted not to tell Callow about its decision until September 2013, however, so as not to jeopardize his performance under the summer service agreement. Unaware of Baycrest's decision, Callow performed free work for Baycrest in the spring and summer of 2013 in the hope that Baycrest would renew both agreements. Callow also discussed the prospect of renewal with two Baycrest representatives, one of whom had negotiated Callow's existing agreements in 2012. These discussions led him to believe that he was likely to receive a two-year contract renewal in 2014 and, therefore, that

the winter service agreement was not in danger. Knowing that Callow was operating under this misapprehension, Baycrest nevertheless continued to withhold information about its termination decision.

[128] On September 12, 2013, Baycrest gave Callow notice that it was terminating the winter service agreement. Callow sued, claiming that Baycrest failed to perform the winter service agreement in good faith and was therefore liable for breach of contract. The trial judge held that Baycrest breached the duty of honest performance. She found that Baycrest's statements and conduct actively deceived Callow and led him to believe that the winter service contract would not be terminated. As a result, she awarded damages to place Callow in the position that it would have been in had the contract not been terminated. The Court of Appeal for Ontario reversed, stating that the duty of honest performance does not impose a requirement of disclosure (2018 ONCA 896, 429 D.L.R. (4th) 704). In its view, even if Baycrest had misled Callow, Callow bargained only for 10 days' notice of termination and that was the extent of its entitlement.

III. Analysis

A. *This Case Can Be Readily Decided by Applying the Common Law Principle of Good Faith*

[129] Disposing of this case is really a simple matter of applying this Court's decision in *Bhasin*. The first step in deciding a common law good faith claim is to

consider whether any established good faith doctrines apply. Callow bases its claim on two established doctrines: the duty of honest performance and the duty to exercise discretionary powers in good faith. As I will explain, however, Callow's claim should be resolved by applying only the duty of honest performance.

(1) The Duty of Honest Performance

[130] As a universally applicable minimum standard, all contracts must be performed honestly. Contracting parties may therefore not lie to, or otherwise knowingly mislead, each other about matters directly linked to performance (*Bhasin*, at paras. 73-74). If a plaintiff suffers loss in reliance on its counterparty's misleading conduct, the duty of honest performance serves to make the plaintiff whole. The duty of honest performance does not, however, "impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract" (*Bhasin*, at para. 73).

[131] The dividing line between (1) actively misleading conduct, and (2) permissible non-disclosure, is the central issue in this appeal. As that line has been clearly demarcated by cases addressing misrepresentation in other contexts, it is in my view worth affirming here that the same settled principles apply to the duty of honest performance. The duty of honest performance is, after all, broadly comparable to the doctrine of fraudulent misrepresentation, although it applies (unlike misrepresentation) to representations made *after* contract formation (B. MacDougall, *Misrepresentation* (2016), at pp. 63-64). It follows that those representations sufficient to ground a claim

for misrepresentation are analogous to the representations that will support a claim based on the duty of honest performance.

[132] The general rule, applicable to contracts other than those requiring utmost good faith, is that contracting parties have no duty to disclose material information (*Bhasin*, at paras. 73 and 86). Mere silence therefore cannot be considered actively misleading conduct (*Alevizos v. Nirula*, 2003 MBCA 148, 180 Man. R. (2d) 186, at para. 19). In some cases, however, silence on a particular topic is misleading in light of what *has* been said (*Xerex Exploration Ltd. v. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6, at para. 56, citing *Opron Construction Co. v. Alberta* (1994), 151 A.R. 241 (Q.B.)). Again, no wheels need re-inventing here. There is, in the context of misrepresentation, "a rich law accepting that sometimes silence or half-truths amount to a statement" (MacDougall, at p. 67; see also A. Swan, "The Obligation to Perform in Good Faith: Comment on *Bhasin v. Hrynew*" (2015), 56 *Can. Bus. L.J.* 395, at p. 402). A contracting party therefore may not create a misleading picture about its contractual performance by relying on half-truths or partial disclosure (*Peek v. Gurney* (1873), L.R. 6 H.L. 377; *Alevizos*, at paras. 24-25; *Xerex*, at paras. 56-57). And contracting parties are required to correct representations that are subsequently rendered false, or which the representor later discovers were erroneous (*Xerex*, at para. 58; MacDougall, at pp. 118-19).

[133] Further, the representation need not take the form of an express statement. So long as it is clearly communicated, it may comprise other acts or conduct on the part

of the defendant (MacDougall, at p. 87). The question is whether the defendant's active conduct contributed to a misapprehension that could be corrected only by disclosing additional information. If so, the defendant must make that disclosure. Conversely, a contracting party is not required to correct a misapprehension to which it has not contributed (T. Buckwold, "The Enforceability of Agreements to Negotiate in Good Faith: The Impact of *Bhasin v. Hrynew* and the Organizing Principle of Good Faith in Common Law Canada" (2016), 58 *Can. Bus. L.J.* 1, at p. 13). The entire context, which includes the nature of the parties' relationship, is to be considered in determining, objectively, whether the defendant made a misrepresentation to the plaintiff (MacDougall, at p. 102; see, e.g., *Outaouais Synergest Inc. v. Lang Michener LLP*, 2013 ONCA 526, 116 O.R. (3d) 742, at paras. 84-87; *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.* (1981), 33 B.C.L.R. 291 (C.A.), at p. 296). It follows that the question of whether a misrepresentation has been made is a question of mixed fact and law, subject to appellate review only for palpable and overriding error.

[134] In light of these principles — which, again, are well established and require nothing more than a statement by this Court of their application to the duty of honest performance — I cannot accept Baycrest's argument that its conduct fell on the side of innocent non-disclosure. Indeed, the trial judge found that "active communications between the parties between March/April and September 12, 2013 . . . deceived Callow" (para. 66 (CanLII)). Based on Baycrest's conduct and express statements, the trial judge found that Baycrest had represented that the winter service agreement was not in danger of termination (paras. 65 and 76). Further, the trial judge found that

Baycrest knew that its representations were misleading and nonetheless expressed its intention of keeping Callow in the dark (paras. 48 and 69). These findings are sufficient to support the conclusion that Baycrest breached the duty of honest performance. And Baycrest identifies no palpable and overriding error to justify overturning them.

[135] Nor do I accept Baycrest's argument that its representations related only to the renewal of a new winter agreement and not to the termination of Callow's existing agreement. As I have explained, whether Baycrest made an actionable representation about its performance must be determined in context, which included its conduct as I have described it. And it was open to the trial judge to conclude from that conduct that Callow reasonably inferred that the winter service agreement would not be terminated (see, e.g., *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, at pp. 128-32). Again, I see no basis for disturbing the trial judge's conclusion.

(2) The Duty to Exercise Discretionary Powers in Good Faith

[136] Callow also argues that Baycrest's decision to terminate the winter service agreement was a discretionary decision that it was required to make in good faith. He relies on the good faith duty that arises "where one party exercises a discretionary power under the contract", and which was affirmed by this Court in *Bhasin* (para. 47). As a preliminary matter, I note that not every decision that involves a degree of discretion is subject to this duty (*Bhasin*, at para. 72; J. T. Robertson, "Good Faith as an Organizing Principle in Contract Law: *Bhasin v Hrynew* — Two Steps Forward and One Look Back" (2015), 93 *Can. Bar Rev*. 809, at p. 859). The extent to which it applies

to unfettered termination rights remains unsettled, and I do not purport to resolve that controversy here (*Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214, at para. 41; *Mohamed v. Information Systems Architects Inc.*, 2018 ONCA 428, 423 D.L.R. (4th) 174, at para. 19).

[137] This duty limits the exercise of certain contractual powers that may appear to grant one party unfettered discretion. For the purposes of this appeal, it is unnecessary to express a firm view on the standard that applies to a breach of this duty. It is sufficient to note that where a plaintiff relies on this duty, its complaint is *not* about dishonesty; rather, it is that the defendant was not entitled to make the decision that it made. The wrongful behavior is the very exercise of discretion, and the plaintiff therefore bases its claim on the *effect* of that decision (see, e.g., *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.); *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 19 Alta. L.R. (3d) 38 (C.A.)). Damages are awarded based on the difference between the outcome that occurred and the outcome that would have occurred if the defendant had exercised its discretion in the least onerous, yet lawfully acceptable, manner.

[138] Callow, however, does not dispute that Baycrest was entitled to terminate the winter service agreement, as it did, without cause and by providing only 10 days' notice. Rather, Callow impugns *the dishonesty* that *preceded* Baycrest's exercise of discretion. Callow therefore seeks damages measured by considering what would have happened had Baycrest made the same decision, albeit without misrepresenting its

intentions. The applicable duty is therefore the duty of honest performance. In sum, the appeal at bar presents a case about dishonesty in the performance of a contract, and nothing more. Indeed, it represents *precisely* the sort of instance contemplated by Cromwell J.'s reference for this Court in *Bhasin,* at para. 73, to circumstances where a party "lie[s] or mislead[s] the other party about one's contractual performance". Conversely, it is *not* a case about the exercise of a discretionary power.

(3) Damages

[139] Having concluded that Baycrest breached the duty of honest performance, the remaining issue is whether the trial judge awarded the appropriate quantum of damages. While I reach the same result as the majority, I approach this question somewhat differently than it does. The majority would retain the expectation measure of damages for breach of the duty of honest performance. I say, however, that it follows from recognizing Baycrest's misleading conduct as a wrong independent of the termination provision that the proper measure of damages represents the loss Callow suffered in reliance on Baycrest's misleading representations (which I accept will often coincide with the expectation measure).

[140] The majority relies on Cromwell J.'s statement in *Bhasin* that a breach of the duty of honest contractual performance "supports a claim for damages according to the contractual rather than the tortious measure" (para. 88). But when the purpose of the expectation measure of damages for breach of contract is examined and contrasted with the legal framework developed in *Bhasin*, the actual claim in *Bhasin* and the

damages actually received, it becomes readily apparent that the reliance measure is precisely the measure that the *Bhasin* framework contemplates should be awarded. On this point, the majority's reasons represent *not* fidelity to *Bhasin*, but a regrettable departure that undermines the coherence between the interests sought to be protected in *Bhasin* and the remedy to be awarded.

[141] It has "long been settled and [is] indeed axiomatic" that the legal aim in remedying a breach of contract is to give the innocent party the full benefit of the bargain by placing it in the position it would have occupied had the contract been performed (P. Benson, *Justice in Transactions* (2019), at p. 5; see also *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at para. 27). Awarding a reliance measure — that is, compensating for losses sustained by the innocent party in reliance on the contract — would ignore the innocent party's right to performance that flows from its having pledged consideration therefor, thereby potentially depriving it of the benefit of the contract. Indeed, confining recovery to losses sustained in reliance on the agreement would create an incentive to breach agreements where the cost of performance outweighs the reliance measure of damage (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at para. 704; see also L. L. Fuller and W. R. Perdue Jr., "The Reliance Interest in Contract Damages" (1936), 46 *Yale L.J.* 52, at pp. 57-66).

[142] But the justification for awarding expectation damages does not apply to breach of the duty of honest performance. In such cases, the issue is *not* that the defendant has failed to perform the contract, thereby defeating the plaintiff's

expectations. It is, rather, that the defendant *has* performed the contract, but has also caused the plaintiff loss by making dishonest extra-contractual misrepresentations concerning that performance, *upon which the plaintiff <u>relied</u>* to its detriment. In short, the plaintiff's complaint is not lost value of performance, but detrimental reliance on dishonest misrepresentations. The interest being protected is not an expectation interest, but a reliance interest. And just as these are unrelated interests, an expectation measure of damage is unrelated to the breach of the duty of honest performance.

[143] The claim in *Bhasin* itself is illustrative. Bhasin contracted to sell financial products for Can-Am. The contract would renew automatically at the end of the initial term unless one of the parties gave six months' notice of non-renewal. Can-Am intended to force a takeover of Bhasin's business by his competitor, Hrynew, but misled him about its intention to do so. Can-Am also appointed Hrynew to audit Bhasin's business. When Bhasin protested this conflict of interest, Can-Am lied to him about the reason for Hrynew's appointment as auditor and the terms that would govern his access to Bhasin's confidential information. Ultimately, when Can-Am gave notice of non-renewal, Bhasin lost the value of his business. This Court found that, but for Can-Am's dishonesty in the period leading up to the non-renewal, he "would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to Mr. Hrynew" (para. 109). It awarded damages to compensate for the lost value of the business.

[144] Neither the claim, then, nor the damage award, related to Can-Am's failure to perform the contract with Bhasin. The theory of the judgment was that Bhasin lost the value of his business by relying on Can-Am's dishonest representations. The relief actually awarded was therefore measured by the difference between Bhasin's position and the position he would have occupied had Can-Am not been dishonest about its intention to force a takeover by way of cancelling his contract. Had Bhasin not relied on Can-Am's dishonesty, no damages could have been awarded on this basis, because the dishonesty would not have altered his position.

[145] The measure applied in *Bhasin* was, therefore, clearly not based on expected performance, and indeed it appears to have had nothing to do with placing Bhasin in the position he would have occupied had the contract been performed (K. Maharaj, "An Action on the Equities: Re-Characterizing *Bhasin* as Equitable Estoppel" (2017), 55 *Alta. L. Rev.* 199, at p. 215). Rather, it was directed solely towards making good the detriment that flowed from Bhasin's reliance on a dishonest misrepresentation — a measure characterized by one scholar as "very tort-like" (MacDougall, at p. 65). Much like estoppel and civil fraud, therefore, the duty of honest performance vindicates the plaintiff's *reliance* interest (Robertson, at p. 861; Maharaj, at pp. 215-18). A contracting party that breaches this duty will be liable to compensate its counterparty for any foreseeable losses suffered *in reliance* on the misleading representations.

[146] This is not to suggest that the duty of honest performance is "subsumed" by estoppel and civil fraud (Kasirer J.'s reasons, at para. 50). Rather, it is merely to observe that each of these legal devices protects the same interest. Indeed, far from being "subsumed" into estoppel and civil fraud, the duty of honest performance protects the reliance interest in a distinct and broader manner since, as this Court observed in *Bhasin*, the defendant may be held liable even where it does not *intend* for the plaintiff to rely on the misleading representation (para. 88). Irrespective of the defendant's intention, all a plaintiff need show is that, but for its reliance on the misleading representation, it would not have sustained the loss.

[147] Baycrest advances three arguments for reducing the trial award. First, it says that the ten day notice period defines its maximum exposure for damages because, irrespective of its dishonesty, its least onerous means of performance was to terminate the agreement. The trial judge therefore incorrectly awarded damages as if the winter contract had not been terminated.

[148] While Baycrest is correct to say that damages for breach of contract are measured against the defendant's least onerous means of performance (*Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 20), that principle does not assist Baycrest here. To perform the contract *honestly* (that is, without breaching the duty of honest performance), Baycrest was required *not to mislead* Callow about whether the contract would be terminated. It could have accomplished this by keeping silent about termination or, having misled Callow as to

the true state of affairs, by correcting Callow's misapprehension before he relied on the misleading conduct to his detriment. Had either of these possibilities occurred, Callow would have been able to seek other work for the 2013-14 winter season.

[149] Of course, we cannot say with certainty that Callow *would have secured* other work. He might have sat idle in any event, assuming that the winter service contract was in good standing. But this evidentiary difficulty is the product of Baycrest's dishonesty, and Baycrest should not be relieved from liability simply because Callow cannot definitively prove what would have occurred had it not been misled (*Wood v. Grand Valley Rway. Co.* (1915), 51 S.C.R. 283, at pp. 288-91; see also *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at pp. 539-40). Callow gave evidence that it typically bid on winter contracts during the summer months and that it was too late to find replacement work by the time it was notified of termination. I agree with the majority that, based on the record, we can reasonably presume that Callow would have been able to replace the winter service agreement with a contract of similar value. While the trial judge erred by awarding damages as if the winter service agreement had not been terminated, I would, based on this presumption, award the same quantum of damages.

[150] Secondly, Baycrest says that the trial judge's award led to double recovery for Callow's expenses. But this is simply incorrect. The trial judge awarded Callow the *net* value of the winter service agreement ($64,306.96) — representing the gross contract value ($80,383.70) less Callow's expenses, which the trial judge approximated

at 20 percent ($16,076.74). She then added back the cost of an equipment lease, which Callow had already entered into in reliance on Baycrest's misleading representations. Though the trial judge did not say so expressly, the record shows that Callow's approximated expenses included the cost of leasing equipment. If Callow is not reimbursed for the leasing expenses that he incurred in reliance on Baycrest's misleading representations, those expenses would therefore be counted against him twice. Absent Baycrest's breach of contract, Callow would have obtained a similarly valued contract and ended the 2013-14 winter season with $64,306.96 in profit. The trial judge's approach ensured that Callow was restored to this position, and, accordingly, I see no basis for overturning this aspect of her award.

[151] Finally, Baycrest argues that the trial judge misapprehended the evidence relating to Callow's expenses. I am not convinced, however, that the trial judge did anything other than estimate Callow's expenses at 20 percent of the winter service contract's value, based on evidence that Callow gave regarding its expenses in previous years. Estimating the expenses was a decision that fell within the trial judge's remit as a fact-finder and should not be disturbed on appeal. Indeed, it is difficult to imagine how the trial judge could have proceeded differently, given that the winter services agreement was never performed and that we therefore cannot say with certainty what Callow's expenses would have been.

B. *"Abuse of Right", "Wrongful Exercise of a Right", and Comparative Analysis of Good Faith in the Law of Contract*

[152] With the exception of my discussion regarding damages, most of the foregoing is consistent, or at least not inconsistent, with the majority's reasons, and is sufficient to dispose of this appeal. But while acknowledging this (at para. 44: "the duty to act honestly about matters directly linked to the performance of the contract . . . is sufficient to dispose of this appeal"; "[n]o expansion of the law set forth in *Bhasin* is necessary to find in favour of Callow"), the majority nonetheless proceeds to delve into matters beyond the duty to act honestly. And in so doing, it does indeed expand upon (and, I say, confuse) the law set forth in *Bhasin*.

[153] More particularly, the majority says that this appeal presents an opportunity to resolve two issues: first, "what constitutes a breach of the duty of honest performance where it manifests itself in connection with the exercise of a seemingly unfettered, unilateral termination clause" (para. 30); and secondly, "when dishonesty is directly linked to the performance of a contract" (para. 64). These questions lead the majority to focus on whether the exercise of the termination provision was *itself* dishonest. It explains:

> . . . the duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right . . . . This means, simply, that instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest. [para. 53]

The majority finds support for this approach in Quebec civil law. Specifically, it contends that the "required direct link between dishonesty and performance" is "made plain" by considering "how the framework for abuse of rights in Quebec connects the manner in which a contractual right is exercised to the requirements of good faith" (para. 67). It states that arts. 6, 7 and 1375 of the *Civil Code of Québec* "point to this connection by providing that no contractual right may be exercised abusively without violating the requirements of good faith" (para. 67).

[154] Both as a substantive and methodological matter, I cannot endorse this. First, in the circumstances of this particular appeal, the majority's resort to the civil law as a "source of inspiration" (para. 60) is inappropriate. As the majority acknowledges, the issues to which its analysis responds are fully addressed by *Bhasin* itself, and there is no indication that the principles outlined therein require further elaboration. Secondly, and relatedly, the majority's focus on the wrongful exercise of a right distorts the analysis mandated by *Bhasin* and undermines the independent character of the various common law good faith duties identified therein.

(1) Comparative Analysis

[155] The majority draws on the civilian concept of abuse of rights "as a framework to understand the common law duty of honest performance" (para. 73). Specifically, it finds that this framework "helps to focus the analysis of whether the common law duty of honest performance has been breached on what might be called the wrongful exercise of a contractual right" (para. 63).

[156] In considering the utility of the comparative exercise that the majority proposes, it must be borne in mind that the common law principles applicable to this

appeal are both determinative and settled. Drawing from civil law in these circumstances departs from this Court's accepted practice in respect of comparative legal analysis. Rather than permissibly drawing inspiration or comfort from the civil law in filling a gap in the common law or in modifying it, the majority's approach, I say respectfully, risks subsuming the common law's already-established and distinct conception of good faith into the civil law's conception. And to the extent it does so, it confuses matters significantly, the majority's assurances to the contrary notwithstanding.

[157] As Moldaver J. observed (in dissent, but not on this point) in *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 113 (emphasis added), "[t]he coexistence of <u>two distinct legal systems</u> in Canada — the civil law system in Quebec and the common law system elsewhere — is a unique and defining characteristic of our country." The distinct common law and civil law traditions represent an integral component of Canadian legal heritage and identity (Hon. M. Bastarache, "Bijuralism in Canada", in *Bijuralism and Harmonization: Genesis* (2001), at p. 26; see also M. Samson, "Le droit civil québécois: exemple d'un droit à porosité variable" (2018-19), 50 *Ottawa L. Rev.* 257, at p. 257).

[158] Preserving this unique aspect of Canada's identity requires maintaining the distinct features of both the common law and civil law traditions. Indeed, this Court has gone so far as to describe its own composition as having been designed to ensure "that the common law and the civil law would evolve side by side, <u>while each</u>

maintained its distinctive character” (*Reference re Supreme Court Act*, at para. 85 (emphasis added)). It follows that, just as this Court decided in *Reference re Supreme Court Act* that the presence on this Court of at least three judges from Quebec “ensur[es] civil law expertise and the representation of Quebec’s legal traditions”, the integrity and distinct character of the common law is also ensured by the presence of judges from Canada’s common law jurisdictions.

[159] It also follows from the distinct nature of Canada’s two legal traditions that drawing from one tradition to influence the other is simply an exercise in comparative legal analysis (*Caisse populaire des Deux Rives v. Société mutuelle d’assurance contre l’incendie de la Vallée du Richelieu*, [1990] 2 S.C.R. 995, at p. 1016). As I have already recounted, this is what the majority claims it is doing here. But while comparison is an important tool, its uses are not unlimited. In particular, comparative analysis, in the sense of using law from another legal system to elucidate or develop the domestic legal system, is generally appropriate only where domestic law does not provide an answer to the problem facing the court, or where it is necessary to otherwise develop that law. Using law from other systems in other circumstances would either be superfluous, or would (to the extent of its use) have the undesirable effect of displacing established domestic jurisprudence (J.-L. Baudouin, “L’interprétation du Code civil québécois par la Cour suprême du Canada” (1975), 53 *Can. Bar Rev.* 715, at pp. 725-27; see also K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd rev. ed. 1998), at pp. 17-18; T. Lundmark, *Charting the Divide between Common and Civil Law* (2012), at pp. 8-10). As Justice Sharpe writes extra-judicially about the use of authority

generally, which applies equally to comparative legal analysis, "[i]t is only where the case cannot readily be decided on the basis of binding authority that non-binding sources will have a material effect on the decision" (*Good Judgment: Making Judicial Decisions* (2018), at p. 171).

[160] These sources are not expressions of jurisdictional chauvinism. Rather, they express a posture of prudence and disciplined restraint in the deployment of comparative analysis in judgments. And for good reason. Seeking inspiration from external sources when it is unnecessary to do so may simply complicate a straightforward subject, thereby introducing uncertainty to a previously settled area of law (*Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, 2004 SCC 53, [2004] 3 S.C.R. 95, at para. 56, citing J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (6th ed. 2003), at p. 193). Even something as seemingly innocuous as changing the terminology used to describe a concept — for example, the majority's reliance on the civil law device of abuse of right and references to the wrongful exercise of a right — can have substantive legal implications, affecting the coherence and stability of the resulting modified legal system. Language itself, after all, plays "a crucial role in the evolution of the law" (Bastarache, at p. 20; see also Lundmark, at pp. 74-86).

[161] This is not mere conjecture. The seemingly benign injection of civil law terminology into common law judgments has previously generated precisely that kind of instability. Substantial confusion in the common law of unjust enrichment arose in

Canada in the 1970s from the introduction of civil law terminology of "absence of juristic reasons for an enrichment" as if it were synonymous with the traditional requirement of "unjust factors" that had been "deeply ingrained" since Lord Mansfield's judgment in *Moses v. Macferlan* (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) (M. McInnes, "The Reason to Reverse: Unjust Factors and Juristic Reasons" (2012), 92 *B.U.L. Rev.* 1049, at pp. 1052 and 1054). As Professor McInnes explains:

> . . . without discussion or explanation, the Supreme Court of Canada began to use the civilian terminology (i.e., "absence of juristic reason for the enrichment") while continuing to apply the traditional unjust factors. Predictably, the Canadian law of unjust enrichment grew ever more confused as the court said one thing and did another. [Footnotes omitted; p. 1056.]

[162] The result was, to put it mildly, destabilizing. And predictably so. While Western legal systems are called upon to address the same kinds of disputes, each has developed different ways over the centuries to resolve them. The result is like two massive jigsaw puzzles that cover the same amount of ground. From a distance, each looks much the same as the other, but up close, it becomes apparent that the pieces are cut differently so that pieces from one cannot fit (or at least fit easily) into the other. And so it was when "juristic reasons" began to be spoken of in the Canadian common law of unjust enrichment. Conflicting lines of authorities continued to apply the common law requirement of unjust factors, while in other decisions courts ascribed legal significance to the introduction of civilian language — that is, they "took the civilian language at face value and ordered restoration when defendants could not justify the retention of their enrichments" (McInnes, at p. 1056 (footnote omitted)). In

the end, this Court had to settle the question in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, which it did by clarifying that the civilian terminology of "juristic reasons" applies. But coming even several decades after the uncertainty arose, we must acknowledge that this confirmation of the civil law terminological shift *itself* also effected substantive instability in the administration of the common law:

> In a stroke, lawyers and judges were required to alter fundamentally their conception of injustice. Liability now responds to the *absence* of any reason for the defendant's *retention*, rather than to the *presence* of some reason for the plaintiff's *recovery*. The transition has not been seamless, and it will be many years before practice settles into the level of consistency and certainty that litigants have the right to expect from a mature system of law. [Emphasis in original.]
>
> (McInnes, at p. 1057)

[163] This is not to suggest that *Garland* is wrongly decided, or that its authority in the common law of unjust enrichment is somehow undermined by its civilian inclination. Rather, it is simply to point out that there can be a heavy price to pay — typically, by unijural lawyers and their clients — when external legal concepts are introduced via a judgment on a purely domestic legal issue. Hence the restraint which this Court has (until now) shown, by introducing external legal concepts to a judgment only where it is necessary to do so — that is, to fill a gap where domestic law *does not* provide an answer, or where it is necessary to modify or otherwise develop an existing legal rule. In such circumstances, other legal systems may well reveal potential solutions that would not have been apparent from a narrow domestic focus (Zweigert and Kötz, at pp. 17-20; see also *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at pp. 1140-47 (per McLachlin J., as she then

was)). This is what we mean when we say that Canada's two legal systems can serve as sources of "inspiration" (*Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 38).

[164] We can also draw on the experience of other legal systems to assist our deliberations about whether an identified potential solution to a legal problem will result in negative consequences. Indeed, that was the limited use this Court made of Quebec law (and, for that matter, U.S. law) in *Bhasin*, at paras. 83-85, *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 34, and *Norsk*, at pp. 1174-75 (per Stevenson J., concurring). Similarly, this Court will sometimes observe that a legal concept developed within one system, using domestic sources, mirrors a concept found in another system (*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 138 (per McLachlin C.J., dissenting in part); *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at para. 41; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at paras. 76-79; see also *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564, at p. 570 (per Beetz J., concurring)). When used in these ways, comparative sources are relied on to provide comfort that other legal systems have arrived at similar conclusions.

[165] But that is not this case. Here, no gaps are to be filled, and no domestic common law requires development (or even "clarification"). Rather, in service of what the majority describes as a "dialogue" between the civil law and common law, it uses the civil law device of abuse of right to drive an analysis which, I repeat, is neither

necessary to decide this appeal, nor helpful in its obscuring of the law. Further, this case engages an issue — the place of good faith in contract law — on which the Canadian common law and civil law systems have adopted very different approaches — each autonomous, and neither inherently superior to the other (see, generally, R. Jukier, "Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec" (2019), 1 *Journal of Commonwealth Law* 83). As the Hon. Louis LeBel observed:

> [TRANSLATION] The fact that the Court has maintained the specificity of the two legal traditions with respect to good faith shows the importance it attaches to respect for their conceptual autonomy. The dialogue between the two systems remains circumscribed by a judicial stance that, in general today, understands the importance and characteristics of the major legal traditions that make up Canadian bijuralism.
>
> ("Les cultures de la Cour suprême du Canada: vers l'émergence d'une culture dialogique?", in J.-F. Gaudreault-DesBiens et al., eds., *Convergence, concurrence et harmonisation des systèmes juridiques* (2009), 1, at p. 15)

[166] Indeed, there are principled reasons for the distinct treatment of good faith as between the common law and civil law systems. As Professor Valcke observes, the common law also relies on other concepts, including the equitable doctrine of estoppel, to achieve similar outcomes as the doctrine of good faith ("*Bhasin v Hrynew*: Why a General Duty of Good Faith Would Be Out of Place in English Canadian Contract Law" (2019), 1 *Journal of Commonwealth Law* 65, at p. 77). At a more general level, the common law and civil law are premised on different understandings of legal rights (H. Dedek, "From Norms to Facts: The Realization of Rights in Common and Civil

Private Law" (2010), 56 *McGill L.J.* 77, at pp. 79-81) and of the role of the state in mitigating the effects of harsh bargains (M. Pargendler, "The Role of the State in Contract Law: The Common-Civil Law Divide" (2018), 43 *Yale J. Intl L.* 143, at p. 179).

[167] I acknowledge that the majority refers to "special reasons" to be "cautious in undertaking the comparative exercise to which Callow invites us here" (para. 70). But — and, again I stress, in an area of common law that admits of no lacuna or gap that needs filling, or that is in need of development — by applying the civilian doctrine of "abuse of right" as it does, caution is thrown to the wind, the independent character of the existing good faith doctrine, which *Bhasin* carefully preserved, is undermined, and the generally applicable rule that this Court rejected in *Bhasin* is at least implicitly embraced.

[168] To be clear, the majority's comparative methodology is not mere surplusage. Rather, its application is the only point of the exercise. As I have already recounted, the doctrine of abuse of rights is applied "to focus the analysis of whether the common law duty of honest performance has been breached on what might be called the wrongful exercise of a contractual right" (para. 63). Quebec civil law is cited as authority for the proposition that "no contractual right may be exercised abusively" (para. 67). This leads to another reason why comparative methodology is undesirable in this case, which requires me to speak plainly. The passages I have just cited from the majority's reasons, and indeed the very notion of "abuse of right", would not be

familiar, meaningful or even comprehensible to the vast majority of common law lawyers and judges. And yet, many of them would reasonably assume — as many did when the language of "juristic reasons" entered the common law lexicon of unjust enrichment — that there is legal significance in their use here, and that they must therefore familiarize themselves with these concepts or retain bijural assistance in order to competently represent their clients or adjudicate their cases. At the very least, common law lawyers applying the common law concepts under discussion here will presumably need to have an eye, as the majority does, to the *Civil Code of Québec*. How they would acquire the necessary familiarity, and the extent to which they must acquire it, is left unexplained.

[169] These are not idle concerns, and on this point there is a certain reality that we must bear in mind. Few common law lawyers and judges in most provinces are sufficiently versed in French to read the sources of civil law concerning the abuse of right. And of those who are, fewer still will be trained in the civil law so as to understand their substance.

[170] I confess that I am in no position to express a view on the correctness of the majority's proclamation that it, or this Court, is pursuing a "dialogue" between the civil and common legal systems. Indeed, it is not obvious to me what having such a "dialogue" means in the context of discharging our adjudicative responsibilities. But accepting that my colleagues understand themselves to be so engaged, I suggest with utmost respect that their dialogical pursuit should not occur at the expense of those who

must know, understand and apply an aspect of one of those legal systems that the majority now renders opaque. It really comes down to this: the majority's unnecessary digression into external legal concepts will create practical difficulties on the ground by making the common law governing contractual relationships less comprehensible and therefore less accessible to those who need to know it, thereby increasing costs for all concerned. At a time when many are striving to remove old barriers that impede access to justice, I would not erect new barriers in the form of legal expression that bears little to no resemblance to the training and experience of those who help citizens navigate the legal system.

[171] Even where a comparative analysis *is* appropriate, the analogy of the jigsaw puzzles must be borne in mind. It is simply not the case that "the common law and the civil law represent . . . distinctive <u>ways of knowing the law</u>" (Kasirer J.'s reasons, at para. 71 (emphasis added)). They are not different *theories* of law. They are different *systems* of law. And because legal rules must originate from the system within which that rule will operate, comparative analysis must be undertaken with care and circumspection. This Court's statement in *Caisse populaire des Deux Rives*, at p. 1004, is apposite:

> . . . apparent similarity of the fundamental rules should not cause us to forget that the courts have a duty to ensure that insurance law develops in a manner consistent with the rest of Quebec civil law, of which it forms a part. Accordingly, while the judgments of foreign jurisdictions, in particular Britain, the United States and France, may be of interest when the law there is based on similar principles, the fact remains that Quebec civil law is rooted in concepts peculiar to it, and <u>while it may be necessary</u>

> to refer to foreign law in some cases, the courts should only adopt what is consistent with the general scheme of Quebec law. [Emphasis added.]

[172] The direction that civil law developments must be consistent with the overall civil law of Quebec applies with equal force when considering potential modifications to the common law. Maintaining the distinct character of each of Canada's legal traditions requires administering each system according to its own scheme of rules, and by reference to its own authorities (*Colonial Real Estate Co. v. La Communauté des Soeurs de la Charité de l'Hôpital Général de Montréal* (1918), 57 S.C.R. 585, at p. 603; see also J. Dainow, "The Civil Law and the Common Law: Some Points of Comparison" (1967), 15 *Am. J. Comp. L.* 419, at pp. 434-35). It follows that any enrichment from another legal system must be incorporated only insofar as it conforms to the internal structure and organizing principles of the adopting legal system (F. Allard, *The Supreme Court of Canada and its Impact on the Expression of Bijuralism* (2001), at p. 9). Ultimately, the golden rule in using concepts from one of Canada's legal systems to modify the other is that the proposed solution must be able to completely and coherently integrate into the adopting system's structure (J.-L. Baudouin, "Mixed Jurisdictions: A Model for the XXIst Century?" (2003), 63 *La. L. Rev.* 983, at pp. 990-91).

[173] This is of practical concern here. Analytically jamming the civilian concept of abuse of right regarding the termination of a contract into the common law is not the tidy and discrete affair that the majority appears to suppose. This is because the obligation of good faith in civil law imposes more onerous duties on the party

terminating the contract than it does at common law. The Quebec Court of Appeal has explained the notion of abuse of right in the context of termination of a contract in the following way:

> [TRANSLATION] Up until now, the courts have sometimes sanctioned abuse of right in cases of malice. However, they have also sanctioned unilateral resiliation by a distributor for reasons found not to be within the spirit of the discretionary resiliation clause, or where the resiliation was improper, that is, without any valid reason, or without prior notice or without any sign of what was to come. These cases clearly illustrate the "moralization" of contractual relations by the doctrine of abuse of right: for it is not enough to resiliate a contract in a strictly lawful manner (in accordance with the language of a resiliation clause), it is also necessary to do so in a legitimate way. [Emphasis added.]
>
> (*Birdair inc. v. Danny's Construction Co.*, 2013 QCCA 580, at para. 131 (CanLII), citing J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), by P.-G. Jobin with the collaboration of N. Vézina, at para. 125)

[174] Even if we were to imagine that it *was* the exercise of the termination clause that led in this case to the breach of duty of honest contractual performance — which, as I shall explain below, it was not — *Bhasin* stipulates clearly that there is no duty to disclose information or intentions relevant to termination that flows from the common law duty of good faith. But under the civilian doctrine invoked by the majority, terminating a contract without disclosing intentions can constitute an abuse of right. While the majority acknowledges that it "do[es] not rely on the civil law here for the specific rules that would govern a similar claim in Quebec" (para. 73), this tends to affirm how inappropriate its comparative analysis is here. The majority either relies on a truncated and therefore distorted version of the civilian framework of abuse of right, or else opens the door to future "clarifications" (which would further undermine the

integrity of the common law duty of honest performance as stated in *Bhasin*). Even on its own terms, then, the majority's invocation of abuse of right raises more questions than it claims to answer.

[175] For all these reasons, I am of the respectful view that it is not appropriate to refer to, and rely upon, the doctrine of abuse of right in this case. This appeal calls upon this Court to straightforwardly apply the duty of honest performance, and nothing more. Transplanting the doctrine of abuse of right into the common law context is not only unnecessary here, doing so without reference to the broader context in which good faith operates in the common law will cause significant uncertainty.

(2) The Wrongful Exercise of a Right

[176] The majority's reliance on the civilian doctrine of abuse of a right leads me to a final, substantive criticism: in focusing on the wrongful exercise of a right, it distorts the analysis described in *Bhasin* and elides the distinction between honest performance and good faith in the exercise of a contractual discretion.

[177] The gravamen of a claim in honest performance is that a party made dishonest representations concerning contractual performance that caused its counterparty to suffer loss. It is *not* that a right was exercised in a way that was wrongful, abusive, or even dishonest. Here, for example, the complaint hinges on Baycrest's deceptive conduct *preceding* the exercise of the termination clause. By relying on Baycrest's misleading representations, Callow missed the opportunity to bid

on other contracts. The exercise of the termination clause is relevant only in the sense that it was the subject of the misrepresentation.

[178] I recognize that, in *Bhasin*, Cromwell J. stated that the defendant breached the duty of honest performance when it "failed to act honestly with [the plaintiff] in exercising the non-renewal clause" (para. 103). This phrasing, however, mirrored the trial judge's finding that the defendant "acted dishonestly toward Bhasin in exercising the non-renewal clause" (*Bhasin v. Hrynew*, 2011 ABQB 637, 526 A.R. 1, at para. 261, quoted in *Bhasin*, at para. 94). Elsewhere, Cromwell J. is clear that the breach "consisted of [the defendant's] failure to be honest with [the plaintiff] about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal" (para. 108). This reflects the general framework that he describes, i.e., that the duty of honest performance "is a simple requirement not to lie or mislead the other party about one's contractual performance" (para. 73).

[179] Maintaining analytical clarity about the source of the breach — the dishonesty that preceded the termination, and not the termination itself — is important for two reasons. First, a breach of the duty of honest performance may arise from many aspects of performance. The general rule enunciated in *Bhasin* provides a clear standard that can be applied across different contexts, including to the facts of this appeal. There is no benefit in developing a separate analysis that responds narrowly to dishonesty concerning the exercise of a contractual right. Doing so will only make the law more confused and difficult to apply.

[180] Secondly, the source of the breach distinguishes the duty of honest performance from the duty to exercise contractual discretion in good faith. As discussed above, where a breach of the latter duty is alleged, the focus of the analysis is whether the defendant was entitled to exercise its discretion in the way that it did. By shifting the focus of the honest performance analysis to the manner in which a right was exercised, the majority blurs the boundaries between these two distinct duties. Indeed, it contends that "the duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by fixing, at least in circumstances like ours, on the wrongful exercise of a contractual prerogative" (para. 51).

[181] We are bound by *Bhasin* to treat the duty of honest performance as conceptually distinct from the duty to exercise discretionary powers in good faith (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para. 65). This is not simply a matter of *stare decisis* and incremental legal development (although it is at least those things); there is also the practical concern that blurred and ambiguous treatment of these two duties has a meaningful impact on the outcome for contracting parties. Contrary to the majority's suggestion, the wrong at issue in each category of cases is distinct, and the damages available differ accordingly. The award for a breach of the duty of honest performance addresses the effect of the *dishonesty*. In contrast, the award for a breach of the duty to exercise discretion in good faith addresses the effect of the *exercise of discretion itself*. Placing both duties under the umbrella of the "wrongful exercise of a

contractual right" obscures these distinctions and thus represents an unfortunate departure from *Bhasin*.

IV. Conclusion

[182] I would allow the appeal, set aside the Court of Appeal decision, and reinstate the judgment of the trial judge with costs in this Court and the courts below.

The following are the reasons delivered by

CÔTÉ J. —

[183] What constitutes actively misleading conduct in the context of a contractual right to terminate without cause? Where should the line be drawn between active dishonesty and permissible non-disclosure of information relevant to termination? Does a party to a contract have an obligation to dissuade his counterparty from entertaining hopes regarding the duration of their business relationship? These are the questions raised by this appeal.

[184] In this case, the respondents ("Baycrest") bargained for a right to terminate *at any time* and *for any other reason than unsatisfactory services* upon giving 10 days' notice. Baycrest made the decision to terminate, but it chose to wait before sending the notice, as it did not want to jeopardize the performance of other work that was being

done by the appellant ("Callow", referring interchangeably to C.M. Callow Inc. and to its principal, Mr. Christopher Callow). In the meantime, Baycrest became aware that its counterparty was entertaining hopes of a renewal, although it did not say or do anything that materially contributed to those hopes. Baycrest did nothing to discourage them; such conduct may not be laudable, but it does not fall within the category of "active dishonesty" prohibited by the contractual duty of honest performance.

I. Issue on Appeal

[185] Both of my colleagues seem to agree on the following propositions.

[186] First, this case concerns solely the duty of honest performance and not the duty to exercise discretionary powers in good faith (these two duties were distinguished in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras. 47, 50 and 72-73).

[187] Second, the duty of honest performance "means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract" (*Bhasin*, at para. 73).

[188] Third, there is no duty to disclose information or one's intentions with respect to termination (*Bhasin*, at paras. 73 and 87).

[189] Fourth, there is no need to extend the law by recognizing a new duty of good faith relating to "active non-disclosure".

[190] I take it we all agree with these premises. Therefore, the issue, when properly framed, bears on the distinction referred to in *Bhasin* (at paras. 73 and 86-87) between actively misleading conduct and permissible non-disclosure. In the context of this case it comes down to this: did Baycrest lie or otherwise knowingly mislead Callow into thinking that there was no risk it would exercise its right to terminate the winter agreement for any other reason than unsatisfactory services? The answer to this question is no.

[191] Before turning to my analysis, I wish to express my substantial agreement with Justice Brown's observations insofar as they pertain to the role of external legal concepts. Justice Kasirer states at paragraph 44 of his reasons that "[n]o expansion of the law set forth in *Bhasin* is necessary" to dispose of this appeal. However, he then embarks on, and I say this respectfully, an unnecessary comparative exercise between the civil law and the common law under the pretext of "dialogue". I am perplexed by the virtues of "dialogue" in a case like this one where no gaps in the common law need to be filled and no rules need to be modified. I do not see why we should adopt such an approach, one that provides no palpable benefits and that is also arbitrary and unpredictable.

[192] That being said, I believe that the common law as it now stands does not support the result my colleagues arrive at. I am afraid that the unnecessary debate about comparative legal exercises may have diverted attention from the facts of this case as they are.

II. Ambit of the Duty of Honest Performance

A. *Context in Which the Duty Was Created*

[193] In *Bhasin*, the Court unanimously introduced the contractual duty of honest performance as a "new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts" (para. 72). Cromwell J. stressed that this was no more than a "modest, incremental step" (para. 73; see also paras. 82 and 89), with the duty of honest performance being a "minimum standard" (para. 74).

[194] In Cromwell J.' opinion, the new duty would "interfer[e] very little with freedom of contract" (para. 76); so little that he thought such interference would be "more theoretical than real" (para. 81). On the subject of the organizing principle of good faith from which it grew, Cromwell J. stated:

> The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest . . . . The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties. [para. 70]

[195] Cromwell J. also expressed specific concerns relating to the clarity of the duty, its effect on commercial certainty and other practical implications (at paras. 59,

66, 70-71, 73, 79-80 and 86-87). He endeavoured to explain what the new duty was *not*:

> The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. [Emphasis added; para. 86.]

[196] Turning to a positive description, he stressed that the duty of honest performance *was* a "simple requirement" not to lie or knowingly mislead about matters directly linked to performance of the contract (para. 73).

[197] The requirement that parties not lie is straightforward. But what kind of conduct is covered by the requirement that they not otherwise knowingly mislead each other? Absent a duty to disclose, it is far from obvious when exactly one's silence will "knowingly mislead" the other contracting party. Are we to draw sophisticated distinctions between "mere silence" and other types of silence, as Brown J. suggests? If that be so, I wonder how a contracting party — on whom, I note, the law imposes *neither* "a duty of loyalty or of disclosure" *nor* a requirement "to forego advantages flowing from the contract" (*Bhasin*, at para. 73) — is supposed to know at what point a permissible silence turns into a non-permissible silence that may constitute a breach of contract. With the greatest respect, I do not believe such casuistry is compatible with the "simple requirement" Cromwell J. meant to set out in *Bhasin*.

[198] As Cromwell J. put it, "a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty" (para. 86 (emphasis added)). He added that "*United Roasters* makes it clear that there is no unilateral duty to disclose information relevant to termination. But the situation is quite different, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract" (para. 87 (emphasis added)). These words should be taken at face value. The duty of honest performance should remain "clear and easy to apply" (para. 80).

B. *Permissible Non-disclosure*

[199] It must be borne in mind that all obligations flowing from the duty of honest performance are "negative" obligations (P. Daly, "La bonne foi et la common law: l'arrêt *Bhasin c. Hrynew*", in J. Torres-Ceyte, G.-A. Berthold and C.-A. M. Péladeau, eds., *Le dialogue en droit civil* (2018), 89, at pp. 101-2; see also Kasirer J.'s reasons, at para. 86). Extending the duty beyond that scope would "detract from . . . certainty in commercial dealings" (*Bhasin*, at para. 80).

[200] Therefore, silence cannot be considered dishonest within the meaning of *Bhasin* unless there is a positive obligation to speak. Such an obligation does not arise simply because a party to a contract realizes that his counterparty is operating under a mistaken belief.

[201] Absent a duty of disclosure, that is, absent any kind of free-standing positive obligation flowing from the duty of honest performance, a party to a contract has no obligation to correct his counterparty's mistaken belief unless the party's active conduct has *materially* contributed to it (see, in a different context, T. Buckwold, "The Enforceability of Agreements to Negotiate in Good Faith: The Impact of *Bhasin v. Hrynew* and the Organizing Principle of Good Faith in Common Law Canada" (2016), 58 *Can. Bus. L.J.* 1, at pp. 12-13).

[202] What constitutes a material contribution will obviously depend upon the context, which includes the nature of the parties' relationship (see Brown J.'s reasons, at para. 133) as well as the relevant provisions of the contract. But the reason underlying this requirement is a practical one that is consistent with *Bhasin*'s emphasis on commercial expectations (at paras. 1, 34, 41, 60 and 62): parties that prefer not to disclose certain information — which they are entitled not to do — are not required to adopt a new line of conduct in their contractual relationship simply because they chose silence over speech.

[203] It cannot be that the law, on the one hand, allows contracting parties not to disclose information but, on the other hand, negates that possibility by imposing a standard of conduct that is at odds with the spontaneous attitudes — such as evasiveness and equivocation — parties might have when their conversations bear precisely on what they wish not to disclose.

[204] Even though parties who make that choice must be careful with what they say or do, especially if they become aware that their counterparties are operating under a mistaken belief, they should not be asked to behave as if their actions were being scrutinized under a microscope to determine whether they have contributed to that mistaken belief. Such a requirement would be unacceptable.

[205] In the context of a right to terminate a contract without cause, a party that intends to end an agreement does not have to convey hints in order to alert his counterparty that their business relationship is in danger. No duty of disclosure should mean no duty of disclosure.

[206] A party's awareness of his counterparty's mistaken belief will therefore not, in itself, trigger an obligation to speak unless the party has taken positive action that materially contributed to that belief. The active conduct and the mistaken belief must both pertain to contractual performance; otherwise, it could hardly be said that one has "knowingly misle[d] [the] other about matters directly linked to the performance of the contract" (*Bhasin*, at para. 73).

[207] In sum, the "minimum standard" of honesty imposed by the duty of honest performance has to be consistent with the other principles set out in *Bhasin*. It also has to be realistic and not overly formalistic. Absent a duty of disclosure, a party has no obligation to dissuade his counterparty from persisting in a mistaken belief. This does not mean that the party may induce or reinforce such a belief by significant positive

actions or representations. There is an obligation to correct this mistaken belief if the party's active conduct has *materially* contributed to it.

III. <u>Analysis</u>

[208] Callow and Baycrest entered into two two-year contracts: a winter agreement covering mostly snow removal services for the period from November 1, 2012 to April 30, 2014 and a summer maintenance services agreement for the period from May 1, 2012 to October 31, 2013. The winter agreement, which is at issue here, contained the following provision:

> 9. If the Contractor [i.e. Callow] fails to give satisfactory service to the Corporation [i.e. Baycrest] in accordance with the terms of this Agreement and the specifications and general conditions attached hereto <u>or if for any other reason</u> the Contractor's services are no longer required for the whole or part of the property covered by this Agreement, then the Corporation may terminate this contract upon giving ten (10) days' notice in writing to the Contractor, and upon such termination, all obligations of the Contractor shall cease and the Corporation shall pay to the Contractor any monies due to it up to the date of such terminations. [Emphasis added.]
>
> (A.R., vol. III, at p. 10)

[209] In March or April 2013, Baycrest decided to terminate the winter agreement. On September 12, 2013, it gave Callow 10 days' notice that it was terminating the contract. In the meantime, Baycrest had learned that Callow was performing free extra landscaping work and that he was under the impression the winter agreement would not be terminated (trial reasons, 2017 ONSC 7095, at para. 48 (CanLII)).

[210] It can easily be understood from these circumstances that Callow was "shocked" by the termination. Callow believed that, "if there was a problem, he would have expected [Baycrest] to bring it to his attention like [it] had done in the past" (trial reasons, at para. 49). Baycrest's behaviour was certainly discourteous and cavalier. Yet, that is not the question here. The question is whether Baycrest materially contributed to Callow's mistaken belief that the contract would not be terminated. If Baycrest did, then it had an obligation to correct that mistaken belief in accordance with its duty of honest performance. Otherwise, it had no obligation to disclose anything.

[211] Before our Court, Callow acknowledged that by entering into the winter agreement, he had taken the risk that Baycrest "may terminate [the contract], but only disclose the termination decision on 10 days' written notice" (transcript, at p. 11; see also C.A. reasons, 2018 ONCA 896, 429 D.L.R. (4th) 704, at para. 14). I am of the view that according to the terms of the winter agreement, Callow could have found himself in the exact same situation regardless of Baycrest's behaviour during the spring and summer of 2013. Such a possibility was in fact inherent in the contract he had bargained for.

[212] Callow essentially submits that Baycrest's active conduct led him to believe that the winter agreement was no longer at risk of being terminated despite the clear wording of the termination provision. He stresses the following points:

(1) Baycrest deliberately kept its decision secret because it did not want to jeopardize the performance of the summer agreement;

(2) Baycrest showed satisfaction with Callow's services;

(3) Callow had discussions with Mr. Peixoto and Mr. Campbell regarding the renewal of the winter agreement;

(4) Baycrest accepted Callow's "freebie" work; and

(5) Baycrest was aware of Callow's mistaken belief.

[213] In my view, the appeal should be dismissed.

[214] The trial judge's understanding of "active dishonesty" is tainted by an error of law. She did not consider the principle that, in order to amount to a breach of the duty of honest performance, any active dishonesty had to be "directly linked to the performance of the contract" (*Bhasin*, at para. 73). In assessing Baycrest's conduct, she did not inquire into whether Baycrest had "lie[d] or otherwise knowingly misle[d]" Callow about the exercise of its right to terminate the winter agreement for *any other reason* than unsatisfactory services. This explains why she wrongly insisted on, amongst other things, the need to "address the alleged performance issues" (para. 67)

despite the fact that the winter agreement could be terminated even if Callow's services were satisfactory.

[215] Furthermore, although the trial judge seems to have been aware that there was no duty of disclosure (para. 60), she nonetheless found that Baycrest had acted in bad faith by "withholding the information to ensure Callow performed the summer maintenance services contract" (para. 65; see also para. 76). She never asked herself whether Baycrest had explicitly or implicitly said or done anything that could have misled Callow into thinking that the contract was at no risk of being terminated for any other reason than unsatisfactory services. It is clear from reading the trial judge's reasons as a whole that the "representations" she found had been made by Baycrest (at paras. 65, 67 and 76) were not directly linked to the performance of the winter agreement. In sum, the trial judge's misunderstanding of the applicable legal principles vitiated the fact-finding process.

[216] Baycrest had bargained for a right to terminate its winter agreement *for any reason* and *at any time* upon giving 10 days' notice. Its duty of honest performance did not require it to "forego" this undeniable "advantag[e] flowing from the contract" (*Bhasin*, at para. 73). It had no obligation to tell Callow about its decision to terminate the winter agreement until 10 days before the termination was to take effect, as the contract stipulated. Even after Baycrest became aware of Callow's mistaken belief, it had no obligation to refuse the "freebie" work Callow was performing on his own initiative or to correct this mistaken belief he was operating under. Such an obligation

would have arisen only if Baycrest had contributed materially to that mistaken belief by inducing it or reinforcing it. In light of the evidence and the trial judge's findings, I am not convinced that Baycrest had done so.

[217] I do not have the same reading as my colleague Kasirer J. about certain of the trial judge's findings of fact (para. 100). These findings expressed in very broad terms should not be insulated from the reasons as a whole and from the evidence that was before the trial judge. For instance, my colleague writes that "Mr. Peixoto made statements to Mr. Callow suggesting that a renewal of the winter maintenance agreement was likely" (para. 95), and he considers that to be a "key finding" (para. 96). However, the trial judge's finding pertained to *what Callow had thought*, not to *what Baycrest had said* (trial reasons, at para. 41), which is something quite different. Indeed, as I demonstrate below, the evidence supporting this "key finding" shows that Callow's thoughts regarding a renewal of the winter agreement had nothing to do with what Baycrest said to him.

[218] I now turn to the application of the foregoing legal principles to the facts of this case.

A. *Discussions About Renewal*

[219] Callow argues that Baycrest materially contributed to his mistaken belief by discussing a possible renewal. Indeed, the renewal issue is central in this appeal. It is not disputed that unlike the contract at issue in *Bhasin*, the winter agreement did not

contemplate any automatic renewal; it only contemplated termination. Since renewal was not a term of the winter agreement, it cannot be considered "performance of the contract" within the meaning of *Bhasin*. For Callow's claim to succeed, any breach of the duty of honest performance must pertain to termination.

[220] Both of my colleagues accept Callow's submission that it can be inferred from the discussions about renewal that the winter agreement was not in danger of termination. I would agree with such a proposition in the following circumstances: if one party leads another to believe that their contract will be renewed, it follows that the other party can reasonably expect their business relationship to be extended rather than terminated. But an inference to that effect cannot be drawn in the abstract. In order to infer that one party, through discussions about renewal, led the other party to think that there was no risk their existing agreement would be terminated, the inference-drawing process must obviously take into account the nature of the risk at stake and what was actually communicated during those discussions. Otherwise, the inference would entail a palpable and overriding error that would be subject to appellate review (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 22-23).

[221] Here, s. 9 of the winter agreement contemplated that the agreement might be terminated (1) for unsatisfactory services, or (2) for any other reason than unsatisfactory services. Did Baycrest, by discussing renewal, communicate anything that might have led Callow to believe there was no risk the winter agreement would be

terminated for *any other reason* than unsatisfactory services? The trial judge described the discussions between the parties as follows:

> During the spring and summer of 2013, Callow performed regular weekly grass cutting, garbage pick-up and was in discussions with the condominium corporations' board members to renew the contract for the following summer and also the winter maintenance services contract for a further two years. At this time, Callow had only completed year one of a two-year contract. The contract was supposed to remain in place for the winter of 2013-2014.
>
> After his discussions with Mr. Peixoto and Mr. Campbell, Mr. Callow thought that he was likely to get a two-year renewal of his winter maintenance services contract and they were satisfied with his services. [Emphasis added; paras. 40-41.]

[222] The trial judge, who found Callow to be credible, relied on the following part of his testimony:

> **Q.** Now is probably a good time to — well tell me about these discussions. Let's hear what discussions were you having.
>
> **A.** Mostly with Joe [Peixoto], we discussed it, and he said "yeah, it looks good, I'm sure they'll be up for it, let me talk to them".
>
> **Q.** Up for what?
>
> **A.** A two-year renewal.
>
> **Q.** All right. Anyone else?
>
> **A.** Kyle Campbell I ran into once or twice on site and we had discussions as well too.
>
> **Q.** Okay, and what was your impression of —of — I mean I suppose you already answered....

> **A.** That I was likely going to be getting a two-year renewal, <u>there was no reason not to, they were satisfied with the service, they were happy with it</u>. [Emphasis added.]
>
> (A.R., vol. II, at pp. 67-68)

[223] Apparently not much importance was attached to the renewal issue at trial. The amended statement of claim did not even address this issue; it instead focused on Baycrest's knowledge, Callow's "freebie" work and the provision of satisfactory services. Even though the trial judge did consider renewal, I note that her findings in this regard bore on Callow's *mistaken belief* that the winter agreement was likely to be renewed (at para. 41); they did *not* bear on anything Baycrest actually did or said that would have misled Callow into that belief.

[224] What Callow thought is one thing; what Baycrest said or did is another. According to Callow himself, Mr. Peixoto did not propose anything on behalf of Baycrest. Mr. Peixoto's statement that "I'm sure they'll be up for it, let me talk to them" (A.R., vol. II, at p. 67) clearly meant that despite his favorable opinion, he was not the one making the decision and that Baycrest had not even considered the mere possibility of a renewal at the time. It certainly could not be inferred from this statement that a renewal was likely. Callow's testimony does not suggest that he was misled into believing that Baycrest was actually contemplating a renewal — Mr. Peixoto's response instead presupposes the contrary — nor does it suggest that Baycrest did or said anything to negate the risk Callow took that his contract might be terminated for any other reason than unsatisfactory services. Indeed, Callow insisted that he had

believed a renewal was likely because "there was no reason not to, they were satisfied with the service, they were happy with it" (A.R., vol. II, at p. 68).

[225] In his examination for discovery, Callow had given the same reason for thinking his winter agreement would be renewed, that is, because "there was no reason not to" (A.R., vol. II, at p. 49). He did *not* refer to his discussions with Mr. Peixoto or Mr. Campbell. When asked if anyone had told him that his contract would be renewed, he said he could not recall. The evidence does *not* establish that Mr. Peixoto or Mr. Campbell initiated the discussions about renewal. On the contrary, it suggests that Callow did. When cross-examined about his "freebie" work, Callow admitted that, although he was under the mistaken belief that his contract was likely to be renewed, he was in fact only "*hopeful*" that it would be. *Nowhere* in his testimony did he suggest that he had been given *any* information that could mislead him into believing that Baycrest was seriously contemplating a two-year renewal instead of termination.

[226] The trial judge referred to "active communications . . . between March/April and September 12, 2013, which deceived Callow" (para. 66), and to "representations in anticipation of the notice period" (para. 67; see also paras. 65 and 76). But those references must be read in light of the evidence and the reasons as a whole. Even though the trial judge made credibility findings against Mr. Peixoto and Mr. Campbell and credibility findings in favour of Callow, the evidence pertaining to renewal supports only a very limited number of inferences regarding termination.

[227] At most, it can be said that Mr. Peixoto and Mr. Campbell did not dissuade Callow from entertaining hopes when they had a chance to do so. But, and most importantly, they did not suggest that Baycrest was actually contemplating a continuation of their business relationship. If that had been the case, then I would agree that it might have been justifiable to infer that Callow had been led to believe there was no risk that his existing contract would be terminated before its term. But that was simply not the case here. In my view, the trial judge did not infer from the discussions about renewal that Baycrest had done or said anything to negate the risk that the winter agreement would be terminated for any other reason than unsatisfactory services. Had she made such an inference, it would be subject to appellate review, as it would not be supported by the evidence. Given the context discussed above, Mr. Peixoto's and Mr. Campbell's vague and evasive declarations did not materially contribute to Callow's mistaken belief that would have required Baycrest to disclose additional information.

B. *Baycrest's Satisfaction With Callow's Services*

[228] The trial judge placed great importance on the fact that Callow's services had been satisfactory and that Baycrest's conduct had given him no reason to think otherwise (paras. 22, 27, 29-30, 34-36, 39, 41, 46-47 and 55). I note there is no finding that Baycrest communicated any particular sign of satisfaction pertaining *to the performance of the winter agreement* past March 19, 2013. That being said, there is

nothing dishonest about Baycrest terminating the winter agreement after showing its satisfaction with the quality of Callow's work.

[229] Further, the parties had explicitly contemplated that Baycrest could terminate the winter agreement even if it was satisfied with Callow's performance, as the contract provided that Baycrest could exercise its termination right for any other reason than unsatisfactory services. Thus, positive feedback about Callow's services cannot justify Callow's mistaken belief that the contract would not be terminated.

C. *Callow's Mistaken Belief That the Winter Agreement Would Remain in Effect*

[230] The trial judge found that Baycrest had "continu[ed] to represent that the contract was not in danger" (paras. 65 and 76; see also para. 13). This finding was essentially grounded on the overall signs of satisfaction communicated by Baycrest, on its acceptance of the "freebie" work and on Callow's mistaken belief following the discussions pertaining to renewal. As I have already explained, nothing here required Baycrest to disclose its intent to terminate the winter agreement.

[231] What the trial judge *did not find* is also relevant. She did *not* find that Baycrest had decided to forego its right to terminate the winter agreement. She did *not* find that Baycrest had lied to Callow. She did *not* find that Baycrest had negated the risk taken by Callow that his contract would be terminated for any other reason than unsatisfactory services. Lastly, she did not clearly indicate why Callow so firmly

believed "that his winter maintenance services contract would remain in place during the following winter" (para. 13).

[232] Callow's belief that there was no risk Baycrest would exercise its termination right was based on two things. First, on the positive feedback he had received regarding his services. In his words, Baycrest was "happy with it". However, this is not very relevant in a context in which Baycrest could terminate the winter agreement for any other reason than unsatisfactory services. Second, and most importantly, Callow's mistaken belief was based on an erroneous interpretation of the winter agreement.

[233] At trial, Callow testified that he was aware of the termination clause, but that he thought the two-year term made it unenforceable:

> **Q.** . . . So, in that letter, there is a — a statement that the termination was in breach of the agreement. So, my question for you is, at that point in time what was your understanding, why was the termination in breach of the agreement?
>
> **A.** Because they asked me, and we entered into a two year agreement, to provide services both summer and winter; and I did so at a reduced rate. I upheld my end of the bargain which was to perform that work at that reduced rate. They — and which I might add, I was not paid for, the landscaping and the final aspect of it, they were supposed to pay me. They didn't do it. And I continued to fulfill my contractual obligations. I expected nothing less than the same from them.
>
> **Q.** So — so, when you — because you talk — but you knew that in the winter contract, there was that termination clause.
>
> **A.** They had a clause written in there. <u>I didn't believe it be enforceable because we had a two year contract. That's the whole idea to a two year</u>

> contract. You have contract for two years. I provide services for two years and they pay me for those services. [Emphasis added.]
>
> (A.R., vol. II, at p. 120; see also pp. 106-7.)

[234] Even though that was not the position he took in this Court, Callow's uninformed interpretation of the termination provision casts an important light on the reason why he did not believe there was a risk the winter agreement would be terminated for any other reason than unsatisfactory services. The evidence does not suggest that Baycrest said or did anything that could have negated that risk, nor does it suggest that Baycrest had anything to do with Callow's erroneous interpretation of the termination provision. I am therefore of the view that Baycrest was not required to correct Callow's mistaken belief by disclosing information it decided not to disclose.

IV. Conclusion

[235] The trial judge erred in concluding that Baycrest had to address performance issues or provide prompt notice prior to termination (para. 67). She did not inquire into whether Baycrest had made any representations that had misled Callow into thinking Baycrest would not terminate the winter agreement for any other reason than unsatisfactory services. In my view, the trial judge extended the ambit of the duty of honest performance in a way that was not consistent with the other principles set out in *Bhasin*.

[236] In sum, the narrow issue in this appeal comes down to this: Did Baycrest lie or otherwise knowingly mislead Callow into thinking that there was no risk it would exercise its right to terminate the winter agreement for any other reason than unsatisfactory services? There were no outright lies. Baycrest was aware of Callow's mistaken belief that his services would be required for the upcoming winter. But Baycrest never forewent the contractual advantage it had of being able to end the winter agreement at any time upon 10 days' notice. Nor did Baycrest say or do anything that materially contributed to Callow's mistaken belief that the winter agreement would not be terminated for any other reason than unsatisfactory services. Regardless of how its conduct is characterized, Baycrest had no obligation to correct Callow's mistaken belief.

[237] To be clear, the result I arrive at should not be interpreted as meaning that Baycrest's behaviour was appropriate or that Callow has no recourse. It means that Callow's recourse cannot be based on a breach of the duty of honest performance. The trial judge did in fact find that Baycrest had been unjustly enriched by the "freebie" work (at para. 77), but she stated that Callow had not provided evidence of his expenses. That question exceeds the scope of this appeal, however.

[238] I would therefore dismiss the appeal.

Appeal allowed with costs throughout, CÔTÉ J. *dissenting*.

Solicitors for the appellant: McCarthy Tétrault, Toronto; KMH Lawyers, Ottawa.

Solicitors for the respondents: Gowling WLG (Canada), Ottawa.

Solicitors for the intervener the Canadian Federation of Independent Business: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener the Canadian Chamber of Commerce: Torys, Toronto.

TAB 4

CITATION: Cline Mining Corporation (Re), 2015 ONSC 622
COURT FILE NO.: CV-14-10781-00CL
DATE: 2015-01-30

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick* and *Logan Willis*, for the Applicants Cline Mining Corporation et al.

Michael DeLellis and *David Rosenblatt*, for the FTI Consulting Canada Inc., Monitor of the Applicants

Jay Swartz, for the Secured Noteholders

HEARD: January 27, 2015

ENDORSEMENT

[1] Cline Mining Corporation, New Elk Coal Company LLC and North Central Energy Company (collectively, the "Applicants") seek an order (the "Sanction Order"), among other things:

a. sanctioning the Applicants' Amended and Restated Plan of Compromise and Arrangement dated January 20, 2015 (the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"); and

b. extending the stay, as defined in the Initial Order granted December 3, 2014 (the "Initial Order"), to and including April 1, 2015.

[2] Counsel to the Applicants submits that the Recapitalization is the result of significant efforts by the Applicants to achieve a resolution of their financial challenges and, if implemented, the Recapitalization will maintain the Applicants as a unified corporate enterprise

and result in an improved capital structure that will enable the Applicants to better withstand prolonged weakness in the global market for metallurgical coal.

[3] Counsel submits that the Applicants believe that the Recapitalization achieves the best available outcome for the Applicants and their stakeholders in the circumstances and achieves results that are not attainable under any other bankruptcy, sale or debt enforcement scenario.

[4] The position of the Applicants is supported by the Monitor, and by Marret, on behalf of the Secured Noteholders.

[5] The Plan has the unanimous support from the creditors of the Applicants. The Plan was approved by 100% in number and 100% in value of creditors voting in each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class.

[6] The background giving rise to (i) the insolvency of the Applicants; (ii) the decision to file under the CCAA; (iii) the finding made that the court had the jurisdiction under the CCAA to accept the filing; (iv) the finding of insolvency; and (v) the basis for granting the Initial Order and the Claims Procedure Order was addressed in *Cline Mining Corporation (Re),* 2014 ONSC 6998 and need not be repeated.

[7] The Applicants report that counsel to the WARN Act Plaintiffs in the class action proceedings (the "Class Action Counsel") submitted a class proof of claim on behalf of the 307 WARN Act Plaintiffs in the aggregate amount of U.S. $3.7 million. Class Action Counsel indicated that the WARN Act Plaintiffs were not prepared to vote in favour of the Plan dated December 3, 2014 (the "Original Plan") without an enhancement of the recovery. The Applicants report that after further discussions, agreement was reached with Class Action Counsel on the form of a resolution that provides for an enhanced recovery for the WARN Act Plaintiffs Class of $210,000 (with $90,000 paid on the Plan implementation date) as opposed to the recovery offered in the Original Plan of $100,000 payable in eight years from the Plan implementation date.

[8] As a result of reaching this resolution, the Original Plan was amended to reflect the terms of the WARN Act resolution.

[9] The Applicants served the Amended Plan on the Service List on January 20, 2015.

[10] The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicants.

[11] Equity claimants will not receive any consideration or distributions under the Plan.

[12] The Plan provides for the release of certain parties (the "Released Parties"), including:

(i) the Applicants, the Directors and Officers and employees of contractors of the Applicants; and

(ii) the Monitor, the Indenture Trustee and Marret and their respective legal counsel, the financial and legal advisors to the Applicants and other parties employed by or associated with the parties listed in sub-paragraph (ii), in each case in respect of claims that constitute or relate to, *inter alia*, any Claims, any Directors/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA Proceedings, the Chapter 15 Proceedings, the business or affairs of the Applicants or certain other related matter (collectively, the "Released Claims").

[13] The Plan does not release:

(i) the right to enforce the Applicants' obligations under the Plan;

(ii) the Applicants from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA; or

(iii) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[14] The Plan does not release Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the Applicants' applicable Insurance Policies.

[15] The Meetings Order authorized the Applicants to convene a meeting of the Secured Noteholders, a meeting of Affected Unsecured Creditors and a meeting of WARN Act Plaintiffs to consider and vote on the Plan.

[16] The Meetings were held on January 21, 2015. At the Meetings, the resolution to approve the Plan was passed unanimously in each of the three classes of creditors.

[17] None of the persons with Disputed Claims voted at the Meetings, in person or by proxy. Consequently, the results of the votes taken would not change based on the inclusion or exclusion of the Disputed Claims in the voting results.

[18] Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the plan. The effect of the court's approval is to bind the company and its creditors.

[19] The general requirements for court approval of the CCAA Plan are well established:

a. there must be strict compliance with all statutory requirements;

b. all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done, which is not authorized by the CCAA; and

c. the plan must be fair and reasonable.

(see *Re SkyLink Aviation Inc.*, 2013 ONSC 2519)

[20] Having reviewed the record and hearing submissions, I am satisfied that the foregoing test for approval has been met in this case.

[21] In arriving at my conclusion that the Plan is fair and reasonable in the circumstances, I have taken into account the following:

a. the Plan represents a compromise among the Applicants and the Affected Creditors resulting from discussions among the Applicants and their creditors, with the support of the Monitor;

b. the classification of the Applicants' creditors into three voting classes was previously approved by the court and the classification was not opposed at any time;

c. the results of the Sale Process indicate that the Secured Noteholders would suffer a significant shortfall and there would be no residual value for subordinate interests;

d. the Recapitalization provides a limited recovery for unsecured creditors and the WARN Act Plaintiffs;

e. all Affected Creditors that voted on the Plan voted for its approval;

f. the Plan treats Affected Creditors fairly and provides for the same distribution among the creditors within each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class;

g. Unaffected Claims, which include, *inter alia*, government and employee priority claims, claims not permitted to be compromised pursuant to sections 19(2) and 5.1(2) of the CCAA and prior ranking secured claims, will not be affected by the Plan;

h. the treatment of Equity Claims under the Plan is consistent with the provisions of the CCAA; and

i. the Plan is supported by the Applicants (Marret, on behalf of the Secured Noteholders), the Monitor and the creditors who voted in favor of the Plan at the Meetings.

[22] The CCAA permits the inclusion of third party releases in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring (see: *ATB Financial* v. *Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587

("*ATB Financial*"); *SkyLink, supra;* and *Re Sino-Forest Corporation*, 2012 ONSC 7050, leave to appeal denied, 2013 ONCA 456).

[23] The court has the jurisdiction to sanction a plan containing third party releases where the factual circumstances indicate that the third party releases are appropriate. In this case, the record establishes that the releases were negotiated as part of the overall framework of the compromises in the Plan, and these releases facilitate a successful completion of the Plan and the Recapitalization. The releases cover parties that could have claims of indemnification or contribution against the Applicants in relation to the Recapitalization, the Plan and other related matters, whose rights against the Applicants have been discharged in the Plan.

[24] I am satisfied that the releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the Applicants.

[25] Further, the releases provided for in the Plan were contained in the Original Plan filed with the court on December 3, 2014 and attached to the Meetings Order. Counsel to the Applicants submits that the Applicants are not aware of any objections to the releases provided for in the Plan.

[26] The Applicants also contend that the releases of the released Directors/Officers are appropriate in the circumstances, given that the released Directors and Officers, in the absence of the Plan releases, could have claims for indemnification or contribution against the Applicants and the release avoids contingent claims for such indemnification or contribution against the Applicants. Further, the releases were negotiated as part of the overall framework of compromises in the Plan. I also note that no Director/Officer Claims were asserted in the Claims Procedure.

[27] The Monitor supports the Applicants' request for the sanction of the Plan, including the releases contained therein.

[28] I am satisfied that in these circumstances, it is appropriate to grant the releases.

[29] The Plan provides for certain alterations to the Cline Articles in order to effectuate certain corporate steps required to implement the Plan, including the consolidation of shares and the cancellation of fractional interests of the Cline Common Shares. I am satisfied that these amendments are necessary in order to effect the provisions of the Plan and that it is appropriate to grant the amendments as part of the approval of the Plan.

[30] The Applicants also request an extension of the stay until April 1, 2015. This request is made pursuant to section 11.02(2) of the CCAA. The court must be satisfied that:

(i) circumstances exist that make the order appropriate; and

(ii) the applicant has acted, and is acting in good faith and with due diligence.

[31] The record establishes that the Applicants have made substantial progress toward the completion of the Recapitalization, but further time is required to implement same. I am satisfied that the test pursuant to section 11.02(2) has been met and it is appropriate to extend the stay until April 1, 2015.

[32] Finally, the Monitor requests approval of its activities and conduct to date and also approval of its Pre-Filing Report, the First Report dated December 16, 2014 and the Second Report together with the activities described therein. No objection was raised with respect to the Monitor's request, which is granted.

[33] For the foregoing reasons, the motion is granted and an order shall issue in the form requested, approving the Plan and providing certain ancillary relief.

R.S.J. Morawetz

Date: January 30, 2015

TAB 5

COURT OF APPEAL FOR ONTARIO

CITATION: Hutchingame Growth Capital Corporation v. Independent Electricity System Operator, 2020 ONCA 430
DATE: 20200702
DOCKET: C66553

Lauwers, Hourigan and Thorburn JJ.A.

BETWEEN

Hutchingame Growth Capital Corporation

Plaintiff (Appellant)

and

Independent Electricity System Operator

Defendant (Respondent)

Michael S. Hebert and Cheryl Gerhardt McLuckie, for the appellant

Thomas G. Conway and Benjamin Grant, for the respondent

Heard: February 25, 2020

On appeal from the judgment of Justice Pierre E. Roger of the Superior Court of Justice, dated January 10, 2019, with reasons reported at 2019 ONSC 259.

Lauwers J.A.:

[1] This appeal arises from a contract dispute over a failed renewable energy project that was to be built and operated by a numbered company carrying on business as Greenview Power.

A. OVERVIEW

[2] In 2007, Greenview Power entered into a Renewable Energy Standard Offer Program Contract ("RESOP Contract") to build a biomass renewable energy facility to generate and supply electricity to the Ontario Power Authority. The respondent, the Independent Electricity System Operator ("IESO"), is the Authority's successor.

[3] Greenview Power's obligations under the RESOP Contract were to build a renewable energy facility and supply electricity for a period of 20 years beginning on November 8, 2010, the "Commercial Operation Date." Greenview Power could not meet this deadline and the IESO amended the RESOP Contract twice, extending the Commercial Operation Date to January 15, 2013. According to the appellant, Hutchingame Growth Capital Corporation ("HGC"), the RESOP Contract had a potential revenue stream of $80 million over its 20-year term.

[4] Greenview Power could not meet the original or revised deadlines in the RESOP Contract for reaching commercial operation. To save the project, in the fall of 2012, HGC, led by its principal Eric Hutchingame, purchased some of Greenview Power's secured debt and assumed its effective control. Another Hutchingame investment vehicle, Sea to Sky Pollution Solutions Corporation ("Sea to Sky"), played a supporting role.

[5] In 2013, HGC entered into the Waiver and Amending Agreement with Greenview Power, the IESO, and Greenview Power's other secured creditors. The Agreement waived specified events of default under the RESOP Contract and amended various targets under it, setting November 8, 2015 as the new Commercial Operation Date. However, Greenview Power went bankrupt on February 24, 2014 and the RESOP Contract terminated.

[6] HGC could have revived the RESOP Contract under s. 9.2(3), a provision in the Contract that permitted it, as a secured creditor, to step into the bankrupt's shoes. Instead of invoking this provision, HGC tried to assign its rights under the RESOP Contract to Truestar Investments Ltd., including the RESOP Contract, using s. 9.2(2). The trustee obtained a vesting order from the bankruptcy court that approved Truestar's purchase of Greenview Power's assets.

[7] The trial judge found that the RESOP Contract clearly stated that it would terminate on bankruptcy, that HGC's efforts to assign the Contract to Truestar failed, and that HGC had failed to prove that it was entitled to damages for breach of contract or negligence. He dismissed HGC's action.

[8] I would dismiss the appeal for the reasons that follow.

B. THE ISSUES

[9] HGC raised several issues that distill into five questions for determination:

1. Did the RESOP Contract terminate automatically when Greenview Power made an assignment in bankruptcy?
2. Was the vesting order effective in vesting the RESOP Contract in Truestar?
3. Did the IESO breach its contractual obligations?
4. Did the IESO owe HGC a duty of care in negligence?
5. Was HGC entitled to damages?

Before analyzing these questions, I set out the factual context.

C. THE FACTUAL CONTEXT

[10] The root of the case lies in the standard form 2007 RESOP Contract. Section 7 expressly stipulates the acts of default by a generator like Greenview Power that could result in the Contract's termination. Some of the defaults could be cured within 30 days after the generator received written notice from the IESO. However, the RESOP Contract provided that when a generator files a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, or makes an assignment in bankruptcy, then the Contract terminates automatically without the need for the IESO to provide notice.

[11] Section 9.2 of the RESOP Contract, which is reproduced in the Appendix to this decision, gave HGC certain rights as a secured creditor. Section 9.2(2) allowed HGC to enforce its security by acquiring Greenview Power's interest, defined as "the right, title and interest of the Generator in or to the Contract

Facility and this Agreement or any benefit or advantage of any of the foregoing," and then selling or assigning the interest to a third party. The s. 9.2(2) right to assign was subject to s. 13.4 of the RESOP Contract, which added two relevant stipulations. First, under s. 13.4(1), the Generator (Greenview Power and subsequently HGC, which stepped into Greenview Power's shoes under the RESOP Contract) was obliged to provide prior written notice of any assignment to the IESO. Second, s. 13.4(4) provided that: "No assignment of this Agreement shall be valid or effective and no change of Control shall be permitted if the assigning Party is in default at the time of the assignment or change of Control." Upon taking control of Greenview Power earlier, under s. 9.2(2), HGC, standing in Greenview Power's shoes, became "bound by all of the Generator's rights and obligations hereunder so long as it is the owner or is in control or possession of the Generator's Interest."

[12] Section 9.2(3) provided that if an identified "Generator Event of Default" terminated the RESOP Contract before the end of its term, then a secured creditor like HGC could revive it by assuming Greenview Power's position. To do so, s. 9.2(3) required HGC to send a written request to the IESO within 90 days of the default that led to the Contract's termination, pay the outstanding amounts, including fees owing to the IESO, and cure any outstanding defaults under the Contract.

(1) Greenview Power defaults and enters into the 2013 Waiver and Amending Agreement

[13] Greenview Power defaulted under the RESOP Contract by filing a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act* in November 2012. It also missed several targeted dates by which commercial operation was to begin.

[14] On May 15, 2013, Greenview Power entered into the Waiver and Amending Agreement with the IESO, HGC, and its other secured creditors. The Agreement waived the effect of Greenview Power's proposal under the *Bankruptcy and Insolvency Act* and its other defaults. It also amended certain provisions of the RESOP Contract.

[15] Sea to Sky also signed in its capacity as interim funder under the proposal. Sea to Sky provided interim financing through a loan made by Truestar to Sea to Sky. Under the loan agreement, Sea to Sky agreed to assign to Truestar all of its interest in the loan being made to Greenview Power and the security that it took over the Greenview assets. As interim funder, Sea to Sky was granted priority for advances that it made to Greenview Power.

[16] It is worth noting that the IESO could have relied on Greenview Power's proposal under the *Bankruptcy and Insolvency Act* as a terminating event. But the IESO wanted the project to succeed. The IESO's counsel, Harry Fogul,

testified that the IESO was prepared to allow the project to proceed because: “the proposal was accepted and Greenview was going to complete the project in accordance with the terms of the proposal and in accordance with the terms of the RESOP contract, that was what [was] understood and that’s what the intention was.” He added: “technically speaking the contract would have terminated but for the fact that the [IESO] was prepared to waive it, which is why the agreement was called a waiver and amending agreement. It was waiving the default.”

[17] The trial judge found that after the parties entered into the Waiver and Amending Agreement, HGC took “no immediate real action” to meet Greenview Power’s new obligations and to put the project back on track to meet the revised Commercial Operation Date: at para. 27.

(2) Greenview Power goes bankrupt

[18] On February 24, 2014, Greenview Power made an assignment in bankruptcy, which had the effect of automatically terminating the RESOP Contract. The trial judge found that HGC did not engage the process required by s. 9.2(3) to revive the Contract, despite making representations to the IESO that it was doing so: at para. 55.

(3) HGC tries to assign its interest to Truestar

[19] HGC took a different tack. On May 15, 2014, several months after Greenview Power's bankruptcy, HGC and Sea to Sky advised the IESO that they wanted to exercise their rights under s. 9.2(2) of the RESOP Contract. On the same day, and without advising the IESO, HGC alone entered into an assignment agreement with Truestar in which it purported to assign its interest in the RESOP Contract and in the Waiver and Amending Agreement, along with its security interest in Greenview Power, to Truestar for $4.7 million. The assignment was prepared without legal assistance. The principals of HGC, Mr. Hutchingame, and Truestar, William Baker, are longstanding acquaintances.

[20] Mr. Hutchingame admitted that the assignment "was not disclosed to the OPA/IESO, or to the secured creditors until after this action was started." He testified that "only he and Mr. Baker were aware of the Assignment to Truestar." Mr. Hutchingame said that: "he had no obligation to tell anyone." However, the trial judge disagreed, noting that s. 13.4(1) of the RESOP Contract required written notice to be given to the IESO prior to the assignment: at para. 50.

[21] On May 23, 2014, the IESO responded to Mr. Hutchingame's request to proceed by assignment under s. 9.2(2) of the RESOP Contract. The IESO stated that it considered that the Contract had terminated automatically under s. 7.1(20) on February 24, 2014 when Greenview Power made the assignment in

bankruptcy, and that it assumed that HGC's May 15, 2014 communication meant that HGC was exercising its rights under s. 9.2(3) of the Contract.

[22] HGC explained that, rather than pursue its rights under s. 9.2(3) of the RESOP Contract, in July 2014, Sea to Sky, in its capacity as interim funder under the terms of Greenview Power's proposal, exercised its rights as a secured creditor and entered into an Agreement of Purchase and Sale to sell all of Greenview Power's assets, including "all real estate, land, equipment, building, intellectual-property, and all of the contracts with the [IESO]" to Truestar for $500,000 (emphasis added).

[23] On July 29, 2014, the trustee in bankruptcy of Greenview Power, moved for an order in bankruptcy court to vest in Truestar all of Greenview Power's assets, including its interest in the RESOP Contract, for $500,000. Mr. Hutchingame did not advise the IESO that this step was being taken. The court made the vesting order on August 21, 2014 and Mr. Hutchingame gave a copy of the order to the IESO that day.

[24] By letter dated September 4, 2014, the IESO reiterated its position that the RESOP Contract had terminated on February 24, 2014 upon Greenview Power's bankruptcy and that HGC could only assign its interest under s. 9.2(2) after following the process mandated by s. 9.2(3) of the RESOP Contract. HGC did not comply with this direction.

[25] Truestar did not pay HGC for Greenview Power's assigned assets. HGC brought this action. It claimed that by taking the position that the RESOP Contract was terminated, the IESO: had thwarted the assignment agreement between HGC and Truestar; had breached the Waiver and Amendment Agreement; and had acted negligently. HGC claimed $4.7 million in damages – the value of the Truestar assignment agreement. The trial judge dismissed the action.

D. ANALYSIS

[26] In this appeal, the interpretation of the *Bankruptcy and Insolvency Act* and the applicable common law are questions of law subject to the correctness standard of review: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 23. This standard would also apply to the interpretation of the RESOP Contract as a standard form contract, standing alone: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 46; *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, leave to appeal refused, [2016] S.C.C.A. No. 39. The Waiver and Amending Agreement was a negotiated contract that amended the RESOP Contract. Accordingly, the interpretation of both contracts together with the remaining issues engage questions of mixed fact and law and are subject to the standard of

palpable and overriding error, except for any extricable errors of law, which are subject to the correctness standard: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 37; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 10.

(1) Issue One: Did the trial judge err in holding that the RESOP Contract terminated automatically upon Greenview Power's bankruptcy?

[27] HGC argues that the RESOP Contract was not terminated by Greenview Power's bankruptcy, for three reasons. First, the Waiver and Amending Agreement superseded the provision that automatically terminated the RESOP Contract on Greenview Power's bankruptcy. Second, the termination provision in the RESOP Contract was invalid because it violated the stay imposed by s. 69.3 of the *Bankruptcy and Insolvency Act.* Third, the termination provision was invalid because it contravened the common law doctrine of fraud upon the bankruptcy law, also known as the "anti-deprivation rule". I address each argument in turn.

(a) The Waiver and Amendment Agreement did not supersede the termination provisions in the RESOP Contract

[28] The trial judge rejected HGC's argument that s. 10(b) of the Waiver and Amending Agreement superseded the termination clause in the RESOP Contract. It provides:

> 10(b) <u>In this Agreement</u>:

> (i) breach of any covenant or other provision <u>hereof</u> by the Generator; or
>
> (ii) a representation or warranty that is incorrect or untrue in any material respect,
>
> shall be deemed to be a Generator Event of Default under the RESOP Contract, provided that a thirty (30) calendar day cure period shall be applicable thereto, and pursuant to which the [IESO] may *inter alia* pursue any remedy available to it under section 7.2 of the RESOP Contract, including (but not limited to) the termination of the RESOP Contract. [Emphasis added.]

[29] The trial judge found that s. 10(b) only provides that a default of any “new obligations” contained in “this Agreement,” being the Waiver and Amending Agreement itself, could be cured within 30 days: at para. 112. He rejected HGC’s core argument, repeated on appeal, for the following reasons: “I also disagree with [HGC] that section 10(b) of the Waiver and Amending Agreement eliminates any automatic terminations of the RESOP Contract and provides a thirty-day cure period for any breach of both the Waiver and Amending Agreement or the underlying RESOP Contract”: at para. 112. He added that, in reaching the Waiver and Amending Agreement, the parties had not discussed what would happen if Greenview Power went bankrupt. Instead, he noted that “the focus of the secured lenders, of Greenview Power, and of the [IESO] was on the success of the proposal, not on its failure”: at para. 116.

[30] The trial judge found that “the text of the RESOP Contract is unambiguous – an assignment into bankruptcy automatically terminates the RESOP Contract

without [any obligation on the part of the IESO to provide] notice": at para. 103. He found that the RESOP Contract therefore automatically terminated on Greenview Power's bankruptcy: at paras. 104, 124. Accordingly, the IESO did not breach the RESOP Contract by taking the position that the bankruptcy had terminated it.

[31] I do not discern any error in the trial judge's interpretation of either the RESOP Contract or the Waiver and Amending Agreement. I agree with him that the Waiver and Amending Agreement did not supersede the termination provisions of the RESOP Contract and that the termination was effective on February 24, 2014 when Greenview Power went bankrupt.

(b) The termination provision in the RESOP Contract was not invalid under s. 69.3 of the *Bankruptcy and Insolvency Act*

[32] Section 69.3 of the *Bankruptcy and Insolvency Act* provides:

> 69.3(1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[33] The trial judge rejected HGC's argument that the automatic termination in the RESOP Contract violated the automatic stay imposed by s. 69.3 of the *Bankruptcy and Insolvency Act.* He noted that the stay only prevents creditors from pursuing claims against the insolvent person: at para. 105.

[34] HGC argues that because the IESO was a creditor of Greenview Power, s. 69.3(1) stayed “any remedial action by [the] IESO to terminate the RESOP Contract.” On this argument, once the stay was in place, the IESO was required to move in bankruptcy court to lift the stay and to provide the written notice to commence the 30-day cure period “that it was required to provide” under the Waiver and Amendment Agreement; or, alternatively, to move in bankruptcy court to appeal or amend the vesting order. But the true reason for HGC’s approach to the stay issue is found in its assertion: “Had [the] IESO taken any of these steps, the matter could have been put before a bankruptcy court and the anti-deprivation rule considered.”

[35] Professor Roderick J. Wood explains: “the automatic stay of proceedings in bankruptcy has never been interpreted as preventing the exercise of [the] right” of “a contracting party [to] terminat[e] an agreement between it and the debtor”: *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law Inc., 2015) at p. 167. He notes that the presence of express provisions having that effect in proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 and in the restructuring provisions of the *Bankruptcy and Insolvency Act* “supports the view that the automatic stay of proceedings was not intended to extend to the termination of executory contracts, since the provision would not be needed otherwise”: at p. 167.

[36] Professor Wood's logic is persuasive, especially in the absence of any contrary authority. I agree with the trial judge that s. 69.3 of the *Bankruptcy and Insolvency Act* did not invalidate the termination provision in the RESOP Contract. I have already noted that there is no basis for HGC's assertion that under the Waiver and Amendment Agreement the IESO was required to give 30 days' written notice of termination when the event of default was bankruptcy.

[37] While HGC anchors its approach to s. 69.3 on the *Bankruptcy and Insolvency Act* itself, it also relies on *Garmeco Canada International Consulting Engineers Ltd. v. International Hi-Tech Industries Inc.* for its submission that, in general, the *Bankruptcy and Insolvency Act* "allows secured creditors to realize on their security despite the stay of proceedings," and that the Act's intention is "not to interfere with the rights of secured creditors": 2011 BCCA 292, 20 B.C.L.R. (5th) 1, at para. 16. HGC seems to argue that, as a secured creditor, it should have been free to exercise its security over Greenview Power's assets without any impediment arising under the RESOP Contract.

[38] I would reject this argument. While the court affirmed the "position of secured creditors" in the event of bankruptcy in *Garmeco*, it ultimately concluded that a stay of proceedings did not apply in that case: at paras. 16, 18 and 23. HGC's reliance on *Garmeco* is misplaced; the case does nothing to support its argument on the effectiveness of the stay of proceedings in this case.

[39] HGC seeks to use s. 69.3 of the *Bankruptcy and Insolvency Act* as a springboard to the common law anti-deprivation rule, to which I now turn.

(c) The termination provision in the RESOP Contract did not violate the common law "anti-deprivation rule"

[40] HGC submits that contractual provisions, like ss. 7.2(2) and 7.1(20), which terminated the RESOP Contract automatically on the bankruptcy of Greenview Power, are void as being contrary to public policy under the common law doctrine of "fraud on the bankruptcy law," particularly the component of the doctrine known as the "anti-deprivation rule". HGC argues that the automatic termination had the effect of removing value from Greenview Power's insolvent estate and prevented secured creditors from exercising their rights over the secured assets.

[41] Professor Wood explains that the anti-deprivation rule invalidates contractual provisions that remove assets otherwise available to creditors in the event of insolvency. He discusses the fraud on the bankruptcy law doctrine in *Bankruptcy and Insolvency Law* at p. 88:

> Canadian courts have recognized that a contractual provision that is designed to remove value from the reach of an insolvent person's creditors is void on the basis that it violates the public policy of equitable and fair distribution on bankruptcy. This is referred to as the "fraud on the bankruptcy law principle." The principle can be usefully broken down into two distinct components: the anti-deprivation rule and the *pari passu* rule. The anti-deprivation rule operates by invalidating provisions that withdraw an asset that would otherwise be available to satisfy the claims of creditors upon the

> insolvency of the party or the commencement of insolvency proceedings. [Internal citations omitted.]

[42] The common law anti-deprivation rule applies in commercial bankruptcies, including Greenview Power's bankruptcy: *Aircell Communications Inc. (Trustee of) v. Bell Mobility Cellular Inc.,* 2013 ONCA 95, at para. 12, citing *Canadian Imperial Bank of Commerce v. Bramalea Inc*. (1995), 33 O.R. (3d) 692, 1995 CanLII 7420 (C.J.); *Capital Steel Inc. v. Chandos Construction Ltd.*, 2019 ABCA 32, 438 D.L.R. (4th) 195, at paras. 21 and 32, leave to appeal granted, [2019] S.C.C.A. No. 109.

[43] In each of these cases, the bankruptcy had the effect of depriving creditors of a valuable asset. In *Aircell*, a dealer of telecommunications products deprived the estate of earned commissions on sales: at paras. 1-2. In *Bramalea*, a clause in a partnership agreement permitted a partner to acquire an insolvent partner's interest in a shopping mall venture at book value rather than at the substantially higher fair market value: at paras. 3, 10. In *Capital Steel*, the contract reduced the amount owing to the bankrupt by ten percent: at paras. 1, 16 and 32.

[44] By contrast, in this case, the IESO received no financial benefit from the automatic termination of the RESOP Contract and removed no value from the reach of Greenview Power's creditors to its benefit. As Mr. Fogul testified at trial, his client had no "skin in the game" or an economic interest in the project; its

interest as a regulator was ensuring "the rules, regulations and the contracts are covered."

[45] The trial judge rejected HGC's argument that the termination clause in the RESOP Contract violated the "anti-deprivation rule," noting that the termination clause in this case "does not offend the public policy expressed in [*Bramalea* and *Aircell*]," because the contractual provision did not cause an inequity among creditors: at para. 109.

[46] I would reject HGC's argument that its rights as a secured creditor under the *Bankruptcy and Insolvency Act* were prejudiced by the automatic termination of the RESOP Contract on bankruptcy. The trial judge noted that the Contract as a whole preserves the rights of secured creditors, like HGC: at paras. 119, 124. Section 9.2(3) of the RESOP Contract was designed to protect a secured creditor, such as HGC, against automatic termination resulting from the generator's bankruptcy; HGC had the right to revive the terminated agreement within 90 days of the bankruptcy if it paid outstanding amounts owing to the IESO and cured existing defaults. Had HGC availed itself of the revival right, it could have exercised its rights as a secured creditor against the Greenview assets.

[47] I see no legal error in the trial judge's determination. I also note that the RESOP Contract is an executory contract. As the IESO points out, "[the] IESO's obligation to buy electricity [did] not arise until Greenview began supplying

electricity in accordance with the contract's terms." In *Capital Steel*, the majority noted that clauses that "operate to terminate executory agreements … [and therefore] eliminat[e] a debtor's opportunity to perform a contract [do] not necessarily result in a deprivation of value that would prejudice creditors" (citations omitted): at para. 34; see also *Belmont Park Investments Pty Ltd. v. BNY Corporate Trustee Services Ltd. & Anor*, [2011] UKSC 38, [2012] 1 A.C. 383.

(d) HGC could not assign its interest in the RESOP Contract to Truestar under s. 9.2(2) without curing the outstanding defaults and reviving the Contract under s. 9.2(3)

[48] Why did Mr. Hutchingame pursue the assignment approach under s. 9.2(2), rather than revive the RESOP Contract under s. 9.2(3)? As noted, revival required payment of outstanding amounts and the curing of existing defaults. The trial judge recounted Mr. Hutchingame's testimony that HGC had the funds to assume Greenview Power's obligations under the RESOP Contract but simply chose not to because doing so "would have been a bad business decision": at para. 87. Perhaps the desire to avoid the minimal expense of complying with s. 9.2(3) explains Mr. Hutchingame's effort to engage s. 9.2(2), rather than s. 9.2(3).

[49] The trial judge found that it would have been impossible for HGC to assign its interest in the RESOP Contract to Truestar under s. 9.2(2) without first curing

the outstanding defaults: at para. 132. He noted that an assignment is only permitted in accordance with s. 13.4, which states that “No assignment of this Agreement shall be valid or effective and no change of Control shall be permitted if the assigning Party is in default at the time of the assignment or change of Control”: at para. 133. The trial judge held that, since Greenview Power, in whose shoes HGC effectively stood, was in default at the time of the purported assignment, HGC could not assign its interests in the RESOP Contract or the Waiver and Amending Agreement. The trial judge reasoned that a secured creditor could not have greater rights to assume and assign Greenview Power’s obligations under the RESOP Contract than Greenview Power itself would have had: at para. 136.

[50] I agree with the trial judge’s interpretation of s. 9.2 of the RESOP Contract. Once the Contract was automatically terminated, HGC’s sole avenue to wring value out of it was to pursue its rights under s. 9.2(3). If it wanted to assign its interest to Truestar under s. 9.2(2), it could only do that after reviving the Contract under s. 9.2(3). But, as Mr. Hutchingame’s trial evidence suggests, he might have avoided this course of action, in part, because he did not want to incur the expense.

(2) Issue Two: Was the vesting order effective in vesting the RESOP Contract in Truestar?

[51] HGC argues that the trial judge erred in ignoring the effect of the vesting order, which was to vest the RESOP Contract in Truestar. The vesting order stated:

> All of the Bankrupt's and Trustee's right, title and interest in and to the Property and the Purchased Assets [defined to include the RESOP Contract]… shall vest absolutely in the Purchaser [defined as Truestar], free and clear of and from any and all security interests (whether contractual, statutory, or otherwise)...[.]

[52] The trial judge observed that the IESO was "clear in its communications with the trustee and Mr. Hutchingame that [its] position was that the RESOP Contract had not been transferred under the vesting order," that Greenview Power's bankruptcy terminated the Contract, and that the Contract "could only be assigned by following the process mandated by section 9.2(3) of the RESOP Contract": at para. 63. He said: "the evidence shows that this was understood by Mr. Hutchingame and Mr. Baker": at para. 63.

[53] The trial judge accepted the IESO's position and found that Mr. Hutchingame's conduct was "the probable cause of the project's failure and of the failed Assignment to Truestar": at para. 152. In arriving at this conclusion, he canvassed the evidence on the vesting order: at paras. 60-64 and 142-154. The trial judge was attentive to the "unusual" circumstances surrounding the

vesting order, particularly that the IESO was not served with motion materials and the motion was made without notice to the IESO, that both the trustee and the court were unaware of the $4.7 million assignment to Truestar, and that "Mr. Hutchingame's dealings were secretive, and he delayed directly addressing the [IESO's] position until … it was too late": at paras. 144-145, 151-152.

[54] When the vesting order came to the IESO's attention, Mr. Fogul went into problem-solving mode. While the IESO wanted the project to succeed, it was not prepared to permit the vesting order to be the vehicle for that success. That was communicated to HGC. Mr. Fogul testified: "My solution was, go and get an amendment to the vesting order, take the RESOP contract out of it and proceed under 9.2(3)."

[55] When asked whether he got instructions from the [IESO] to challenge the vesting order, Mr. Fogul explained that he did not because at that point he understood that "the trustee [would] bring a motion to amend the order[,] change the purchaser, and remove the RESOP contract" from the assets to be vested. This understanding arose from a conference call between Mr. Fogul, counsel for the trustee, counsel for HGC, and Mr. Hutchingame, to which the trial judge referred at para. 148.

[56] At trial, Mr. Fogul explained that the IESO did not bring a motion in bankruptcy court because of this agreement in principle, which never materialized:

> Q. Did you get instructions from the [IESO] to bring any - any motion to amend the vesting order?
>
> A. No, because at that point I had understood that there was an agreement in principle that the trustee was going to bring a motion to amend the order and change the purchaser and remove the RESOP contract, so we were waiting for him to do that, which never happened.
>
> Q. How did - where did you get that understanding from?
>
> A. Well, from the last call we had on the 24th where <u>they said we now have to go to court because we have a new purchaser. We're going to move to amend the approval and vesting order and so I assumed that they were going to do it, but apparently they never did.</u> [Emphasis added.]

[57] On appeal, HGC argues that the vesting order, by its terms, vested the RESOP Contract in Truestar, free and clear of all encumbrances, leaving to creditors the proceeds generated by the sale transaction. In support of its argument, HGC relies on *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.,* 2019 ONCA 508, 435 D.L.R. (4th) 416, at paras. 25 and 139. HGC adds that it was up to the IESO to appeal the vesting order, or

apply to vary it or have it set aside; having failed to do so, the vesting order binds the IESO.

[58] I would reject HGC's argument that the effect of the vesting order was to vest the RESOP Contract in Truestar. The premise of this argument is that the RESOP Contract had not terminated automatically on the date of Greenview Power's bankruptcy, a premise that has already been rejected. There was, in short, nothing left of the RESOP Contract to vest in Truestar. There is also merit in the IESO's argument that if the order effectively had vested the RESOP Contract in Truestar, then only Truestar could bring an action seeking to enforce the IESO's obligations under the RESOP Contract, not HGC.

(3) Issue Three: Did the trial judge err in finding that the IESO did not breach its contractual obligations?

[59] On the facts, the IESO did not give HGC notice of the automatic termination of the RESOP Contract. HGC's argument, that the IESO was required to give at least 30 days' written notice of termination as the result of the Waiver and Amending Agreement, has been rejected. However, the trial judge observed that: "The [IESO] might have acted more transparently upon learning that Greenview had filed for bankruptcy, rather than waiting silently for the 90-day period to expire": at para. 127.

[60] At trial, HGC argued that good faith contractual performance and the common law duty to act honestly in the performance of contractual obligations imposed a duty on the IESO to advise HGC that the RESOP Contract would terminate automatically if Greenview Power went bankrupt. In support of this argument, HGC invoked the duty of good faith in contractual performance stemming from *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494.

[61] The trial judge rejected this argument. In his view, this consequence "should have been quite obvious to [HGC] from the clear language of the RESOP Contract": at para. 126. He took the view that: "The duty of honesty in contractual performance 'does not impose a duty of loyalty or of disclosure or require a party to forgo advantages flowing from the contract'": at para. 126, citing *Bhasin*, at para. 73.

[62] As for the effect of the IESO staying silent during the 90-day period in which HGC could have asked to revive the RESOP Contract, the trial judge found that the IESO's actions did not constitute bad faith or a breach of the general duty of honesty in contractual performance. He stated, at para. 127:

> I do not find that this constituted bad faith or acting in breach of the general duty of honesty in contractual performance because the [IESO] did not lie or otherwise mislead [HGC], and the [IESO's] understanding of section 9.2(3) of the RESOP Contract was straightforward and correct. I also find that thereafter the [IESO] acted honestly and in good faith, and made all

> reasonable efforts to facilitate [HGC's] obtaining a new agreement under section 9.2(3) of the RESOP Contract; this is quite apparent from the evidence…[.]

The IESO's efforts to help revive the RESOP Contract continued well after the end of the 90-day period.

[63] HGC made much of Mr. Hutchingame's testimony that he was "gob-smacked" by the IESO's position that the RESOP Contract had automatically terminated. The trial judge quoted this evidence, noting that Mr. Hutchingame "considered it to be a declaration of war": at para. 54. But the trial judge then pointed out some 11 actions that belied Mr. Hutchingame's asserted position, noting that his communications made "no mention of his alleged shock and dismay at [the IESO's] position": at paras. 54-55, 67. He did not find Mr. Hutchingame to be credible, remarking that his evidence "is often contradicted by the documents": at para. 78. The documents prepared by Mr. Hutchingame "often contain exaggerations and misstatements, and they are also often unsupported by the evidence": at para. 78.

[64] I make this observation about HGC's argument. Assuming that HGC was not fully aware of the automatic termination provision, the IESO's silence during the 90-day period did not prejudice HGC. This is because the IESO effectively waived HGC's obligation to give written notice within the 90-day period of its intention to trigger the revival of the RESOP Contract under s. 9.2(3) by working

with HGC to get the vesting order amended, an effort that HGC itself abandoned. There was no basis for HGC's argument that the IESO breached any duty of good faith contractual performance or the common law duty to act honestly in the performance of its contractual obligations.

[65] The trial judge properly instructed himself on the law and made no palpable and overriding error on the facts. I would dismiss this ground of appeal. The IESO did not breach the terms of the RESOP Contract nor did it fail in its duty of good faith contractual performance.

(4) Issue Four: Did the trial judge err in finding that the IESO was not negligent?

[66] HGC's claim for negligent misrepresentation rests on the foundation that the IESO misrepresented that the Waiver and Amending Agreement would extend the RESOP Contract even if Greenview Power went bankrupt. The trial judge dismissed this claim: "[HGC] failed to prove that the [IESO] made any statement that was untrue, inaccurate, or misleading, that [HGC] relied on such a statement to its detriment, or that such reliance led to [HGC's] damages": at para. 128.

[67] HGC has not shown that the trial judge made a palpable and overriding error in this factual finding. I would dismiss this ground of appeal.

(5) Issue Five: Did the trial judge err in his approach to damages?

[68] Because HGC has not established a legal entitlement to damages for breach of contract or negligence on the IESO's part, there is no need to address the issue of damages.

E. DISPOSITION

[69] For the reasons given, I would dismiss the appeal and award the IESO costs for the appeal in the agreed amount of $25,000 plus disbursements and applicable taxes.

Released: "P.L." July 2, 2020

"P. Lauwers J.A."
"I agree. C.W. Hourigan J.A."
"I agree. Thorburn J.A."

APPENDIX

9.2(2) A Secured Lender may, subject to the provisions of this Agreement, enforce any Secured Lender's Security Agreement and acquire the Generator's Interest in any lawful way and, without limitation, may sell or assign the Generator's Interest provided such sale or assignment complies with the requirements of Section 13.4 and provided further that if the Secured Lender is the owner or is in control or possession of the Generator's Interest, then it shall be entitled to and bound by all of the Generator's rights and obligations hereunder so long as it is the owner or is in control or possession of the Generator's Interest. Despite anything else contained in this Agreement, any Person to whom the Generator's Interest is transferred shall take the Generator's Interest subject to the Generator's obligations under this Agreement.

(3) In the event of the termination of this Agreement prior to the end of the Term due to a Generator Event of Default, the [IESO] shall enter into a New Agreement, which New Agreement shall be effective as of the Termination Date and shall be for the then-remainder of the original Term of this Agreement and otherwise upon the terms contained in this Agreement, provided that the Secured Lender delivers to the [IESO] a written request thereof within ninety (90) days after the Termination Date; and provided further that the [IESO's] obligation to enter into a New Agreement is conditional upon the Secured Lender (a) paying all sums that would, at the time of the execution and delivery thereof, be due to the [IESO] under this Agreement but for such termination, (b) otherwise fully curing any defaults under this Agreement existing immediately prior to termination of this Agreement that are capable of being cured, (c) paying all reasonable costs and expenses, including legal fees, incurred by the [IESO] in connection with such default and termination, and the preparation, execution and delivery of such New Agreement and

related agreements and documents, provided, however, that with respect to any default that could not be cured by the Secured Lender until it obtains possession, such Secured Lender shall have the applicable cure period commencing on the date that it obtains possession to cure such default, and (d) if there is more than one Secured Lender's Security Agreement outstanding in respect of which the [IESO] has received the notice described in Section 9.2(1), delivering to the [IESO] the written consent of all other Secured Lenders with respect to such New Agreement.

TAB 6

CITATION: Lydian International Limited (Re), 2020 ONSC 4006
COURT FILE NO.: CV-19-00633392-00CL
DATE: 2020-07-10

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Elizabeth Pillon, Maria Konyukhova, Sanja Sopic,* and *Nicholas Avis*, for the Applicants

D. J. Miller and *Rachel Bergino*, for Alvarez & Marsal Inc.

Robert Mason and *Virginie Gauthier*, for Osisko Bermuda Limited

Pamela Huff and *Chris Burr*, for Resource Capital Fund VI L.P.

David Bish and *Michael Pickersgill*, for Orion Capital Management

Alexander Steele, for Caterpillar Financial Services (UK) Limited

Bruce Darlington, for ING Bank N.V./Abs Svensk Exportkredit (publ)

John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen and Atilla Bozkay, each in their capacity as a Shareholders of Lydian International Limited

HEARD by ZOOM Hearing and DECIDED: **June 29, 2020**

REASONS RELEASED: **July 10, 2020**

ENDORSEMENT

[1] Lydian International Limited, Lydian Canada Ventures Corporation and Lydian U.K. Corporation Limited (the "Applicants") bring this motion for an order (the "Sanction and Implementation Order"), among other things:

a) declaring that the Meeting of Affected Creditors held on June 19, 2020 was duly convened and held, all in accordance with the Meeting Order;

b) sanctioning and approving the Applicants' Plan of Arrangement (the "Plan") as approved by a requisite majority of Affected Creditors at the Meeting, in accordance with the Plan Meeting Order (each as defined below), a copy of which is attached as Schedule "A" to the draft Sanction and Implementation Order; and

c) granting various other related relief (as more particularly outlined below).

[2] The Applicants submit that the Plan represents the culmination of the Applicants' restructuring efforts and allows for the resolution of these CCAA Proceedings. The Monitor and the majority of the Affected Creditors are supportive of the Plan and if sanctioned and implemented, the Plan will provide a path forward for Lydian Canada and Lydian UK as part of a privatized Restructured Lydian Group (as defined in the Plan) and ultimately lead to the termination of these CCAA Proceedings.

[3] Shortly after the conclusion of the hearing on June 29, 2020, which was conducted by Zoom, I granted the motion with reasons to follow.

[4] The facts with respect to this motion are more fully set out in the Affidavit of Edward A. Sellers sworn June 24, 2020 (the "Sellers Sanction Affidavit"), the Affidavit of Edward A. Sellers sworn June 15, 2020 (the "Sellers Meeting Affidavit") and the Affidavit of Mark Caiger sworn June 11, 2020 (the "BMO Affidavit"). Mr. Sellers and Mr. Caiger were not cross-examined. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Sellers Sanction Affidavit, the Sellers Meeting Affidavit, and the Plan. All references to currency in this factum are references to United States dollars, unless otherwise indicated.

Background

[5] The Applicants are three entities at the top of the Lydian Group. The Lydian Group owns a development-stage gold mine in south-central Armenia through its wholly owned non-applicant operating subsidiary Lydian Armenia. The Applicants contend that they have been unable to access their main operating asset, the Amulsar mine, since June 2018 due to blockades and the associated actions and inactions of the Government of Armenia ("GOA"), and as a result, this has prevented the Applicants from completing construction of the mine and generating revenue in the ordinary course.

[6] The Applicants further contend that the effects of the blockades, amongst other factors, caused the Applicants to seek protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). An Initial Order was granted on December 23, 2019. Alvarez & Marsal Canada Inc. was appointed as Monitor.

[7] In the two years since the blockades began, the Applicants contend that they have used their best efforts to resolve the factors that led to their insolvency, including engaging in negotiations with the GOA, defending their commercial rights and commencing legal proceedings in Armenia to attempt to remove the blockades but these efforts have yet to result in the Applicants re-gaining access to the Amulsar site.

[8] In early 2018, the Applicants retained BMO to canvass the market for potential refinancing or sale options. BMO has conducted multiple rounds of a sales process to market the Lydian Group's mining assets. BMO also ran a process to solicit interest in financing the Applicants' potential Treaty Arbitration. These efforts have not yet resulted in a transaction capable of satisfying the claims of the Applicants' secured lenders.

[9] Since the blockades began, the Senior Lenders have been funding the Applicants' efforts to find a solution to the situation caused by the blockades. The Senior Lenders provided additional financial support to the Lydian Group totalling in excess of $43 million.

[10] As of March 31, 2020, the Lydian Group owed its secured lenders more than $406.8 million.

[11] According to the Applicants, the secured lenders are no longer willing to support the Applicants' efforts to monetize their assets. The Equipment Financiers CAT and ING have taken enforcement steps and Ameriabank has issued preliminary notice of enforcement.

[12] Further, the Applicants point out that the liquidity made available to the Applicants since April 30, 2020 has been conditioned on the Applicants: (i) proposing a restructuring that would be equivalent to the Senior Lenders enforcing their security over the shares of Lydian Canada; and (ii) meeting a deadline to exit the CCAA Proceedings imposed by a majority of the Applicants' Senior Lenders, or further enforcement steps would be taken.

[13] The Applicants submit that the Plan represents the most efficient mechanism to effect an orderly transition of the Lydian Group's affairs. The Applicants contend that the Plan minimizes adverse collateral impacts on Lydian Armenia, provides for winding down the proceedings before this court and the Jersey Court and avoids uncoordinated enforcement steps being taken on the Lydian Group's property to the detriment of the Lydian Group's stakeholders generally.

The Plan

[14] The Plan recognizes and continues the priority position of the Senior Lenders in the Restructured Lydian Group. The Senior Lenders make up the only class eligible to vote on the Plan and receive a distribution thereunder.

[15] According to the Applicants, secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders. Stakeholders with claims at the Lydian International level will continue to have their claims on the Plan Implementation Date, which are intended to be addressed through

the proposed J&E Process in Jersey. Equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan.

[16] The purpose of the Plan is to (a) implement a corporate and financial restructuring of the Applicants, (b) provide for the assignment or settlement of all intercompany debts owing to the Applicants prior to the Effective Time to, among other things, minimize adverse tax consequences to Lydian Armenia and its stakeholders, (c) provide for the equivalent of an assignment of substantially all of the assets of Lydian International to an entity owned and controlled by the Senior Lenders ("SL Newco"), through an amalgamation of Lydian Canada with SL Newco resulting in a new entity ("Restructured Lydian"), and (d) provide a release of all of the existing indebtedness and obligations owing by Lydian International to the Senior Lenders. The Plan will result in the privatization of the Lydian Group to continue as the Restructured Lydian Group.

[17] The steps involved in the Plan's execution are described in detailed in paragraphs 71 to 74 of the Sellers Meeting Affidavit.

[18] The Plan provides for certain releases. The releases are more fully described in the Sellers Meeting Affidavit at paragraph 83.

[19] Mr. Sellers in the Sellers Sanction Affidavit at para. 16 states that the releases were critical components of the negotiations and decision-making process for the D&Os and Senior Lenders in obtaining support for the Plan and resolving these CCAA Proceedings for the benefit of the Restructured Lydian Group, including Lydian Armenia, and all of its stakeholders.

[20] Mr. Sellers further states that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings, which resulted directly in the preservation of the Lydian Group's business, provided numerous opportunities for the Applicants to seek to monetize their assets for the benefit of stakeholders generally and led to the successful negotiation of the Plan for the benefit of the Restructured Lydian Group.

[21] The Plan provides for a Plan Implementation Date on or prior to June 30, 2020. The majority of the Applicants' Senior Lenders have agreed to fund the costs associated with implementing the Plan and termination of the CCAA Proceedings and the J&E Process in Jersey, through the DIP Exit Facility Amendment, which will make a DIP Exit Credit Facility available to the Applicants totalling an estimated additional $1.866 million.

[22] The test that a debtor company must satisfy in seeking the Court's approval for a plan of compromise or arrangement under the CCAA is well established:

a) there must be strict compliance with all statutory requirements;

b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA and prior Orders of the Court in the CCAA proceedings; and

c) the plan must be fair and reasonable.

Issues

[23] The issues for determination on this motion are whether:

a) the Plan is fair and reasonable and should be sanctioned;

b) the releases contemplated by the Plan are appropriate;

c) the increase to the DIP Charge to capture the amounts to be advanced under the DIP Exit Credit Facilities is appropriate;

d) the Stay Period should be extended;

e) the unredacted Sellers Sanction Affidavit should be sealed; and

f) the Monitor's activities, as detailed in the Fifth Report, Sixth Report and Seventh Report, should be approved and the fees of Monitor and its counsel through to June 23, 2020 should be approved.

LAW AND ANALYSIS

Approval of the Plan

[24] To determine whether there has been strict compliance with all statutory requirements, the court considers factors such as whether: (a) the applicant meets the definition of a "debtor company" under section 2 of the CCAA; (b) the applicant has total claims against it in excess of C$5 million; (c) the notice calling the creditors' meeting was sent in accordance with the order of the court; (d) the creditors were properly classified; (e) the meeting of creditors was properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.

[25] The Applicants submit that they have complied with the procedural requirements of the CCAA, the Initial Order, the Amended and Restated Initial Order, the Meeting Order and all other Orders granted by this Court during these CCAA Proceedings. In particular:

a) at the time the Initial Order was granted, the Applicants were found to be "debtor companies" to which the CCAA applied and that the Applicants' liabilities exceeded the C$5 million threshold amount under the CCAA;

b) the classification of the Applicants' Senior Lenders into one voting class (namely, the Affected Creditors class) was approved pursuant to the Meeting Order. This classification was not opposed at the hearing to approve the Meeting, nor was the Meeting Order appealed; the Applicants properly effected notice in accordance with the Meeting Order prior to the

Meeting. In addition, the Applicants issued a press release on June 15, 2020 announcing their intention to seek an Order of the Court to file the Plan and call, hold and conduct a meeting of the Senior Lenders;

c) the Meeting was properly constituted and the voting on the Plan was carried out in accordance with the Meeting Order; and

d) the Plan was approved by the Required Majority.

[26] Sections 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan unless the plan contains certain specified provisions concerning Crown claims, employee claims and pension claims. The Applicants' submit that these provisions of the CCAA are satisfied by the Plan. Crown claims and employee claims are treated by the Plan as Unaffected Claims, meaning that such claims, if any, are not compromised or otherwise affected. The Applicants do not maintain any pension plans, and thus section 6(6) of the CCAA does not apply. In compliance with s. 6(8) of the CCAA, the Plan does not provide for any recovery to equity holders.

[27] I accept the foregoing submissions. I am satisfied that the statutory prerequisites to approval of the Plan have been satisfied, and that there has been strict compliance with all statutory requirements.

[28] The Applicants submit that no unauthorized steps have been taken in these CCAA Proceedings and throughout the entirety of these CCAA Proceedings, they have kept this Court and Monitor appraised of all material aspects of the Applicants' conduct, activities, and key issues they have worked to resolve. I accept this submission.

[29] The Applicants' submit that when considering whether a plan of compromise and arrangement is fair and reasonable, the court should consider the relative degree of prejudice that would flow from granting or refusing to grant the relief sought. Courts should also consider whether the proposed plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (see: *Re Canadian Airlines Corp*, 2000 ABQB 442 at paras. 3, 94, 96, and 137 – 138; and *Re Canwest Global Communications Corp*, 2010 ONSC 4209).

[30] The CCAA permits the filing of a Plan by an Applicant to its secured creditors. The Applicants' submit the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement (*Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA); and *1078385 Ontario Ltd., (Re)*, 2004 CanLII 55041 (ONCA) at paras 30-31 (CanLII), affirming 2004 CanLII 66329 (ONSC)).

[31] The Plan was presented to the Senior Lenders, who are the Applicants' only secured creditors and they voted on the Plan as a single class. The Senior Lenders voted in favour of the Plan by the Required Majority. The value of the claims of Orion and Osisko, who voted in

favour of the Plan comprise 77.8% of the total value of the Affected Creditors who were present and voting.

[32] RCF, a secured lender and 32% shareholder, did not vote in favour of the Plan. RCF has advised that it “does not intend at this time to propose or fund an alternative to the Plan, and in the absence of such an alternative we expect that the Court will have no choice but to issue the Sanction and Implementation Order.”

[33] I have been advised that an issue as between the Senior Lenders and ING has been resolved and for greater certainty this Plan does not compromise any claim that ING may have in respect of proceeds from a successfully-asserted arbitration claim. In addition, the Senior Lenders have agreed that, after payment of all claims of the Senior Lenders to proceeds from a successfully-asserted arbitration claim whether on account of: (i) claims of the Senior Lenders prior to the Plan Implementation Date; or (ii) further advances made by the Senior Lenders (or their affiliates) after the Plan Implementation Date, (whether such further advances are made as equity, secured debt or unsecured debt), the proceeds will be paid to Lydian Armenia in an amount sufficient and to be used to pay ING’s claims against Lydian Armenia prior to any further monies being returned to equity holders.

[34] The Applicants submit that the structure and the nature of the releases in the Plan recognizes and continues the priority position of the Senior Lenders. Secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders.

[35] The Applicants state that they have considered and believe the Plan is the best available outcome for the Applicants, and the interests of the stakeholders generally in the Lydian Group.

[36] As noted in the BMO Affidavit, despite multiple rounds of the SISP and the Treaty Arbitration financing solicitation process, the Applicants submit that no transaction which would satisfy the Lydian Group’s secured obligations is currently available to the Applicants.

[37] The Applicants submit that the monetization of Treaty Arbitration is also not open to the Applicants at this time, and if initiated would require an extended period to litigate and significant additional financial resources.

[38] The Applicants submit that for the purposes of valuing an estate at a plan sanction hearing, the “value has to be determined on a current basis. […] It is inappropriate to value the assets on a speculative or (remote) possibility basis.” A relevant consideration in this analysis is the scope and extent of previous sale or capital raising efforts undertaken by the company and any financial advisors. In support of this submission, the Applicants reference: *Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA), para 36 (CanLII); *Philip Services Corp., Re*, 1999 CanLII 15012 (ONSC) at para 9 (CanLII) *1078385 Ontario Ltd., (Re*), 2004 CanLII 55041 (ONCA) at paras 30-31 (CanLII), affirming *1078385 Ontario Ltd. (Re)*, 2004 CanLII 66329 (ONSC) (CanLII).

[39] The Applicants submit that the outcome of the Plan, that being the distribution of the Applicants' estates to the Senior Lenders, is essentially identical to what would be achieved with any other options available in the circumstances. Without the Plan, the Senior Lenders could (a) privatize the Applicants' assets through the enforcement of share pledges and other security, or (b) could credit bid their debt to acquire the shares or assets; or (c) enforce their secured positions following the Applicants filing for bankruptcy, administration, or liquidation proceedings across multiple jurisdictions. In each scenario (as with the Plan), the Applicants' assets are transitioned to the Senior Lenders.

[40] The foregoing submissions were not challenged.

[41] The Monitor supports the Plan. As noted in the Monitor's Seventh Report, "it is the Monitor's view that the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable."

[42] I am aware that concerns with respect to the fairness of the Plan have been raised by numerous shareholders of Lydian International and oral submissions were made by John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen and Atilla Bozkay.

[43] In addition, a number of emails were sent directly to the court, which were forwarded to counsel to the Monitor. In addition, certain emails were sent to the Monitor. None of the emails were in a proper evidentiary form.

[44] The concerns of the shareholders included criminal complaints of activities in Armenia, the content of certain press releases and the impact of the COVID-19 pandemic. Some shareholders requested a delay of three months in these proceedings.

[45] As previously noted, equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan. Simply put, the shareholders of Lydian International will not receive any compensation for their shareholdings. This is a reflection of the insolvency of the Applicants and the priority position afforded to shareholders by the CCAA.

[46] I recognize that the shareholders' monetary loss will be crystalized if the Plan is sanctioned. However, a monetary loss resulting from the ownership, purchase or sale of their equity interest is an "equity claim" as defined in s. 2(1) of the CCAA. This definition is significant as s. 6(8) of the CCAA provides:

> 6(8) Payment – equity claims – 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.

[47] The Plan does not provide for payment in full of claims that are not equity claims. Consequently, equity claimants are not in the position to receive any compensation.

[48] The economic reality facing the shareholders existed prior to the COVID-19 pandemic. The Applicants were insolvent when they filed these proceedings on December 23, 2019. The financial situation facing the Applicants has not improved since the filing. In fact, it has declined. The mine is not operating with the obvious result that it is not generating revenues and interest continues to accrue on the secured debt. The fact that shareholders will receive no compensation is unfortunate but is a reflection of reality which does not preclude a finding that the Plan is fair and reasonable for the purposes of this motion.

[49] The Senior Lenders have voted in sufficient numbers in favour of the Plan. I am satisfied that there are no viable alternatives, and, in my view, it is not feasible to further delay these proceedings.

[50] Section 6.6 of the Plan provides for full and final releases in favour of the Released Parties, who consist of (a) the Applicants, their employees, agents and advisors (including counsel) and each of the members of the Existing Lydian Group's current and former directors and officers; (b) the Monitor and its counsel; and (c) the Senior Lenders and each of their respective affiliates, affiliated funds, their directors, officers, employees, agents and advisors (including counsel) (collectively, the "Ancillary Releases"). A chart setting out the impact of the releases is attached as Schedule "A" to these reasons.

[51] The Applicants submit that the releases apply to the extent permitted by law and expressly do not apply to, among other things:

a) Lydian Canada's, Lydian UK's or the Senior Lenders' obligations under the Plan or incorporated into the Plan;

b) obligations of any Existing Lydian Group member other than Lydian International under the Credit Agreement and Stream Agreement, and any agreements entered into relating to the foregoing, from and after the Plan Implementation Date;

c) any claims arising from the willful misconduct or gross negligence of any applicable Released Party; and

d) any Director from any Director Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[52] Unsecured creditors' claims, other than the Ancillary Releases in favour of the Directors, are not compromised or released and remain in the Restructured Lydian Group.

[53] The Applicants submit that it is accepted that there is jurisdiction to sanction plans containing releases if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad. 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 (see: *Re Canadian Airlines Corp*, 2000 ABQB 442

at para 92 (CanLII) CCAA at s. 5(1); *Re Metcalfe & Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 61 and 70 (CanLII); *Re Canwest Global Communications Corp*, 2010 ONSC 4209 at para 28-30 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 85-88 (CanLII).

[54] The Applicants submit that in considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the courts have considered the following factors:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.

[55] The Applicants submit that the releases were critical components of the decision-making process for the Applicants' directors and officers and Senior Lenders' participation in these CCAA Proceedings in proposing the Plan and the Applicants submit that they would not have brought forward the Plan absent the inclusion of the releases.

[56] The Applicants also submit that the support of the Senior Lenders is essential to the Plan's viability. Without such support, which is conditional on the releases, the Plan would not succeed.

[57] The Applicants submit that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. The extensive efforts of the Applicants' directors and officers and the Senior Lenders and Monitor resulted in the negotiation of the Plan, which forms the foundation for the completion of these CCAA Proceedings. The Senior Lenders financial contributions through forbearances, additional advances and DIP and Exit Financing were instrumental.

[58] The Applicants also submit that the releases are an integral part of the CCAA Plan which provides an orderly and effective alternative to uncoordinated and disruptive secured lender enforcement proceedings. The Plan permits unsecured creditors future potential recovery in the Restructured Lydian Group, which may not exist in bankruptcy (*Re Metcalfe &Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 71 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 80-82 (CanLII).

[59] The Applicants submit that this Court has exercised its authority to grant similar releases, including in circumstances where the released claims included claims of parties who did not vote on the plan and were not eligible to receive distributions (*Target Canada Co. et al*. (2 June 2016), Toronto CV-15-10832-00CL (Ont. Sup. Ct. [Comm. List]) Sanction and Vesting Order at Schedule "B" art. 7 (Monitor's website); *Rubicon Minerals Corporation et al*. (8 December 2016), Toronto CV-16-11566-00CL (Ont. Sup. Ct. [Comm. List]) Sanction Order at Schedule "A" art. 7 (Monitor's website); and *Nortel Networks Corporation et al*. (30 November 2016), Toronto 09-CL-7950 (Ont. Sup. Ct. [Comm. List]) Plan of Compromise and Arrangement at art. 7 (Monitor's website)).

[60] Full disclosure of the releases was made in (a) the draft Plan that was circulated to the Service List and filed with this Court as part of the Applicants' Motion Record (returnable June 18, 2020); and (b) the Plan attached to the Meeting Order. The Applicants also issued the Press Releases. This notification process ensured that the Applicants' stakeholders had notice of the nature and effect of the Plan and releases.

[61] The foregoing submissions with respect to the releases were not challenged.

[62] In my view, each of the Released Parties has made a contribution to the development of the Plan. In arriving at this determination, I have taken into account the activities of the Released Parties as described in the Reports of the court-appointed Monitor. I am satisfied that it is appropriate for the Plan to include the releases in favour of the Released Parties.

[63] The development of this Plan has been challenging and as the Monitor has stated, "the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable".

[64] I accept this assessment and find that the Plan is fair and reasonable in the circumstances.

DIP Charge

[65] The terms of the DIP Exit Facility Amendment are described in the Sellers Sanction Affidavit. The DIP Exit Facility Amendment provides for exit financing totalling $1.866 million to assist in implementing the Plan and taking the necessary ancillary steps to terminate the CCAA Proceedings and support the J&E Process.

[66] This Court has the jurisdiction to authorize funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA. These same provisions of the CCAA provide this Court with the authority to approve amendments to a DIP agreement and secure all obligations arising from the amended DIP loans with an increased DIP charge.

[67] The Applicants submit that, based on the following, the DIP Amendment should be approved and the increase to the DIP Facility should be secured by the DIP Charge:

a) the DIP Exit Credit Facility is necessary to enable the Applicants to implement the Plan;

b) the Monitor is supportive of the DIP Exit Facility Amendment;

c) the DIP Exit Facility Amendment is not anticipated to give rise to any material financial prejudice; and

d) the DIP Lenders are the majority of Senior Lenders.

[68] I am satisfied that the requested relief in respect to the DIP Amendment is reasonably necessary and appropriate in the circumstances.

Sealing Request

[69] The Applicants seek to seal the unredacted Sellers Sanction Affidavit on the basis that the redacted portions of the Sellers Sanction Affidavit contain commercially sensitive information, the disclosure of which could be harmful to stakeholders.

[70] The redactions currently being sought are consistent with previous Orders in these CCAA Proceedings. In my view, the documents in question contain sensitive commercial information. Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, 2002 Sec. 41 at para. 53 I am satisfied that the request for a sealing order is appropriate and is granted.

Stay Period

[71] On the Plan Implementation Date, the CCAA Proceedings with respect to Lydian UK and Lydian Canada will be terminated, such that Lydian International will be the only remaining Applicant in the CCAA Proceedings. The Applicants are requesting an extension of the Stay Period for Lydian International until and including the earlier of (i) the issuance of the Monitor's CCAA Termination Certificate and (ii) December 21, 2020 to enable the remaining Applicant and the Monitor to take the steps necessary to implement the Plan and terminate the CCAA Proceedings and initiate the J&E Process. The Applicants are also requesting an extension of the Stay Period for the Non-Applicant Stay Parties (other than Lydian US) until and including the earlier of the issuance of the Monitor's Plan Implementation Certificate.

[72] I am satisfied that the Applicants in requesting the extension of the Stay Period have demonstrated that circumstances exist that make the order appropriate; and that they have acted and are acting in good faith and with due diligence such that the request is appropriate.

Approval of Monitor's Activities

[73] The Applicants are seeking an order approving the Monitor's activities to date, as detailed in the Fifth Report, Sixth Report and the Seventh Report (collectively, the "Reports").

This Court has already approved the activities of the Monitor that were detailed in its previous reports. There was no opposition to the request.

[74] I am satisfied that the Reports and the activities described therein should be approved. The Reports were prepared in a manner consistent with the Monitor's duties and the provisions of the CCAA and in compliance with the Initial Order. The Reports are approved in accordance with the language provided in the draft order.

Approval of Monitor's Fees

[75] The Applicants further seek approval of the fees and disbursements of (i) the Monitor for the period April 14, 2020 to June 23, 2020, inclusive, and (ii) counsel to the Monitor for the period April 16, 2020 to June 23, 2020. The Applicants have reviewed the fees of the Monitor and its counsel and support the payment of the same.

[76] I am satisfied that the fee requests are appropriate in the circumstances and they are approved.

DISPOSITION

[77] The Applicants' motion is granted. The Plan is sanctioned and approved. The ancillary relief referenced in the motion is also granted and an Order reflecting the foregoing has been signed.

Chief Justice Geoffrey B. Morawetz

Date: July 10, 2020

SCHEDULE "A"

Lydian International Limited et al.

Impact of the Releases Described in s. 6.6 of the Plan

Lydian Jersey		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Guarantee of Equipment Lessors ING, CAT, Ameriabank	Not Released. Addressed in the J&E Process in Jersey	Section 6.6 (carve-out (E))
Other Unsecured Claims Includes Maverix Metals claim against Lydian Jersey	Not Released. Addressed in the J&E Process in Jersey.	Section 6.6 (carve-out (E))
Equity Claims Held by RCF, Orion, and public Shareholders	Not Released. Addressed in the J&E Process in Jersey.	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Intercompany Claims Claims by Lydian Jersey against Lydian Canada and other subsidiaries	Assigned to Lydian Canada	Section 6.3(h)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian Canada		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors[1] ING, CAT, Ameriabank	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Jersey in Lydian Canada	Not Released (but subject to amalgamation with SL Newco)	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

[1] This includes contractual rights as outlined in the Waiver and Consent Agreement between Lydian Jersey, Lydian Canada, Lydian UK and Lydian Armenia dated November 26, 2018 (the "**Waiver**").

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian UK		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors ING, CAT, Ameriabank[2]	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in Lydian UK	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

[2] This includes the contractual rights outlined in the Waiver.

11910728 Canada Inc. (“DirectorCo”)		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in DirectorCo	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal cousnel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor’s legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian International Holdings Limited, Lydian Resources Armenia Limited, and Lydian Resources Kosovo Limited		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Other Secured Claims Includes claim of Maverix Metals in shares of Lydian Resources Armenia Limited, which is subordinated to claims of Senior Lenders	Not Released	Section 6.6
Unsecured Claims Includes Maverix Metals claim against Lydian International Holdings Limited	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian UK in Lydian International Holdings Limited, and shareholdings of Lydian International Holdings Limited in Lydian Resources Armenia (“**BVI**”) and Lydian Resources Kosovo Limited Includes Maverix Metals’ share pledge in BVI	Not Released	Section 6.6 (carve-out (E))
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor’s legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian Armenia		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Equipment Lessor Secured Claims ING, CAT and Ameriabank (to the extent secured by their collateral)	Not Released	Section 6.6 (carve-out (E))
Equipment Lessor Unsecured Claims ING, CAT and Ameriabank (unsecured deficiency claims)	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims e.g. Trade creditors	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings held by BVI / DirectorCo (as sole shareholder representative of BVI	Not Released	Section 3.5
D&O Claims Claims against the Directors	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6 (i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian US Lydian Zoloto, Lydian Resources Georgia Limited ("Lydian Georgia") and Georgian Resource Company LLC ("Lydian GRC", and collectively with Lydian US, Lydian Zoloto and Lydian Georgia, the "Released Guarantors" under the Plan)		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Claims	Not Released	Section 6.6
Equity Claims (a) Shareholdings of Lydian Jersey in Lydian US, Lydian Georgia and Lydian Zoloto; and (b) Shareholdings of Lydian Georgia in Lydian GRC	(a) Not Released. Per s. 6.4 of the Plan, Lydian US and Lydian Zoloto to be wound-up and dissolved pursuant to the laws of Colorado and Armenia, respectively. (b) Lydian Georgia shares held by Lydian Jersey to be transferred to Lydian Georgia Purchaser on Plan Implementation Date. (b) Shares of Lydian GRC held by Lydian Georgia not released. See note re: Lydian Georgia above.	Section 3.5 and section 6.4
D&O Claims, Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

TAB 7

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does not permit a release of claims against third parties and that 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.

Held, the appeal should be dismissed.

On a proper interpretation, 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. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; 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 CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entre to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to 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.

While the principle 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 is an important one, 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.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion 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 was reasonable.

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Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Q.B.); NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883, 261 D.L.R. (4th) 368, 204 O.A.C. 205, 11 B.L.R. (4th) 185, 15

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APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

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 [page517] 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 timetable -- 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 Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) 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. [page518]

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

[page519] 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 Montreal Protocol -- the parties committed [page520] 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 [page521] 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 ABDP 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 art. 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 [page522] 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 co-operated 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 25. The vote was overwhelmingly in support of the Plan -- 96 per cent 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 per cent of those connected with the development of the Plan voted positively, as did 80 per cent 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 [page523] 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? [page524]

(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. [See Note 1 below] 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 [page525] 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 entre 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] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[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", [See Note 2 below] 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 [page526] -- 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": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 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 Qubec 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. [page527]

[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] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., 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 (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in Elan, supra, at pp. 306-307 O.R.:

> [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [See Note 3 below] 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 [page528] 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 [page529] 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. [page530]

. . . . .

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: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (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.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688,

[2000] O.J. No. 3993 (C.A.), at para. 11. 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 Air Canada (Re), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[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] T&N Ltd. and Others (Re), supra, is instructive in this regard. It is a rare example of a court focusing 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. [See Note 4 below]

[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 [page532] 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. [See Note 5 below] 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 [page533] 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 [See Note 6 below] 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; [page534]
(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, 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:

> 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.
>
> 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 [page535] Bench in Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (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 Canadian Airlines (Re), however, the releases in those restructurings -- including Muscletech -- 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 Canadian Airlines (Re) 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 wellspring 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, [See Note 7 below] 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). [page536]

[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, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (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. [page537] 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:

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 p. 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.

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 [page538] 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--vis the creditors themselves and not directly involving the company.

(Citations omitted; emphasis added)
See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (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 [page539] 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: Stelco Inc. (Re), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (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):

> 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.
>
> . . . . .
>
> 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.
>
> . . . . . [page540]
>
> 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 [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing 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. [page542]

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.

[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: [See Note 8 below]

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, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associs lte), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] 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; E.A. Driedger and Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham, Ont.: 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. [page544]

[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: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p.

661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "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 [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (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: Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. 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, [page546] 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, [page547] 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 per cent 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 [page548] 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.

Appeal dismissed.

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 dpt et placement du Qubec
Canaccord Capital Corporation [page549]
Canada Mortgage and Housing Corporation
Canada Post Corporation
Credit Union Central Alberta Limited
Credit Union Central of BC
Credit Union Central of Canada

Credit Union Central of Ontario
Credit Union Central of Saskatchewan
Desjardins Group
Magna International Inc.
National Bank of Canada/National Bank Financial Inc.
NAV Canada
Northwater Capital Management Inc.
Public Sector Pension Investment Board
The Governors of the University of Alberta

SCHEDULE "C" -- COUNSEL

(1) Benjamin Zarnett and Frederick L. Myers, for the Pan-Canadian Investors Committee
(2) Aubrey E. Kauffman and Stuart Brotman, for 4446372 Canada Inc. and 6932819 Canada Inc.
(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 Dpt et Placement du Qubec
(8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]
(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, Sbastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aroports de Montral, Aroports de Montral Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Mtropolitaine de Transport (AMT), Giro Inc., Vtements 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.

Notes

Note 1: Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

Note 2: Georgina R. Jackson and 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, B.C.: Carswell, 2007).

Note 3: Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

Note 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.

Note 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.

Note 6: A majority in number representing two-thirds in value of the creditors (s. 6).

Note 7: Steinberg was originally reported in French: Steinberg Inc. c. Michaud, [1993] J.Q. no. 1076, [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.

Note 8: Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

TAB 8

CITATION: Re Green Relief Inc.
<u>2020 ONSC 6837</u>
COURT FILE NO.: CV-20-00639217-00CL
DATE: 20201109

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GREEN RELIEF INC.** (the "**Applicant**")

BEFORE: Koehnen J.

COUNSEL: C *Robert I. Thornton*, *Rebecca L. Kennedy*, *Mitchell Grossell*, for the Applicant

Peter Osborne, Christopher Yung for the directors Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel.

Mark Abradjian for Tony Battaglia in his capacity as shareholder and creditor

David Ward for 2650064 Ontario Inc.

Alex Henderson for Susan Basmaji

Gavin Finlayson for Auxley Cannabis Group Inc. and Kolab Project Inc.

Anton Granic on his own behalf

Rory McGovern, for Steve LeBlanc

Alan Dick and Adrienne Boudreau for Thomas Saunders

Steven Weisz and Amanda McInnis for Lyn Mary Bravo

Brian Duxbury for Warren Bravo

Alex Henderson for Susan Basmaji

Robert Kennaley, *Joshua W. Winter* for Henry Schilthuis and Mark Lloyd

Danny Nunes, for the Monitor

HEARD: November 2 and 3, 2020

ENDORSEMENT

[1] The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.

[2] For the reasons set out below, I:

a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.

b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.

c. Decline to extend the benefit of the release to Susan Basmaji.

I. The Sale Transaction

[3] Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing, Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.

[4] 265 Co. will pay $5,000,000 for the common shares. Approximately $1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will

pay Residual Co. up to $7,000,000 as an earn out during the first two fiscal years following closing. The earn out is based on a payment of 25% of annual EBITDA above $5,000,000.

[5] Section 36(3) of the CCAA provides that, when deciding whether to authorize a sale of assets, the court should consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the Monitor approved the process leading to the proposed sale;

(c) whether the Monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which creditors were consulted;

(e) the effects of the proposed sale or distribution on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[6] These factors are consistent with the principles set out in *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON CA) at para. 16 for the approval of a sales transaction.

[7] I am satisfied that the principles of *Soundair* and the factors set out in section 36 (3) of the CCAA have been met here.

[8] The process leading to the Transaction was reasonable in the circumstances. While there was no formal sale and investor solicitation process, the transaction was the culmination of a seven-month long Notice of Intention and CCAA proceeding. The proceeding involved vigorously competing stakeholders and a competitive bidding process between interested purchasers. The competing stakeholder groups had ample opportunity to bring the business to the attention of potential purchasers. I am satisfied that there was ample information available and ample time for stakeholders to participate in the purchase process or bring the purchase to the attention of market players who may be interested in acquiring Green Relief. The Monitor approved the process and the Transaction. The Monitor notes that its liquidation analysis demonstrates that the Transaction is preferable to a bankruptcy. While creditors were not formally consulted on the process, they had ample information about it as a result of the ongoing CCAA proceeding. Creditors appeared at the various hearings. At times they made submissions in favour of an alternative bid, which submissions I gave effect to. The creditors who have made submissions before me on this motion approve of the Transaction and the release. No creditors ever objected to the process that was being followed. The Transaction makes funds available for creditors and is the best transaction available.

[9] No one opposes the Transaction. Those who spoke in opposition on the motion did not oppose the Transaction but opposed only the release.

II. The Release

[10] The release is opposed by the founders of Green Relief, Steven Leblanc, Warren Bravo and Lynn Bravo. They are supported on this motion by three other shareholders, Thomas Saunders, Henry Schilthuis and Mark Lloyd. For ease of reference, I will refer to those who oppose the release as the Objectors.

[11] There is a long, bitter history of litigation and threats of litigation between the founders, the existing board and Green Relief's approximately 700 other shareholders.

[12] The Objectors argue that I should reject the release because:

(i) It was improper to include it as a condition precedent to the Transaction.

(ii) I have no jurisdiction to approve the release.

(iii) The release fails to meet the test set out in case law concerning releases.

(iv) The release is too broad in scope.

(i) Release as a Condition Precedent

[13] The Objectors note that the term sheet that preceded this motion and that I approved, did not contain any releases, let alone as a condition precedent to a transaction. Mr. Leblanc says he did not oppose the term sheet because it did not refer to releases. As negotiations towards a final agreement developed, the Company and the Monitor advised that Green Relief would be bringing a motion to approve releases. When the issue of a motion to approve releases arose, 265 Co. advised that it was agnostic about releases and that the releases were not theirs to give or ask for. The Objectors note that, instead of a motion to approve a release, Green Relief presented a transaction that contains a release as a condition precedent. The Objectors submit that the court should not be strong-armed in this fashion.

[14] Both Green Relief and the Monitor did advise the court they would be bringing a motion to seek permission to include a release in the Transaction. It is certainly preferable for parties to live by representations they make to the court rather than represent one thing and do another. There is no evidence before me about how the release came to be a condition precedent in the transaction. 265 Co. made no representations in support of the release although it wants the Transaction to be approved. I infer from 265 Co.'s submissions that it does not care about the release and that the release was inserted at the insistence of others.

[15] That certain parties have characterized the release as a condition precedent, is irrelevant to my analysis. Given that Green Relief and the Monitor represented to the court that they would be seeking the court's approval for any release, I will hold them to that representation. I do not feel in any way constrained to accept or reject the release simply because it has been included as a condition precedent. I consider myself free to approve the Transaction with or without the release.

(ii) Jurisdiction to Grant Release

[16] The Objectors submit that I have no jurisdiction to grant the release because the wording of the CCAA does not permit it on the facts of this case.

[17] The Objectors begin their analysis with section 5.1 (1) of the CCAA which provides:

> 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 (emphasis added).

[18] The Objectors note that the section contains two qualifications. First it provides that a compromise or arrangement may include a release. Second, it limits the release to prefiling claims

[19] The Objectors note that the cases to which Green Relief points for the authority to grant a release address the release at the same time as the plan is being approved. Here, there is no plan to approve yet.

[20] The Objectors submit that the distinction is significant because a plan is only approved after a claims process, negotiation for a plan, a meeting approving the plan and a two thirds majority vote in favour of the plan. Those steps are important in their view because they refine the claims against the company and ascertain the value of those claims.

[21] Green Relief has not yet conducted a claims process or proposed a plan. Instead, the objective is to complete the Transaction, put $3,500,000 into Residual Co. and conduct a claims process once Residual Co. has been funded.

[22] Green Relief has not yet decided whether it will address litigation claims inside or outside the CCAA claims process.

[23] While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.

[24] The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In large part I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

[25] Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.

[26] At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.* 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

(iii) The Test for a Release

[27] In *Lydian International Limited (Re)* 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

(a) Whether the claims to be released are rationally connected to the purpose of the plan;

(b) Whether the plan can succeed without the releases;

(c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) Whether the releases are fair, reasonable and not overly-broad.

[28] As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

[29] In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian,* it warrants separate identification on the facts of the case before me.

[30] The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test. The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

The Quality of the Claims being Released

[31] As noted earlier, the principal Objectors are the founders of Green Relief Steven Leblanc, Warren Bravo and Lynn Bravo. Relations between the founders on the one hand and the existing board and other shareholders are poisoned.

[32] On the motion before me, shareholders spoke out against the founders and made submissions to the effect that the release should not preclude any claims by shareholders against the founders. Those shareholders see themselves as having been deprived of their entire investment, in some cases their life savings, because of alleged misrepresentations or improper transactions by the founders. None of those allegations are before me. I raise them only to set the highly litigious context in which the release arises. The release does not propose to release claims against the founders but only releases claims against current directors, Green Relief's legal counsel, the Monitor and its legal counsel.

[33] This proceeding has been highly litigious from the outset, particularly in light of the relatively modest size of the estate at issue. It has been marred by litigation over who is a shareholder, who is or should be a director and who is a creditor.

[34] This follows on a highly contentious corporate history involving struggles between shareholder groups, allegations of misrepresentation and allegations of fraud.

[35] The Objectors' primary opposition to the release is based on their desire to bring an action against the current directors, the Company's legal advisors during the CCAA proceedings, the Monitor and its counsel for their conduct during the CCAA proceedings. The Objectors submit that the current Board, the Monitor and their legal counsel misled the court by suggesting that they had a transaction in the offing that would have injected $20,000,000 into Green Relief. The Objectors say that the releasees did insufficient due diligence to determine whether the proposed purchaser in fact had $20,000,000 available.

[36] The Objectors submit that the Company has incurred needless professional fees because of the fruitless pursuit of the $20,000,000 transaction and that Green Relief suffered a loss of chance in that it was deprived of the ability to pursue alternative transactions.

[37] If anything, the proposed action demonstrates the need for a release. In the overall circumstances of the case, the threat of litigation against the current board, the Company's counsel, the Monitor and its counsel is unfounded and disproportionate. To demonstrate this requires some context and background.

[38] At the outset of the proceeding, 265 Co. proposed to extend a $5,000,000 operating loan to Green Relief. The loan provided no money for creditors. The board feared that accepting the loan would inevitably put Green Relief further into debt and ultimately end up with 265 Co. having ownership of Green Relief without having provided anything for other stakeholders. Mr. Leblanc supported the 265 Co. proposal and urged that I adopt it.

[39] The board urged me to allow them to pursue a proposal from another investor, Mr. Vercouteren. The Vercouteren proposal would have injected $20,000,000 into Green Relief. As it turns out, the Vercouteren proposal did not materialize. Initially the court was advised that the Vercouteren proposal was being delayed because of administrative holdups attributable to the Covid 19 pandemic. A few months later it was discovered that the delays were attributable to the fact that the Vercouteren proposal was contingent upon the completion of another transaction in Europe. The nature of that transaction, its status, closing date, likelihood of closing and reason for not closing to date were never revealed.

[40] It is fair to say that when I discovered this, I expressed frustration to the Applicant for having failed to disclose the true status of the Vercouteren proposal from the outset. The Applicant assured me that they had done due diligence on Mr. Vercouteren and had been assured by his counsel, a reputable law firm, that he was a person of financial substance with the means to complete a transaction of the sort he had proposed.

[41] With the benefit of hindsight one can debate whether the board acted perfectly, their conduct, however, ultimately led to the situation we find ourselves in now which is one that has 265 Co. offering more money to creditors and potentially other stakeholders than its initial proposal did. The proposal I am being asked to approve would see 265 Co. inject $5,000,000 of which $1,500,000 would be for operating purposes and $3,500,000 would be for distribution to creditors. In addition, the 265 Co. proposal contains an earn out of up to an additional $7,000,000 for distribution to creditors. While I agree that it does not offer $20,000,000, the reality is that $20,000,000 was not on the table.

[42] Mr. McGovern, on behalf of Mr. Leblanc submits that the fact that the current offer of 265 Co. is superior to the prior offer does not end the analysis because the board and its advisors got that superior offer by engaging in questionable conduct. According to Mr. McGovern, this introduces moral hazard into the equation which is undesirable.

[43] On that analysis, if anyone has been damaged by the alleged moral hazard, it is 265 Co. which has been led to improve its previous offers based on allegedly misleading information. However, 265 Co. does not complain. It wishes to close the Transaction.

[44] Mr. Dick on behalf of Mr. Saunders and Mr. Kennaley on behalf of Messrs. Schilthuis and Lloyd submit that the Objectors should be able to pursue their loss of chance claim. They argue that there were no other bids for Green Relief because the size of the Vercouteren proposal inhibited others from bidding. While perhaps initially appealing as a basis to speculate about what other bids may have been available, I do not accept the submission for three reasons.

[45] First, the Vercouteren proposal did not stop 265 Co. from making its $5,000,000 operating loan proposal. It also did not stop 265 Co. from making a significantly more superior offer later subject to an exit right based on what its due diligence revealed. Anyone who was seriously interested in the business could have made an offer with a due diligence exit right. There is nothing unusual in that type of proposal

[46] Second, the founders supported 265 Co.'s initial inferior proposal. Had they truly believed Green Relief was worth $20,000,000, it is unlikely they would have done so. In addition, the founders were ideally placed to find other financial solutions preferable to the one on offer. They did not do so. Even when they learned that the current proposal was conditional on the release, the Objectors did not suggest that the company return to the drawing board to search for another transaction. The Objectors want me to approve the Transaction but with the release removed.

[47] Third, no creditor objects to the Transaction. Any hope of a transaction that would offer more funds for creditors, let alone shareholders, than the Transaction does is illusory. At an earlier stage in this proceeding, Mr. Weisz stated that "Green Relief is hopelessly insolvent": see my endorsement of April 20, 2020 at para. 6. At the time, Green Relief was in default of leases, had tax arrears of over $100,000 and was over five months in arrears on a mortgage in favour of Rescom. Hopelessly insolvent companies do not have enough money to pay off creditors, let alone provide value to shareholders. This particular hopelessly insolvent company is a cannabis business. The entire cannabis industry is undergoing a fundamental shakeup. There is no shortage of CCAA proceedings involving players in the cannabis industry. The harsh business reality is that creditors, let alone shareholders, will come out short in these restructurings. If anyone stands to gain from a superior offer, it is creditors. Yet no creditor, apart from Ms. Bravo who asserts that she is a creditor, wants to pursue a claim against anyone for their conduct of the CCAA proceeding.

[48] In those circumstances, I am satisfied that whatever right of action is being removed by the release is so insubstantial that the court need not be concerned about depriving anyone of a cause of action that has even a remote chance of success. At best, it is a cause of action that is entirely without legal merit but which might have some economic value if a defendant were prepared to settle on the basis of the claim's nuisance value. Permitting unmeritorious claims to proceed so that the founders can try to extract a nuisance value settlement arising from steps that were approved by the court at each stage would amount to legally authorized extortion which I am not inclined to permit.

[49] In the circumstances described above, the quality of the claims released would incline me to approve the release.

Application of the Lydian Factors

[50] **Releasees necessary and essential:** The released parties here were necessary and essential to the restructuring. A CCAA proceeding quite obviously cannot proceed without a Monitor, Monitor's counsel or company counsel. Similarly, a restructuring cannot proceed without the other releasees like directors, officers and employees.

[51] **Rational connection between claims released and the purpose of the plan:** The claims released are rationally connected to the purpose of the plan. The object of the release is to diminish indemnity claims by the releasees against Residual Co. and the pool of cash that is being created in its hands to satisfy creditor claims. Given that one purpose of a CCAA proceeding is to maximize creditor recovery, a release which helps do that is rationally connected to the purpose of the plan.

[52] **Whether the plan can succeed without the releases** is unknown. The directors have made the releases a condition precedent to the plan. The court should not accept the release simply because it is said to be a condition precedent. In the circumstances of this case, the condition precedent strikes me as more of a strong-arm tactic that courts should resist. I feel myself at liberty to call the directors' bluff and approve the Transaction without the release.

[53] Success of the plan without releases should, however, also be assessed with regard to factors other than potential strong-arming by incumbent directors. Here, the pool of assets immediately available for distribution of creditors is approximately $3,500,000. As noted, the releasees may have a claim on those funds to satisfy any indemnity claims arising out of the litigation. Mr. McGovern's announced desire to sue the Monitor, its counsel, the directors and Green Relief's counsel for their conduct during the restructuring may give rise to indemnity claims of a size that would make a significant dent in the cash available for creditors. That diminution would make the plan significantly less successful and, depending on circumstances, could eliminate assets available for creditors.

[54] **Did the releasees contribute to the plan:** While there is not yet a plan, the releasees have clearly contributed to get the Company to this stage. The Monitor, its counsel, the directors and Company counsel dedicated time and effort to the CCAA proceedings. Professional advisors contributed further by deferring billing and collection. Messrs. Jha and Battaglia contributed $1,500,000 of their personal funds to provide DIP financing at relatively modest interest rates. Mr. Battaglia contributed $220,000. Dr. Jha initially contributed $500,000 and then increased his contribution to $1,250,000 in June 2020.

[55] **Does the release benefit the debtor as well as creditors:** The release benefits the debtor in that it helps facilitate a transaction that will make funds available to creditors. In the absence of the release, the funds available to creditors could be significantly diminished because of indemnity claims by the releasees. Those indemnity claims would include claims for advancement of defence costs. The advancement of defence costs would be claimed in relation to an action that questions the conduct of the releasees during a court supervised and court approved the process. As noted above, the nature of those claims is highly tenuous.

[56] **Creditors knowledge of the nature and effect of the release:** All creditors on the service list were served with materials relating to this motion. Creditors were free to attend the hearing, several did. Those creditors who made submissions on the motion supported the release.

[57] A consideration of the foregoing *Lydian* factors would also incline me to approve the release. If I balance the right to the Objectors to pursue the releasees for their conduct during the CCAA proceeding against the right of creditors to maximize recovery against the Green Relief estate, there is simply no contest. The creditors with proven claims have legitimate, verified demands against the corporate estate. The Objectors have tenuous claims based on objections to a court supervised process that would in effect amount to a collateral attack on court orders. In those circumstances I am satisfied that the release benefits the debtor and creditors generally.

Scope of the Releases

[58] Although the scope of the releases is captured by the factor that Lydian describes as whether the releases are fair, reasonable and not overly broad, I consider the scope of the release here in a standalone section because of the prominence given to it during argument.

[59] The release is found in paragraph 24 of the proposed order. Its material language provides:

> …the current directors, officers, employees, independent contractors that have provided legal or financial services to the Applicant, legal counsel and advisors of the Applicant, and (ii) the Monitor and its legal counsel (collectively, the "Released Parties") shall be … released … from …all … claims …of any nature or

> kind whatsoever … based in whole or in part on any act or omission, … taking place prior to the filing of the Monitor's Certificate and that relate in any manner whatsoever to the Applicant or any of its assets (current or historical), obligations, business or affairs or this CCAA Proceeding, … provided that nothing in this paragraph shall … release… any claim: (i) that is not permitted to be released pursuant to section 5.1(2) of the CCAA, (ii) against the former directors and officers of the Applicant for breach of trust arising from acts or omissions occurring before the date of the Initial Order, (iii) that may be made against any applicable insurance policy of the Applicant prior to the date of the Initial Order, or (iv) that may be made against the current directors and officers that would be covered by the Directors' Charge granted pursuant to the Initial Order.

[60] While the release appears broad at first blush, a closer reading narrows it scope considerably. The parties being released are by and large parties who provided services to the company during the CCAA process. Given that the incremental steps in the CCAA process were approved by the court and were subject to submission by a wide variety of parties, the release is not, prima facie, unreasonable. In addition, while current directors are also released, the longest-serving of those are Messrs. Jha and Battaglia who became directors on March 7, 2019, approximately one year before the Notice of Intention was filed. The time period for which they are being released outside of the court proceedings is therefore relatively limited. On the motion, no one advanced any basis for a claim against them for pre-Notice of Intention conduct.

[61] The release then goes on to carve out certain types of claims that are not being released even as against the limited population of releasees. The carveouts include claims not permitted to be released under section 5.1 (2) of the CCAA and claims that may be made against any applicable insurance policy.

[62] Section 5.1 (2) of the CCAA prohibits releases for, among other things, "wrongful or oppressive conduct by directors. " Just what that means was the subject of much argument on the motion.

[63] On behalf of Green Relief, Mr. Thornton submitted that the carveout for "wrongful or oppressive conduct" is broad and would include negligence claims. In other words, in the Company's view, negligence claims are not being released. Mr. Thornton submitted that the language of section 5.1 (2) of the CCAA effectively releases the directors from statutory liabilities for which they may be liable because the corporation failed to do something even though that failure is not attributable to any wrongdoing by directors. By way of example, directors' statutory liability for unpaid wages would fall into this category and would be captured by the release.

[64] In *BlueStar Battery Systems International Corp., Re*, 2000 CanLII 22 678 (ON SC) Farley J. said the following about the scope of section 5.1 (2) at para 14:

> "However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1 (2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations Act (Ontario) would be of assistance in defining "oppressive conduct". Similarly it would appear that "wrongful conduct" would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal."

[65] This passage would appear to support Mr. Thornton's submission.

[66] Mr. Osborne, on behalf of the current directors took a narrower view of the meaning of "wrongful or oppressive" conduct and described it as referring to "active but not "passive torts". In Mr. Osborne's submission, the release covers claims in respect of which the corporation can indemnify directors, including negligence, but does not include intentional conduct like fraud.

[67] Given the difference of views, some counsel asked me to define specifically what was or was not excluded by section 5.1 (2) while others urged me not to define the scope of the section at this stage.

[68] My inclination is to not to define the scope of the section or the release in a vacuum. Both the release and section 5.1 (2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises.

[69] In that regard I would urge a heavy dose of restraint on all parties. There has been no shortage of animosity and litigation between the parties. Temperatures have run high throughout. Before continuing any existing litigation or commencing new litigation, I would urge all parties to consider whether they are proceeding out of anger and frustration, however justified it may be, or are they proceeding on a rational economic basis because there is a cogent basis for a claim that will lead to recovery considerably in excess of the costs of litigating. This is a situation where suing "out of principle" warrants considerable restraint.

[70] The release also carves out claims "that may be made against any applicable insurance policy of the Applicant prior to the date of the initial order." I was advised during the motion that the directors were unable to obtain insurance after the Notice of Intention was filed in March 2020 but that the company purchased tail coverage that extended coverage for past conduct of directors. The tail coverage expires on November 26, 2020. That still provides plaintiffs with a period of time to commence an action for which there might be insurance coverage and to which the release might therefore not apply. The tail coverage may for example, cover current and former directors for conduct that arose before the Notice of Intention was filed.

[71] To permit such claims to be filed, I am temporarily lifting the stay of proceedings against officers and directors of Green Relief solely for the purpose of initiating claims that would potentially obtain the benefit of the carveouts under the release.

[72] Given my preference for interpreting the release in light of actual circumstances rather than in a vacuum and given my temporary lift of the stay of proceedings against officers and directors, there is considerable benefit to the parties and considerable judicial efficiency in having the release interpreted by the same judicial officer who approved it and who had oversight of the CCAA proceedings. I will therefore remain seized of this issue and order that any issue about whether the release applies (including the issue of insurance coverage) will be determined by me.

[73] To be clear, if any actions are commenced because of the temporary lift stay, the parties will still have to agree that such actions are carved out of the release by virtue of insurance coverage or I will have to determine that issue. The actions will not proceed and need not be defended until such agreement is reached or until I have determined whether the release applies.

Relief requested by Susan Basmaji

[74] Susan Basmaji is a shareholder who asks that I extend the coverage of the release to her. Ms. Basmaji says she motivated a large number of other shareholders to cooperate with the Monitor and the Company to support the Transaction. She says that as a result of those efforts, Mr. Leblanc has commenced a defamation action against her.

[75] I am not inclined to extend the release to Ms. Basmaji. The release was the product of negotiations between various stakeholders. It is not for the court to rewrite the release and bring other parties into the negotiation. I have extremely limited knowledge of the dispute between Mr. Leblanc and Ms. Basmaji and have no basis for concluding whether Ms. Basmaji was essential to the success of the Transaction as Lydian suggests nor do I have enough information about the defamation action to determine whether Ms. Basmaji should benefit from a release. That that said, it strikes me that the litigation between Mr. Leblanc and Ms. Basmaji a dispute to which the exhortation in paragraph 69 above is particularly relevant.

Disposition

[76] For the reasons set out above, I

a. approve the Transaction;

b. approve the release;

c. will remain seized of all issues concerning the interpretation of the release and the insurance coverage referred to in it;

d. lift the stay of proceedings solely to permit actions to be brought up to and including November 26, 2020 in order to capture the benefit of insurance coverage referred to in the release;

e. reimpose the stay of proceedings effective at 12:01 AM on November 27, 2020; and

f. decline to extend the benefit of the release to Susan Basmaji.

Koehnen J.

Date: November 9, 2020

TAB 9

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SKYLINK AVIATION INC., Applicant

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert J. Chadwick and Logan Willis, for SkyLink Aviation Inc.**

Harvey Chaiton, for Arbib, Babrar and Sunbeam Helicopters

Emily Stock, for Certain Former and Current Directors for Insured Claims

S. R. Orzy and Sean Zweig, for the Noteholders

Shayne Kukulowicz, for Certain Directors and Officers

M. P. Gottlieb and A. Winton, for the Monitor, Duff & Phelps

HEARD : **APRIL 23, 2013**

DECIDED: **APRIL 23, 2013**

REASONS: **APRIL 30, 2013**

ENDORSEMENT

[1] SkyLink Aviation Inc. ("SkyLink Aviation", the "Company" or the "Applicant"), seeks an Order (the "Sanction Order"), among other things:

(a) sanctioning SkyLink Aviation's Plan of Compromise and Arrangement dated April 18, 2013 (as it may be amended in accordance with its terms, the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA");

(b) declaring that the New Shareholders Agreement is effective and binding on all holders of New Common Shares and any Persons entitled to receive New Common Shares pursuant to the Plan; and

(c) extending the Stay Period, as defined in the Initial Order of this Court granted March 8, 2013 (the "Initial Order").

[2] No party opposed the requested relief.

[3] Counsel to the Company submits that the Plan has strong support from the creditors and achieves the Company's goal of a going-concern recapitalization transaction (the "Recapitalization") that minimizes any impact on operations and maximizes value for the Company's stakeholders.

[4] Counsel further submits that the Plan is fair and reasonable and offers a greater benefit to the Company's stakeholders than other restructuring or sale alternatives. The Plan has been approved by the Affected Creditors with 95.3% in number representing 93.6% in value of the Affected Unsecured Creditors Class and 97.1% in number representing 99.99% in value of the Secured Noteholders Class voting in favour of the Plan (inclusive of Voting Claims and Disputed Voting Claims).

[5] The request for court approval is supported by the Initial Consenting Noteholders, the First Lien Lenders and the Monitor.

THE FACTS

[6] SkyLink Aviation, together with the SkyLink Subsidiaries (as defined in the Affidavit of Jan Ottens sworn April 21, 2013) (collectively, "SkyLink"), is a leading provider of global aviation transportation and logistics services, primarily fixed-wing and rotary-wing air transport and related activities (the "SkyLink Business").

[7] SkyLink is responsible for providing non-combat life-supporting functions to both its own personnel and those of its suppliers and clients in high-risk conflict zones.

[8] SkyLink Aviation experienced financial challenges that necessitated a recapitalization of the Company under the CCAA. On March 8, 2013, the Company sought protection from its creditors under the CCAA and obtained the Initial Order which appointed Duff & Phelps Canada Restructuring Inc. as the monitor of the Applicant in this CCAA Proceeding (the "Monitor").

[9] The primary purpose of the CCAA Proceeding is to expeditiously implement the Recapitalization. The Recapitalization involves: (i) the refinancing of the Company's first lien debt; (ii) the cancellation of the Secured Notes in exchange for the issuance by the Company of consideration that includes new common shares and new debt; and (iii) the compromise of certain unsecured liabilities, including the portion of the Noteholders' claim that is treated as unsecured under the Plan.

[10] On March 8, 2013, I granted the Claims Procedure Order approving the Claims Procedure to ascertain all of the claims against the Company and its directors and officers.

SkyLink Aviation, with the assistance of the Monitor, carried out the Claims Procedure in accordance with the terms of the Claims Procedure Order.

[11] Pursuant to the Claims Procedure Order, the Secured Noteholders Allowed Claim, was determined by the Applicant, with the consent of the Monitor and the Majority Initial Consenting Noteholders, to be approximately $123.4 million.

[12] The Secured Noteholders Allowed Claim was allowed for both voting and distribution purposes against the Applicant as follows:

(a) $28.5 million, as agreed among the Applicant, the Monitor and the Majority Initial Consenting Noteholders, was allowed as secured Claims against the Applicant (collectively the "Secured Noteholders Allowed Secured Claim"); and

(b) $94.9 million, the balance of the Secured Noteholders Allowed Claim, was allowed as an unsecured Claim against the Applicant (collectively the "Secured Noteholders Allowed Unsecured Claim").

[13] The value of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range set out in the valuation dated March 7, 2013 (the "Valuation") prepared by Duff & Phelps Canada Limited.

[14] The Claims Procedure resulted in $133.7 million in Affected Unsecured Claims, consisting of the Secured Noteholders Allowed Unsecured Claim of $94.9 million and other unsecured Claims of $38.8 million, being filed against the Company.

[15] In addition, ten claims were filed against the Directors and Officers totalling approximately $21 million. Approximately $13 million of these claims were also filed against the Company.

[16] Following the commencement of these proceedings, SkyLink Aviation entered into discussions with certain creditors in an effort to consensually resolve the Affected Unsecured Claims and Director/Officer Claims asserted by them. These negotiations, and the settlement agreements ultimately reached with these creditors, resulted in amendments to the original version of the Plan filed on March 8, 2013 (the "Original Plan").

PURPOSE AND EFFECT OF THE PLAN

[17] In developing the Plan, counsel submits that the Company sought to, among other things: (i) ensure a going-concern result for the SkyLink Business; (ii) minimize any impact on operations; (iii) maximize value for the Company's stakeholders; and (iv) achieve a fair and reasonable balance among its Affected Creditors.

[18] The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicant.

[19] Unaffected Creditors will not be affected by the Plan (subject to recovery in respect of Insured Claims being limited to the proceeds of applicable Insurance Policies) and will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of the Plan).

[20] Equity Claims and Equity Interests will be extinguished under the Plan and any Equity Claimants will not receive any consideration or distributions under the Plan.

[21] The Plan provides for the release of a number of parties (the "Released Parties"), including SkyLink Aviation, the Released Directors/Officers, the Released Shareholders, the SkyLink Subsidiaries and the directors and officers of the SkyLink Subsidiaries in respect of Claims relating to SkyLink Aviation, Director/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA proceedings or other related matters. These releases were negotiated as part of the overall framework of compromises in the Plan, and such releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization.

[22] The Plan does not release: (i) the right to enforce SkyLink Aviation's obligations under the Plan; (ii) any Released Party from fraud or wilful misconduct; (iii) SkyLink Aviation from any Claim that is not permitted to be released pursuant to Section 19(2) of the CCAA; or (iv) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to Section 5.1(2) of the CCAA. Further, as noted above, the Plan does not release Director/Officer Wages Claims or Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the applicable Insurance Policies.

MEETINGS OF CREDITORS

[23] At the Meetings, the resolution to approve the Plan was passed by the required majorities in both classes of creditors. Specifically, the Affected Creditors approved the Plan by the following majorities:

(a) Affected Unsecured Creditors Class:

95.3% in number and 93.6% in value (inclusive of Voting Claims and Disputed Voting Claims);

97.4% in number and 99.9% in value (Voting Claims only); and

(b) Secured Noteholders Class:

97.1% in number and 99.99% in value.

[24] Counsel to the Company submits that the results of the vote taken in the Affected Unsecured Creditors Class would not change materially based on the inclusion or exclusion of the Disputed Voting Claims as the required majorities for approval of the Plan under the CCAA

would be achieved regardless of whether the Disputed Voting Claims are included in the voting results.

[25] Counsel for the Company submits that the Plan provides that the shareholders agreement among the existing shareholders of SkyLink Aviation will be terminated on the Plan Implementation Date. A new shareholders agreement (the "New Shareholders' Agreement"), which is to apply in respect of the holders of the New Common Shares as of the Plan Implementation Date, has been negotiated between and among: (i) the Initial Consenting Noteholders (and each of their independent counsel), who will collectively hold more than 90% of the New Common Shares; and (ii) counsel to the Note Indenture Trustee, who acted as a representative for the interests of the post-Recapitalization minority shareholders.

REQUIREMENTS FOR APPROVAL

[26] The general requirements for court approval of a CCAA plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.

Olympia & York Developments Ltd. v Royal Trust Co., 17 C.B.R. (3d) 1 (Ont. Sup. Ct. J. (Gen Div)).

Canadian Airlines Corp., Re, 2000 ABQB 442, at para 60, leave to appeal refused 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal refused [2001] SCCA No 60.

[27] Since the commencement of the CCAA Proceeding, I am satisfied that SkyLink Aviation has complied with the procedural requirements of the CCAA, the Initial Order and all other Orders granted by the Court during the CCAA Proceeding.

[28] With respect to the second part of the test I am satisfied that throughout the course of the CCAA Proceeding, SkyLink Aviation has acted in good faith and with due diligence and has complied with the requirements of the CCAA and the Orders of this Honourable Court.

[29] Counsel to SkyLink submits that the Plan is fair and reasonable for a number of reasons including:

(a) the Plan represents a compromise among the Applicant and the Affected Creditors resulting from dialogue and negotiations among the Company and its creditors, with the support of the Monitor and its counsel;

(b) the classification of the Company's creditors into two Voting Classes, the Secured Noteholders Class and the Affected Unsecured Creditors Class, was approved by this Court pursuant to the Meetings Order. This classification was not opposed at the hearing to approve the Meetings Order or thereafter at the comeback hearing;

(c) the amount of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range provided for in the Valuation and is supported by the Monitor;

(d) the Affected Creditors voted to approve the Plan at the Meetings;

(e) the Plan is economically feasible;

(f) the Plan provides for the continued operation of the world-wide business of SkyLink with no disruption to customers and provides for an expedient recapitalization of the Company's balance sheet, thereby preserving the going-concern value of the SkyLink Business;

I accept these submissions and conclude that the Plan is fair and reasonable.

[30] In considering the appropriateness of the terms and scope of third party releases, the courts will take into account the particular circumstances of a case and the purpose of the CCAA:

> The concept that has been accepted is that the Court does have jurisdiction, taking into account the nature and purpose of the CCAA, to sanction the release of third parties where the factual circumstances are deemed appropriate for the success of a Plan.
>
> *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*. (2008), 43 CBR (5th) 269, (Ont. Sup. Ct. J. [Commercial List]); affirmed 2008 ONCA 587 leave to appeal refused (2008), 257 OAC 400 (SCC).

[31] Counsel to the Company submits that the third party releases provided under the Plan protect the Released Parties from potential claims relating to the Applicant based on conduct taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan. The Plan does not release any Released Party for fraud or wilful misconduct.

[32] Counsel to the Company submits the releases provided in the Plan were negotiated as part of the overall framework of compromises in the Plan, and these releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization and that there is a reasonable connection between the releases contemplated by the Plan and the restructuring to be achieved by the Plan to warrant inclusion of such releases in the Plan.

[33] I am satisfied that the releases of the Released Directors/Officers and the Released Shareholders contained in the Plan are appropriate in the circumstances for a number of reasons including:

(a) the releases of the Released Directors/Officers and the Released Shareholders were negotiated as part of the overall framework of compromises in the Plan;

(b) the Released Directors/Officers consist of parties who, in the absence of the Plan releases, would have Claims for indemnification against SkyLink Aviation;

(c) the inclusion of certain parties among the Released Directors/Officers and the Released Shareholders was an essential component of the settlement of several Claims and Director/Officer Claims;

(d) full disclosure of the releases was made to creditors in the Initial Affidavit, the Plan, the Information Statement, the Monitor's Second Report and the Ottens' Affidavit;

(e) the Monitor considers the scope of the releases contained in the Plan to be reasonable in the circumstances.

[34] I am satisfied that the Plan represents a compromise that balances the rights and interests of the Company's stakeholders and the releases provided for in the Plan are integral to the framework of compromises in the Plan.

SEALING THE CONFIDENTIAL APPENDIX

[35] The Applicant also requests that an order to seal the confidential appendix to the Monitor's Third Report (the "Confidential Appendix"), which outlines the Monitor's analysis and conclusions with respect to the amount of the Secured Noteholders Allowed Secured Claim.

[36] The Confidential Appendix contains sensitive commercial information, the disclosure of which could be harmful to stakeholders. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, 2 SCR 522 (WL Can) at para. 53 has been met and the Confidential Appendix should be sealed.

EXTENSION OF STAY PERIOD

[37] The Applicant also requests an extension of the Stay Period until May 31, 2013.

[38] I am satisfied that the Company has acted and, is acting, in good faith and with due diligence such that the extension request is justified and is granted.

MORAWETZ J.

Date: April 30, 2013

TAB 10

COURT OF APPEAL FOR ONTARIO

CITATION: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508
DATE: 20190619
DOCKET: C62925

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

Peter L. Roy and Sean Grayson, for the appellant 2350614 Ontario Inc.

Shara Roy and Nilou Nezhat, for the respondent Third Eye Capital Corporation

Stuart Brotman and Dylan Chochla, for the receiver of the respondent Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for the monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Steven J. Weisz, for the intervener Insolvency Institute of Canada

Heard: September 17, 2018

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated October 5, 2016, with reasons reported at 2016 ONSC 6086, 41 C.B.R. (6th) 320.

Pepall J.A.:

Introduction

[1] There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

[2] These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc*., 2018 ONCA 253, 141 O.R. (3d) 192 ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

[3] The facts underlying this appeal may be briefly outlined.

[4] On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

[5] Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter.[1] The

[1] The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

[6] Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in

addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.[2]

[7] Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

[8] On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

[9] The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement

[2] The ownership of the surface rights is not in issue in this appeal.

contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[10] On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

[11] The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

[12] On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic … why the jurisdiction would not be the

same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value.[3]

[13] Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

[14] For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the

[3] Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

[15] On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that “an appeal is under consideration” and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.’s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period “is what it is” but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same

day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

[16] On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

[17] Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

[18] On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

> (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;

(2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and

(3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

[19] The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

[20] The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109, at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189. It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish

the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

[21] In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

[22] The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

[23] The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

[24] The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

[25] To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4

Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

[26] A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

[27] The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement …
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations ... The vesting order is the holy grail sought by every

> purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

[28] The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious

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[4] To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L§21, said:

> A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

[29] In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

[30] As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

[31] Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters"' in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-

> inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act 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, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

[32] Elmer A. Driedger's now famous formulation is that the words of an 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: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141,

at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

[33] This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[34] The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property.[5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), at para. 281, leave

[5] Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

to appeal refused, [2001] S.C.C.A. No. 63, the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

[35] Blair J.A. elaborated on the nature of vesting orders in *Re Regal Constellation Hotel Ltd.* (2004), 71 O.R. (3d) 355 (C.A.), at para. 33:

> A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

[36] Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 388, involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a

maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

[37] The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

[38] It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

[39] Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

[40] In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

[41] This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

[42] This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

[43] The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand

the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

[44] Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

[45] Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
>
> (c) take any other action that the court considers advisable.

[46] "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> (a) is appointed under subsection (1); or
>
> (b) is appointed to take or takes possession or control – of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt – under
>
> (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
>
> (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver – manager. [Emphasis in original.]

[47] *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a

regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

[48] The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

[49] In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

> 47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.

[50] The language of this subsection is similar to that now found in s. 243(1).

[51] Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

[52] Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh*, *Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Ct. (Gen. Div.)), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver … to … take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of

> insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Re Loewen Group Inc.* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.)[6].

[53] Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

[54] In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and

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[6] This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Re Big Sky Living Inc.*, 2002 ABQB 659, 318 A.R. 165, at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report").[7]

[55] Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009.[8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

[56] Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament

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[7] This 10 day notice period was introduced following the Supreme Court's decision in *R.E. Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

[8] *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 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act*, *the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable. [Emphasis added.]

[57] When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140: "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

[58] Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. <u>This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets</u>. [Emphasis added.]

[59] However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

[60] In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[61] The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

[62] Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language “take any other action that the court considers advisable”.

[63] This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

[64] In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est*

exclusio alterius) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

[65] However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis … is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47, at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R*., 2011 SCC 63, [2011] 3 S.C.R. 721, at paras. 110-111.

[66] The Supreme Court noted in *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt … has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader

> than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the … provisions without regard to their underlying rationale.

[67] Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

[68] In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

[69] Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

[70] These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood’s discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

[71] In contrast, as I will discuss further, typically the nub of a receiver’s responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver’s powers under s. 243. In light of this distinct context and legislative purpose, I do

not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 – Jurisdiction to Grant a Sales Approval and Vesting Order

[72] This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

[73] The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, "the essence of a

receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

[74] This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), aff'd (2000), 47 O.R. (3d) 234 (C.A.).

[75] Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that <u>has not yet been sold or realized</u>" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

[76] It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

[77] Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

[78] I should first indicate that the case law on vesting orders in the insolvency context is limited. In *Re New Skeena Forest Products Inc*., 2005 BCCA 154, 9 C.B.R. (5th) 267, the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Re Loewen Group Inc.,* Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the

basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.,* 2014 NSSC 420, 353 N.S.R. (2d) 194 stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

[79] In *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323, the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: “It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge.” Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or ‘real rights’, it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

[80] The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does

not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver – which did not hold the title – is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

[81] The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets

do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

[82] As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

[83] The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

[84] If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

[85] In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an

agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

[86] Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency – it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

[87] In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

[88] This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of

encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

[89] G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at §34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

[90] The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

[91] That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

[92] This takes me to the next issue – the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

[93] Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Ct. (Gen. Div.)), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

[94] In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

[95] As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

[96] In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

[97] Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union v. 984 Bay Street Inc*., [2005] O.J. No. 3707 (S.C.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was

appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc*., [2006] O.J. No. 1726 (C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union v. 984 Bay Street Inc*., [2006] O.J. No. 3169 (S.C.).

[98] An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

[99] The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and

sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

[100] He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.[9]

[101] As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have

[9] This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189.

considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

[102] In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

[103] First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

[104] For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

[105] Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an

ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

[106] Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: "Vesting Orders Part 2", at pp. 60, 65.

[107] The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Funds Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067*

Ontario Ltd. (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

[108] The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

[109] Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

[110] If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the

proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

[111] Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

[112] While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, at para. 2 is instructive:

> … [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest.

> A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

[113] Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

[114] The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

[115] Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

[116] Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

[117] 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

[118] Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

[119] Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-

appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

[120] There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

[121] The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

[122] Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

[123] In contrast, under the BIA, s. 183(2) provides that courts of appeal are “invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by” the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

[124] Under r. 31 of the BIA Rules, a notice of appeal must be filed “within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.”

[125] The 10 days runs from the day the order or <u>decision</u> was rendered: *Moss (Bankrupt), Re* (1999), 138 Man. R. (2d) 318 (C.A., in Chambers), at para. 2; *Re Koska*, 2002 ABCA 138, 303 A.R. 230, at para. 16; *CWB Maxium Financial Inc. v. 6934235 Manitoba Ltd. (c.o.b. White Cross Pharmacy Wolseley)*, 2019 MBCA 28 (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of “order <u>or</u> decision” (emphasis added). If an

entered and issued order were required, there would be no need for this distinction.[10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Re Koska*, at para. 16.

[126] Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. SICA Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers), at para. 36 and *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 1), until recently, no Ontario case had directly addressed this point.

[127] Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Re Solloway Mills & Co. Ltd., In Liquidation, Ex Parte I.W.C. Solloway*

[10] *Ontario Wealth Managements Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Re Smoke* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

(1934), [1935] O.R. 37 (C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 16.

[128] In *Business Development Bank of Canada v. Astoria Organic Matters Ltd*., 2019 ONCA 269, Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

[129] Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order.

The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

[130] Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

[131] Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

[132] The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

[133] Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

[134] 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

[135] Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the

Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

[136] The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

[137] Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic … why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5,

2016 and did nothing that suggested any intention to appeal until about three weeks later.

[138] As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

[139] For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

[140] Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

[141] As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

[142] The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time …
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:

> (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
>
> (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
>
> (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
>
> (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed…;
>
> (5) The respondent will not be prejudiced by extending the time;
>
> (6) There is an arguable ground or grounds of appeal;
>
> (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

[143] These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distributions Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (in Chambers), at para. 15.

[144] There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it

was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a

bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

[145] I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

[146] While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not

exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

[147] In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

[148] For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the

release of these reasons and the other parties to reply if necessary within 10 days thereafter.

Released: “SEP” JUN 19, 2019

“S.E. Pepall J.A.”
“I agree. P. Lauwers J.A.”
“I agree. Grant Huscroft J.A.”

TAB 11

ALBERTA

RULES OF COURT

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Part 6: Resolving Issues and Preserving Rights

Division 1 Applications to the Court

What this Division applies to

6.1 This Division

(a) applies to every application filed in the Court unless a rule or an enactment otherwise provides or the Court otherwise orders or permits;

(b) does not apply to originating applications unless another rule otherwise provides, the parties otherwise agree or the Court otherwise orders.

AR 124/2010 s6.1;23/2021

Application to the Court to exercise its authority

6.2 When the Court has authority under these rules, a person may make an application to the Court that the Court exercise its authority.

Subdivision 1 Application Process Generally

Applications generally

6.3(1) Unless these rules or an enactment otherwise provides or the Court otherwise permits, an application may only be filed during an action or after judgment is entered.

(2) Unless the Court otherwise permits, an application to the Court must

(a) be in the appropriate form set out in Schedule A, Division 1 to these rules,

(b) state briefly the grounds for filing the application,

(c) identify the material or evidence intended to be relied on,

(d) refer to any provision of an enactment or rule relied on,

(e) specify any irregularity complained of or objection relied on,

(f) state the remedy claimed or sought, and

(g) state how the application is proposed to be heard or considered under these rules.

(3) Unless an enactment, the Court or these rules otherwise provide, the applicant must file and serve on all parties and every other person affected by the application, 5 days or more before the application is scheduled to be heard or considered,

(a) notice of the application, and

(b) any affidavit or other evidence in support of the application.

TAB 12

COURT FILE NUMBER		Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE		
PLAINTIFF		
DEFENDANT		
DOCUMENT	**APPROVAL AND VESTING ORDER (Sale by Receiver)**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT		

DATE ON WHICH ORDER WAS PRONOUNCED: ___________________________________

LOCATION WHERE ORDER WAS PRONOUNCED: _________________________________

NAME OF JUSTICE WHO MADE THIS ORDER: ___________________________________

UPON THE APPLICATION by **[Receiver's Name]** in its capacity as the Court-appointed **[receiver/receiver and manager]** (the "Receiver") of the undertakings, property and assets of **[Debtor]** (the "Debtor") for an order approving the sale transaction (the "Transaction") contemplated by an agreement of purchase and sale (the "Sale Agreement") between the Receiver and **[Name of Purchaser]** (the "Purchaser") dated **[Date]** and appended to the ___ Report of the Receiver dated **[Date]** (the "Report"), and vesting in the Purchaser (or its nominee)[1] the Debtor's right, title and interest in and to the assets described in the Sale Agreement (the "Purchased Assets");

AND UPON HAVING READ the Receivership Order dated **[Date]** (the "Receivership Order"), the Report and the Affidavit of Service; **AND UPON HEARING** the submissions of counsel for the Receiver, the Purchaser **[Names of other parties appearing]**, no one appearing for any other person on the service list, although properly served as appears from the Affidavit of Service, filed;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

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[1] Ensure that there are no legal obstacles to the vesting of assets in a nominee (for example competition and anti-trust law). Should land be transferred and vested in a nominee, the Registrar of Land Titles requires the Purchaser to complete a Certificate of Nomination (which needs to be signed under seal if the Purchaser is a corporation. If the Purchaser is an individual, the signature needs to be witnessed with an affidavit of execution completed.)

1. Service of notice of this application and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this application and time for service of this application is abridged to that actually given.[2]

APPROVAL OF TRANSACTION

2. The Transaction is hereby approved[3] and execution of the Sale Agreement by the Receiver is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for completion of the Transaction and conveyance of the Purchased Assets to the Purchaser (or its nominee).

VESTING OF PROPERTY

3. [Subject only to approval by the Alberta Energy Regulator ("Energy Regulator") of transfer of any applicable licenses, permits and approvals pursuant to section 24 of the *Oil and Gas Conservation Act* (Alberta) and section 18 of the *Pipeline Act* (Alberta)][4] upon delivery of a Receiver's certificate to the Purchaser (or its nominee) substantially in the form set out in **Schedule "A"** hereto (the "Receiver's Closing Certificate"), all of the Debtor's right, title and interest in and to the Purchased Assets [listed in **Schedule "B"** [5] hereto] shall vest absolutely in the name of the Purchaser (or its nominee), free and clear of and from any and all caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgements, executions, levies, taxes, writs of enforcement, charges, or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or

---

[2] Ensure that the application and supporting materials are served on all affected parties including those whose interests will be vested off.

[3] In some cases, notably where this Order may be relied upon for proceedings in the United States, a finding that the Transaction is commercially reasonable and in the best interests of the Debtor and its stakeholders may be necessary. Evidence should be filed to support such a finding. If supported by evidence, the following sentence could be added at the beginning of paragraph 2: "The Transaction and Sale Agreement are commercially reasonable and in the best interest of the Debtor and its stakeholders."

[4] This bracketed clause, paragraph 4(b) and the bracketed words at the end of paragraph 6 are included when the Purchased Assets include mineral interests in land.

[5] To allow this Order to be free-standing (and not require reference to the Court record and/or the Sale Agreement), it may be preferable that the Purchased Assets be specifically described in a Schedule B.

been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, "Claims")[6] including, without limiting the generality of the foregoing:

(a) any encumbrances or charges created by the Receivership Order;

(b) any charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta) or any other personal property registry system;

(c) any liens or claims of lien under the *Builders' Lien Act* (Alberta); and

(d) those Claims listed in Schedule "C" hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, caveats, interests, easements, and restrictive covenants listed in Schedule "D" (collectively, "Permitted Encumbrances"))

and for greater certainty, this Court orders that all Claims including Encumbrances other than Permitted Encumbrances, affecting or relating to the Purchased Assets are hereby expunged, discharged and terminated as against the Purchased Assets

4. Upon delivery of the Receiver's Closing Certificate, and upon filing of a certified copy of this Order, together with any applicable registration fees, all governmental authorities including those referred to below in this paragraph (collectively, "Governmental Authorities") are hereby authorized, requested and directed to accept delivery of such Receiver's Closing Certificate and certified copy of this Order as though they were originals and to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required to convey to the Purchaser or its nominee clear title to the Purchased Assets subject only to Permitted Encumbrances. Without limiting the foregoing:

(a)[7] the Registrar of Land Titles ("Land Titles Registrar") for the lands defined below shall and is hereby authorized, requested and directed to forthwith:

(i) cancel existing Certificates of Title No. * for those lands and premises municipally described as *, and legally described as:

---

[6] The "Claims" being vested out may, in some cases, include ownership claims, where ownership is disputed and the dispute is brought to the attention of the Court. Such ownership claims may, in some cases, continue as against the net proceeds from sale of the claimed assets. In other cases, the ownership claimant may object to its ownership interest being vested out of the claimed assets. For example, it not clear that vesting orders can vest out overriding royalties or restrictive covenants which are interests in land. (In *Third Eye Capital Corp.* v *Dianor Resources Inc.*, 2018 ONCA 253 at paragraphs 108-130 the Ont. C.A. requested further argument regarding whether an overriding royalty which is an interest in land may nevertheless be vested out.) Similarly, other claimed rights, titles or interests may potentially be vested out if the Court is advised what rights are being affected and the affected persons are served. The Committee agrees with the view of the Ontario Committee that a non-specific vesting out of "rights, titles and interests" is vague and therefore undesirable.

[7] Paragraph 4(a) is included when the Purchased Assets include titled lands.

*
(the "Lands")

(ii) issue a new Certificate of Title for the Lands in the name of the Purchaser (or its nominee), namely, *;

(iii) transfer to the New Certificate of Title the existing instruments listed in Schedule "D", to this Order, and to issue and register against the New Certificate of Title such new caveats, utility rights of ways, easements or other instruments as are listed in Schedule "D"; and

(iv) discharge and expunge the Encumbrances listed in Schedule "C" to this Order and discharge and expunge any Claims including Encumbrances (but excluding Permitted Encumbrances) which may be registered after the date of the Sale Agreement against the existing Certificate of Title to the Lands;

(b)[8] Alberta Energy ("Energy Ministry") shall and is hereby authorized, requested and directed to forthwith:

(v) cancel and discharge those Claims including builders' liens, security notices, assignments under section 426 (formerly section 177) of the *Bank Act* (Canada) and other Encumbrances (but excluding Permitted Encumbrances) registered (whether before or after the date of this Order) against the estate or interest of the Debtor in and to any of the Purchased Assets located in the Province of Alberta; and

(vi) transfer all Crown leases listed in Schedule "E" to this Order standing in the name of the Debtor, to the Purchaser (or its nominee) free and clear of all Claims including Encumbrances but excluding Permitted Encumbrances;

(c) the Registrar of the Alberta Personal Property Registry (the "PPR Registrar") shall and is hereby directed to forthwith cancel and discharge any registrations at the Alberta Personal Property Registry (whether made before or after the date of this Order) claiming security interests (other than Permitted Encumbrances) in the estate or interest of the Debtor in any of the Purchased Assets which are of a kind prescribed by applicable regulations as serial-number goods.

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[8] Paragraph 4(b) is included when the Purchased Assets include mineral interests in land.

5. In order to effect the transfers and discharges described above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order and the Sale Agreement. Presentment of this Order and the Receiver's Closing Certificate shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest and cancel and discharge registrations against any of the Purchased Assets of any Claims including Encumbrances but excluding Permitted Encumbrances.

6. No authorization, approval or other action by and no notice to or filing with any governmental authority or regulatory body exercising jurisdiction over the Purchased Assets is required for the due execution, delivery and performance by the Receiver of the Sale Agreement, [other than any required approval by the Energy Regulator referenced in paragraph 3 above.][9]

7. Upon delivery of the Receiver's Closing Certificate together with a certified copy of this Order, this Order shall be immediately registered by the Land Titles Registrar notwithstanding the requirements of section 191(1) of the *Land Titles Act*, RSA 2000, c.L-7 and notwithstanding that the appeal period in respect of this Order has not elapsed. The Land Titles Registrar is hereby directed to accept all Affidavits of Corporate Signing Authority submitted by the Receiver in its capacity as Receiver of the Debtor and not in its personal capacity.

8. For the purposes of determining the nature and priority of Claims, net proceeds[10] from sale of the Purchased Assets (to be held in an interest bearing trust account by the Receiver) shall stand in the place and stead of the Purchased Assets from and after delivery of the Receiver's Closing Certificate and all Claims including Encumbrances (but excluding Permitted Encumbrances) shall not attach to, encumber or otherwise form a charge, security interest, lien, or other Claim against the Purchased Assets and may be asserted against the net proceeds from sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale. Unless otherwise ordered (whether before or after the date of this Order), the Receiver shall not make any distributions to creditors of net proceeds from sale of the Purchased Assets without further order of this Court, provided however the Receiver may apply any part of such net proceeds to repay any amounts the Receiver has borrowed for which it has issued a Receiver's Certificate pursuant to the Receivership Order.

[9] The bracketed words in this paragraph are included when the Purchased Assets include mineral interests in land.

[10] The Report should identify the disposition costs and any other costs which should be paid from the gross sale proceeds, to arrive at "net proceeds".

9. Except as expressly provided for in the Sale Agreement or by section 5 of the Alberta *Employment Standards Code*, the Purchaser (or its nominee) shall not, by completion of the Transaction, have liability of any kind whatsoever in respect of any Claims against the Debtor.[11]

10. Upon completion of the Transaction, the Debtor and all persons who claim by, through or under the Debtor in respect of the Purchased Assets, and all persons or entities having any Claims of any kind whatsoever in respect of the Purchased Assets, save and except for persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely and forever barred, estopped and foreclosed from and permanently enjoined from pursuing, asserting or claiming any and all right, title, estate, interest, royalty, rental, equity of redemption or other Claim whatsoever in respect of or to the Purchased Assets, and to the extent that any such persons or entities remain in the possession or control of any of the Purchased Assets, or any artifacts, certificates, instruments or other indicia of title representing or evidencing any right, title, estate, or interest in and to the Purchased Assets, they shall forthwith deliver possession thereof to the Purchaser (or its nominee).[12]

11. The Purchaser (or its nominee) shall be entitled to enter into and upon, hold and enjoy the Purchased Assets for its own use and benefit without any interference of or by the Debtor, or any person claiming by, through or against the Debtor.

12. Immediately upon closing of the Transaction, holders of Permitted Encumbrances shall have no claim whatsoever against the Receiver.[13]

13. The Receiver is directed to file with the Court a copy of the Receiver's Closing Certificate forthwith after delivery thereof to the Purchaser (or its nominee).

14. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada) and section 20(e) of the Alberta *Personal Information Protection Act*, the Receiver is authorized and permitted to disclose and transfer to the Purchaser (or its nominee) all human

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[11] Successor employer liability is governed by section 5 of the *Employment Standards Code*, RSA 2000 c. E-9 as amended. Inclusion of the words "or by statute" in paragraph 9 ensures that paragraph 9 does not purport to abrogate statutory successor employee liability.

[12] Not all sale agreements require, nor do the terms of the Debtor's possession of human resources and payroll information always permit, disclosure and transfer of such information to the Purchaser. If disclosure and transfer of such information to the Purchaser is not required or permitted, then Section 10 of this Order should be deleted.

[13] The terms of the Permitted Encumbrance and Sale Agreement should be reviewed to determine whether an encumbrance also constitutes a charge against other assets not being sold (in addition to the Purchased Assets.) In that circumstance, absent agreement of the encumbrancer to the contrary, the Debtor may not be fully discharged so the encumbrancer does not lose its charge over the other assets it holds as security. Do not add the words "or the Debtor" to the end of paragraph 12 if an encumbrancer's claim against the Debtor should be reserved.

resources and payroll information in the Debtor's records pertaining to the Debtor's past and current employees. The Purchaser (or its nominee) shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use (of such information) to which the Debtor was entitled.

MISCELLANEOUS MATTERS

15. Notwithstanding:

(a) the pendency of these proceedings and any declaration of insolvency made herein;

(b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "BIA"), in respect of the Debtor, and any bankruptcy order issued pursuant to any such applications;

(c) any assignment in bankruptcy made in respect of the Debtor; and

(d) the provisions of any federal or provincial statute:

the vesting of the Purchased Assets in the Purchaser (or its nominee) pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

16. The Receiver, the Purchaser (or its nominee) and any other interested party, shall be at liberty to apply for further advice, assistance and direction as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.

17. This Honourable Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance to the Receiver, as an officer of the Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

18. Service of this Order shall be deemed good and sufficient by:

(a) Serving the same on:

(i) the persons listed on the service list created in these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order;

(iv) the Purchaser or the Purchaser's solicitors; and

(b) Posting a copy of this Order on the Receiver's website at: *

and service on any other person is hereby dispensed with.

19. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

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Justice of the Court of Queen's Bench of Alberta

Schedule "A"

Form of Receiver's Certificate

COURT FILE NUMBER		Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE		
PLAINTIFF		
DEFENDANT		
DOCUMENT	**RECEIVER'S CERTIFICATE**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT		

RECITALS

A. Pursuant to an Order of the Honourable Justice **[Name]** of the Court of Queen's Bench of Alberta, Judicial District of __________ (the "Court") dated **[Date of Order]**, **[Name of Receiver]** was appointed as the receiver (the "Receiver") of the undertakings, property and assets of **[Debtor]** (the "Debtor").

B. Pursuant to an Order of the Court dated **[Date]**, the Court approved the agreement of purchase and sale made as of **[Date of Agreement]** (the "Sale Agreement") between the Receiver and **[Name of Purchaser]** (the "Purchaser") and provided for the vesting in the Purchaser of the Debtor's right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Receiver to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing as set out in section * of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, capitalized terms have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser (or its nominee) has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions to Closing as set out in section * of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser (or its nominee); and

3. The Transaction has been completed to the satisfaction of the Receiver.

4. This Certificate was delivered by the Receiver at **[Time]** on **[Date]**.

[Name of Receiver], in its capacity as Receiver of the undertakings, property and assets of [Debtor], **and not in its personal capacity.**

Per;______________________________

Name:

Title: